

**Homar v American Home Mtge. Acceptance, Inc.**

2012 NY Slip Op 33722(U)

April 16, 2012

Supreme Court, Orange County

Docket Number: 4330/2011

Judge: Catherine M. Bartlett

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This opinion is uncorrected and not selected for official publication.

**ORIGINAL**

SUPREME COURT-STATE OF NEW YORK  
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----x

ANDREW J. HOMAR and JOSEPH E. RUYACK III,

Plaintiffs,

-against-

AMERICAN HOME MORTGAGE ACCEPTANCE,  
INC. et al.,

Defendants.

To commence the statutory time  
period for appeals as of right  
(CPLR 5513 [a]), you are  
advised to serve a copy of this  
order, with notice of entry,  
upon all parties.

Index No. 4330/2011  
Motion Date: November 18, 2011  
(adjourned to April 3, 2012)

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The following papers numbered 1 to 9 were read on this motion by plaintiffs for summary judgment as against defendants American Home Mortgage Servicing, Inc., Mortgage Electronic Registration Systems, Inc. and Deutsche Bank National Trust Company:

Notice of Motion-Affirmation-Exhibits-Memorandum of Law .....	1-4
Affirmation in Opposition-Affidavit-Exhibits-Memorandum of Law .....	5-8
Reply Affirmation-Exhibits .....	9-10

Upon the foregoing papers it is ORDERED that the motion is determined as follows:

Plaintiffs move this Court for summary judgment for summary judgment as against defendants American Home Mortgage Servicing, Inc., Mortgage Electronic Registration Systems, Inc. and Deutsche Bank National Trust Company essentially claiming that MERS lacked authority to transfer the mortgage and note and that Deutsche Bank essentially has no standing to claim any ownership of the note itself due to the involvement of MERS

[\* 2]

Defendant Deutsche Bank claims it has a lien which precludes summary judgment. Defendant claims that it has possession of the note and mortgage, that plaintiffs admit they signed the note, and that payments have not been made thereon. Moreover, Defendant claims that merely possession of a promissory note endorsed in blank is presumptive ownership of the note.

Summary judgment is a drastic remedy that “should not be granted where there is any doubt as to the existence of a triable issue” (citations omitted). In its analysis of such a motion, a court must construe the facts in a light most favorable to the nonmoving party so as not to deprive that person his or her day in court (citations omitted). *Russell v A. Barton Hepburn Hosp.*, 154 AD2d 796, 797 (3<sup>rd</sup> Dept. 1989); *See also, Mascots v Oarlock*, 23 AD2d 943, 944 (3<sup>rd</sup> Dept., 1965).

While summary judgment is an available remedy in some cases, its dire effects preclude its use except in “unusually clear” instances. *Stone v Aetna Life Ins. Co.*, 178 Misc. 23, 25 (Sup. Ct., New York County, 1941). “A remedy which precludes a litigant from presenting his evidence for consideration by a jury, or even a judge, is necessarily one which should be used sparingly, for its mere existence tends to alter our jurisprudential concept of a ‘day in court.’” *Danger v Zea*, 45 Misc2d 93, 94, (Sup. Ct., Albany County, 1965), *aff’d* 26 AD2d 729 (3<sup>rd</sup> Dept. 1966). Given the fact that summary judgment is the procedural equivalent of a trial, granting summary judgment requires that no material or triable issues of fact exist. When doubt exists or where an issue is arguable, or “fairly debatable,” summary judgment must be denied. *Bayesian v HF Horn*, 21 AD2d 714 (1<sup>st</sup> Dept. 1964); *Jones v County of Herkimer*, 51 Misc2d 130, 135 (Sup. Ct., Herkimer County, 1966); *Town of Preble v Song Mountain, Inc.*, 62 Misc2d 353, 355 (Sup. Ct., Courtland County, 1970); *See also, Sillman v Twentieth Century-Fox Film Corporation*, 3

[\* 3]

NY2d 395, 404 (1957). The drastic remedy of summary judgment is rarely granted in negligence cases since the very question of whether the defendant's conduct was indeed negligent is a jury question except in the most glaring cases. *See, Johansdottir v Kohn*, 90 AD2d 842 (2nd Dept. 1982).

Courts are not authorized to try issues in a case, but rather to determine whether there is an issue to be tried. *Esteve v Abad*, 271 AD2d 725, 727 (1<sup>st</sup> Dept. 1947). "Issue-finding, rather than issue-determination, is the key to the procedure. If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment." *Id.*; *Sillman*, 3 NY2d at 404.

According to the Court of Appeals, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [citations omitted]. Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the opposing papers [citations omitted]." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985); *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993); *Finkelstein v Cornell University Medical College*, 269 AD2d 114, 117 (1<sup>st</sup> Dept. 2000).

It is well established that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985); *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993); *Finkelstein v Cornell University Medical College*, 269 AD2d 114, 117 (1<sup>st</sup> Dept. 2000). The moving party must affirmatively demonstrate the merits of its claim or defense, and cannot obtain summary

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judgment merely by “pointing to gaps in its opponent’s proof.” *Kajfasz v Wal-Mart Stores, Inc.*, 288 AD2d 902, 902 (4<sup>th</sup> Dept. 2001); *Dodge v City of Hornell Industrial Development Agency*, 286 AD2d 902, 903 (4<sup>th</sup> Dept. 2001); *Frank v Price Chopper Operating Co., Inc.*, 275 AD2d 940 (4<sup>th</sup> Dept. 2000).

