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IndyMac Bank, FSB v Bethley
2009 NY Slip Op 50186(U) [22 Misc 3d 1119(A)]
Decided on February 6, 2009
Supreme Court, Kings County
Schack, J.
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Decided on February 6, 2009

Supreme Court, Kings County

<p>Indymac Bank, FSB,, Plaintiff,</p> <p>against</p> <p>Randolph Bethley; SONIA BADILLO ROSADO, et. al.,</p> <p>Defendants.</p>

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David P. Case, Esq. of Fein Such & Crane, LLP, Rochester NY represented plaintiff.

Arthur M. Schack, J.

In this mortgage foreclosure action for the premises located at 1051 Hancock Street, Brooklyn, New York (Block 3388, Lot 57, County of Kings) plaintiff INDYMAC BANK, FSB [INDYMAC] moves for: summary judgment, pursuant to CPLR Rule 3212, striking the answer of defendant SONIA BADILLO ROSADO [ROSADO]; with the default of all other defendants,

an order of reference to compute the amount due to plaintiff; and, related relief.

Plaintiff's motion is denied without prejudice with leave to renew within sixty (60) days of this decision and order, if plaintiff submits:

- (1) documents demonstrating plaintiff INDYMAC's ownership interest in the subject mortgage and note prior to the commencement of this action on March 24, 2008;
- (2) an affidavit by Erica A. Johnson-Seck, Vice President of plaintiff INDYMAC, explaining: her employment history for the past three years; and, why a conflict of interest does not exist in how she acted as Vice President of the assignee, INDYMAC, in this action, and as Vice President of both the instant assignor MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. [MERS] and Deutsche Bank in another case before me, *Deutsche Bank v Maraj*, 18 Misc 3d 1123 (A) (Sup Ct, Kings County 2008);
- (3) an affidavit by Laura Hescott, Vice President of MERS, who assigned the instant mortgage and note to plaintiff INDYMAC on March 26, 2008, but previously, on February 18, 2008, executed an affidavit as Vice President of INDYMAC in another case [*2] before me, *Indymac Bank, FSB v Boyd*, 22 Misc 3d 1113 (A) [Sup Ct, Kings County 2009], explaining: her employment history for the past three years; and, why a conflict of interest does not exist in how at she acted as the assignor of the instant mortgage and note to INDYMAC, as Vice President of MERS, and as Vice President of the instant assignee, INDYMAC, in *Boyd*;
- (4) an affidavit from an officer of INDYMAC's successor in interest [The Office of Thrift Supervision closed INDYMAC on July 11, 2008 and the Federal Deposit Insurance Corporation, as conservator, transferred most of INDYMAC'S assets to a new entity, INDYMAC FEDERAL BANK, F.S.B.] explaining whether INDYMAC was aware of the conflict of interest of both Ms. Johnson-Seck and Ms. Hescott, and if MERS acted in good faith and loyalty to INDYMAC; and
- (5) an affidavit or affirmation identifying whether the instant mortgage loan, pursuant to L 2008, ch 472, § 3-a is a subprime home loan as defined in Real Property and Actions Proceedings Law § 1304 or is a high-cost home loan as defined in Banking Law § 6-1.

Background

As a preliminary matter, plaintiff's counsel did not attach as exhibits to the instant

motion the mortgage, note and assignment. The Court obtained this information by checking the records of the Automated City Register Information System (ACRIS) of the New York City Department of Finance. Defendants RANDOLPH BETHLEY [BETHLEY] and ROSADO executed the instant mortgage and note on September 13, 2006 and borrowed \$489,696.00 from INDYMAC BANK, F.S.B. MERS, as nominee for INDYMAC, recorded the instant mortgage and note on October 10, 2006, in the Office of the City Register of the City of New York, City Register File Number (CRFN) 2006000565862.

According to the May 8, 2008-affidavit of Erica A. Johnson-Seck, Vice President of INDYMAC, defendants BETHLEY and ROSADO defaulted on the subject loan by failing to make their December 1, 2007 payment. Ms. Johnson-Seck, as mentioned above, in the *Deutsche Bank v Maraj* case, assigned the mortgage note as Vice President of MERS, on July 3, 2007 and then, as I observed in *Maraj*:

Twenty-eight days later, on July 31, 2007, the same Erica Johnson-Seck executed plaintiff's affidavit submitted in support of the instant application for a default judgment. Ms. Johnson-Seck, in her affidavit, states that she is "an officer of Deutsche Bank National Trust Company as Trustee under the Pooling and Servicing Agreement Series INDX 2006-AR6, the plaintiff herein." At the end of the affidavit she states that she is a Vice President of DEUTSCHE BANK . . . Did Ms. Johnson-Seck change employers from July 3, 2007 to July 31, 2007, or does she engage in self-dealing by wearing two corporate hats?

