

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable DICCIA T. PINEDA-KIRWAN  
Justice

IA PART 36

-----X  
RWPO III, LLC,

Plaintiff(s),

-against-

ET AL,

Defendant(s).  
-----X

Index No.:  
Motion Date: 3/29/12  
Motion Cal. No.: 18  
Motion Seq. No.: 1

The following papers numbered 1 to 22 read on this motion by plaintiff pursuant to CPLR 3212 for summary judgment striking the answer and dismissing the affirmative defenses of the answering defendant, directing entry of summary judgment in favor the plaintiff, appointing a Referee to compute the amount due to plaintiff, and amending the caption to substitute the name of Coseng Orolfo in place and stead of "John Doe #1" and amending the caption to strike out the names "John Doe #2" through "John Doe #12" who are not necessary parties to this action; and on the cross motion by defendant Orolfo pursuant to CPLR 3211(a)(7) and 3212 for summary judgment dismissing the complaint and dismissing the action pursuant to CPLR 1001, 1003, and 3211(a)(10) on the grounds that the plaintiff failed to join a necessary party.

PAPERS	NUMBERED
Notice of Motion - Affidavits - Exhibits.....	1 - 9
Notice of Cross Motion - Affidavits - Exhibit.....	10 - 15
Answering Affidavits - Exhibits.....	16 - 18
Reply Affidavits.....	19 - 22

Upon the foregoing cited papers and after conference, it is ordered that motion for an order and cross motion are determined as follows:

Plaintiff commenced this action by filing a copy of the summons and complaint with notice of pendency on October 22, 2010. Plaintiff seeks to foreclose on a mortgage on the subject real property, known as 33-17 146<sup>th</sup> Street, Flushing, New York, to secure a note, evidencing a loan in the principal amount of \$544,000, plus interest, extended to the defendant \_\_\_\_\_, as record owner of the premises, by GreenPoint Mortgage Funding, Inc. (GreenPoint). Plaintiff alleges that it is the holder of the mortgage and underlying obligation pursuant to an assignment and that the defendant \_\_\_\_\_ defaulted under the terms of the note and mortgage by failing to make the monthly installment payment due on November 1, 2009, and as a consequence, it elected to accelerate the entire mortgage debt.

Plaintiff moves for summary judgment and for an order of reference. Defendant \_\_\_\_\_ cross-moves for summary judgment dismissing the complaint, on the ground, among others, that plaintiff lacked standing to commence this action.

Once a plaintiff's standing is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief (*see U.S. Bank N.A. v Sharif*, 89 AD3d 723 [2011]). A plaintiff establishes that it has standing where it demonstrates that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying

note (*Bank of N.Y. v Silverberg*, 86 AD3d 274 [2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2011]). An assignment of the mortgage without assignment of the underlying note or bond is a nullity (*Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636 [2011]). Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2009]).

Here, plaintiff failed to establish that it had standing to commence the action, as it did not submit any evidence that it was the holder of the note at the time of the commencement of the action. The plaintiff argues that it was assigned the mortgage in an assignment recorded November 22, 2010. While the assignment to the plaintiff of the mortgage states that the mortgage was assigned together with the note, only if the party assigning the note has the authority to do so will such an assignment of the note be effective (see *Bank of N.Y. v Silverberg*, 86 AD3d at 280-83; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 109). Here, the party assigning the mortgage and note was MCMCAP Homeowner's Advantage Trust III (MCMCAP). In a prior assignment, dated December 18, 2008, MERS attempted to assign the mortgage and the note to MCMCAP. The mortgage, however, did not specifically give MERS the authority to assign the note and plaintiff presented no evidence that MERS was actually in possession of the note at the time of that assignment. Therefore, MERS did not have the authority to assign the note on behalf of GreenPoint and the note was never assigned to MCMCAP (see *Bank of N.Y. v Silverberg*, 86 AD3d at 280-83; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 109). Since the note was never effectively assigned from GreenPoint to MCMCAP, the note could not have been assigned from MCMCAP to the plaintiff. Inasmuch as an assignment of a mortgage without the underlying debt is a nullity, the plaintiff failed to demonstrate that it had standing to commence the action (see *U.S. Bank N.A. v Dellarmo*, 94 AD3d 746 [2012]).

Plaintiff also claims it is the "present holder and owner of defendant's note and mortgage" and that it currently possesses the "original wet-ink documents." Plaintiff, however, did not submit any factual details concerning when it received physical possession of the note, and, thus failed to establish that it had physical possession of the note prior to commencing the action (*Citimortgage, Inc. v Stosel*, 89 AD3d 887 [2011]; *U.S. Bank N.A. v Shariff*, 89 AD3d at 725). Without evidence that it possessed the note at the time of commencement, plaintiff cannot rely on its possession of the note to establish its standing (*Bank of N.Y. v Silverberg*, 86 AD3d at 280-83). Inasmuch as plaintiff failed to prove that it had standing to commence this action, the action must be dismissed (*Citimortgage, Inc. v Stosel*, 89 AD3d at 887; *U.S. Bank N.A. v Shariff*, 89 AD3d at 725).

In light of the decision granting the cross motion for summary judgment dismissing the complaint, plaintiff's motion is denied.

Accordingly, plaintiff's motion is denied. Defendant's cross-motion for summary judgment dismissing the complaint is granted and the complaint is dismissed.

Dated: July 3, 2012



\_\_\_\_\_ **DICCIA T. PINEDA-KIRWAN, J.S.C.**