

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

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ONEWEST BANK, FSB, AS SUCCESSOR IN  
INTEREST TO INDYMAC BANK, FSB,

Plaintiff,

-against-

JAMES DONOVAN, TARA CONROY A/K/A TARA  
DONOVAN, ROBIN DONOVAN, NEW YORK  
STATE DEPARTMENT OF TAXATION AND  
FINANCE and "JOHN DOE #1" through "JOHN DOE  
#10" the last 10 ten names being fictitious and  
unknown to plaintiff, the persons or parties intended  
being the persons or parties, if any, having or claiming  
an interest in or lien upon the mortgaged premises  
described in the verified complaint,

Defendants.

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INDEX NO.: 30795/09  
MOTION DATE: 10/11/12  
MOTION NO.: 004 CASEDISP

**PLAINTIFF'S ATTORNEY:**  
McCABE, WEISBERG & CONWAY  
145 Huguenot St., Suite 499  
New Rochelle, New York 10801

**DEFENDANTS' ATTORNEY:**  
KINGHAM LAW GROUP, PLLC  
4250 Veterans Memorial Highway  
Suite 3020W  
Holbrook, New York 11741

Upon the following papers numbered 1 to 65 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-20; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 21-47; Replying Affidavits and supporting papers 48-65; Other     ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion (motion sequence no. 004) of defendants James Donovan and Tara Conroy a/k/a Tara Donovan for an order dismissing the complaint pursuant to CPLR R. 3211(a)(3), (7) and (1); cancelling the notice of pendency pursuant to CPLR §6514; and awarding sanctions and attorneys fees to defendants, subsequently converted to a motion for summary judgment pursuant to the order of this Court (BAISLEY, J.) dated March 1, 2013, is granted to the extent that defendants are awarded summary judgment dismissing the complaint and cancelling the notice of pendency.

The mortgage that plaintiff OneWest Bank, FSB is seeking to foreclose herein was executed on April 25, 2007 by defendants as mortgagors in favor of Indymac Bank, F.S.B. as mortgagee. Plaintiff OneWest Bank, FSB, as successor in interest to Indymac Bank, FSB, commenced this action to foreclose the mortgage on August 7, 2009. Defendants' submissions on the converted motion for summary judgment establish, *prima facie*, that plaintiff OneWest Bank, FSB was not the owner or holder of the mortgage and note at the time of the commencement of the action.

Defendant has produced various documents and agreements reflecting that after the failure of IndyMac Bank, F.S.B. in 2008 and the appointment of the Federal Deposit Insurance Corporation ("FDIC") as receiver and conservator, "substantially all" of the assets of IndyMac

Bank, F.S.B. were transferred to the newly formed entity IndyMac Federal Bank, FSB, and thereafter certain assets held by Indymac Federal Bank, FSB were sold to OneWest Bank, FSB. Other assets, rights and liabilities were conveyed to other entities including IndyMac Ventures, LLC and IMB HoldCo., LLC. None of the documents and agreements between and among the foregoing entities specifically identify defendants' loan as among the IndyMac Bank, F.S.B. assets acquired by IndyMac Federal Bank, FSB or as among the assets acquired by plaintiff from IndyMac Federal Bank, FSB.

It is well established that an action for foreclosure of a mortgage may not be brought by one who has no title to it, and that the plaintiff in a mortgage foreclosure action must own both the mortgage and the underlying note at the time the action is commenced (*Kluge v Fugazy*, 145 AD2d 537 [2d Dept 1988]). Where the issue of standing is raised by a defendant, either in the answer or in a pre-answer motion to dismiss the complaint pursuant to CPLR R. 3211(a), the plaintiff must prove its standing in order to be entitled to relief (*US Bank, N.A. v. Collymore*, 68 AD3d 752 [2d Dept 2009]; *Wells Fargo Bank Minnesota, N.A. v Mastropaolo*, 42 AD3d 239 [2d Dept 2007]). Here, defendant's answer dated August 23, 2009 squarely raises the issue of plaintiff's standing, asserting, in paragraph 3 thereof, that "[p]laintiff lacked standing on the date the complaint was filed in as much as Plaintiff was not the Successor in Interest to IndyMac Bank FSB." A plaintiff in a foreclosure action establishes its standing "by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note, 'either by physical delivery or execution of a written assignment prior to the commencement of the action'" (*Citimortgage, Inc. v Stosel*, 89 AD3d 887 [2d Dept 2011], quoting *Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]).

Here, both in opposition to defendants' original motion to dismiss and in further opposition to the converted motion for summary judgment, plaintiff has submitted only the affirmation of its attorney, who does not have personal knowledge of the facts asserted therein. Accordingly, the affirmation is without evidentiary value (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Moreover, the documents annexed as exhibits to the affirmation in opposition, even if they were properly authenticated, fail to establish, *prima facie*, plaintiff's standing to commence and maintain the instant foreclosure action. The "Loan Sale Agreement" between the FDIC as receiver for IndyMac Federal Bank, FSB and plaintiff, dated as of March 19, 2009, on which plaintiff relies to establish its status as the holder of the subject note and mortgage, does not identify defendants' mortgage loan as one of the assets purportedly acquired by plaintiff pursuant to the agreement. That agreement reflects, at Article II, plaintiff's purchase of "all of the Seller's rights, title and interests in, to and under the Loans...identified on the Loan Schedule attached hereto as Attachment A." However, the "Loan Schedule" annexed to the agreement as Attachment A is blank. Accordingly, plaintiff has failed to provide admissible proof that defendants' note and mortgage was included among those purportedly purchased pursuant to the agreement with the FDIC.

Plaintiff has also annexed a copy of the note bearing an endorsement in blank by an officer of IndyMac Bank, F.S.B. and two purported "allonges" to the note, both executed by one Sandra Schneider, as "Attorney-In-Fact" for the FDIC as receiver for IndyMac Federal Bank, FSB, successor to IndyMac Bank, F.S.B. All of the foregoing documents are undated, and there is no proof in admissible form as to when they were executed, assuming they are otherwise valid. The Court notes that the "certified true copy" of the note that was annexed to plaintiff's complaint as

an exhibit does not contain either the endorsement or the allonges, suggesting that they were executed after the action was commenced. In the absence of proof that the endorsement and/or allonges were executed prior to commencement of the action, they fail to establish plaintiff's standing (*Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674 [2d Dept 2007]). Plaintiff has also submitted no admissible proof to establish that the note and mortgage were physically delivered to plaintiff prior to commencement of the action (*Lasalle Bank Natl. Assn. v Ahearn*, 59 AD3d 911 [3d Dept 2009]). Accordingly, plaintiff's submissions fail to establish that it had standing to commence this foreclosure action on August 7, 2009 because "it failed to establish by proof in admissible form how or when it became the lawful holder of the note either by delivery or valid assignment of the note to it" (*Citimortgage v Stosel, supra*, 89 AD3d at 888).

In light of the foregoing, defendants' converted motion for summary judgment is granted and the complaint is dismissed. The compliance conference presently scheduled to be held before the undersigned on August 29, 2013 is cancelled.

Submit judgment on notice.

Dated: August 12, 2013

**PAUL J. BAISLEY, JR.**

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J.S.C.