INDEX # 26141-08
RETURN DATE: **12-5-08**
MOT. SEQ. # **001**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

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US BANK, N.A. AS TRUSTEE FOR CCB LIBOR SERIES 2004-1

Plaintiff,

-against-

RUDOLPH C. HOGLUND, JENNIFER HOUSER-BOLAND a/k/a JENNIFER HOUSER-HOGLUND, FLEET NATIONAL BANK, UNITED STATES OF AMERICA, "JOHN DOE" #1, etc.

Defendants.

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CALENDAR DATE: July 8, 2009
MNEMONIC: MD

PLTF'S/PET'S ATTORNEY:

Berkman, Henoch, Peterson & Peddy
100 Garden City Plaza
Garden City, NY11530

DEFT'S/RESP ATTORNEY:

David Lee Heller, Esq.
3334 Noyac Road
Sag Harbor, NY 11963

Upon the following papers numbered 1 to 33 read on this motion for summary judgment and to appoint a referee ; Notice of Motion/Order to Show Cause and supporting papers 1-18 ; Notice of Cross-Motion and supporting papers _____; Answering Affidavits and supporting papers 19-28 ; Replying Affidavits and supporting papers 29- 33 ; Other _____; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by U.S. Bank N.A. as Trustee for CCB Libor Series 2004-1 (hereinafter plaintiff) for summary judgment pursuant to CPLR §3212 and the appointment of a referee in this mortgage foreclosure proceeding is denied as there are readily identifiable issues of fact which preclude summary disposition on the issue of standing.

The plaintiff instituted this foreclosure action seeking to foreclose on premises located at 11 Henry Street in Sag Harbor, Suffolk County on Long Island, New York. The defendants, Rudolph C. Hoglund and Jennifer Houser-Boland a/k/a Jennifer Houser-Hoglund (hereinafter Hoglunds), duly executed a note and mortgage with Chevy Chase Bank, FSB, (hereinafter Chevy Chase), dated December 23, 2002, in the amount of $975,000. The Hoglunds failed to pay under the terms of the note on or about December, 1 2007. The note and mortgage in the name of Chevy Chase was subsequently assigned to the plaintiff on August 25, 2008 by Mortgage Electronic Registration Systems, Inc. (hereinafter MERS), acting solely as a nominee for Chevy Chase, but there is no direct assignment from Chevy Chase to the plaintiff. The plaintiff filed additional papers with regard to the trust documents upon the Court expressing some concerns about the powers of the trustee but the trust documents filed as supplemental papers are incomplete and deal only with Article III concerning "Administration and servicing of mortgage loans." A review of the trust's table of contents indicates Article II deals with the conveyance of transferred assets and purposes of the trust, Article VIII deals with defaults and Article IX deals with the powers of the trustee, yet those provisions were not provided, nor did plaintiff provide the complete trust documents for Court review.

The plaintiff now moves for summary judgment pursuant to CPLR §3212 on its complaint seeking foreclosure and appointment of a referee to compute the amounts owed under the mortgage and the Hoglunds oppose the motion claiming that the plaintiff lacks standing to bring this action at the time of its commencement because it was not the holder of the mortgage and the note sought to be foreclosed or, at the very least, there are factual issues about the standing of the plaintiff to institute this action and therefore summary disposition is unwarranted.

For the following reasons, the plaintiff's motion for summary judgment is denied as there are issues of fact on the question of standing. The plaintiff has failed to establish as a matter of law that it was the record holder of the mortgage and the note at the time of commencement of this proceeding.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. **Elzer v. Nassau County**, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); **Steven v. Parker**, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); **Gaeta v. New York News, Inc.**, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in **Sillman v. Twentieth Century Fox**, 3 NY2d 395, 404 (1957):

> To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (**DiMenna & Sons v. City of New York**, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (**Braun v. Carey**, 280 App. Div. 1019), or where the issue is 'arguable' (**Barnett v. Jacobs**, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (**Esteve v. Avad**, 271 App. Div. 725, 727).

On a motion for summary judgment the Court must consider all the facts in a light most favorable to the party opposing the motion, **Thomas v. Drake**, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there any material and triable issues of fact presented. The key is issue finding, not issue determination, and the Court should not attempt to determine questions of credibility. **S.J. Capelin Assoc., v. Globe**, 34 NY2d 338, 357 NYS2d 478 (1974).

