

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

D34061  
Y/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - January 31, 2012

MARK C. DILLON, J.P.  
ANITA R. FLORIO  
CHERYL E. CHAMBERS  
PLUMMER E. LOTT, JJ.

2011-00695

DECISION & ORDER

HSBC Bank USA, etc., appellant, v Ana Hernandez,  
et al., respondents.

(Index No. 7171/08)

Hogan Lovells US, LLP, New York, N.Y. (Allison J. Schoenthal, Renee Garcia, and  
Jessica L. Ellsworth of counsel), for appellant.

Harold M. Somer, P.C., Westbury, N.Y., for respondents.

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Nassau County (Adams, J.), entered October 8, 2010, which denied its motion for summary judgment on the complaint and, upon, in effect, searching the record, awarded summary judgment to the defendants dismissing the complaint without prejudice.

ORDERED that the order is modified, on the law, by deleting the provision thereof, in effect, searching the record and awarding summary judgment to the defendants dismissing the complaint without prejudice; as so modified, the order is affirmed, without costs or disbursements.

In order to commence a foreclosure action, a plaintiff must have a legal or equitable interest in the mortgage. A plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced (*see Bank of N.Y. v Silverberg*, 86 AD3d 274, 279; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 207; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753). An assignment of a mortgage without assignment of the underlying note or bond is a nullity, and no interest is acquired by it (*see Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 637;

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*Bank of N.Y. v Silverberg*, 86 AD3d at 280). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation” (*U.S. Bank, N.A. v Collymore*, 68 AD3d at 754; see *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 108).

Here, the plaintiff failed to establish, prima facie, that it had standing to commence the action. The plaintiff’s evidence did not demonstrate that the note was physically delivered to it prior to the commencement of the action. The affidavit from the plaintiff’s servicing agent did not give any factual details of a physical delivery of the note and, thus, failed to establish that the plaintiff had physical possession of the note prior to commencing this action (see *Citimortgage, Inc. v Stosel*, 89 AD3d 887, 888; *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d at 637; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 108; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 754). Accordingly, the Supreme Court properly denied the plaintiff’s motion for summary judgment on the complaint.

However, the Supreme Court should not have, in effect, searched the record and awarded summary judgment to the defendants dismissing the complaint without prejudice, as the parties’ submissions failed to establish, as a matter of law, that the plaintiff lacked standing to commence the action.

DILLON, J.P., FLORIO, CHAMBERS and LOTT, JJ., concur.

ENTER:



Aprilanne Agostino  
Clerk of the Court