

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

_____)	
In re:)	
)	
RICHARD P. LOTFY and SHARI D. LOTFY)	Chapter 13
)	Case No. 08-40106
_____)	
)	
RICHARD P. LOTFY and SHARI D. LOTFY)	
Plaintiffs,)	
vs.)	
)	
MORTGAGE ELECTRONIC REGISTRATION)	Adv. Pro. No. 08-04071
SYSTEMS, INC.)	
)	
and)	
)	
INDYMAC BANK, F.S.B.)	
Defendants.)	
_____)	

Defendant, Mortgage Electronic Registration System, Inc. (“MERS”), submits this Memorandum of Fact and Law in support of its Motion to Dismiss Plaintiffs’ Complaint with Prejudice Pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim against MERS upon which relief may be granted.

In further support of its motion, MERS states the following:

I. FACTS AND PROCEDURAL HISTORY.

1. On or about May 12, 2006, Richard P. Lotfy executed a certain promissory note (the “Note”) in the original principal amount of \$300,000.00 in favor of IndyMac Bank, F.S.B.

2. On or about May 12, 2006, Mr. Lotfy granted a certain mortgage (the “Mortgage”) to MERS, as nominee for IndyMac Bank, F.S.B. Said Mortgage was recorded with

the Worcester County (Worcester District) Registry of Deeds (the “Registry”) at Book 38967, Page 279.

3. The Mortgage encumbered the real property located at and known as 145 Hazel Street, Uxbridge, Worcester County, Massachusetts (the “Premises”).

4. The Mortgage was subsequently assigned by MERS to IndyMac Bank, F.S.B., as Trustee under the Pooling and Servicing Agreement Series BSALTA 2006-4 (“IMB”).

5. IMB conducted a foreclosure auction sale of the Premises on or about August 8, 2007. IMB was the successful high-bidder at the Auction.

6. On or about December 10, 2007, a Foreclosure Deed was recorded with the Registry at Book 42172, Page 27 (the “FC Deed”). IMB was both the grantor and grantee of the FC Deed.

7. On or about May 13, 2008, Mr. Lotfy and Shari D. Lotfy, through counsel, filed a Complaint to Avoid Transfer of Real Property (the “Complaint”). The Complaint contains two Counts, with Count I alleging violations of M.G.L. c. 244 and Count II alleging a “violation of §548 U.S.C. as Fraudulent Conveyance.”

8. Count I of the Complaint pertains to the foreclosure auction sale by IMB and Count II presumptively¹ refers to the FC Deed.

9. On or about July 8, 2008, counsel for MERS contacted Plaintiffs’ counsel to ascertain whether MERS’ inclusion in the Complaint was intentional, as it did not appear the Complaint prayed for any relief as to MERS. Counsel for MERS followed up with Plaintiffs’ counsel again on July 21, 2008 and on even date. While Plaintiffs’ counsel has advised that the matter is being looked into, undersigned counsel has not received any affirmative response as to

¹ Count II does not contain any specific factual or legal allegations, but instead only contains an incorporation by reference of Paragraphs 1-23 of the Complaint.

whether or not MERS was inadvertently named as a party in the Complaint and/or the grounds for the inclusion of MERS in this Adversary Proceeding.

II. DISCUSSION.

A. Standard for Granting Fed. R.Civ. P. 12(b)(6) Dismissal.

Recently “the United States Supreme Court issued a decision in an antitrust case which implicates the standard for dismissal under Fed. R. Civ. P. 12(b)(6)”, which is made applicable to the Complaint by Fed. R. Bankr. P. 7012. Holland v. EMC Mortg. Corp (In re Holland), 374 B.R. 409, *438. “In Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007), the Court seemingly modified the time-honored standard for dismissal set forth in Conley v. Gibson, 355 U.S. 41, 47 (1957), replacing that decision's "no set of facts" language for a "plausibility" standard with respect to notice pleading in complaints. In other words, according to the Supreme Court in Bell Atlantic, a court should not dismiss a complaint if there are ‘enough facts to state a claim to relief that is plausible on its face,’ 127 S. Ct. at 1974, or if the plaintiff has demonstrated a ‘reasonably founded hope that the [discovery] process will reveal relevant evidence’ to support his or her claims’ Id. at 1967”. Holland at 438.

While this new “plausibility” standard may have created “[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings” (Iqbal v. Hasty, 490 F. 3d. 143, 2007 WL 171803, *8 (2nd Cir. 2007); see also Holland at 438), an exposition into those uncertainties is not warranted here. As a matter of law, recovery against MERS on Counts I and II of the Complaint is implausible on its face.

B. Both Counts of the Complaint Pertain Only to IMB.

As stated above, the Complaint alleges violations of M.G.L. c. 244 which, the Plaintiffs contend, resulted in an invalid sale. As a result, the Plaintiffs (presumptively) further allege that

the resultant FC Deed was a fraudulent transfer. The Plaintiffs' sole requests for relief contained in the Complaint are for the foreclosure sale of the Premises to be invalidated and that steps be taken to reflect such an invalidation.

In the instant matter, the foreclosure auction sale was conducted by IMB, not MERS. As such, there are no plausible grounds for a claim against MERS as to violations of M.G.L. c. 244, or that MERS may do anything affirmatively to reflect the alleged invalidity of that sale. Similarly, the grantor (and grantee) of the FC Deed was IMB. MERS was not a party to the FC Deed that the Plaintiffs allege to be a fraudulent transfer of the Premises, and thus cannot do anything to reflect the purported invalidity of it.

Clearly the claims asserted by the Plaintiffs, when read in conjunction with their prayers for relief, revolve solely around IMB, not MERS. There are no plausible set of facts upon which Plaintiffs may exhibit that MERS can be found to have violated M.G.L. c. 244. Moreover, MERS has no control over the Premises and does not possess the ability to either transfer or otherwise convey it.

III. CONCLUSION.

For the foregoing reasons, the defendant, Mortgage Electronic Registration Systems, Inc., respectfully requests that this Honorable Court allow its Motion to Dismiss the Complaint against it with prejudice, and for such other relief as this Court deems just and proper.

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.

By its attorney,

ORLANS MORAN PLLC

/s/ Joseph P. Corrigan

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Date: July 28, 2008

CERTIFICATE OF SERVICE

I, Joseph P. Corrigan, do hereby certify that on this 28th day of July, 2008, I served a true copy of the within document by sending it to the undersigned via first class mail, postage prepaid or other method specified.

Electronically

Rosaleen J. Clayton rondonlaw@aol.com

Via U.S. Mail

Richard P. Lotfy
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/s/ Joseph P. Corrigan

Joseph P. Corrigan

Date: July 28, 2008