Here, after reviewing the evidentiary material presented in the light most favorable to the party opposing the motion for summary judgment as required, [**Robinson v. Strong Memorial Hospital**, 98 AD2d 976, 470 NYS2d 239 (4th Dept. 1983)], the Court finds readily identifiable issues of fact as to whether the plaintiff has standing to maintain this action at the time it commenced this mortgage foreclosure proceeding. While plaintiff alleges it is the holder of the mortgage and note by assignment, there is a disconnect between the original mortgagor Chevy Chase and the plaintiff. The Hoglunds argue that the plaintiff's assignment from MERS as a nominee for Chevy Chase cannot purport to transfer an interest because MERS was merely a nominee of Chevy Chase and not the owner of the mortgage and the note.

> discern from the face of the instrument that Mers has been appointed, as nominee, 'mortgagee of the record.' As the instrument appears to reflect a valid conveyance (Real Property Law §290[3]), the Clerk is required to record the instrument in MERS' name 'as nominee for Lender' (Real Property Law §291). Given that the identity of the actual lender is ascertainable from the mortgage document itself-indeed the use of a nominee as the equivalent of an agent for the lender is apparent and not unusual- I concur with the majority that the Clerk is obligated to record MERS mortgages.

However, in a footnote to the above statement, Judge Carmen Beauchamp Ciparick went on to state:

> *I also agree that the issues concerning the underlying validity of the MERS instrument- in particular, whether its failure to transfer beneficial interest renders it a nullity under the real property law, whether it violates the prohibition against separating the note from the mortgage, and whether MERS has standing to foreclose on a mortgage-are best left for another day...* (emphasis supplied)

Here, these very issues are the issues of fact that require resolution by a trier of fact and preclude this Court from finding as a matter of law that the plaintiff is the duly designated and rightful owner of the "mortgage and note" so as to have the standing to institute this foreclosure action against the Hoglunds. See, "***A New Perspective on Foreclosures in Title***" NYLJ 8-25-2009, s4, col. 1 for a good discussion on the difficulties with title in foreclosure actions. Since the question of ownership of the note and mortgage at the time of commencement of this lawsuit is so critical in this case, the plaintiff's motion for summary judgment pursuant to CPLR §3212 must be denied as the Court cannot conclude as a matter of law that the plaintiff is the rightful owner/ holder of the mortgage and note based upon an assignment, not from Chevy Chase but from MERS as a nominee for Chevy Chase. See, ***MERS v. Revoredo***, 955 So2d 33 (Fla. App. 3rd District 2007) for a contrary view.

Further, the affidavit in support of the motion for summary judgment from Jeffrey R. Huston (hereinafter Huston), dated October 14, 2008, identifies Huston as a Vice President of Chevy Chase as Servicing agent for the plaintiff, yet in a further affidavit, dated March 30, 2009, Huston identifies himself as Vice President of CCB Libor Series 2004-1. The question remains who is the trustee of the owner of the note and mortgage and if it is the plaintiff, then who has apparent authority from the plaintiff to provide an affidavit of knowledge of this complex financial transaction in which the plaintiff does not seem to be the plaintiff at all. The plaintiff needs to present an affidavit of merit regarding the facts constituting the claim and the amounts due (*see e.g.*, ***Wolf v Citibank, N.A.***, 34 AD3d 574, 824 NYS2d 176 [2nd Dept 2006]) or, in the alternative, proof that the plaintiff's purported agent, Chevy Chase as servicing agent for the plaintiff, through Huston as servicer, or Huston as Vice President of CCB Libor Series 2004-1, has the authority to set forth such facts and amounts due. See, ***HSBC Bank USA, N.A. v. Yeasmin***, 19 Misc3d 1127(A), 866 NYS2d 92 [Table], 2008 WL 1915130 (Sup Ct. Kings Co. 2008). Here, the plaintiff has submitted

In **LaSalle Bank Nat'l Assn. v. Lamy**, 12 Misc3d 1191(A) the Court noted:

> It is axiomatic that to be effective, an assignment of the note and mortgage given as security thereof must be made by the owner of such note and mortgage and that an assignment made by entities having no ownership interest in the note and mortgage pass no title therein to the assignee (see, **Matter of Stralem**, 303 AD2d 120, 758 NYS2d 345, and the cases cited therein). A nominee of the owner of the note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee.

