

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN IA Part 10  
Justice

	x	Index
E*TRADE BANK		Number <u>19203</u> 2007
- against -		Motion
		Date <u>December 2,</u> 2008
		Motion
ANTHONY PEREZ a/k/a ANTONIO M. PEREZ, et al.		Cal. Number <u>6</u>
	x	Motion Seq. No. <u>1</u>

The following papers numbered 1 to 17 read on this motion by Bank of New York (BONY), as assignee of defendant Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for America's Wholesale Lender, pursuant to CPLR 1012(a)(3) for leave to intervene as a party defendant, and for leave to amend the caption, or in the alternative, to vacate the default of BONY's assignee, MERS, as nominee for America's Wholesale Lender (AWL) pursuant to CPLR 5015(a)(1) and (3), for leave to serve an answer as proposed, to vacate the judgment of foreclosure and sale dated March 15, 2008 and the Referee's deed dated June 17, 2008, to direct plaintiff E\*Trade to refund all funds paid to it by 200 Forbell Street, Inc. (Forbell), as the successful purchaser at the foreclosure sale, to declare the BONY mortgage to be superior to plaintiff E\*Trade's mortgage and direct plaintiff E\*Trade to satisfy its mortgage pursuant to RPAPL 1921.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits.....	1-9
Answering Affidavits - Exhibits.....	10-14
Reply Affidavits.....	15-17

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff E\*Trade commenced this foreclosure action, by filing on August 2, 2007 a copy of the summons and complaint and notice of pendency, alleging that it was the holder of a consolidated mortgage given by defendants Anthony Perez a/k/a Antonio M. Perez

and Aida Perez a/k/a Aida A. Perez, with respect to the subject premises known as 30-62 12<sup>th</sup> Street, Astoria, New York, and recorded on September 3, 2002. The consolidated mortgage served as security for a credit line in a principal amount which was not to exceed \$240,000.00, plus interest. Plaintiff E\*Trade named MERS, acting as the nominee for AWL, as a party defendant, alleging that MERS was the holder of a subordinate mortgage dated August 12, 2005 and recorded on September 1, 2005. Plaintiff E\*Trade did not name BONY as a party defendant in this action. Defendant MERS defaulted in appearing or answering the complaint, and plaintiff E\*Trade obtained a judgment of foreclosure and sale dated March 15, 2008 in the principal amount of \$258,656.60 plus interest as of January 30, 2008.

The Referee, appointed pursuant to the judgment, sold the property at public auction on May 2, 2008 to 200 Forbell St. Inc. (Forbell) as the successful bidder, having bid the amount of \$590,000.00. According to the report of the Referee, the Referee paid the amounts directed in the judgment of foreclosure and sale to be paid out of the proceeds of sale, executed and delivered a deed dated June 17, 2008 to Forbell, and deposited the surplus of the proceeds in the amount of \$312,328.88 into court to the credit of this action.

Meanwhile, prior to the commencement of this action, defendant Aida Perez apparently contacted E\*Trade regarding the payoff of the credit-line mortgage, and in response, E\*Trade issued a payoff letter dated July 27, 2005. AWL made a loan in the principal amount of \$500,000.00, plus interest, to defendants Perez, secured by the mortgage dated August 12, 2005 against the subject premises, which then was encumbered by E\*Trade's mortgage. MERS was named in the AWL mortgage as the mortgagee of record for the purpose of recording the AWL mortgage. A check, in the amount of \$241,970.00, along with a cover letter dated August 17, 2005, was forwarded to E\*Trade on behalf of AWL, indicating that the tendered funds represented the "payoff" of E\*Trade's mortgage, and requesting that E\*Trade "please close the remaining credit line and forward a satisfaction of mortgage...." Although the funds were accepted, no satisfaction was sent, nor was the credit line closed, and defendants Perez thereafter reaccessed the credit line. Then, defendants Perez defaulted on the obligation to E\*Trade and the obligation to AWL, causing BONY, as the assignee of MERS, to commence a separate foreclosure action entitled Bank of New York as Trustee for the Certificateholders of CWABS, Inc. Asset-Backed Certificates, Series 2005-1 v Perez, (Supreme Court, Queens County, Index No. 16413/2007), by filing a copy of a summons and complaint and notice of pendency on June 29, 2007, and E\*Trade to commence the instant action, 34 days later.

