

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

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QUAMIA BALLARD

Plaintiff,

Index No.: 702257/2014

-against-

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> MORTGAGE  
CORPORATION

AND "JOHN DOE" 1-5 the last five names being  
fictitious, said parties intended being undisclosed,  
unnamed and unknown investors, participants,  
corporate or other entities, conduits, trustees, servicers,  
custodians and others, if any, having or claiming an interest  
in, or lien upon the premises described in the complaint

Defendants.  
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**PLAINTIFF'S MEMORANDUM OF LAW**  
**IN OPPOSITION TO**  
**DEFENDANTS' MOTION TO DISMISS**

Nicholas Harris, Esq.  
Brian McCaffrey, Attorney at Law, P.C.  
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Plaintiff QUAMIA BALLARD ("Plaintiff"), by and through her attorneys, Brian McCaffrey, Attorney at Law, P.C., hereby submits this memorandum of law in opposition to Defendant HSBC Bank, USA's motion pursuant to New York Civil Practice Law and Rules ("CPLR") § 3211(a)(7) to dismiss the claims asserted against it in Plaintiff's Verified Complaint dated April 2, 2014 (the "Complaint").

### **PRELIMINARY STATEMENT**

Plaintiff brings this action for a declaratory judgment: (a) Barring the Defendants from all claim(s) to an estate, interest, lien or encumbrance of any sort, in the Property described herein in accordance with Real Property and Proceedings Law Article 15 or, in the alternative ordering a trial (pursuant to CPLR §2218) as to the issue of whether plaintiff is the actual owner of the mortgage and promissory note (which are the basis of this action herein); or in the alternative, for an order stating (b) The note and mortgage were separated at closing as agreed to by and between the Parties at the closing; (c) As a result of the separation of the note and mortgage, the mortgage is unenforceable; (d) Defendants do not hold a valid lien on the Plaintiff's property; (e) Expunging the mortgage and assignments from the public record; (f) Awarding actual and punitive damages for Defendants violations of the National Mortgage Settlement Consent Judgment; (g) Awarding actual and punitive damages for Defendants denial of access and violations there from of the United States Department of Treasury HAMP loan modification program; (h) Granting Plaintiff's request for a refund of all payments made to Defendants; (i) Tolling of interest on the Plaintiff's mortgage loan from such date as the Court deems just and proper; (j) Awarding Plaintiff reasonable attorney fees, costs and disbursements for bringing this action, and; (k) For such other and further relief as the Court deems just and proper.

Plaintiff has several well pleaded claims. Fully aware that they came into possession of the note and/or mortgage by committing egregious and fraudulent acts in violation of both Federal and State law, Defendants nonetheless frivolously bring the instant motion claiming that Plaintiff has failed to state a

claim upon which relief can be granted. However, Plaintiff has most certainly stated several well pleaded claims upon which relief can be granted, as elucidated below.

The mortgage and purported assignments of mortgage are recorded in the following sequence:

**Mortgage**

Mortgagor: Lorraine Jackson and Quamia Ballard  
Mortgagee: Mortgage Electronic Registration Systems, Inc.  
as nominee for HSBC Mortgage Corporation  
Amount: \$389,200.00  
Dated: April 30, 2007  
Recorded: May 25, 2007  
CRFN: 2007000274086

**Assignment #1 of Mortgage ONLY**

Assignor: Mortgage Electronic Registration Systems, Inc.  
as nominee for HSBC Mortgage Corporation (USA)  
Assignee: GMAC Bank  
Dated: September 23, 2009  
Recorded: November 4, 2009  
CRFN#: 2009000360594

**Assignment #2 of Mortgage and Note**

Assignor: ALLY BANK f/k/a GMAC BANK  
Assignee: Residential Funding Company, LLC  
Dated: October 5, 2011  
Recorded: October 21, 2011  
CRFN#: 2011000373732