Thus, questions of fact are raised as to the authority/standing of the plaintiff to commence a mortgage foreclosure action when the plaintiff takes its interest through an assignment from MERS strictly as a nominee and not from Chevy Chase itself where there is an issue of whether or not it owned the mortgage and note upon which it sought relief.

The Court in **Caprer v. Nussbaum**, 36 AD3d 176, 825 NYS2d 55 (2nd Dept. 2006) dealing with the issue of standing set forth:

> A plaintiff generally has standing only to assert claims on behalf of himself or herself. Although there are situations in which representative or organizational standing is permitted (see, CPLR §1004; **Rudder v. Pataki**, 93 NY2d 273, 278 [1999]; **Matter of Dairylea Coop v. Walkley**, 38 NY2d 6, 9 [1978]), one does not as a general rule have standing to assert claims on behalf of another (see, **Society of Plastics Indus. v. County of Suffolk**, 77 NY2d 761, 773 [1991]; **Matter of Hebel v. West**, 25 AD3d 172, 175 [2005]). As explained by the Court of Appeals: 'Whether a person seeking relief is a proper party to request adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation (**Matter of Dairylea Coop. v. Walkley**, 38 NY2d 6, 9). Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria. (see, Comment, *183 Standing of Third Parties to Challenge Administrative Agency Actions, 76 Cal L Rev 1061, 1067-1068 [1988]; see also, **Warth v Seldin**, 422 YS 490, 498) **Society of Plastics Indus. v. County of Suffolk**, supra at 769.

Finally, Judge Carmen Beauchamp Ciparick concurring with the majority of the New York Court of Appeals in **Matter of Merscorp v. Romaine**, 8 NY3d 90, 828 NYS2d 266 (2006) noted:

> When presented with a MERS mortgage to record, the Clerk is able to

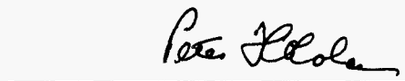
an affidavit of merit and amount due from Huston, the Vice President of Chevy Chase, servicer and/or Vice President of CCB Libor Series 2004-1 but not from the trustee. Said servicer is not a party to this action nor is CCB Libor Series 2004-1 which is represented by a trustee, the plaintiff and there is no evidence that any agent was authorized to act on behalf of the plaintiff for purposes of satisfying the proofs required by statute. See, ***US Bank Nat'l Ass'n v. Merino***, 14 Misc3d 209, 836 NYS2d 853 (2007). The plaintiff has also submitted a complaint verified by counsel [See exhibit B] which amounts to no more than an attorney's affidavit and is therefore insufficient on its own to support entry of judgment pursuant to CPLR §3212 (b) (*see*, ***Mullins v DiLorenzo***, 199 AD2d 218, 606 NYS2d 161 [1st Dept 1993]; *see also*, ***Finnegan v Sheahan***, 269 AD2d 491, 703 NYS2d 734 [2nd Dept 2000]). In the absence of either a proper affidavit of merit by the plaintiff or a complaint verified by a party with personal knowledge of the facts, the plaintiff has failed to meet the burden of proof required by CPLR §3212 (b) to obtain an order granting summary judgment(*see*, ***Peniston v Epstein***, 10 AD3d 450, 780 NYS2d 916 [2nd Dept 2004]; ***Finnegan v Sheahan***, *supra*).

Finally, issues with regard to the plaintiff and its authority to institute this action as a trustee remain unresolved since the trust documents are not present to resolve all issues of fact. In this regard, left unresolved are the powers of the trustee to institute this action, what the plaintiff as a trustee really owns, what the trustee documents claim constitutes a default and what entity or entities are the holder of this particular note and mortgage. See, ***Terwin Advisors, LLC v. Balbachan***, 15 Misc3d 1127(A), 841 NYS2d 222 (2007). Summary judgment being such a drastic remedy so as to deprive a litigant of his day in court, should only be employed when there is no doubt as to the absence of triable issues. **VanNoy v. Corinth Central School District**, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985).

Accordingly, the plaintiff's motion for summary judgment pursuant to CPLR §3212 and the appointment of a referee in this mortgage foreclosure proceeding is denied as there are readily identifiable issues of fact (i.e., standing is a contested issue of fact) which preclude summary disposition at this time. See, ***HSBC Bank USA, N.A. v. Yeasmin***, supra. The plaintiff's motion for striking the defendants' answer and further requested relief is denied as moot in light of the determination above.

The foregoing constitutes the decision of the Court.

Dated: September 3, 2009



J.S.C.