

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ULSTER

ONEWEST BANK, FSB,

Plaintiff,

-against-

SCOTT CULLEN; DONNA GREENFIELD; INDYMAC
BANK, F.S.B.; "JOHN DOE" AND "JANE DOE", said names
being fictitious, it being the intention of Plaintiff to designate
any and all occupants of premises being foreclosed herein,

Defendants.

All Purpose Term

Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
RJ: 55-09-02155 Index No. 09-5421

Appearances: Fein, Such & Crane, LLP
Attorneys For Plaintiff
David P. Case, Esq., of counsel
28 East Main Street
Suite 1800
Rochester, New York 14614

Rusk, Wadlin, Heppner & Martuscello, LLP
Attorneys for Defendants
Jason J. Kovacs, Esq., of counsel
255 Fair Street
P.O. Box 3356
Kingston, New York 12402

DECISION/ORDER

Zwack, J.:

In this mortgage foreclosure proceeding, defendants Scott Cullen and Donna Greenfield (collectively "Cullen") have moved to dismiss the complaint pursuant to CPLR 3211, asserting plaintiff OneWest Bank, FSB ("OneWest") was not the owner of the mortgage and note at issue when this action was commenced, and thus lacks standing. OneWest opposes the motion.

On October 26, 2009, OneWest commenced the present mortgage foreclosure proceeding by filing of the Summons, Verified Complaint and Notice of Pendency with the Ulster County Clerk. Defendant Scott Cullen was served on November 5, 2009, with the Affidavit of Service filed with the Ulster County Clerk on November 9, 2009. OneWest has not submitted proof of service on defendant Donna Greenfield.

On May 8, 2006, Cullen signed a note with IndyMac Bank, F.S.B. ("IndyMac"), promising to pay IndyMac \$64,910.00, and to secure the note signed a mortgage which stated: IndyMac is the lender; that Mortgage Electronic Registration Systems, Inc. ("MERS") is the "mortgagee of record" for purposes of recording the Cullen mortgage; that MERS "is a separate corporation that is acting solely as nominee for Lender and Lender's successors and assigns"; and, that "MERS (as nominee for Lender and Lender's successors and assigns) has the right: (A) to exercise any or all those rights, including, but not limited to, the right to foreclose..." While mortgage assignments are traditionally publicly recorded

with the County Clerk, under the MERS system, the Cullen note and mortgage could instead be transferred electronically to any entity participating in the MERS system and tracked electronically only by MERS (*see, Mercorp, Inc. v Romaine*, 8 NY3d 90). On November 11, 2009, MERS assigned the subject mortgage to OneWest, stating the assignment was effective as of September 18, 2009.

On March 19, 2009, OneWest purchased IndyMac from the Federal Deposit Insurance Corporation (“FDIC”) out of an FDIC receivership of IndyMac. FDIC’s limited power of attorney designated the attorneys in fact authorized to execute on behalf of FDIC all “endorsement of promissory notes or allonges to promissory notes”. As a negotiable note secured by a note (*see, UCC-3-104*), in order to effect a valid assignment of the entire instrument, the Cullen note must be indorsed on the instrument itself or an attached paper (*see, UCC-3-302[3],[4]*). Cullen has placed the assignment of the note and mortgage, and thus the effectiveness of the indorsement on the note, in issue. To the extent OneWest claims the rights of a holder in due course of the note, it has the burden of showing the authority of the indorsement on the note and to establish that it is a holder in due course of the note (*see, UCC 3-307*). The note offered by OneWest is not indorsed by the FDIC; it bears only an unexplained, undated indorsement in blank by IndyMac, the original lender and holder of the note. OneWest has not submitted proof in evidentiary form that establishes that IndyMac held the note at the time of its receivership, or that the FDIC sold, assigned or transferred the note and mortgage to OneWest prior to the commencement of the foreclosure proceeding.

The only proof OneWest offers that it is the holder and owner of the subject note and mortgage is its possession of the note and the November 11, 2009 MERS assignment of the mortgage to OneWest, which states the assignment to be effective as of September 18, 2009.¹

In the absence of evidentiary proof that the FDIC transferred the note to OneWest (*i.e.*, indorsement of the note by the FDIC), the gap in time between when OneWest acquired ownership of IndyMac assets (March 19, 2009) and when the November 11, 2009 MERS assignments states the actual assignment took effect (September 18, 2009), supports one conclusion, namely the note and mortgage remained within the MERS system and was only assigned by the written MERS assignment.

