

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
IBJN002L

BANK OF NEW YORK MELLON F/K/A THE
BANK OF NEW YORK AS TRUSTEE ON
BEHALF OF THE HOLDERS OF THE
ALTERNATIVE LOAN TRUST 2007-5CB
MORTGAGE PASS-THROUGH CERTIFICATES
SERIES 2007-5CB,

**AFFIRMATION IN SUPPORT
OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
AN ORDER OF REFERENCE**

Plaintiff, Index No. 707326/2016

-vs-

SHULLA G. JOSEPH; MARTIN W. JUTE; NEW
YORK STATE DEPARTMENT OF TAXATION
AND FINANCE; "JOHN DOE # 1" through "JOHN
DOE # 12," the last twelve names being fictitious
and unknown to plaintiff, the persons or parties
intended being the tenants, occupants, persons or
corporations, if any, having or claiming an interest
in or lien upon the premises, described in the
complaint,

Motion Sequence: 001

Justice Assigned: Honorable Howard
G. Lane J.S.C.

Defendants.

LISA M. BROWNE, ESQ., affirms under penalties of perjury the truth of the following:

1. I am an attorney in the law firm of Fein, Such & Crane, LLP, attorneys of record
for the Plaintiff in this action and am duly admitted to practice law in the State of New York.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

2. **THAT** this action is brought to foreclose a Mortgage dated January 17, 2007,
covering real property located at 114-77 175TH PLACE, JAMAICA, NY 11434, executed by
SHULLA G. JOSEPH and MARTIN W. JUTE to MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., AS NOMINEE FOR FRANKLIN FIRST FINANCIAL,
LTD, to secure a sum of \$395,000.00, which Mortgage was recorded in the Office of the City
Register of the City of New York on March 15, 2007, in Official Record CRFN 2007000139719.

Said Mortgage was further assigned by MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. AS NOMINEE FOR FRANKLIN FIRST FINANCIAL, LTD to THE BANK
OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE

CERTIFICATEHOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2007-5CB, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-5CB, by Assignment of Mortgage dated, May 17, 2011, and recorded in the Office of the City Register of the City of New York on June 2, 2011, in Official Record CRFN 2011000196094.

3. **THAT** prior to the commencement of this action:
 - a) On November 12, 2014, the sole Borrower, SHULLA G. JOSEPH, was served with a Notice of Default and Intent to Foreclose. Plaintiff refers the Court to Paragraph 7 of and Exhibit C to the August 22, 2017 Affidavit In Support of Summary Judgment of KELI SMITH.
 - b) On October 7, 2015, Defendants, SHULLA G. JOSEPH and MARTIN W. JUTE, were served with 90 day Pre-Foreclosure Notices. Plaintiff refers the Court to Paragraph 8 of and Exhibit D to the August 22, 2017 Affidavit In Support of Summary Judgment of KELI SMITH.
4. **THAT** this action has proceeded as follows:
 - a) The Summons, Complaint and Certificate of Merit were filed in the Office of the Clerk of QUEENS County on June 22, 2016. See Exhibit "A" attached hereto.
 - b) The Notice of Pendency was filed in the Office of the Clerk of QUEENS County on June 22, 2016. See Exhibit "B" attached hereto.
 - c) Service of the Summons and Complaint was made upon all necessary Defendants and the Affidavits of Service thereof were duly filed in the Office of the Clerk of QUEENS County, date stamped copies of which are attached hereto as Exhibit "C".

- d) On July 28, 2016 SHULLA G. JOSEPH and MARTIN W. JUTE, Pro Se, served an Answer to the Complaint, Counterclaims and Cross Claims, a copy of which is attached hereto as Exhibit "D".
- e) On August 10, 2016, a Consent to Change Attorney was served on behalf of Plaintiff substituting Fein, Such, Kahn & Shepard, P.C., in the place and stead of RAS Boriskin, LLC. A copy of the Consent to Change Attorney is attached hereto as Exhibit "E".
- f) On August 10, 2016, Plaintiff served a Verified Reply to Counterclaims and Cross-claims, by both Fein, Such, Kahn & Shepard P.C., and through its prior attorney, RAS Boriskin, LLC, copies of which are collectively attached hereto as Exhibit "F".

