

[\*1]

<b>Indymac Bank, FSB v Boyd</b>
2009 NY Slip Op 50094(U) [22 Misc 3d 1112(A)]
Decided on January 22, 2009
Supreme Court, Kings County
Schack, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on January 22, 2009

**Supreme Court, Kings County**

<b>Indymac Bank, FSB, Plaintiff,</b>
<b>against</b>
<b>Annie Boyd, et al., Defendants.</b>

4275/08

Appearances:

Plaintiff

Mark K. Broyles, Esq.

Fein Such &amp; Crane LLP

Rochester NY

The defendant did not answer this motion for an order of reference.

Arthur M. Schack, J.

The motion of plaintiff, INDYMAC BANK FSB [INDYMAC], upon the default of all defendants, for an order of reference in a mortgage foreclosure action for the premises located at 119 East 45th Street, Brooklyn, New York (Block 4825, Lot 64, County of Kings) is denied without prejudice, with leave to renew upon providing the Court within sixty (60) days of this decision and order with documents demonstrating plaintiff INDYMAC's ownership interest in the subject mortgage and note prior to the commencement of this action on February 8, 2008.

### *Background*

Defendant ANNIE BOYD [BOYD] executed the instant mortgage and note on August 14, 2006 and borrowed \$325,000.00 from VERTICAL LEND, INC. [VERTICAL]. MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. [MERS], as nominee for VERTICAL, recorded the instant mortgage and note on September 5, 2006, in the Office of the City Register of the City of New York, City Register File Number (CRFN) 2006000500244. [\*2] According to the February 18, 2008-affidavit of Laura Hescott, Vice President of INDYMAC, plaintiff BOYD defaulted on the subject loan with her September 1, 2007 payment.

As noted above, plaintiff INDYMAC commenced this action with the February 8, 2008 filing of the summons, complaint and notice of pendency with the Office of the Kings County Clerk.

MERS, as nominee for VERTICAL, assigned the mortgage and note on February 11, 2008 to plaintiff INDYMAC, "effective as of November 17, 2007," with the assignment recorded on March 10, 2008 in the Office of the City Register of the City of New York, CRFN 2008000096004. Plaintiff's counsel, in his March 4, 2008 affirmation, informs the Court that MERS assigned the mortgage to INDYMAC, without stating the assignment date. The Court checked the records of the Automated City Register Information System (ACRIS) of the New York City Department of Finance and discovered that the mortgage was assigned three days after the commencement of the instant action. Absent proof that INDYMAC had possession of the mortgage and note on February 8, 2008, it is clear that VERTICAL, not INDYMAC, owned the BOYD mortgage on the day that this action commenced.

### *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 February 8, 2008, the day INDYMAC filed the summons and complaint with the Kings County Clerk, because it did not own the mortgage and note that day. The instant mortgage and note were assigned to INDYMAC three days later on February 11, 2008. The assignment states that MERS, as nominee for VERTICAL, "has caused this instrument to be signed by its Vice President and attested to on this 11 day of Feb., 2008. Effective as of November 17, 2007." This attempt at retroactivity to November 17, 2007 fails to demonstrate INDYMAC's ownership interest

in the instant mortgage and note on the action's commencement date. The Court, in *Campaign v*

[\[\\*3\]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 Wynn, 19 AD3d 545](#) [2d Dept 2005]; [Sears Mortgage Corp. v Yahhobi, 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 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 BOYD mortgage and note on February 8, 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]; [Credit-Based Asset Management and Securitization, LLC v Akitoye, \\_\\_\\_ Misc 3d \\_\\_\\_, 2009 NY Slip Op 50076 \(U\)](#) [Sup Ct, Kings County Jan. 20, 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](#)).

### *Conclusion*

Accordingly, it is

ORDERED, that the motion of plaintiff INDYMAC BANK FSB, for an order of

reference for the premises located at 119 East 45th Street, Brooklyn, New York (Block 4825, Lot 64, County of Kings) is denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiff INDYMAC BANK FSB, to renew its application for an order of reference for the premises located at 119 East 45th Street, Brooklyn, New York (Block 4825, Lot 64, County of Kings), if it presents to the Court, within sixty (60) days of the date of this decision and order, documents demonstrating plaintiff INDYMAC BANK FSB's ownership interest in the subject mortgage and note prior to the commencement of this action on February 8, 2008.

*[\*4]* This constitutes the Decision and Order of the Court.

ENTER

HON. ARTHUR M. SCHACKJ. S. C.

[Return to Decision List](#)