

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID FOWLER,

Petitioner

v.

IndyMac MBS, Inc., Deutsche Bank National Trust Company, as Trustee for
Securitized Trust Residential Asset Securitization 2006-A3CB TRUST, and
Mortgage Electronic Registration Systems, Inc. ("MERS"),

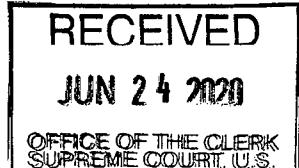
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE STATE OF NEW YORK COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted:

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(i)
QUESTION(S) PRESENTED

- (i) Whether justice is ultimately served when the State of New York Court of Appeals gave no detailed reasoning in denying Petitioner's motion for leave to appeal.
- (ii) Whether the Appellate Division correctly applied the doctrine of collateral estoppel in dismissing Petitioner's complaint without leave to amend.

(ii)

LIST OF PARTIES

Petitioner submits that all parties appear in the caption of the case on the cover page, and are listed below for the Court's reference:

Petitioner: David Fowler

Respondents:

1. Indymac Bank, FSB
2. IndyMac MBS, Inc.
3. Deutsche Bank National Trust Company, as Trustee for
Securitized Trust Residential Asset Securitization 2006-A3CB
TRUST
4. Mortgage Electronic Registration Systems, Inc. ("MERS")

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APPENDIX "B" Decision and Order of the Appellate Division, Second Department (Supreme Court of the State of New York). Dated October 2, 2019.

APPENDIX "C" Order of the Supreme Court of the State of New York-Suffolk County. Dated March 28, 2018.

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IN THE
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is found at *David Fowler v. Indymac Bank, FSB, et. al.*, 2019 NY Slip Op 07055, dated October 2, 2019.

JURISDICTION

The date on which the highest state court decided the merits of the case was October 2, 2019. A copy of that decision appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

This appeal stems from a March 28, 2018 New York State Supreme Court order vacating the default, denying default judgment, and dismissing Petitioner's well-pled complaint without leave to amend.

Petitioner brought forth his claims to dispute any purported superior colorable claim to legal title and equitable title of the subject property asserted by Respondents. Petitioner specifically pledged the subject property collateral, more commonly known as and located at 4 Navy Place, Mastic, NY 11950 (hereinafter referred to as the "subject property"), evidenced by the Warranty Deed and further clarified under the Deed of Trust to the Accommodated Non-Depository Payor Bank, Indymac Bank, FSB. (hereinafter referred to as "Accommodated Party"), as Accommodated Party under a 26 U.S.C. §1031 – Exchange of property. Said subject property was to be held for productive use or investment (hereinafter referred to as a "§1031 – Exchange"). Petitioner set forth sufficient factual allegations in the complaint demonstrating how this exchange process works and how it is supposed to work. Further, Petitioner factually alleged in the Complaint how Respondents asserted an illegal and fraudulent interest in the subject property in order to obtain a foreclosure judgment in a separate action, under Supreme Court of New York-Suffolk County Index Number 38293/2012 (hereinafter referred to as the "foreclosure action").

Petitioner pledged a Deed of Trust granting legal title to Respondent IndyMac Bank, FSB in the Official Records of the Suffolk County Recorder's Office on February 15, 2006. In April of 2012, Respondent MERS executed and had

recorded an Assignment of Deed of Trust, in spite of the fact that the assignment was recorded more than 6 years after the closing date of the “trust,” thus rendering the assignment and any subsequent assignments void as a matter of law. Thus, in the foreclosure action and in the action herein, Respondents had no standing and have not demonstrated any legal and genuinely equitable interest in the subject property. This critical component of standing was clearly overlooked by the trial court, Appellate Division, and shockingly was not even considered by the State of New York Court of Appeals.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW VIOLATES THE NOTION OF FAIRNESS IN THE JUSTICE SYSTEM AS THE STATE OF NEW YORK COURT OF APPEALS GAVE NO DETAILED REASONING FOR DENYING THE MOTION FOR LEAVE TO APPEAL.