5. **THAT** said filed Notice of Pendency of this action, was in the form prescribed by statute and containing, as your affirmant believes, correctly, all the particulars required by law to be stated in such notice, was filed in the Office of the Clerk of QUEENS County, that being the County in which the mortgaged premise is situated; and that since the filing of the said notice, the verified complaint in this action has not been amended by making new parties to this action, or so as to affect other property not described in the original complaint, or so as to extend the claims of the Plaintiff as against the mortgaged premises.

6. **THAT** all of the said Defendants are of full age; that none of the Defendants are in the armed services of the United States of America.

7. **THAT** none of the Defendants are of unsound mind and that none of the Defendants, who have not appeared, are absentees.

8. **THAT** the time of the Defendants to appear, answer or otherwise move, with

respect to the complaint has expired and has not been extended by stipulation, order of the Court or otherwise, and that none of the Defendants has appeared or answered the complaint, except for as set forth above and Plaintiff is entitled to judgment by default against Defendant, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE.

9. **THAT** the attached Affidavits of Service show that the name of the occupant(s) of the subject property, as provided to the process server at time of service, are JOANN "DOE" and request is therefore made that this name be substituted in the caption of this action in the place and stead of "JOHN DOE #1" without prejudice to any of the proceedings heretofore had herein.

10. **THAT** Defendants captioned as "JOHN DOE #2" through "JOHN DOE #12" were not served with copies of the summons and complaint and are not necessary party Defendants. Request is therefore made that said Defendants be excised from the action and from the caption of the action without prejudice to any of the proceedings heretofore had herein.

11. **THAT** The Summons and Complaint, printed on white paper, together with the Notice required by RPAPL 1303, printed on a different colored paper than that of the summons and complaint was served as can be seen from the affidavit of service attached hereto. The process server effected service upon the mortgagor(s) with the complaint copy of the notification pursuant to RPAPL 1303. An exact photocopy of said Notice is attached hereto, evidencing that the title of the Notice is in bold, 20-point font, the text of the Notice is in bold 14-point font, it was on its own page and it was served with the Summons and Complaint.

12. **THAT** the mortgagors were served with additional notice of summons in compliance with CPLR 3215(g)(3), a copy of which is attached hereto as part of Exhibit "C".

SUMMARY JUDGMENT

13. **THAT** Defendants' allegation of a lack of standing to foreclose is not a fact generally known of which judicial notice may be taken. "The matters of which judicial notice may be taken are those which ... are of such general and public notoriety that every one may fairly be presumed to be acquainted with them." Wood v. Northwestern Ins. Co., 46 N.Y. 421, **7 (1871).

VALIDITY OF NOTE ENDORSEMENT AND THE MERS MORTGAGE

14. Here, Defendants deny the validity of both (1) the endorsement to the Note, and (2) the Assignment of Mortgage from MERS into the Plaintiff. Firstly, the indorsement in blank presents no issue that would preclude summary judgment for the Plaintiff. The indorsement is "signed" as same is defined in the UCC, specifically NY CLS UCC sec. 1-201(37). Only a symbol is required, and it may be printed, stamped or written. Id. Further, it is the authority to indorse, and not the physical act of indorsement, that determines the validity of such indorsement. An authorization to sign a document may be implied from surrounding circumstances. Collins v. Widger, 231 App. Div. 321, 323 (1931).

15. Secondly, the existence of a MERS Assignment in the assignment chain is no legal impediment to Plaintiff's standing to foreclose in this case. Deutsche Bank National Trust Company as Trustee v. Pietranico, 928 N.Y.S.2d 818 (Suffolk County 2011). Indeed, as a matter of law, the assignment of the Note was effectuated by physical delivery of the Note prior to the commencement of the action and the Mortgage was validly assigned by MERS, which assignment is validly reflected in the public records. Bank of New York Mellon Trust Company NA v Sachar, 943 N.Y.S.2d 893 (First Dept. 2012). In any event, by the very terms of the Mortgage itself, Defendants granted MERS the authority to assign the Mortgage. U.S. Bank N.A.

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