The Court is concerned that there may be fraud on the part of plaintiff DEUTSCHE BANK, or at least malfeasance. Before granting an application for an order of reference, the Court requires an affidavit from Ms. Johnson-Seck, describing her employment history for the past three years.

To date, this Court has not yet received any affidavit from Ms. Johnson-Seck describing her employment history, whether it is with MERS, INDYMAC Deutsche Bank, or any other entity.

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As noted above, plaintiff INDYMAC commenced this action with the March 24, 2008 filing of the summons, complaint and notice of pendency with the Office of the Kings County Clerk. MERS, as nominee for INDYMAC, assigned the mortgage and note on March 26, 2008 to plaintiff INDYMAC, "effective as of October 1, 2007," with the assignment recorded on June 4, 2008 in the Office of the City Register of the City of New York, CRFN 2008000224712. The assignment was executed for MERS by Laura Hescott, Vice President of MERS. In the prior *Boyd* action, Ms. Hescott executed the affidavit of facts, on February 18, 2008, as Vice President of INDYMAC, the assignee in the instant action. Clearly, Ms. Hescott, similar to Ms. Johnson-Seck, has a conflict of interest, acting as the assignor in this action and as Vice President of the assignee, INDYMAC, 35 days earlier in *Boyd*.

Discussion

Plaintiff INDYMAC must have "standing" to bring this action. "Standing to sue is critical to the proper functioning of the judicial system. It is a threshold issue. If standing is denied, the pathway to the courthouse is blocked. The plaintiff who has standing, however, may cross the threshold and seek judicial redress." (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801 812 [2003], *cert denied* 540 US 1017 [2003]). Professor David Siegel, in NY Prac, § 136, at 232 [4th ed] instructs that:

[i]t is the law's policy to allow only an aggrieved person to bring a lawsuit . . . A want of "standing to sue," in other words, is just another way of saying that this particular plaintiff is not involved in a genuine controversy, and a simple syllogism takes us from there to a "jurisdictional" dismissal: (1) the courts have jurisdiction only over controversies; (2) a plaintiff found to lack "standing" is not involved in a controversy; and (3) the courts therefore have no jurisdiction of the case when such a plaintiff purports to bring it.

"Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request." ([Caprer v](#)

[Nussbaum \(36 AD3d 176](#), 181 [2d Dept 2006]). If a plaintiff lacks standing to sue, the plaintiff may not proceed in the action. (*Stark v Goldberg*, 297 AD2d 203 [1st Dept 2002]).

Plaintiff INDYMAC lacked standing to foreclose on the instant mortgage and note when this action commenced on March 24, 2008, the day INDYMAC filed the summons and complaint with the Kings County Clerk, because it did not own the mortgage and note on that day. The instant mortgage and note were assigned to INDYMAC two days later on March 26, 2008. The assignment states that MERS, as nominee for INDYMAC, "has caused this instrument to be signed by its Vice President and attested to on this 26th day of March, 2008. Effective as of October 1, 2007." This attempt to retroactively predate the assignment to October 1, 2007 is a legal nullity, and fails to demonstrate INDYMAC's ownership interest in the instant mortgage and note on the action's commencement date. The Court, in [Campaign v Barba \(23 AD3d 327](#) [2d Dept 2005]), instructed that "[t]o establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and the mortgage note, ownership of the mortgage, and the defendant's default in payment [*Emphasis added*]." (*See Witelson v Jamaica Estates Holding Corp. I*, 40 AD3d 284 [1st Dept 2007]; *Household Finance Realty Corp. of New York v Winn*, 19 AD3d 545 [2d Dept 2005]; *Sears Mortgage Corp. [*4] v Yaghobi*, 19 AD3d 402 [2d Dept 2005]; [Ocwen Federal Bank FSB v Miller, 18 AD3d 527](#) [2d Dept 2005]; [U.S. Bank Trust Nat. Ass'n Trustee v Butti, 16 AD3d 408](#) [2d Dept 2005]; *First Union Mortgage Corp. v Fern*, 298 AD2d 490 [2d Dept 2002]; *Village Bank v Wild Oaks, Holding, Inc.*, 196 AD2d 812 [2d Dept 1993]).

