

## MEMORANDUM

## NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote  
Acting Supreme Court Justice

IAS TERM, PART 33

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Quamia Ballard,

Plaintiff,

Index No: 702257/14

-- against -

Motion Date:02/03/15

Mortgage Electronic Registration  
Systems, Inc., As Nominee for HSBC  
Mortgage Corporation (USA) its  
Successors and Assigns, Ally Bank  
FKA GMAC Bank, Residential Funding  
Company, LLC, HSBC Bank, USA, N.A.,  
21<sup>st</sup> Century Mortgage Corporation,  
and "John Doe 1-5",

Defendants.  
-----x

Seq. No: 3

**FILED**  
SEP 28 2015  
COUNTY CLERK  
QUEENS COUNTY

The following papers numbered 1 to were read on this motion  
by defendant MERS to dismiss the complaint.

PAPERS  
NUMBERED

Notice of Motion, Affirmation, Affidavits and Exhibits.....	1 - 4
Answering Affirmations, Affidavits and Exhibits.....	5 - 7
Reply Affirmations, Affidavits and Exhibits.....	8 - 9
Other.....	

After due consideration, the motion is granted.

## Background

On April 30, 2007, plaintiff executed a note and mortgage in favor of HSBC in order to finance the purchase of residential property. Plaintiff commenced this action alleging that the note and mortgage are unenforceable. Defendant HSBC moves to dismiss.

## Discussion

The first cause of action to quiet title alleges that the note and mortgage were separated at the closing because the note

listed HSBC Mortgage Corporation as the note holder and the mortgage listed MERS, as nominee for HSBC, as the mortgagee. This claim is not justiciable because the complaint does not allege that the property is wrongfully encumbered (see, *Acocella v Bank of New York Mellon*, 127 AD3d 891, 893 [2d Dept 2015]). Accordingly, this claim fails to state a cause of action and is dismissed.

The second cause of action alleges that the MERS system (or "scheme" as the plaintiff describes it) is void because it is against public policy. In light of the fact that the Court of Appeals has upheld the legality of the MERS system (*MERSCORP, supra*), the second cause of action must also be dismissed.

The third cause of action alleges that the assignment of the mortgage dated July 24, 2013, from Residential Funding Company to 21<sup>st</sup> Mortgage Corporation is invalid because Residential Funding was in Bankruptcy and an automatic stay was in effect at the time of the assignment. A transfer made in violation of the automatic stay is voidable, not void (*Omrazeti v. Aurora Bank FSB*, Slip Copy, 2013 WL 3242520 [W.D.Tex., 2013]). Accordingly, the assignment is presumptively valid and the third cause of action is dismissed.

The fourth cause of action alleges that the defendants failed to comply with the National Mortgage Settlement Consent Judgment. However, "individual borrowers are merely incidental beneficiaries of the National Mortgage Settlement, and so have no right to bring third-party suits to enforce the consent judgment" (*Lawrence v. Wells Fargo Bank, N.A.*, 2014 WL 2705425 [N.D.Cal.2014]). Accordingly, the fourth cause of action is dismissed.

The fifth cause of action alleges that defendants wrongfully denied plaintiffs access to Home Affordable Modification Program (HAMP). However, HAMP does not authorize a private right of action against participating lenders (*Lawrence, id.*). Accordingly, the fourth cause of action is dismissed.

The movant's motion is, therefore, granted and the case is dismissed as to movant.

This constitutes the Order of the Court.

Dated: September 23, 2015

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Leonard Livote, A.J.S.C.

**FILED**  
SEP 28 2015  
COUNTY CLERK  
QUEENS COUNTY