In its one-page decision denying the Motion for Leave to Appeal, the State of New York Court of Appeals gave no detailed reasoning for its denial. *See Appendix A.*

Petitioner successfully argued in his Motion for Leave to Appeal that as an injured party, Petitioner was entitled to further appellate review of the Appellate Division’s affirmance of the dismissal of Petitioner’s well-pled complaint against Respondents. The doctrine of collateral estoppel was inapplicable to the case at bar, however the State of New York Court of Appeals refused to hear the merits of Petitioner’s arguments without giving any detailed reasoning why. Clear errors of

law were made by the Supreme Court-Suffolk County and the Appellate Division, Second Department. These clear errors deserve appellate review, and the State of New York Court of Appeals unjustifiably denied Petitioner leave to appeal.

As Petitioner attempted to argue to the State of New York Court of Appeals, the Fourteenth Amendment to the United States Constitution explicitly provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” Due process has many meanings and many variations depending on its context. At a minimum, in the civil law arena, it requires that the Court accept competent evidence, provide all parties with a fair and reasonable opportunity to be heard, and to enter findings based on truthful competent evidence. Petitioner submits that the lower tribunals here violated his constitutional right to due process by accepting false or fabricated evidence presented by Respondents and preventing Petitioner from a fair and equitable opportunity to refute the fabricated evidence put forth by the other parties. The appellate division reached its conclusions without providing Petitioner an opportunity to be heard on the merits of his defenses, including, but not limited to, the Forensic Loan Securitization Audit which conclusively showed that Respondents failed to properly document any transfer of the underlying Note and security obligation, thus depriving them from standing to foreclose on the subject property.

Due to securitization, the Note has been permanently converted into a stock or stock equivalent, the note is no longer a note and part of a pooling and servicing agreement, and required note is unsecured debt and governed under 15 USC §1692

with unsecured rights. Once a loan is securitized, the loan forever loses its security component (mortgage) and right to foreclose forever lost. Mortgage assignment after trust closing date VOID because it violates trust instrument. Assignments of mortgage are invalid without a verified purchase. There is no record of note and mortgage transfer concurrently with note. Mortgage and note have been irrevocably separated making a nullity out or security in a property. In the event a loan was sold, pooled, and turned into a security, the alleged holder can no longer claim it is a real party of interest as the original lender has been paid in full. A Security and Exchange Commission filing of the true original loan note and mortgage had to be provided by document custodian by March 30, 2006 because they were not claim of ownership by trust cannot be substantiated and loan servicing rights not established at law by agreement. Without proper negotiation and physical transfer, the "True Sale" of the tangible note is invalid or is unsecured stripped of real property collateral.

The subject property was wrongfully and illegally foreclosed upon. Respondents never demonstrated any standing or legal right to foreclose on the subject property.

It is well established in the U.S Court system that the cornerstone of the American judicial system is due process. Due process considerations include, as a threshold matter, that the parties litigating have the requisite standing, or interest in the matter sufficient to warrant Court intervention, and/or only awarding relief in favor of those parties who have sufficiently demonstrated their legal standing to seek relief. In the case herein, an order of dismissal was awarded to a party who

failed to demonstrate the requisite level of standing necessary to be granted relief. In fact, the Appellate Division found that Respondent Deutsche Bank established standing to foreclose on the subject property, in spite of being defaulted for its failure to answer or actively defend in the time allowed by law and in spite of unrefuted evidence proffered by Fowler which debunked any demonstration of legal standing to foreclose. However, contrary to the appellate panel's decision, the facts clearly demonstrate otherwise.