In this case, "the crucial issue then is whether the written assignment, dated after the commencement of the action but stated to be effective on a date before the commencement, was effective to give plaintiff the requisite interest in the mortgage and thus standing to commence an action to foreclose it." (*Deutsche Bank Trust Co. Americas v Peabody*, 20 Misc 3d 1108 [A][Sup Ct, Saratoga County 2008]). Assignments are made by either written instrument or by the assignor physically delivering the mortgage and note to the assignee. The written assignment to INDYMAC with a retroactive date is not effective if INDYMAC, the assignee, did not have physical possession of the note and mortgage until the assignment date. INDYMAC has failed to demonstrate to the Court that it had physical possession of the BETHLEY and ROSADO mortgage and note on March 24, 2008. "Our courts have repeatedly held that a bond and mortgage may be transferred by delivery without a written instrument of assignment." (*Flyer v Sullivan*, 284 AD 697, 699 [1d Dept 1954]). (*See Levy v Louvre Realty Co.*, 222 NY 14, 20 [1917]; *Curtis v Moore*, 152 NY 159 [1897]; *Bankers Trust Co. v Hoovis*, 263 AD2d 937, 938 [3d Dept 1999]; *Indymac Bank, FSB v Boyd, supra*; *Credit-Based Asset Management and*

Securitization, LLC v Akitoye, 22 Misc 3d 1110 (A) [Sup Ct, Kings 2009]; *Washington Mut. Bank v Patterson*, 21 Misc 3d 1145 (A) [Sup Ct, Kings County 2008]; *Fremont Investment & Loan v Laroc*, 21 Misc 3d 1124 (A) [Sup Ct, Queens County 2008]; *Deutsche Bank Trust Co. Americas v Peabody*, *supra*; [Countrywide Home Loans, Inc. v Taylor](#), 17 Misc 3d 595 [Sup Ct, Suffolk County 2007]). Plaintiff INDYMAC "offers no evidence that it took physical possession of the note and mortgage before commencing this action, and again, the written assignment was signed after defendant was served. The assignment's language purporting to give it retroactive effect, absent a prior or contemporary delivery of the note and mortgage is insufficient to grant it standing." (*Deutsche Bank Trust Co. Americas v Peabody*, *supra*).

Further, 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. (*See Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985] [Olisanr, LLC v Hollis Park Manor Nursing Home, Inc.](#), 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2nd Dept 1974]).

CPLR 3212 (b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law "that there is no defense to the cause of action or that the cause of action or defense has no merit." The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. [*5] (*Friends of Animals, Inc., v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

In the instant action there are issues of material fact with respect to the conflict of interest between assignor MERS, as nominee for INDYMAC, and assignee INDYMAC. The Court of Appeals (*MERSCORP, Inc. v Romaine* [8 NY3d 90 [2006]]) explained how MERS acts as the agent of mortgagors, holding at 96:

In 1993, the MERS system was created by several large

participants in the real estate mortgage industry to track ownership interests in residential mortgages. 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. [Emphasis added]*

Thus, there is a fiduciary relationship between MERS, as nominee for INDYMAC, and INDYMAC itself, which results from the manifestation of consent by INDYMAC to MERS, allowing MERS, as nominee for INDYMAC, to act on INDYMAC's behalf, subject to INDYMAC's control and consent. An agent, who has a fiduciary relationship with the principal, "is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority." (*Maurillo v Park Slope U-Haul*, 194 AD2d 142, 146 [2d Dept 1992]). "Agents are bound at all times to exercise the utmost good faith toward their principals. They must act in accordance with the highest and truest principles of morality." (*Elco Shoe Mfrs. v Sisk*, 260 NY 100, 103 [1932]). (See *Sokoloff v Harriman Estates Development Corp.*, 96 NY 409 [2001]); *Wechsler v Bowman*, 285 NY 284 [1941]; *Lamdin v Broadway Surface Advertising Corp.*, 272 NY 133 [1936]). An agent "is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties. Not only must the . . . agent account to his principal for secret profits, but he also forfeits his right to compensation for services rendered by him if he proves disloyal." (*Lamdin*, at 136).