BONY failed to name E\*Trade as a defendant in the action under Index No. 16413/2007, notwithstanding that no satisfaction appeared of record at the time of the commencement of its action. According to Donald Clark, the assistant vice-president of Countrywide Home Loans, Inc., the servicing agent for BONY, it was assumed the satisfaction did not appear of record due to a "clearance matter."<sup>1</sup> BONY asserts it first learned of the existence of the instant action, foreclosure sale and surplus herein when counsel representing it in the earlier action received a letter dated July 15, 2008 from First American Title Insurance Company of New York, the title insurance company engaged by Forbell, advising that BONY's mortgage interest had been foreclosed by virtue of the judgment of foreclosure and sale.

BONY seeks to intervene herein, set aside the foreclosure sale and judgment of foreclosure and sale, and serve an answer, arguing that it should have been joined as a party defendant by virtue of its filing of the notice of pendency in the action under Index No. 16413/2007. BONY alternatively seeks to vacate the judgment of foreclosure and sale, and the referee's deed, and serve an answer, pursuant to CPLR 5015(a)(3) or CPLR 5015(a)(1).

Plaintiff E\*Trade opposes the motion, arguing that it joined defendant MERS, as the nominee for AWL, as the record holder of the subordinate AWL mortgage, and that MERS defaulted in appearing and answering the complaint. Plaintiff asserts that to the extent BONY is the assignee of the AWL mortgage, BONY cannot appear in this action without first vacating the default of MERS, BONY's assignor. In addition, plaintiff E\*Trade asserts that it was not obligated to join BONY as a necessary party defendant insofar as the assignment of the AWL mortgage to BONY was not recorded until September 28, 2007. It alternatively argues that service upon MERS constituted service upon BONY because service upon MERS constituted service upon AWL, and that Countrywide Home Loans, Inc. (Countrywide) is doing business as AWL, and Countrywide is the servicing agent of BONY.

Forbell also opposes the motion, on similar grounds, claiming it is a bona fide purchaser for value and that BONY's interest, if any, was divested upon the happening of the foreclosure sale. In addition, Forbell argues that BONY has unclean hands and is guilty of laches, and therefore should be estopped from intervening and seeking to set aside the sale and judgment.

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Again, the notice of pendency filed herein did not appear as of record at the time of the commencement of the action under Index No. 16413/2007.

At the outset, the court notes that a foreclosure action is equitable in its nature and that equity principles apply. Section 1311 of the Real Property Actions and Proceedings Law sets forth those parties which must be named defendants in a foreclosure action. RPAPL 1311 provides that a necessary defendant is one "whose interest is claimed to be subject and subordinate to the plaintiff's lien." RPAPL Section 1311(3) requires that "[e]very person having any lien or incumbrance upon the real property which is claimed to be subject and subordinate to the lien of the plaintiff" be made a party. Parties are named in a foreclosure action to extinguish the rights of redemption they possess as subordinate lienholders and to vest complete title in the purchaser at the judicial sale (see RPAPL 1311; Polish National Alliance v White Eagle Hall Company, 98 AD2d 400 [1983]; Cornell Associates v White Plains Colony Estates, 212 NYS2d 825 [1961]).

Although E\*Trade asserts that the notice of pendency filed under Index No. 16413/2007 failed to apprise it that BONY was claiming to have been assigned the AWL mortgage, by virtue of an assignment yet to be recorded, the notice notified E\*Trade and the world that BONY was maintaining an action for foreclosure of the AWL mortgage (see Cornell Associates v White Plains Colony Estates, 212 NYS2d 825 [Sup Ct 1961]; see generally Greenpoint Sav. Bank v McMann Enterprises, Inc., 214 AD2d 647 [1995]). Thus, E\*Trade also should have joined BONY as a necessary party defendant, notwithstanding its joinder of MERS, as a means of insuring that regardless of the basis for BONY's claim, the title vested in the purchaser at the judicial sale would be complete.

