

<b>Deutsche Bank v Jones</b>
2007 NY Slip Op 30183(U)
March 5, 2007
Supreme Court, Suffolk County
Docket Number: 0014768
Judge: Edward D. Burke
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT - STATE OF NEW YORK  
IAS/TRIAL PART 9 - SUFFOLK COUNTY**

**PRESENT:**

Hon. EDWARD D. BURKE  
Acting Justice of Supreme Court

Motion R/D : NONE - *Ex parte*  
Mot Seq # : 002 MD  
**ORDER "NOT SIGNED"**

-----X  
**DEUTSCHE BANK, NATIONAL TRUST  
COMPANY, AS TRUSTEE  
C/O Litton Loan Servicing  
4828 Loop Central Drive  
Houston, TX 77081,**

Plaintiff(s),

- against -

**STEVEN J. BAUM, P.C.**  
*Attorneys for Plaintiff(s)*  
220 Northpointe Parkway, Suite G  
Amherst, New York 14428

**REGINALD D. JONES, TRACY L. JONES, BANDE  
DEVELOPMENT CO., COMMISSIONER OF  
TAXATION & FINANCE, GREAT SENECA  
FINANCIAL CORP., Assignee of DIRECT  
MERCHANTS CREDIT CARDBANK, NA, OUR  
LADY OF PROVIDENCE REGIONAL SCHOOL,  
PALISADES COLLECTION LLC, AS Assignee of  
PROVIDIAN NATIONAL BANK, PEOPLE OF  
THE STATE OF NEW YORK, SUFFOLK COUNTY  
DEPARTMENT OF SOCIAL SERVICES, WINOKA  
MANOR LLC,**

Defendant(s).

**COHEN & SLAMOWITZ**  
*Attorneys for Defendant WINOKAMANOR, LLC*  
199 Crossways Park Drive  
P.O. Box 9004  
Woodbury, New York 11797

-----X  
Upon the following papers numbered 1 to 3 read on this motion by plaintiff for an order fixing defaults of the mortgagor and appointing a referee to compute; Notice of Motion/Order to Show Cause and supporting papers 1 to 3; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion (#001) by the plaintiff for an order fixing the defaults of the mortgagor and other defendants and, *inter alia*, for an order appointing a referee to compute amounts due under the note and mortgage that are the subject of this foreclosure action is denied. None of the defaults outlined in the court's short form order of September 20, 2006, which denied a prior application (#001) by the plaintiff for the same relief, have been addressed, let alone remedied, by the papers submitted on this application.

As this court previously indicated, a plaintiff seeking a default judgment must establish the following: 1) due service of the summons and complaint within one (1) year of the interposition of the plaintiff's motion; 2) a default in answering or otherwise appearing on the part of the defendants; and 3) facts which constitute cognizable claims against the defendant (CPLR 3215(b)(c); *Resnick v Lebovitz*, 28 AD3d 533, 813 NYS2d 480; *Beaton v Transit Facility Corp.*, 14 AD3d 637, 789 NYS2d 314; *Morgan v Bagayyoko*, 1 AD3d 582, 767 NYS2d 631). It is also well established that one of the elements of a cognizable claim for foreclosure of a mortgage is that the plaintiff is the owner of the note and mortgage at the time of the commencement of the foreclosure action (*Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92; *Katz v Eastville Realty Co.*, 249 AD2d 243, 672 NYS2d 308; *LaSalle Bank v Lamy*, 2006 NY Slip Op 51534[U], 2006 WL 22527221 [NYSup, Suffolk Cty, Burke, J. 8/7/06]).

Here, the plaintiff stands before this court as a purported assignee of the entity known as Mortgage Electronic Registration Systems, Inc. (MERS), whom the plaintiff characterizes as the nominee of the lender/obligee named in the subject note and mortgage. Review of the documentation attached to the moving papers reveals, however, that the plaintiff's assignor, MERS, was not the owner of the note and mortgage at the time it executed the purported assignment of the note and mortgage to the plaintiff. Rather, MERS was merely named in the mortgage as a "separate corporation acting solely as nominee for the lender and the lender's successors and assigns AND FOR PURPOSES OF RECORDING THIS MORTGAGE MERS IS THE MORTGAGEE OF RECORD." Since MERS was without ownership of the note and mortgage at the time of its assignment thereof to the plaintiff, the assignment did not pass ownership of the note and mortgage to the plaintiff. The failure on the part of the plaintiff to plead and establish its ownership of the note and mortgage at the time of the commencement of this action precludes the granting of the instant motion as the plaintiff has failed to establish the fact(s) constituting a viable claim against the defendants as required by CPLR 3215(f) (*Resnick v Lebovitz*, *supra*; *Fappiano v City of New York*, 5 AD3d 627, 774 NYS2d 773; *Green v Dolphy Construction Co., Inc.*, 178 AD2d 635, 590 NYS2d 238; *Kluge v Fugazy*, *supra*).

Additionally, neither the submission of the subject assignment to the County Clerk nor the Clerk's recording of said assignment warrants a different result. It is well settled that while the County Clerk must accept for filing MERS assignments (*see, MERS Corp, Inc. v Romaine*, 24 AD3d 673, 808 NYS2d 307, *aff'd* 8 NY3d 90, \_\_\_ NYS2d \_\_\_), such acceptance is purely ministerial in nature (*see, Real Property Law* §316-a(1); *see, also, Mortgage Electronic Systems, Inc. v Burek*, 4 Misc2d 1030, 798 NYS2d 346).

In view of the foregoing, the instant motion for an order fixing the defaults of the defendant mortgagor and, *inter alia*, for an order appointing a referee to compute is denied and the proposed order attached to the moving papers has been marked "*Not Signed*".

Dated: March 5, 2007.

  
EDWARD D. BURKE, A.J.S.C.