

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,  
IN AND FOR PINELLAS, FLORIDA  
CIVIL DIVISION**

**INDYMAC FEDERAL BANK, FSB, SUCCESSOR  
IN INTEREST TO INDYMAC BANK, F.S.B.,**

**NO. 08-15815-CI-19**

**PLAINTIFF,**

**v.**

**ERICE D. DAVIS A/K/A ERICE DAVIS,  
ET AL**

**DEFENDANT.**

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**DEFENDANT ERICE DAVIS' RESPONSE TO PLAINTIFF'S  
AMENDED MOTION TO SUBSTITUTE PARTY PLAINTIFF**

- I. THE PLAINTIFF'S ATTEMPT TO SUBSTITUTE PARTY PLAINTIFF IS A VIOLATION OF THIS COURT'S PRE-TRIAL ORDER**
  - II. THE PLAINTIFF'S ATTEMPT TO SUBSTITUTE PARTY PLAINTIFF IS A VIOLATION OF FL.R.CIV.PRO.R. 1.260**
  - III. THE PLAINTIFF'S ATTEMPT TO SUBSTITUTE PARTY PLAINTIFF IS IN CONFLICT WITH IT'S OWN GOVERNING CONTRACTS**
1. The Plaintiff in its Ex-Party Motion for Substitution of Party Plaintiff claimed that IndyMac Federal Bank, sold the Note and Mortgage, “[S]ubsequent to the Complaint being filed”, to Deutsche Bank National Trust Company (hereinafter “Deutsche Bank”), under the Pooling and Servicing Agreement dated *March 1, 2006*. Emphasis Added.
  2. On information and belief, Defendant asserts that the Plaintiff may have made an incorrect statement to the court in its Ex-Parte Motion for Substitution of Party Plaintiff by stating that the sale occurred after the Complaint was filed. The Pooling and Servicing Agreement that is filed with this case indicates that the loan which the subject of this lawsuit was transferred on or about March 1, 2006.

3. The Plaintiff, IndyMac also stated to the Court in its Amended Motion to Substitute Party Plaintiff that, “*On March 19, 2009, the FDIC as receiver for Plaintiff completed the sale of substantially all of Plaintiff’s assets to ONEWEST BANK, FSB...including its interests or rights with regard to the subject note and mortgage. Since that time, ONEWEST BANK, FSB, has transferred this mortgage loan to DEUTSCHE BANK.*” initiation of this litigation.

**I. THE PLAINTIFF’S ATTEMPT TO SUBSTITUTE PARTY PLAINTIFF IS A VIOLATION OF THIS COURT’S PRE-TRIAL ORDER**

4. On March 16, 2009, the Honorable Amy M. Williams signed an Order Setting Non-jury Trial Conference which states in relevant part:

“NO MOTIONS WILL BE HEARD AT PRE-TRIAL CONFERENCE.  
All motions shall be filed and heard prior to the pre-trial conference. All motions not heard by the pre-trial conference shall be deemed abandoned.” Pretrial at ¶5

5. The Parties had a pre-trial conference on June 10, 2010 at 9:30 a.m. While the Plaintiff indicated in this pretrial conference that it intended to make a Motion to Substitute Party Plaintiff, Defendant did not receive the Motion to Substitute Party Plaintiff until on or around June 21, 2010 and its Amended Motion to Substitute Party Plaintiff on or around June 28, 2010. These motions to substitute party plaintiff occurred after the June 10<sup>th</sup> deadline. Pursuant to the Honorable Amy M. Williams Order, these motions **shall be deemed abandoned.**

6. Therefore, based on this court’s clear order the Court should deny the Motion to Substitute Party Plaintiff and because the Plaintiff admitted it its Motion to Substitute Party Plaintiff that it is not the correct Plaintiff in this case, this action should be dismissed with prejudice.