BONY, furthermore, has demonstrated a "real and substantial interest in the outcome of the foreclosure action warranting its intervention" (Greenpoint Sav. Bank v McMann Enters., 214 AD2d at 648; see also Harrison v Bain Estates, 2 Misc. 2d 52, affd 2 AD2d 670), insofar as E\*Trade allowed defendants Perez to borrow additional funds pursuant to the credit line mortgage, notwithstanding E\*Trade's acceptance of the funds in satisfaction of the credit line mortgage. E\*Trade argues that it could close the credit line mortgage only upon proper notice from defendants Perez, and that defendant Aida Perez had executed a "Line of Credit Payoff Request Form," without checking either box thereon, thereby indicating her desire that the credit line mortgage remain open and no satisfaction be filed. Contrary to such argument, the cover letter that accompanied the AWL check constituted a specific written request to discharge the credit line mortgage, and forward a satisfaction of mortgage (see RPAPL 1921; Merrill Lynch Equity Mgt. v Kleinman, 246 AD2d 884, 885 [1998]; Barclay's Bank of NY v Market St. Mtge. Corp., 187 AD2d 141, 144 [1993]; cf. Reitman v Wachovia Nat. Bank, N.A., 49 AD3d 759 [2008]). Therefore, to the

extent E\*Trade required written notice from the borrowers as a condition to closing the credit line mortgage, it should have rejected the tender until such written notice was provided. By accepting the funds, it had to accede to AWL's terms as the money tendered belonged to AWL, and AWL had the right to say on what condition it should be received (see Merrill Lynch Equity Mgt. v Kleinman, 246 AD2d at 886). BONY consequently has set forth a meritorious defense to the foreclosure action.

E\*Trade argues that BONY actually was joined as a party defendant herein by virtue of service of a copy of the summons and complaint upon MERS, as the nominee for AWL, arguing that Countrywide Home Loans, Inc. (Countrywide) is doing business as AWL, and Countrywide is the servicing agent of BONY. The affidavit of service dated August 9, 2007, of a licensed process server, indicates that MERS was served, care of "CT Corporation System" by personal delivery of a copy of the summons and complaint upon Paula Kash, "SENIOR PROCESS SPECIALIST," as the authorized agent of MERS, on August 9, 2007. Thus, the service was not intended to have been made upon Countrywide, but rather upon MERS, and E\*Trade has failed to demonstrate that Countrywide is the authorized agent of BONY under CPLR 311 or Business Corporation Law § 306 (see Matter of Hanover Ins. Co. v Cannon Express Corp., 1 AD3d 358 [2003]).

To the extent Forbell asserts that it was a bona fide purchaser at foreclosure, the notice of pendency filed in the earlier action likewise put Forbell on notice of a claim by BONY of an interest in the property. Forbell argues BONY is guilty of laches and should be estopped from intervening in this action, because BONY should have made inquiries when no satisfaction of the credit line mortgage appeared as of record by the time of the commencement of the earlier action.

Again, Forbell was on constructive notice, by virtue of the notice of pendency filed in the earlier action of BONY's claim in the subject premises at the time Forbell bid at foreclosure herein. Furthermore, Forbell has failed to demonstrate it suffered prejudice, e.g. made any commitments to effectuate its bid, substantially changed its position vis-a-vis third parties, etc. (cf. Amsterdam Sav. Bank v City View Mgt. Corp., 45 NY2d 854 [1978]).

Accordingly, the motion by BONY to intervene is granted, and BONY is directed to serve and file an answer within 20 days after service of a copy of this order with notice of entry. The judgment of foreclosure and sale is vacated, the public sale is revoked and the Referee's deed conveying the premises to Forbell is set aside

(see Mercaldo v Navarro, 15 Misc 3d 1135[A], affd 50 AD3d 980 [2008]).

Dated: February 20, 2009

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J.S.C.