The incestuous relationship between INDYMAC's agent, MERS, and INDYMAC is evidenced by: Ms. Johnson-Seck's affidavit in the instant action as Vice President of INDYMAC, but claiming to be Vice President of both MERS and Deutsche Bank in *Deutsche Bank v Maraj*, *supra*; and, Ms. Hescott's assignment of the instant mortgage and note as Vice President of MERS in the instant action, but claiming to be Vice President of INDYMAC in *Indymac Bank, FSB v Boyd*, *supra*. The Court wonders if

MERS, as nominee for INDYMAC, acted with "the utmost good faith and loyalty in the performance of [its] . . . duties" toward INDYMAC, when MERS assigned the instant BETHLEY and ROSADO mortgage and note to INDYMAC. If an agent acts "adversely to his employer in any part of the transaction or omits to disclose any interest which would naturally influence his employer's conduct in dealing with the subject of employment, it is such a fraud upon his employer as [the agent] forfeits any right to compensation for his services. (*Murray v Beard*, 102 NY 505 [1886])." (*Beatty v Guggenheim Exploration Co.*, 223 NY 294, 304 [1918]). [*6]"The faithless agent rule thus is founded upon the agent's duty of loyalty to the principal." (*G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95, 101 [2d Dept 2007]). Therefore, if plaintiff INDYMAC renews its motion for summary judgment and an order of reference, it must include an affidavit from an officer of INDYMAC explaining how MERS acted in good faith and loyalty to its principal, INDYMAC, when Ms. Hescott assigned the instant mortgage and note on March 26, 2008 to INDYMAC.

Conclusion

Accordingly, it is

ORDERED, that the motion of plaintiff INDYMAC BANK F.S.B. for:

summary judgment, pursuant to CPLR Rule 3212; striking the answer of defendant SONIA BADILLO ROSADO; and, upon the default of all other defendants, an order of reference for the premises located at 1051 Hancock Street, Brooklyn, New York (Block 3388, Lot 57, County of Kings); and, related relief, is denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiff INDYMAC BANK, F.S.B.'s successor in interest to renew this motion for: summary judgment, pursuant to CPLR Rule 3212; striking the answer of defendant SONIA BADILLO ROSADO, and, upon the default of all other defendants, an order of reference for the premises located at 1051 Hancock Street, Brooklyn, New York (Block 3388, Lot 57, County of Kings), within sixty (60) days of this decision and order, provided that plaintiff INDYMAC BANK, F.S.B.'s successor in interest submits to the Court:

(1) documents demonstrating plaintiff INDYMAC BANK, F.S.B.'s ownership interest in the subject mortgage and note prior to the March 24, 2008

commencement of this action;

(2) an affidavit by Erica A. Johnson-Seck, Vice President of plaintiff INDYMAC BANK, F.S.B., explaining: her employment history for the past three years; and, why a conflict of interest does not exist in how she acted as Vice President of assignee INDYMAC BANK, FSB in the instant action, and Vice President of both MORTGAGE ELECTRONIC REGISTRATIONS SYSTEMS, INC. and Deutsche Bank in *Deutsche Bank v Maraj*, 18 Misc 3d 1123 (A) (Sup Ct, Kings County 2008);

(3) an affidavit by Laura Hescott, Vice President of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. explaining: her employment history for the past three years; and, why a conflict of interest does not exist in how she acted as the assignor of the instant mortgage and note to INDYMAC BANK, F.S.B. and Vice President of INDYMAC BANK, F.S.B. in *Indymac Bank v Boyd*, 22 Misc 3d 1113 (A) (Sup Ct, Kings County 2009);

(4) an affidavit from an officer of INDYMAC BANK, F.S.B.'s successor in interest explaining whether INDYMAC BANK, F.S.B. was aware of the conflict of interest of both Ms. Johnson-Seck and Ms. Hescott, and if MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. acted in good faith and loyalty to INDYMAC BANK, F.S.B.; and,

(5) an affidavit or affirmation identifying whether the instant mortgage loan, pursuant to L 2008, ch 472, § 3-a is a subprime home loan as defined in Real Property and Actions [*7]Proceedings Law § 1304 or is a high-cost home loan as defined in Banking Law § 6-1.

This constitutes the Decision and Order of the Court.

ENTER

HON. ARTHUR M. SCHACKJ. S. C.

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