"Standing...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. It is difficult to draw an exquisitely sharp line separating the worthy litigant from one who would generate a lawsuit to advance someone else's cause. The rules governing standing help courts separate the tangible from the abstract or speculative injury, and the genuinely aggrieved from the judicial dilettante or amorphous claimant." See *Saratoga County Chamber of Commerce v. Pataki*, 100 NY2d 801, 812 [2003]. (emphasis added). "In New York, 'a plaintiff may not proceed with an action in the absence of standing.'" *Raske v. Next Mgt., LLC*, 40 Misc 3d 1240[A], 2013 NY Slip Op 51514[U], *7 [Sup Ct, NY County 2013], quoting *Ryan, Inc. v. New York State Dept. of Taxation & Fin.*, 26 Misc 3d 563, 567 [Sup Ct, NY County 2009]). "The plaintiff must have an injury in fact in order to bring a cause of action against a particular defendant." (*id.*, citing *Silver v. Pataki*, 96 NY2d 532, 539 [2001]). Respondents never demonstrated a cognizable right to foreclose, and thus in this action, Petitioner sought the proper legal redress for Respondents'

wrongful conduct. Additionally, Respondents failed to show an unbroken chain of title entitling them with standing to foreclose on the subject property. Respondent Deutsche Bank never proffered any evidence that it has suffered an injury in fact. Neither the trial court nor the appellate division found that Respondent Deutsche Bank or any other Respondent had suffered any injury in fact which would confer standing.

The U.S. Supreme Court has stated, "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. *Warth v. Seldin*, 422 U.S. 490 (1975). Respondent Deutsche Bank had no standing to interpose an answer or any other pleading asserting standing, and Petitioner's complaint contained the requisite factual allegations to justify relief. The Appellate Division overlooked these trivial facts when it affirmed the dismissal of Petitioner's well-established claims. These claims were well made to the State of New York Court of Appeals, however that tribunal refused to hear them, thus blocking Petitioner's access to the legal system to redress clear wrongs perpetrated upon him by Respondents.

II. THE APPELLATE DIVISION MISAPPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL IN AFFIRMING THE DISMISSAL OF PETITIONER'S COMPLAINT WITHOUT LEAVE TO AMEND.

The Appellate Division stated that "the evidence submitted...was sufficient to establish that the issue decisive of the present action was necessarily decided by the foreclosure court when it determined that Deutsche Bank had standing to foreclose

upon the subject property." Going on further to state: "Accordingly we agree with the Supreme Court's determination granting that branch of the defendants' cross motion which was pursuant to CPLR 3211(a)(5) to dismiss the complaint under the doctrine of collateral estoppel." *See Appendix B, Page 2.* The State of New York Court of Appeals refused to hear argument to the contrary. Contrary estoppel was inapplicable to the case at bar.

"The doctrine of collateral estoppel, a narrower species of *res judicata*, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). "Collateral estoppel comes into play when four conditions are fulfilled: (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" (*Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015] [internal quotation marks and citations omitted]). "The party seeking to invoke collateral estoppel has the burden to show the identity of the issues, while the party trying to avoid application of the doctrine must establish the lack of a full and fair opportunity to litigate" (*Matter of Dunn*, 24 NY3d 699, 704 [2015]).

Petitioner had no meaningful opportunity to proffer his evidence and factual demonstrations of the fraud perpetrated by Respondents to the foreclosure court. Specifically, as it related to the issue of standing, which was not fully litigated at

the foreclosure level, Petitioner was not given equal opportunity to present sufficient evidence showing that the Respondents had no legal interest in the subject property. In order for collateral estoppel to apply, this issue had to have been actually litigated and decided in a previous action. That is not the case here, as Respondents led the Appellate Division to believe. The record in the foreclosure case also demonstrates that Petitioner was not given a full and fair opportunity to litigate in the prior proceeding. Accordingly, not all four of the requisite elements established by the *Conason* Court were met. Therefore, it was manifest error for the Appellate Department to affirm the dismissal on the ground of collateral estoppel.

Accordingly, the petition for Writ of Certiorari should be granted.

