

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

IN THE MATTER OF:

RICHARD P. LOTFY
SHARI D. LOTFY,
Debtors

CHAPTER 13
CASE NO. 08-40106

RICHARD P. LOTFY
SHARI D. LOTFY,
Plaintiffs

v.

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.

and

INDYMAC BANK, FSB
Defendants

ADVERSARY PROCEEDING
CASE NO.

COMPLAINT TO AVOID TRANSFER OF REAL PROPERTY

TO THE HONORABLE JUDGE JOEL B. ROSENTHAL:

Now comes the Debtors, by and through their counsel, Rosaleen J. Clayton, who hereby submits this Complaint to Avoid the Transfer of Real Property as the statutory requirements regarding Foreclosure under a Power of Sale, pursuant to M.G.L. ch. 244, §14, were defective.

In support of this Complaint, attorney for the Debtors respectfully represent as follows:

1. On January 14, 2008, (the "Petition Date"), the Debtors filed a voluntary petition in the United States Bankruptcy Court for the Western District of Massachusetts under Chapter 13 of the Bankruptcy Code.
2. The Court therefore has jurisdiction over this matter pursuant to 28 U.S.C. §1334. This proceeding is a core proceeding. An adversary proceeding is required by

M.L.B.R. 7001. This Court has jurisdiction to enter a final judgment. Venue of this action is appropriate based on the underlying bankruptcy case.

PARTIES

3. Richard P. Lotfy and Shari D. Lotfy, the Debtors/Plaintiffs (hereinafter "Lotfys") are natural persons residing in Worcester County at 145 Hazel Street, Uxbridge, Massachusetts.
4. Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS") is a corporation organized under the laws of Delaware and doing business in the Commonwealth of Massachusetts. Upon information and belief, its mailing address is P.O. Box 2026, Flint, Michigan, 48201-2026.
5. IndyMac Bank, FSB (hereinafter "IndyMac"), is a federally chartered savings bank doing business in the Commonwealth of Massachusetts. Upon information and belief, IndyMac's corporate office is located at 155 North Lake Avenue, Pasadena, California, 91101.

FACTUAL ALLEGATIONS

6. Debtors purchased the property located at 145 Hazel Street, Uxbridge, Worcester County, Massachusetts on May 16, 2006.
7. On the same date, Debtors executed two loan agreements for the purchase price. The first was with MERS/IndyMac in the amount of \$300,000.00. The second was also with MERS/IndyMac in the amount of \$75,000.00.
8. Contemporaneously with the execution of the loan agreements, Debtors gave a security interest in the property to MERS/IndyMac.
9. The first security interest securing the \$300,000.00 loan was recorded with the Worcester County Registry of Deeds on May 16, 2006 in book 38967, Page 279.
10. The second security interest securing the \$75,000.00 loan was recorded with the Worcester County Registry of Deeds on May 16, 2006 in book 38967, Page 303.
11. The Debtors subsequently defaulted on their loan obligations.
12. On June 15, 2007 a Complaint for authority to foreclose on the first mortgage was executed.

13. Said Complaint was filed with the Massachusetts Land Court on July 7, 2007 by IndyMac Bank, FSB as Trustee under the Servicing and Pooling Agreement Series BSALTA 2006-4.
14. On August 8, 2007, a foreclosure sale occurred on the property and a Certificate of Entry was recorded with the Worcester County Registry of Deeds on December 10, 2007 in Book 42172, Page 26.
15. On November 5, 2007, a Foreclosure Deed was executed by Erika Johnson-Seck, Vice President of IndyMac Bank, FSB as Trustee under the Servicing and Pooling Agreement Series BSALTA 2006-4 transferring the property to IndyMac Bank, FSB as Trustee under the Servicing and Pooling Agreement Series BSALTA 2006-4.
16. Said Foreclosure Deed was recorded with the Worcester County Registry of Deeds on December 10, 2007 in Book 42172, Page 27.
17. On July 20, 2007 an Assignment of Mortgage was executed from MERS, as nominee for IndyMac assigning the Mortgage securing the real property located at 145 Hazel Street, Uxbridge, Worcester County, Massachusetts to IndyMac Bank, FSB as Trustee under the Servicing and Pooling Agreement Series BSALTA 2006-4.
18. The Assignment of Mortgage was recorded with the Worcester County Registry of Deeds on December 10, 2007 in Book 42172, Page 22.

CLAIMS

COUNT I

Violation of M.G.L. ch. 244

19. The allegations of Paragraph 1-18 are incorporated herein as if fully set forth.
20. Massachusetts General Laws, chapter 244, §14 provides in pertinent part that "...The mortgagee or person having his estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person, may, upon breach of condition and without action, do all the acts authorized or required by the power...".

21. The general rule is that conditions precedent to the execution of a power of sale must be strictly complied with. McGreevey v. Charlestown Five Cents Sav. Bank (1936) 294 Mass 480.
22. Debtors contend that Defendants failed to comply with G.L. c. 244, §14, because the actual owner of the Note/Mortgagee was not the party that actually foreclosed on the property.
23. Debtor contends it is reasonable to interpret the statute to require the proper party, the holder of the Note/Mortgagee, to foreclose on the mortgage.

COUNT II

Violation of §548 U.S.C. as Fraudulent Conveyance

24. The allegations of Paragraph 1-23 are incorporated herein as if fully set forth.

WHEREFORE, the Debtor prays that this Court enter an Order to:

1. Assume jurisdiction of this case;
2. Order that:
 - a. The foreclosure sale of Debtors' residence be invalidated; and
 - b. Defendants take all necessary steps to reflect the invalidation of the sale;
3. Award costs and reasonable attorney's fees; and
4. Grant any other relief which this Court deems necessary and proper.

Respectfully submitted,
The Debtors,
By his Attorney
Rosaleen J. Clayton

/s/ Rosaleen J. Clayton
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