

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

D25228
O/nl

_____AD3d_____

Submitted - November 6, 2009

PETER B. SKELOS, J.P.
RANDALL T. ENG
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS, JJ.

2008-09808

DECISION & ORDER

Countrywide Home Loans, Inc., appellant, v Anthony Gress, respondent, et al., defendants.

(Index No. 1193/07)

Rosicki, Rosicki & Associates, P.C., Plainview, N.Y. (Edward Rugino of counsel),
for appellant.

Steinberg, Fineo, Berger, & Fischhoff, P.C., Woodbury, N.Y. (Gary C. Fischhoff and
Jessica Anne Gould of counsel), for respondent.

In an action to foreclose a mortgage, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Nassau County (Feinman, J.), dated June 25, 2008, as granted that branch of the motion of the defendant Anthony Gress which was to dismiss the complaint insofar as asserted against him pursuant to CPLR 3211(a)(3).

ORDERED that the order is affirmed insofar as appealed from, with costs.

Contrary to the plaintiff's contention, the Supreme Court properly granted that branch of the motion of the defendant Anthony Gress which was to dismiss the complaint insofar as asserted against him pursuant to CPLR 3211(a)(3) on the ground that the plaintiff lacked standing to bring this action. In order to commence a foreclosure action, the plaintiff must have a legal or equitable interest in the subject mortgage (*see Wells Fargo Bank, N.A. v Marchione*, _____AD3d_____, 2009 NY Slip Op 07624 [2d Dept 2009]; *Katz v East-Ville Realty Co.*, 249 AD2d 243; *Kluge v Fugazy*, 145 AD2d 537, 538). "Where the plaintiff is the assignee of the mortgage and the underlying note at the time the foreclosure action was commenced, the plaintiff has standing to maintain the

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action” (*Federal Natl. Mtge. Assn. v Youkelsone*, 303 AD2d 546, 546-547; see *Wells Fargo Bank, N.A. v Marchione*, _____AD3d_____, 2009 NY Slip Op 07624 [2d Dept 2009]; *First Trust Natl. Assn. v Meisels*, 234 AD2d 414). Here, it is undisputed that the subject mortgage was not assigned to the plaintiff until July 5, 2007, more than five months after the commencement of this action on January 22, 2007. Furthermore, although the July 5, 2007, assignment recited that it was effective retroactive to August 1, 2006, “a retroactive assignment cannot be used to confer standing upon the assignee in a foreclosure action commenced prior to the execution of the assignment” (*Wells Fargo Bank, N.A. v Marchione*, _____AD3d_____, 2009 NY Slip Op 07624 [2d Dept 2009]; see *LaSalle Bank Natl. Assn. v Ahearn*, 59 AD3d 911, 912).

In light of our determination, we need not reach the parties’ remaining contentions.

SKELOS, J.P., ENG, LEVENTHAL and CHAMBERS, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court