A party moving for summary judgment has the burden of submitting evidence, in admissible form, to support his motion. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Unsworn documents are inadmissible evidence and thus a party’s reliance thereon in support of a motion for summary judgment is improper. *See, Huntington Crescent Country Club v M & M Auto & Marine Upholstery, Inc.*, 256 AD2d 551, 551 (2<sup>nd</sup> Dept. 1998).

The moving party’s failure to meet this burden of proof “requires denial of the motion, regardless of the sufficiency of the opposing papers”, for the burden in that event never shifts to the opponent to demonstrate the existence of a material issue of fact. *Winegrad v New York University Medical Center, supra*, 64 NY2d at 853. The Second Department has repeatedly affirmed that the movant’s failure in the first instance to demonstrate entitlement to the drastic relief of summary judgment mandates denial of the motion regardless of the sufficiency of the opposing papers. *See, e.g., Miccoli v Kotz*, 278 AD2d 460, 461 (2<sup>nd</sup> Dept. 2000); *Karras v County of Westchester*, 272 AD2d 377, 378 (2<sup>nd</sup> Dept. 2000); *Fox v Kamal Corporation*, 271 AD2d 485 (2<sup>nd</sup> Dept. 2000); *Gstalder v State of New York*, 240 AD2d 541, 542 (2<sup>nd</sup> Dept. 1997); *Lamberta v Long Island Railroad*, 51 AD2d 730, 730-731 (2<sup>nd</sup> Dept. 1976); *Greenberg v Manlon Realty, Inc.*, 43 AD2d 968, 969 (2<sup>nd</sup> Dept. 1974).

In *Salas v Town of Lake Luzerne*, 265 AD2d 770, 770 (3<sup>rd</sup> Dept. 1999), the Court held that the attorney’s affirmation in support of a motion for summary judgment is insufficient when

[\* 5]

the attorney has no personal knowledge of the facts. *See also, Wright v Rite-Aid of NY, Inc.*, 249 AD2d 931, 932 (4<sup>th</sup> Dept. 1998); *Hodgson, Russ, Andrews, Woods & Goodyear v Roth*, 186 AD2d 1001, 1002 (4<sup>th</sup> Dept.1992). In brief, the motion must be supported by a an affidavit of a person having knowledge of the facts, together with a copy of the pleadings and other available proof.” *S.J. Capelin Associates, Inc. v Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341 (1974). The defendant’s failure to do so requires that its motion be denied regardless of any proof submitted by plaintiff.

Plaintiffs submitted no affidavit from anyone with personal knowledge of the facts in support of their motion, just an attorneys’ affirmation, lacking sufficient supporting evidence to even make out a prima facie case. In the instant case, the uncontroverted affidavit of Barbara Campbell of defendant Deutsche Bank stated that it received the subject note on December 29, 2005 and the mortgage on November 28, 2007 both of which remained with Deutsche Bank until they were sent to American Home Mortgage Serving, Inc. on November 30, 2010 for the foreclosure proceedings.

Courts have struggled to understand the MERS system since it was created in 1993. The Court of Appeals has, in *Matter of MERSCORP, Inc. v Romaine*, 8 NY3d 90, 96 (2006), touched upon the history of MERS, in a determination which upheld the right of MERS to compel the Suffolk County Clerk to record and index its mortgages and assignments and discharges thereof.

Mortgage lenders and other entities, known as MERS members, subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages. *Members contractually agree to appoint MERS to act as their common agent on all mortgages they register in the MERS system.*

The initial MERS mortgage is recorded in the County Clerk's office with "Mortgage Electronic Registration Systems, Inc." named as the lender's nominee or mortgagee of record on the instrument. During the lifetime of the mortgage, the beneficial ownership interest or servicing rights may be transferred among MERS members (MERS assignments), but these assignments are not publicly recorded; instead they are tracked electronically in the MERS's private system. (emphasis added).

Recently, in *Bank of New York v Silverberg*, 86 AD3d 274 (2<sup>nd</sup> Dept. 2011), the Court, in explaining and examining the role of MERS, referenced a MERS website, About Us—Overview, MERS, <http://www.mersinc.org/about/index.aspx>, a particularly intemperate law review article (see Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U Cin. L. Rev. 1359 [2010] ), newspaper articles, and the holding in a Bankruptcy Court case, *In re Agard*, 444 B.R. 231 (2011).

