

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Submitted - September 7, 2012

DANIEL D. ANGIOLILLO, J.P.
ANITA R. FLORIO
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2011-06975

DECISION & ORDER

IndyMac Bank F.S.B., appellant, v Jean Thompson,
et al., respondents.

(Index No. 45315/07)

Frennel, Lambert, Weiss, Weisman & Gordon, LLP, Bay Shore, N.Y. (Barry M. Weiss of counsel), for appellant.

In an action to foreclose a mortgage, the plaintiff appeals, by permission, from an order of the Supreme Court, Kings County (Jacobson, J.), May 17, 2011, which, sua sponte, directed dismissal of the complaint and advised counsel for the plaintiff that it would inform counsel within 60 days of any further action it might take against counsel for violating Rule 4.1 of the Rules of Professional Conduct.

ORDERED that the appeal from so much of the order as advised counsel for the plaintiff that the court would inform counsel within 60 days of any further action it might take against counsel for violating Rule 4.1 of the Rules of Professional Conduct is dismissed; and it is further,

ORDERED the order is reversed insofar as reviewed, on the law; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

The Supreme Court's advisory statement in the order appealed from, in which it indicated to the plaintiff's counsel that it would inform counsel of any further action it might take against counsel for violating Rule 4.1 of the Rules of Professional Conduct, is not appealable as of right or by permission (*see Weiss v Industrial Enters.*, 7 AD3d 518).

October 3, 2012

Page 1.

INDYMAC BANK F.S.B. v THOMPSON

Contrary to the Supreme Court's determination, an original mortgagee can continue an action even though it assigned its interest in the mortgage and note to another entity during the pendency of an action, unless the court directs a substitution of parties pursuant to CPLR 1018 (*see CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759; *NationsCredit Home Equity Servs. v Anderson*, 16 AD3d 563; *Lincoln Sav. Bank, FSB v Wynn*, 7 AD3d 760; *Central Fed. Sav. v 405 W. 45th St.*, 242 AD2d 512). Accordingly, the Supreme Court erred in, sua sponte, directing dismissal of the complaint based on the plaintiff's alleged assignment of the subject mortgage and note to another entity during the pendency of this action.

ANGIOLILLO, J.P., FLORIO, BELEN and ROMAN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court