## II. THE PLAINTIFF'S ATTEMPT TO SUBSTITUTE PARTY PLAINTIFF IS A VIOLATION OF FL.R.CIV.PRO.R. 1.260

7. The *Florida Rules of Civil Procedure* addresses Transfer of Interest in Rule 1.260(c)

which provides:

In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. *Service of the motion shall be made as provided in subdivision (a) of this rule.* Emphasis Added.

8. There is a relatively small universe of cases which directly deal with the procedure of transfer of interest and none which directly match the facts of the present case. However, Rule 1.260(c) specifically cites Fla.R.Civ.P. 1.260(a) as the place where service of motion issues are addressed. Additionally, Courts have held that the procedure followed in other subdivisions of Rule 1.260 follow the procedure of Rule 1.260(a), applicable to death of a party. See *Ballard v. Wood*, Case No. 5D02-3368 (Fla. 5<sup>th</sup> DCA 2003) stating “Apparently, the committee drafting rule 1.260(b) did not feel that a separate section was necessary in order to detail the procedure to follow in the event of the incompetency of a defendant and directed that the procedure described in rule 1.260(b), applicable to death of a party, would also be used when a party becomes incompetent.”
9. Both the Case law and Rule 1.260(C) point to *Fla.R.Civ.P.* Rule 1.260(a), as the rule which governs the procedure followed in Transfer of Interest cases. Rule 1.260(a) states:

If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on all parties as provided in rule 1.080 upon persons not parties in the manner provided for service of summons. *Unless the motion for substitution is made within 90 days after the death is suggested upon the record by service of a*

*statement of the fact of the death in the manner provided for the service of the motion, the action shall be dismissed as to the deceased party.* Emphasis Added.

10. Courts have held that failing to dismiss an action a motion where a motion for substitution was filed more than 90 days after the death of a party is reversible error.

*Canter v. Hyman*, 363 So.2d 29 (Fla. 3<sup>rd</sup> DCA 1978). Moreover, at least one court has recognized that:

the Rule itself provides 90 days to effectuate a substitution and obviously a dismissal of an action prior to the expiration of the 90 days, was in direct violation of this Rule, see *Matter of Raymond Const. of Florida* 6 B.R. 793 US Bankr. M.D.Fla.(1980)

11. The Plaintiff in its Amended Motion to Substitute Party Plaintiff correctly noted that an Amended Motion to Substitute Party Plaintiff is governed by *Fla.R.Civ.P.* 1.260(c). Rule 1.260(c) explicitly references Rule 1.260(a) to be the rule which guides service of 1.260(c) motions.

12. Pursuant to Rule 1.260(a):

“[u]nless the motion for substitution is made within 90 days after the death ... the action shall be dismissed as to the deceased party.”

13. IndyMac is no longer a valid company. According to the Plaintiff's own Amended Motion to Substitute Party Plaintiff paragraph 1, “Indymac Bank, FSB, the originator of the subject mortgage...was closed on July 11, 2008”. Therefore the Plaintiff effectively died, more than 90 days before this lawsuit was ever filed.

14. Here, the Rules require that transfer of interest be made within 90 days after the death of a party. The Motion to Substitute Party Plaintiff was made more than 90 days after the Transfer of Interest. Fla.R.Civ.P. 1.260(a) requires the Motion to Substitute Party Plaintiff to be made within 90 days of the Transfer of interest.

15. The Motion to Substitute Party Plaintiff was made will after 90 days of the death/transfer of interest of IndyMac, therefore the Court should deny the Plaintiff's Amended Motion to Substitute Party Plaintiff, and dismiss the Plaintiff's action against the Defendant with prejudice because the Plaintiff in its Amended Motion to Substitute Party Plaintiff admitted that it is not the proper plaintiff.