**Assignment #3 of Mortgage ONLY –**

**Corrective Assignment to correct the assignee in Assignment # 1**

Assignor: Mortgage Electronic Registration Systems, Inc.  
as nominee for HSBC Mortgage Corporation (USA)  
Assignee: HSBC Bank USA, N.A.  
Dated: October 11, 2011  
Recorded: October 24, 2011  
CRFN#: 2011000374561

**Assignment #4 of Mortgage ONLY**

Assignor: HSBC Bank USA, N.A.  
Assignee: Residential Funding Company, LLC  
Dated: October 11, 2011  
Recorded: October 24, 2011  
CRFN#: 2011000374586

**Assignment #5 of Mortgage ONLY**

Assignor: Residential Funding Company, LLC  
Assignee: 21<sup>st</sup> Mortgage Corporation

Dated: \*September 11, 2013  
Recorded: September 19, 2013  
CRFN#: 2013000430747

### **ARGUMENT**

#### **DEFENDANT'S MOTION MUST BE DENIED IN ITS ENTIRETY BECAUSE PLAINTIFF HAS SEVERAL WELL PLED CLAIMS**

Pursuant to N.Y. Real Property Actions and Proceedings Law ("RPAPL") § 1515, a plaintiff alleging a claim to quiet title must set forth facts showing that "the defendant claims, or that it appears from the public records or from the allegations of the complaint, that the defendant might claim an estate or interest in the real property, adverse to that of the plaintiff, and the particular nature of such estate or interest." RPAPL § 1515(b). Plaintiff has clearly met this requirement.

Defendants incorrectly argue in their motion that Plaintiff has failed to state a claim to quiet title. Plaintiff has satisfied all requirements necessary for a well pled quiet title claim. The Defendants claim to hold an encumbrance in the form of a mortgage lien on the subject premises, which clearly clouds Plaintiff's title. Defendants' alleged interest in the subject premises is clearly adverse to Plaintiff's, because if Defendants were legitimate mortgagees then they would be entitled to payment prior to Plaintiff transferring title to a *bona fide* purchaser. Plaintiff absolutely does not admit that Defendants have a legitimate interest in the subject premises as mortgagees, which is exactly the purpose of the instant action.

Defendants are wrongfully identified in the public record as the mortgagees of the subject premises, and thus illegitimately cloud Plaintiff's title, which Plaintiff now seeks to have corrected by bringing the instant action. This wrongful identification stems from the fact that Defendants executed one or more defective and/or fraudulent assignments of mortgage and recorded them with the Queens County Office of the City Register.

The defects in the first assignment and third assignment (hereinafter "Assignment 1" and "Assignment 3", all assignments collectively annexed hereto as Exhibit "A"), which nullify all

subsequent assignments, consist of the following: 1. They purport to assign only the mortgage, without the note, which is axiomatically a nullity; and 2. They're executed by MERS, an entity which, as was held by the Appellate Division 2<sup>nd</sup> Department, has no authority to execute assignments where, as here, it was not the holder of the underlying mortgage and note. *See Bank of New York v Silverberg*, 86 AD3d, 281-82 (2d Dep't 2011). Furthermore, Assignments 4 and 5 also assign only the mortgage, without the note. Thus, Plaintiff's title to the subject premises is clouded by an encumbrance in the form of a mortgage lien in favor of Defendants due to the fact that Defendants willfully or fraudulently executed and recorded defective assignments of mortgage.

