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MERCER COUNTY  
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COUNTRYWIDE HOME LOANS,

Plaintiff,

v.

GUSTINA JONES, ET AL

Defendants,

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION  
MERCER COUNTY

DOCKET NO.: F-21402-08

Civil Action

**ORDER DENYING PLAINTIFF'S  
SUMMARY JUDGMENT AND  
GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

THIS MATTER having been opened to the court by Plaintiff, by and through their attorney, Phelan, Hallinan & Schmeig, by means of the filing of a motion for Summary Judgment to Strike Defendant's Answer and Foreclose on Defendant's property; and the Defendant having filed a cross-motion for Summary Judgment to Strike the Plaintiff's Answer, and the Court having reviewed the moving and opposing papers, if any; and having heard the oral arguments of counsel; and for good cause shown;

IT IS on the 14<sup>th</sup> day of October, 2009

ORDERED as follows:

1. Plaintiff's Motion for Summary Judgment is hereby denied.
2. Defendant's Cross Motion for Summary Judgment is hereby granted;

*Complaint dismissed without prejudice  
for reasons in written decision dated 10/9/09*

*Maria Marinari Szpek*  
\_\_\_\_\_  
Maria Marinari Szpek, P.J.Ch



contemporaneously executed a mortgage on the subject premises to Mortgage Electronic Registration Systems, Inc., (MERS) as nominee for Security Atlantic Mortgage Co., Inc. The instrument is not a purchase money mortgage. Acting on behalf of Security Atlantic, MERS allegedly assigned the Note and Mortgage to plaintiff.

Defendant defaulted on February 1, 2008 and pursuant to the loan agreement, plaintiff accelerated the debt. Plaintiff filed its foreclosure complaint on June 4, 2008. The Defendant failed to answer within the specified time period, and the Court entered a default judgment against the defendant. Defendant filed a motion to vacate the default judgment of August 18, 2008, which the Court granted. Defendant filed an answer on October 23, 2008 and asserted a counterclaim for damages arising from Plaintiff's alleged "predatory lending violations and Truth and Lending Act violations..." Answer at 5.

Plaintiff, Countywide Home Loans, Inc., now brings the within motion for summary judgment on its foreclosure action. As the Plaintiff does not move before the Court for summary judgment on Ms. Jones' counterclaim, the Court will not address the issue. Defendant Gustina Jones brings a cross-motion for summary judgment seeking to dismiss plaintiff's complaint.

#### ***LEGAL ANALYSIS***

In determining whether to grant either parties' motion for summary judgment, the Court must resolve the central question of whether Security Atlantic properly assigned Jones' Note and Mortgage to Countrywide prior to the commencement of this action on

June 4, 2008, thru conveying proper standing for Countrywide to file its foreclosure complaint.

Under N.J. Ct.R.4:46-2, the Court should grant the motion for summary judgment only where the pleadings, affidavits and other matters of record show that there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). If the moving party makes the requisite prima facie showing, the burden of production shifts to the opposing party, who must then come forward with competent proofs indicating that the facts are not as the moving party asserts. Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App.Div.), certif., den., 37 N.J. 229 (1962). The Court is then obligated "to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the moving party." Brill, supra, 142 N.J. at 540.

In order to prevail in a foreclosure action, a plaintiff must establish the following elements: 1) the validity of the mortgage; 2) the amount of indebtedness; and 3) the right of the mortgagee to resort to the mortgaged premises. See Great Falls Bank v. Pardo, 273 N.J. Super. 388, 394 (Ch.Div.1993), aff'd 273 N.J. Super 542 (App.Div. 1994). Plaintiff contends that it satisfies these three requirements and specifically that it may foreclose the subject property because the original lender validly assigned the note and mortgage to plaintiff. Defendant responds by pointing out the invalidity of the purported assignment due to 1) plaintiff's failure to properly acknowledge the assignment; and 2) fraud. N.J.

R. 4:26-1 provides that “[e]very action may be prosecuted in the name of the real party in interest....” For a plaintiff in a foreclosure action to establish itself as the real party in interest, it must show that it owns the mortgage as well as the underlying obligation for which the mortgage serves as security.

As a threshold matter, an assignee of a Note and Mortgage who proceeds without a recorded assignment must supply “the assignor’s name, the assignee’s name and the date that the assignment was executed and *acknowledged*...” *EMC Mortgage Corporation v. Chaudhri, et al.*, 400 N.J. Super. 126 (App.Div. 2008) (emphasis added). R. 4:64-1(b)(10) further indicates that the foreclosure complaint must set forth in detail, *inter alia*, “... the names of the original mortgagee and a recital of all assignments in the chain of title...” Plaintiff concedes that the complaint sets forth only that “[t]he Note and Mortgage have been assigned...” and that “[t]he assignment is in the process of being record.” Verified Complaint at ¶¶2b, 3. In some circumstances, however, foreclosure plaintiffs’ may proceed without a recorded Note and Mortgage, as R. 4:64-2 indicates:

[p]roof required by R.4:64-1 may be submitted by affidavit, unless the court otherwise requires. The moving party shall produce the original mortgage, evidence of indebtedness, *assignments*, claim of lien..., and *any other original documents* upon which the claim is based. In lieu of an *original document*, the moving party may produce a legible copy of a recorded or filed document, certified as a true copy by the recording or filing officer or by a New Jersey attorney, or a copy of an original document, if unfiled or unrecorded, certified as a true copy by a New Jersey attorney.” (emphasis added)

The Rules thus indicate that in lieu of original recorded assignments, a Court *may* accept an attorney-certified copy of an assignment as proof of chain of title as required by R. 4:64-1(b). At the time of the complaint, however, plaintiff could not supply either a valid, recorded assignment of the note and mortgage, or a detailed recitation of the

instruments' chain of title. The complaint merely stated the Mortgage Electronic Registration Systems, Inc., "as nominee for Security Atlantic Mortgage Co., Inc...assigned the mortgage" to plaintiff on May 28, 2008, and that as a result of said assignment "[p]laintiff is the owner of the Note and Mortgage.

In response to Defendant's interrogatories, plaintiff attempted to cure this defect by supplying an "Assignment of Mortgage" dated May 28, 2008 three days before plaintiff filed its complaint. The document, however, contained the signature of plaintiff's counsel, Mr. Francis Hallinan, purporting to assign the note and mortgage to plaintiff on behalf of Mortgage Electronic Registration Systems, Inc. ("MERS"), a non-party to this action mentioned as Security Atlantic's "nominee" in the Security Agreement. The assignment was notarized by Mr. Thomas Strain, an employee of a copy owned in part by Mr. Hallinan and who admitted in other proceedings to routinely acknowledging that he witnesses Mr. Hallinan sign documents when, in fact, Mr. Hallinan did not sign the documents in Strain's present. Defendant notes that Mr. Hallinan's participation on behalf of both MERS and Plaintiff casts serious doubt on the validity of the assignment and by extension plaintiff's standing to prosecute the within action.

After defendant raised these and other credibility issues with respect to the assignment, plaintiff submitted 1) a bailment letter from Security Atlantic to Countrywide dated June 14, 2007 in which plaintiff "consented to act as agent, bailor and custodian for [Security Atlantic]..." and 2) a "Corrective Assignment of Mortgage dated August 25, 2009. This "corrective" instrument differs from the original Assignment of Mortgage in two respects. First, the assignment is signed by "Michele M. Bradford, Assistant

Secretary and Vice President” of MERS. Second, the assignment is acknowledged by “Angela M. McFadden, Notary Public.” In additional, the corrective assignment asserts that “[t]his assignment should hold the effective date of the original of 5/28/08.” Plaintiff’s submission also contained a letter from Defendant to Plaintiff dated August 30, 2007 in which defendant requested forgiveness of a late payment fee. Plaintiff asserts that the bailment letter and defendant’s letter requesting forgiveness from a late penalty sufficiently establish plaintiff’s interest and that the Corrective Assignment effectively eliminates the credibility issues surrounding the first assignment. For the following reasons the Court disagrees.

First, Plaintiff did not provide sufficient proof of chain of title when it filed its complaint as required under R. 4:64-1(b)(10). Second, the fact that plaintiff’s counsel purported to assign the mortgage and note to plaintiff on behalf of MERS raises sufficient credibility issues to cast doubt on the genuineness of the “corrective assignment.” Moreover, the “corrective assignment” occurred on August 25, 2009 over one year after plaintiff commenced this suit. Even if this court was satisfied that the corrective assignment was genuine, the fact that plaintiff procured such assignment at such a late stage in the litigation cannot be overlooked. Where as here, the defendant raises substantial issues with respect to plaintiff’s alleged chain of title, the Court is constrained to find that the plaintiff has not sufficient established itself as the owner of Ms. Jones’ Note and Mortgage, and by extension, the real party of interest in this litigation. The Court’s decision is based on this particular set of facts. However, all who participate in today’s foreclosure environment recognize the complicated nature of the securitization. The lender, servicer, assignee, assignor, mortgage agent, title companies who are

particularly involved generally on the plaintiff's side of the argument will ask the Court to understand the "nature of the way of doing business" that is necessitated by the large volume of loans, the bundling of such purchases, the structure of how these are managed to support a position that the Plaintiff as named is the entity which has a stake in the case. That being so the creator's of this complex procedure must bear the burden of making their entitlement clear as opposed to placing that burden on the Court to unravel the twisted ball of yarn or that matter require the homeowner to be astute enough to raise concerns as to the validity of the Court proceedings. As a result the Court finds that this particular case as part of the complexity of the securitization landscape must be dismissed.

Therefore, the Defendant's motion is granted and the Plaintiff's complaint is dismissed without prejudice.