

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D21621  
C/hu

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Argued - November 18, 2008

ROBERT A. SPOLZINO, J.P.  
MARK C. DILLON  
EDWARD D. CARNI  
JOHN M. LEVENTHAL, JJ.

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2007-06265

DECISION & ORDER

Vladimir Sudit, respondent, v Joseph Ezagui,  
et al., defendants, Ameriquest Mortgage  
Company, appellant.

(Index No. 24782/05)

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Albanese & Albanese, LLP, Garden City, N.Y. (Barry A. Oster of counsel), for  
appellant Eli Eliav.

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains, N.Y.  
(Frank J. Haupel and Michael J. Schwarz of counsel), for appellant Bank of  
America, N.A.

Solomon Rosengarten, Brooklyn, N.Y., for respondent.

In an action, inter alia, to foreclose a mortgage, the defendant Ameriquest Mortgage Company appeals, as limited by its brief, from so much of an amended order of the Supreme Court, Kings County (Hinds-Radix, J.), dated April 4, 2007, as granted, on condition, those branches of the plaintiff's motion which were for summary judgment against it and for the appointment of a referee to compute, and granted that branch of the plaintiff's separate motion which was to consolidate the action with two related actions entitled *Ezagui v Sudit*, pending under Kings County Index No. 17038/01, and *Sudit v Lefferts Homes, Inc.*, pending under Kings County Index No. 22592/01, to the extent of directing that the actions shall be tried jointly.

ORDERED that the amended order is reversed insofar as appealed from, on the law, with costs, those branches of the plaintiff's motion which were for summary judgment against

December 30, 2008

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the appellant and for the appointment of a referee to compute are denied, and that branch of the plaintiff's separate motion which was to consolidate the action with two related actions entitled *Ezagui v Sudit*, pending under Kings County Index No. 17038/01, and *Sudit v Lefferts Homes, Inc.*, pending under Kings County Index No. 22592/01 is denied.

The Supreme Court erred in granting that branch of the plaintiff's motion which was for summary judgment against the appellant, Ameriquest Mortgage Company (hereinafter Ameriquest), which had issued mortgages on four condominium units in the subject building in August 2004. In opposition to the plaintiff's prima facie showing of entitlement to summary judgment, Ameriquest raised a triable issue of fact as to whether the 1997 mortgages had been orally modified, whether there had been part performance of the alleged oral agreement, and whether such part performance was unequivocally referable to the alleged oral agreement (*see Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 235-236; *Anostario v Vicinanza*, 59 NY2d 662, 664; *Rose v Spa Realty Assoc.*, 42 NY2d 338, 343-344; *Luft v Luft*, 52 AD3d 479, 480-481; *Travis v Fallani & Cohn*, 292 AD2d 242, 244; *Sarcona v DeGiaino*, 226 AD2d 1143; *cf.* General Obligations Law § 5-703; § 15-301[1], [2]). Thus, the Supreme Court erred in granting, on condition, those branches of the plaintiff's motion which were for summary judgment against Ameriquest and for the appointment of a referee to compute.

In light of our determination, a joint trial of the instant action with the two related actions would be inappropriate, as it would result in prejudice to a substantial right of Ameriquest (*see Skelly v Sachem Cent. School Dist.*, 309 AD2d 917, 917-918).

The parties' remaining contentions either have been rendered academic in light of our determination or are without merit.

SPOLZINO, J.P., DILLON, CARNI and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court