Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

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| TERWIN ADVISORS, LLC, x<br><br>Plaintiff,<br><br>- against -<br><br>ASHA BALBACHAN, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for MORTGAGEIT, INC., "JOHN DOE 1 to JOHN DOE 25," said names being fictitious, the person 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,<br><br>Defendants. x | Index Number 15323 2006<br><br>Motion Date February 7, 2006<br><br>Motion Cal. Number 42<br><br>Motion Seq. No. 1 |

The following papers numbered 1 to 15 read on this motion by plaintiff for summary judgment dismissing the answer of defendant Asha Balbachan and for leave to appoint a referee to compute the amount due and owing plaintiff and to amend the caption.

| | Papers Numbered |
|---|---|
| Notice of Motion - Affidavits - Exhibits..... | 1-5 |
| Answering Affidavits - Exhibits..... | 6-13 |
| Reply Affidavits..... | 14-15 |

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

Plaintiff commenced this foreclosure action alleging that it is the holder of the mortgage given by defendant Balbachan to Mortgage Electronic Registration Systems, Inc., as nominee for Mortgageit, Inc., with respect to the premises known as 109-12 124th

Street, South Ozone Park, New York, to secure a note evidencing a loan in the principal amount of $432,000.00, plus interest. Plaintiff alleges that defendant Balbachan defaulted under the terms of the mortgage and note by failing to make the monthly installment payment due on April 1, 2006, and that it elected to accelerate the entire mortgage debt.

Defendant Balbachan served an answer, and the remaining defendants have defaulted in appearing, or answering the complaint. Plaintiff has determined that there is a single tenant residing at the premises, and that his name is "Rickford Frank," and that defendants "John Doe 2" through "John Doe 25" are unnecessary party defendants. That branch of the motion seeking leave to amend the caption substituting "Rickford Frank" for defendant "John Doe 1," and deleting defendants "John Doe 2" through "John Doe 25" is granted.

With respect to that branch of the motion by plaintiff for summary judgment as against defendant Balbachan, it is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

Although plaintiff has submitted evidentiary proof of the existence of the mortgage and note executed by defendant Balbachan, and default in payment thereunder, it has failed to present proof of the assignment of the mortgage documents to it (see Miller v Planning Corp. with Delta Funding Corp. v Wells, 253 AD2d 859 [1998]; Votta v Votta Enters., 249 AD2d 536 [1998]; Mahopac Natl. Bank v Baisley, 244 AD2d 466 [1997]). A plaintiff seeking to foreclose upon a mortgage must establish that it has legal or equitable interest in the mortgage and underlying debt (see Katz v East-Ville Realty Co., 249 AD2d 243 [1998]; Kluge v Fugazy, 145 AD2d 537 [1988]; see also First Trust Nat. Assn. v Meisels, 234 AD2d 414 [1996]). "Ownership of the note and mortgage may be established by the lending documents themselves or by proof that the plaintiff is the owner of the note and mortgage by reason of an assignment of both the note and mortgage by the owner thereof to the plaintiff or by the owner's indorsement of the note and its written assignment of mortgage to the plaintiff (Federal National Mortgage Association v Youkelsone, 303 AD2d 546 [2003])" (LaSalle Bank Nat. Assn. v Lamy, 12 Misc 3d 1191(A) [2006]).

Under such circumstances, that branch of the motion by plaintiff for summary judgment as against defendant Balbachan is denied. That branch of the motion by plaintiff for leave to appoint a referee to compute the sums due and owing plaintiff is denied at this juncture.

Dated: April 16, 2007

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J.S.C.