

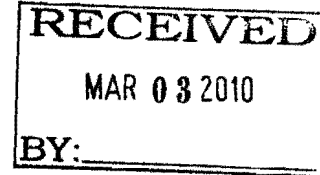
IN CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

INDYMAC FEDERAL BANK, F.S.B. F/K/A
INDYMACBANK, FSB
PLAINTIFF

CASE NO. 08-15958-CI-20

V.

JOHN DAVID ROGERS, ET.AL
DEFENDANT _____/



ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS MATTER, having come on consideration from the Defendant's Motion to Dismiss, submitted by counsel for Defendant Matthew D. Weidner, Esq., this Court, having reviewed the file and after accepting the arguments of counsel it is hereby,

ORDERED AND ADJUDGED that:

1. Counsel for Defendant in his Motion to Dismiss argued that the case should be dismissed because the Plaintiff failed to attach a copy or any evidence of the promissory note that is alleged to be at issue in this case.

2. During the hearing on the Motion to Dismiss, counsel for Defendant noted that the at the time of filing the complaint, the only document attached to the complaint was a copy of a mortgage which indicates that the lender is, "ARK-LA-TEX Financial Services, LLC".

3. Prior to the hearing on Defendant's Motion to Dismiss, the Plaintiff filed the Original Note, but failed to file any assignment of mortgage.

4. Counsel for Defendant noted that the Original Note shows both an allonge

from “Ark-LA-TEX Financial Services” to “Indmac Bank, FSB” and an endorsement which is permanently affixed to the original note which indicates that the note was endorsed from “Indymac Bank, FSB” to “Citbank, National Association, as Trustee”.

5. Counsel for Defendant argued that Plaintiff is not the “holder” of the promissory note at issue in this case pursuant to Florida Statutes §671.201(21) which defines “Holder” as “The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.” While Plaintiff may be the bearer of the instrument, the instrument before this Court is not payable to bearer but rather to a third party namely, “Citibank, National Association” and thus the Plaintiff fails the second prong of the definition. See Troupe V. Redner, 652 So.2d 394 (Fla.App. 2 Dist. 1995) and Booker V. Sarasota, Inc., 707 So.2d 886 (Fla.App. 1 Dist. 1998)

6. While the Plaintiff makes the general assertion that it is “the holder of the mortgage note and mortgage and/or is entitled to enforce the note and mortgage” in its Complaint the exhibits which are attached to the Plaintiff’s complaint and which are filed now with the case by virtue of Plaintiff’s Notice of Filing establish that a party other than the named Plaintiff may be the real party in interest in this case. When there is a conflict between the general allegations made within the pleadings and the exhibits which are attached to the complaint, the exhibits control. See Geico Gen. Ins. Co. V. Graci, 849 So.2d 1196 (Fla.App. 4 Dist. 2003); See also Ginsberg V. Lennar Florida Holdings, 645 So.2d 490 (Fla.App. 3 Dist. 1994) Exhibits attached to the complaint are controlling, where the allegations of the complaint are contradicted by the exhibits, the plain meaning of the exhibits will control.

7. The Plaintiff has failed to attach any assignment of mortgage and failed to plead that any equitable assignment of the mortgage occurred prior to filing the instant case. The Plaintiff's failure to establish standing by virtue of exhibits attached to its complaint or subsequently filed is a defect that may not be cured by the acquisition of standing after the case is filed. See Progressive Exp. v. Mcgrath Chiro., 913 So.2d 1281 (Fla.App. 2 Dist. 2005) and Jeff-Ray Corp. v. Jacobson, 566 So.2d 885 (Fla.App.4 Dist.1990) See also Credit Based, v. Hardy, 16 Fla. L. Weekly Supp. 1147a (14th Jud.Cir.BayCty.8/19/09; Suntrust v. Fullerton, 16 Fla. L. Weekly Supp. 1146b(6thJud.Cir.Pinellas Cty.10/28/09 Edwin B. Jagger, Judge); U.S. Bank v. Rose and Choquette, 16 Fla. L. Weekly Supp. 1044a (9thJud.Cir.OrangeCty.9/14/09); Wachovia Bank v. Norton, 16 Fla. L. Weekly Supp. 1043a (2ndJud.Cir.LeonCty.9/22/09); JP Morgan v. Hussein, 16 Fla. L. Weekly Supp. 939b(4thJud.Cir.DuvalCty.8/4/09); Bank of America v McKenna, 16 Fla. L. Weekly Supp. 833c al,(6thJud.Cir.PinellasCty.7/13/09Anthony Rondolino, Judge).

WHEREFORE, for the reasons cited above it is ORDERED AND ADJUDGED that the Defendant's Motion to Dismiss is GRANTED except that the Plaintiff shall have twenty (20) days from the date of this Order to file an Amended Complaint. If the Plaintiff files their Amended Complaint the case shall not be dismissed and the Defendant shall file his response to the Amended Complaint within twenty days (20) of receipt.

DONE AND ORDERED in Chambers on this the 1st day of December, 2009 by **MAR 01 2010**

Hon. George Jirotka *George M. Jirotk*

cc: Matthew Weidner, Esq.
Justin J. Kelly, Esq.