Absent standing, OneWest may not seek judicial relief (*Saratoga County of Chamber of Commerce v Pataki*, 100 NY2d 801). As OneWest is not the original mortgagee or lender of the Cullen note and mortgage, to have standing to commence the foreclosure action it must prove that the assignment of the note and mortgage was completed prior to the commencement of the action. An assignment of the note and mortgage may be effected by delivery alone, or by a writing (*see, e.g., Curtis v Moore*, 152 NY 159, 162 [1897]; *Flyer v Sullivan*, 284 AD 697, 699 [1st Dept 1954]), and may be effectuated by delivery alone (*see id.*). “Where plaintiff is the assignee of a mortgage at the time of service of the complaint,

¹ OneWest did submit a copy of the FDIC Bill of Sale, without the schedule or list which identified the IndyMac assets transferred to it. Also, although it submitted a list of attorneys in fact authorized to indorse the notes transferred by the FDIC, the Cullen note was not indorsed by the FDIC. The statements of OneWest’s attorneys in its Affirmation in Opposition are conclusory only, and thus fail to establish that the FDIC actually transferred the Cullen note and mortgage as part of its receivership of IndyMac.

plaintiff has standing and is entitled to commence a proceeding its own name (citation omitted)...” (*Bankers Trust Co. V Hoovis*, 263 AD2d 937, 938 [3d Dept 1999]). As in this matter, when a retroactive written assignment is executed after the commencement of the action, in the absence of proof of actual delivery of the note and mortgage prior to the commencement of the action, the retroactive assignment is insufficient to confer standing upon the assignee (OneWest) in a foreclosure action ((*LaSalle Bank National Association v Ahearn*, 59AD3d 911 [3d Dept 2009]; *Wells Fargo Bank, N.A. v Marchione*, 887 NYS2d 615 [2nd Dept 2009]). Clearly, the assignment by MERS is a retroactive assignment executed after the commencement of the foreclosure action and insufficient alone to confer standing upon OneWest in this foreclosure action.

To support it having standing to foreclose the Cullen mortgage, notwithstanding its retroactive written assignment executed after the commencement of this action, OneWest states it purchased the assets of IndyMac on March 19, 2009, and it then became and remains the owner and holder of the Cullen note and mortgage. However, as previously noted, OneWest has not submitted proof in evidentiary form to establish that the Cullen note and mortgage was included in the IndyMac assets sold and delivered by the FDIC to OneWest on or about March 19, 2009. The Cullen note indorsement is unexplained, undated, in blank by IndyMac, and not by the FDIC. Beyond possession of the note indorsed in blank (which can be presumptive evidence of its ownership [*see Glynn v. United Steel Works Corp.*, 160 Misc 405]), the only evidentiary proof submitted by OneWest that it is also the owner and

holder of the Cullen mortgage is the November 19, 2009 MERS assignment, which is stated to be effective as of September 18, 2009.

In the absence of an indorsement of the Cullen note by the FDIC, or other evidentiary proof establishing that the subject note and mortgage was assigned to OneWest by the FDIC, the November 11, 2009 MERS assignment is controlling. OneWest's unsubstantiated claim that it acquired the Cullen note and mortgage as part of its March 19, 2009 purchase of IndyMac assets from the FDIC is insufficient to establish that OneWest became the holder of the subject note and mortgage prior to the commencement of the foreclosure action.

For the foregoing reasons, the Court finds that OneWest has failed to establish it has standing in this proceeding(CPLR 3211), and dismisses the complaint in this proceeding.

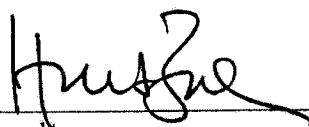
Accordingly, it is

ORDERED that defendants Scott Cullen and Donna Greenfield's motion to dismiss is granted, as set forth above.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for the defendants. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order

shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: March 3, 2010
Troy, New York



Henry F. Zwack
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion to Dismiss dated November 17, 2009; Affirmation of Jason J. Kovacs, Esq. dated November 17, 2009; together with Exhibit "A";
2. Affirmation in Opposition of David P. Case, Esq. dated December 7, 2009; together with Exhibits "A" through "J";
3. Reply Affirmation of Jason J. Kovacs, Esq. dated December 14, 2009; together with Exhibit "A".