

## **NO NEED TO SUBSTITUTE PLAINTIFF UPON MORTGAGE ASSIGNMENT**

By: Bruce J. Bergman\*

This question arises all the time. During the course of a mortgage foreclosure action, the note and mortgage (or whatever the more extensive mortgage documents may be) are assigned by the foreclosing plaintiff. Is there a mandate to make a motion to change the caption of the action to reflect the name of the new mortgage holder as the plaintiff?

The answer is no, as a matter of statute (CPLR §1018) and case law, confirmed as recently as October, 2011 [*Citimortgage, Inc. v. Rosenthal*, \_\_\_\_\_ A.D.3d \_\_\_\_, \_\_\_\_ N.Y.S.2d \_\_\_\_ (2d Dept. 2011).] For those who may want to delve more deeply into case law and nuances on this subject, see 2 *Bergman on New York Mortgage Foreclosures* §23.46, LexisNexis Matthew Bender (rev. 2011).

Why this is particularly relevant as a practical matter is highlighted by the mentioned new case. The borrower delivered a mortgage in 1988 to A, immediately assigned to B. In 1994, B assigned to C. In early 2008, C assigned

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to Citibank which, upon encountering a default, began a foreclosure in July, 2008.

On July 1, 2009 the judgment of foreclosure and sale was signed. Thereafter, and as is not uncommon, in May, 2010, Citibank assigned the mortgage to PennyMac. A sale was scheduled for July, 2010, intercepted by the borrower's order to show cause alleging lack of standing (to be addressed in a separate alert) and, relevant to this review, the charge that the foreclosure could not proceed because PennyMac (plaintiff Citibank's assignee) had not been formally substituted as plaintiff.

Not so ruled the court (based upon established case law and the noted practice statute) – although the ultimate real life mischief was that while the foreclosing plaintiff won on this point in the trial court, the borrower appealed. The mortgage holder won there too, but victory came fifteen months after the originally scheduled sale date.

So, it helps to be right on the law – and servicers and practitioners should be familiar with this principle – but being correct didn't stave off time and expense.

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