

COPY

SUPREME COURT - STATE OF NEW YORK  
IAS/TRIAL PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. EDWARD D. BURKE  
Acting Justice of Supreme Court

Motion R/D : NONE - *Ex parte*  
Mot Seq # : 001 MD  
ORDER "NOT SIGNED"

-----X  
PROPERTY ASSET MANAGEMENT INC.,

Plaintiff(s),

- against -

DRUCKMAN & SINEL  
*Attorney for Plaintiff*  
242 Drexel Avenue, Suite 2  
Westbury, New York 11590

GUSTAVO HUAYTA, MERS, INC., as Nominee for  
LEHMAN BROTHER BANK, FSB, MARGARET  
MILORD, "JOHN DOE 1" to "JOHN DOE #25", said  
names being fictitious, the persons or parties intended being  
the persons, parties, corporations or entities, if any, having or  
claiming an interest in or lien upon the mortgaged premises,  
described in the complaint,

Defendant(s).  
-----X

Upon the following papers numbered 1 to 3 read on this motion by plaintiff for an order fixing defaults of the mortgagor and appointing a referee to compute; Notice of Motion/Order to Show Cause and supporting papers 1 to 3; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this *ex-parte* application (#001) by the plaintiff for an order, *inter alia*, fixing the defaults of the mortgagor defendant and appointing a referee to compute amounts due under the terms of the note and mortgage that are the subject of this foreclosure action is considered under CPLR 3215 and RPAPL 1321 and is denied. It is well established that a plaintiff seeking a default judgment must establish the following: 1) due service of the summons and complaint within one (1) year of the interposition of the plaintiff's motion; 2) a default in answering or otherwise appearing on the part of the defendants; and 3) facts which constitute cognizable claims against the defendant (CPLR 3215(b)(c); *Resnick v Lebovitz*, 28 AD3d 533, 813 NYS2d 480; *Beaton v Transit Facility Corp.*, 14 AD3d 637, 789 NYS2d 314; *Morgan v Bagayyoko*, 1 AD3d 582, 767 NYS2d 631). It is also well established that one of the elements of a cognizable claim for foreclosure of a mortgage is that the plaintiff is the owner of the note and mortgage at the time of the commencement of the foreclosure action (*Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92; *Katz v Eastville Realty Co.*, 249 AD2d 243, 672 NYS2d 308; *LaSalle Bank v Lamy*, 12 Misc.3d 1191; 8/17/06 NYLJ 25[col.1], [NYSup, Suffolk Cty, Burke, J. 8/7/06]).

Here, the plaintiff's complaint alleges that the mortgagor defendant, Gustavo Huayta, executed a note dated July 24, 2006 in favor of Mortgage Electronic Registration Systems, Inc. (MERS, Inc.) as Nominee for BNC Mortgage Inc. and that said note, together with the mortgage given as security therefor, was assigned by MERS, Inc. to the plaintiff herein. Review of said note reveals, however, that the mortgagor defendant, Gustavo Huayta, did not execute a note in favor of MERS, Inc. Rather, said note was executed in favor of BNC Mortgage Inc., as it was the lender that advanced the mortgage monies, which are the subject of this action, to defendant Huayta. Since MERS, Inc. had no ownership interest in said note, it could not assign it to the plaintiff and any assignment purportedly transferring an ownership interest in the note to the plaintiff by a MERS, Inc. assignment of said note is a nullity (*Deutsche Bank National Trust Company v Clouden*, 16 Misc.3d 1140, 2007 WL 2709996 [NY Sup, Kings Cty, Schack, J. 9/8/07]; *LaSalle Bank v Lamy*, 12 Misc.3d 1191; 8/17/06 NYLJ 25[col.1], [NYSup, Suffolk Cty, Burke, J. 8/7/06]).

In view of the foregoing, the instant motion (#001) is denied as it is apparent from the documentary submissions of the plaintiff that it was not the owner of the note at the time of the commencement of this action.

Proposed order marked "*Not Signed*".

Dated: December 5, 2007.

  
EDWARD D. BURKE, A.J.S.C.