A fundamental legal principle is that the mortgage follows the note, which means that as the note changes hands, the mortgage remains connected to it legally even though it is not physically attached. In other words, the promissory note is enforceable against the property because of the mortgage, but the mortgage instrument itself is not independently enforceable as a debt. This principle is not changed when MERS is the mortgagee because of the agency relationship between MERS and the lender. An agency relationship arises where one party is specifically authorized to act on behalf of another in dealings with third persons, and the legal definition of a "nominee" is a "party who holds bare legal title for the benefit of others." Here, the language of the mortgage appoints MERS as nominee, or agent, for the lender and its successors and assigns for the purposes set forth therein. The mortgage also grants MERS broad

rights, again as nominee for the lender and the lender's successors and assigns, "to exercise any and all" of the interests granted by the borrower under the mortgage, "including but not limited to, the right to foreclose and sell the property; and to take any action required of the lender."

Thus, the language of the recorded mortgage authorizes MERS to act on behalf of the lender in serving as the legal titleholder under the mortgage and exercising any of the rights granted to the lender there under.

MERS members affirm this agency relationship with MERS in their membership agreements, which provide that MERS "shall serve as mortgagee of record" with respect to each mortgage loan that the MERS member registers on the MERS® System and provide that "MERS shall at all times comply with the instructions of the holder of the mortgage loan promissory notes." \* \* \* When the note is sold, MERS continues to act as the mortgagee for the new note holder because the mortgage interest follows the note when it changes hands.

The chain of title starts and stops with Mortgage Electronic Registration System, Inc. as the mortgagee. MERS, as agent for the note-owner, can hold legal title for the note-owner in the land records. The basic concept of a recording statute is that a person or company claiming an interest in land protects its interest by recording that interest at the county recorder of deeds office. The recorded document provides constructive notice to the world of the claim.... The concept of nominees appearing in the land records on behalf of the true owner has long been recognized. It has never been the case that the true owners of interests in real estate could be determined using land records.

MERS, as noted in *Matter of MERSCORP, Inc. v Romaine*, 8 NY3d 90, *supra*, has been contractually designated by Members who register in the MERS system to act as their common

agent on all mortgages they register therein and that the documents demonstrate that clear intention of the parties. As such, particularly under the MERS system, the holder of the note can enforce the mortgage since the mortgage interest follows the note when it changes hands.

Under New York law, it is the owner of the mortgage note that dictates ownership of the mortgage as evidence by Article 3 and Article 9 of the Uniform Commercial Code. As commonly said, the “mortgage follows the note” so that when the note changes hands, the mortgage interest automatically follows. The mere possession of a promissory note endorsed in blank (just like a check) provides presumptive ownership of that note by the current holder. Such is the foundation of negotiable instruments law. Any disparity between the holder of the note and the mortgagee of record does not stand as a bar to a foreclosure action because the mortgage is not the dispositive document of title as to the mortgage loan. The holder of the note is deemed the owner of the underlying mortgage loan with standing to foreclose. Such was the holding in *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674 (2d Dept. 2007) (“at the time of the commencement of this action, MERS was the lawful holder of the promissory note, and of the mortgage, which passed as an incident to the promissory note. Accordingly, MERS had standing to bring this action [citations omitted];”) (see also *Yoi-Lee Realty Corp. v 177th St. Realty Assocs.*, 208 AD2d 185, 189–190 [1st Dept. 1995] [“The mortgage note is inseparable from the mortgage, to which the note expressly refers, and from which the note incorporates provisions for default”]).

The Second Department in *Bank of New York v Silverberg*, 86 AD3d 274, *supra*, in reviewing *Coakley*, *supra*, reaffirmed that its prior “determination was a sufficient basis upon which to conclude that MERS has standing.” While also noting that the two mortgages in that

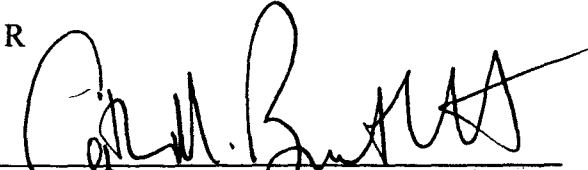
case were superseded by the consolidation agreement, the court did retreat from the *dicta* in *Coakley*, that based upon the clear and unequivocal terms of the mortgage instrument itself, the borrower had expressly agreed that MERS had the right to foreclose (“this Court’s holding in *Coakley* was dependent upon the fact that MERS held the note before commencement of the foreclosure action. In the absence of that crucial fact, the language in the mortgage instrument would not have provided further support’ for the proposition that MERS had the power to foreclose in that case” [*id.* ] ). The court, thereby, reaffirmed the supremacy of the note in relation to the mortgage.

In the instant case, the undisputed evidence demonstrates that Deutsche Bank is the holder and possessor of the note and mortgage and is entitled to foreclose for lack of payment thereunder. Plaintiffs came forward with no admissible evidence to make out a prima face case in the first instance, requiring denial of summary judgment for failure to even prove a prima face case. However, assuming arguendo that plaintiffs made out a prima facie case, the evidence submitted in opposition to the motion, for the reasons stated above, warrants denial of the motion for summary judgment. Thus, plaintiffs’ motion is denied in all respects and defendants may proceed with the foreclosure process.

The foregoing constitutes the decision and order of this Court.

Dated: April 16, 2012  
Goshen, New York

ENTER

  
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 HON. CATHERINE M. BARTLETT,  
 A.J.S.C.  
 JUDGE NY STATE COURT OF CLAIMS  
 ACTING SUPREME COURT JUSTICE