#### **A. An Assignment of Mortgage Without The Note Is A Nullity**

A basic concept in law is that "the mortgage follows the note". This was pronounced by the Supreme Court of the United States in 1872 in *Carpenter v. Longan*, 83 US. 271, 274 as follows: "...the note and mortgage are inseparable..., the assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." (*Bank of N.Y. v Silverberg*, 86 AD3d 274, 279; *see Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709). Moreover, while assignment of a promissory note also effectuates assignment of the mortgage (see *Bank of N.Y. Silverberg*, 86 AD3d at 280; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 753-754; *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674), the converse is not true: since a mortgage is merely security for a debt, it cannot exist independently of the debt, and thus, a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it (see *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636; *Bank of N.Y. v Silverberg*, 86 AD3d at 280; *US Bank Natl. Assn. v Dellarmo*, 94 AD3d 746, 748 [2d Dept 2012]; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d at 710; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 210; *LaSalle Bank Natl. Assn. v Ahearn*, 59 AD3d at 912-913).

Here, as in *Dellarmo*, all Assignments except Assignment 2 "indicate only that the mortgage was assigned to the plaintiff. Since an assignment of a mortgage without the underlying debt is a nullity (see *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636; *Bank of N.Y. v Silverberg*, 86 AD3d at 280), the

plaintiff has failed to demonstrate that it had standing to commence this action (see *Bank of N.Y. v Silverberg*, 86 AD3d at 280; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 754).” Though *Dellarmo* was a foreclosure action and this is a quiet title action, the result is the same. Defendant has no claim to the title of the subject premises and its motion must be denied in its entirety.

***B. The MERS Assignments of Mortgage are Void Ab Initio***

Since its inception, the Assignment was a nullity. The Assignment was executed by an entity (MERS) which, as confirmed by the Appellate Division 2<sup>nd</sup> Department, had no authority to execute it where it was not the holder of the underlying Mortgage and Note. (*Id.*) Defendants have not even addressed this controlling decision in their moving papers, however, similarly situated defendants often erroneously rely on the holding in *Matter of MERSCORP, Inc. v Romaine*, 8 NY3d 90 (2006) to assert that an assignment from MERS is valid. However, as delineated in *Silverberg*, the holding in *MERSCORP* only applies where MERS was the holder of the underlying note at the time the assignment was executed. *Silverberg* at 279. There is absolutely no evidence that--and Defendants have not even alleged that--MERS was in possession of the original Note and physically delivered it to the assignee at the time the Assignment was executed. Thus, on top of the fact that the assignments assign only the mortgage and not the note, the mere fact that MERS had no authority to execute the assignments renders them void from their inception.

The fact pattern of *Dellarmo* and the instant action are very similar, and, with regards to the invalidity of the MERS assignments, the court held that “[t]hough this may be cured by proof of physical delivery of the note and mortgage, inasmuch as the Defendant’s motion does not allege that the note was physically delivered to the Defendant, and nothing in the Court’s record could support a finding that such physical delivery occurred, the corrective assignment cannot be given retroactive effect.” (*US Bank Natl. Assn. v Dellarmo*, 94 AD3d 746). Likewise, here, Assignment 3 cannot be given retroactive effect and Assignment 1 cannot be given any effect at all. Furthermore, as detailed above,



Assignments 1, 3, 4, and 5 also only assign the Mortgage without the Note, rendering them null.

Accordingly, Defendant's motion to dismiss must be denied.

**CONCLUSION**

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant 21<sup>st</sup> Mortgage Corporation's motion in its entirety, with reasonable attorneys' fees and costs, along with such other and further relief as the Court deems just and proper.

DATED: June 30, 2014  
Jamaica, New York

BRIAN MCCAFFREY ATTORNEY AT LAW, P.C.

A handwritten signature in black ink, appearing to read 'Nicholas Harris', is written over a horizontal line.

By: Nicholas Harris, Esq.  
Attorney for Debtors / Plaintiff  
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in, or lien upon the premises described in the complaint

Defendants.

**Plaintiff's Opposition to Defendant's Motion to Dismiss**

Pursuant to 22 NYCRR 130-1.1 the undersigned, an attorney duly admitted to practice in the courts of the State of New York, certifies that, upon information and belief and reasonable inquiry the contention(s) contained in the annexed document are not frivolous.

Dated: Queens, New York  
June 30, 2014



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