III. THE LOWER COURT FAILED TO APPREHEND THE IMPLICATIONS OF THE FRAUDULENT SECURITIZATION PROCESS AS ALLEGED IN THE COMPLAINT.

As properly alleged in the Complaint which was erroneously dismissed with prejudice, the underlying mortgage and note were allegedly assigned to Deutsche Bank without any legal and legitimate proof of same.

Consumer finance is driven by false claims of "securitization." Consumers are oftentimes lured into damaging transactions. And false claims for enforcement are filed daily on behalf of unidentified "holders" of unidentified "certificates" that neither convey nor even allow any knowledge nor any right, title or interest in any

debt from a consumer. Courts and consumer protection agencies should conduct hearings on the identification of claimed creditors who have both paid for and currently legally own the underlying debt. Rules should require such identification. It's what the law and common sense require.

The current system involves no purchase of underlying debt by any investor. As a result, claims of servicing rights or administrative rights over a loan are not based on a grant of authority from the owner of the debt. Instead, servicers are merely 'designated' by investment banks with no vested interest in any loan except the expectation of additional profit. Foreclosures and other collections are regularly conducted for profit and not repayment. As is the case here, which the lower court overlooked when it dismissed Petitioner's complaint with prejudice.

This undermines the entire paradigm of lending because the "lenders" are only originators and the investment bank is providing funding from money advanced by investors for reasons other than the purchase of debt, the securities issues are neither mortgage backed nor exempt from securities regulation. In reality, such scenarios present an entirely different scenario than their label as "loans." The payment of money to or on behalf of a consumer is actually a royalty payment for the use of data relating to the consumer's name, signature, reputation and home or car. **It is the data that is sold not the debt.** This is why no claimant in any foreclosure or bankruptcy has ever been able to present proof of payment for the debt despite the clear requirement that they do so under Article 9 §203 of the UCC.

The royalty payment is conditional and creates a concurrent liability of the consumer. The arrangements are not disclosed, and neither is the compensation,

profits, bonuses, and fees arising from issuing securities, which is the actual basis for the transaction with the consumer. But for the issuance of securities, the transaction would never have occurred. If proper disclosure had occurred, the consumer, pursuant to TILA and other statutes, would have had an opportunity to evaluate and bargain for better terms on the royalty payment. Collection efforts and foreclosures are inconsistent with the royalty payment and are only viewed as legal because the transaction is labeled as a loan and the designated claimant, who has no financial interest and represents nobody who owns such an interest, is labeled as a claimant, a plaintiff, a successor, or a lender --- all of which labels are false.

In a conventional loan, the lender is known by the "borrower" to have a stake in the outcome which depends upon success of the loan performance. In the current paradigm, that is reversed. Investment banks are able to multiply vast profits by simply taking money from investors at one rate (a conditional promise of return on investment) and then lending at another rate to "borrowers." The incentive is to make loans that will fail and then bet on their failure --- the opposite of a conventional loan paradigm. This produced an undisclosed yield spread premium of as much as 70% of the amount invested or 300% of the amount loaned. By grouping such "risky" loans into a tranche, the investment bank knew with certainty that an "event" would occur (many declared "defaults") thus diminishing the value of the tranche that triggered an insurance or hedge counterparty payment to the disinterested investment bank --- thus vastly increasing already exorbitant profit margins. Credit default swaps were disguised sales of the tranche triggering still

more payments, while the "borrower" was in the dark unaware that everyone had been paid and was continuing to receive payment while demands were made to make still more payments or even give up collateral.

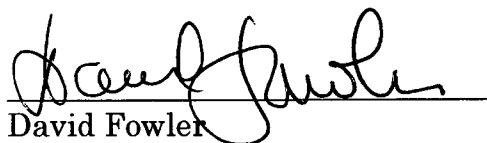
Accordingly, this case requires Supreme Court review and a writ should issue forthwith.

CONCLUSION

For the reasons herein, the petition for writ of certiorari should be granted.

Dated: June 19, 2020.

Respectfully submitted,



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