

**Online Reference: FLWSUPP 1705INDY**

**Civil procedure -- Dismissal -- Failure to establish standing -- Plaintiff was not holder of promissory note at issue where note was payable to third party -- Plaintiff's general assertion in complaint that it is holder of mortgage note and mortgage and/or is entitled to enforce the note and mortgage conflicts with exhibits attached to complaint, and when there is conflict between general allegations made within pleadings and the exhibits attached to complaint, the exhibits control**

INDYMAC FEDERAL BANK, F.S.B. F/K/A INDYMACBANK, FSB, Plaintiff, v. JOHN DAVID ROGERS, ET.AL, Defendant. Circuit Court, 6th Judicial Circuit in and for Pinellas County. Case No. 08-15958-CI-20. March 1, 2010. George Jirotko, Judge. Counsel: Justin J. Kelly. Matthew Weidner, for 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 "Indymac 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. Bay Cty. 8/19/09); *Suntrust v. Fullerton*, 16 Fla. L. Weekly Supp. 1146b (6th Jud. Cir. Pinellas Cty. 10/28/09 Edwin B. Jagger, Judge); *U.S. Bank v. Rose and Choquette*, 16 Fla. L. Weekly Supp. 1044a (9th Jud. Cir. Orange Cty. 9/14/09); *Wachovia Bank v. Norton*, 16 Fla. L. Weekly Supp. 1043a (2nd Jud. Cir. Leon Cty. 9/22/09); *JP Morgan v. Hussein*, 16 Fla. L. Weekly Supp. 939b (4th Jud. Cir. Duval Cty. 8/4/09); *Bank of America v. McKenna*, 16 Fla. L. Weekly Supp. 833c al, (6th Jud. Cir. Pinellas Cty.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.

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