**III. THE PLAINTIFF'S ATTEMPT TO SUBSTITUTE PARTY PLAINTIFF IS IN CONFLICT WITH IT'S OWN GOVERNING CONTRACTS**

16. On information and belief, the Defendant asserts that the loan which is subject to this instant litigation may be governed by the terms of the Loan Sale Agreement by and between the Federal Deposit Insurance Corporation as Receiver For Indymac Federal Bank. If this is in fact the case, this governing document provides:

Section 5.05 Loans in Litigation

(a)With respect to any Loans, that as of the Closing date, are subject to any pending litigation,...The Purchaser shall, within thirty (30) Business Days after the Closing Date or within thirty (30) Business Days after receiving the notice described above...notify the clerk of the court or other appropriate official and all counsel of record that ownership of the loan was transferred from the Seller to the Purchaser...

(o)r within thirty-five (35) Business Days after receiving the written notice described above...substituting the Purchaser's attorney for the Seller's attorney, removing the Seller and Indymac Federal (or its predecessor-in-interest) as a party to the litigation and substituting the purchaser as the real party-in-interest.

17. Although the Plaintiff has failed to assert whether the loan at issue in this case is in fact subject to the agreement as cited, if in fact the loan is subject to the agreement, the Plaintiff's attempts to substitute are untimely according to the terms of their own governing documents

**RECENT CASES**

18. Under a factually similar case, *U.S. Bank National Association v. William Shane McLeod*, Case No.: CA-08-2124 (Fla. 7<sup>th</sup> Cir. 2010) the Court granted an order to vacate an order to substitute party plaintiff and dismissed the action with prejudice. *See also M&T Bank v. Smith*, CA-09-0418. The Court held:

(it) was misled by the Plaintiff's Motion to Substitute Party Plaintiff in which the Plaintiff stated that [Successor Bank] was appointed as the successor trustee *since* the commencement of this action. The Court relied on the representations of Plaintiff's attorney in granting the order to substitute parties, but now sees that [Successor Bank] could not have been a successor trustee to [Original Bank] since the commencement of this action because [Original Bank] never had standing as the owner and holder of the mortgage note during the pendency of this action. [Successor Bank] should have been named as a party plaintiff in the original complaint and instead of informing the court that the mistake was made in the original filing, the Plaintiff sought to mislead the court into believing [Successor Bank] acquired standing to be a party plaintiff after the commencement of this action. Accordingly, the Order Substituting Party Plaintiff rendered November 24, 2009, will be vacated, and this action will be dismissed with prejudice as to [Original Bank].

19. It is unclear whether the Plaintiff has deliberately misled the Defendant since the start of this litigation about who the real party in interest in this litigation is, but the facts that the Plaintiff presented to the Court in its Amended Motion to Substitute Party Plaintiff and Ex-Parte Motion for Substitution of Party Plaintiff conflict not only with each other, but with the IndyMac and Deutsche Bank National Trust Company Pooling and Servicing Agreement Dated as of March 1, 2006 which Defendant believes governs this case. Specifically, while Plaintiff claims that the loan in question was transferred "[s]ubsequent to the Complaint being filed," the Pooling and Servicing Agreement which governs this loan suggests that the loan at issue was transferred on March 1, 2006. If this is the case, IndyMac never had standing as the owner and holder of mortgage during the pendency of


this action and the true holder and owner of the loan should have been named as the party plaintiff.

20. Therefore, in accordance with the court's order in *U.S. Bank National Association v. William Shane*, we respectfully request that the Court deny any Motion to Substitute Party Plaintiff and dismiss this action with prejudice as to IndyMac Bank (which will not prevent the proper plaintiff bringing a new action on the mortgage and note should it so desire.)

WHEREFORE, Defendant respectfully requests that this Court deny the Amended Motion to Substitute Party Plaintiff because it is in violation of a previous order and DISMISS THIS ACTION WITH PREJUDICE; or in the alternative, DISMISS THIS ACTION WITH PREJUDICE because it is barred by the Florida Rules of Civil Procedure and/or the Plaintiff misled the court.

#### CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to ROBERT S. KAHANE, Kahane & Associates, P.A., 8201 Peters Road, Ste. 3000, Plantation, Florida 33324 on this the 6<sup>th</sup> Day of July 2010.

  
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