

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
BBO 652132
319A Southbridge Street
Auburn, MA 01501
(508) 832-9006
(508) 832-9112 (facsimile)

B104 (FORM 104) (08/07)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)		ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS Richard P. Loffy Shari D. Loffy	DEFENDANTS MERS, Inc. Indymac Bank, FSB	
ATTORNEYS (Firm Name, Address, and Telephone No.) Kosaleen J. Clayton Clayton Law Offices 319A Southbridge St. Auburn, MA 01501 508 832-9006	ATTORNEYS (If Known) Unknown	
PARTY (Check One Box Only) <input checked="" type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee	PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input checked="" type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee	
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Complaint by Debtors in Possession to avoid a transfer of property by invalid foreclosure sale.		
NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)		
FRBP 7001(1) – Recovery of Money/Property <input checked="" type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input checked="" type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input type="checkbox"/> 14-Recovery of money/property - other FRBP 7001(2) – Validity, Priority or Extent of Lien <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property FRBP 7001(3) – Approval of Sale of Property <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) FRBP 7001(4) – Objection/Revocation of Discharge <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) FRBP 7001(5) – Revocation of Confirmation <input type="checkbox"/> 51-Revocation of confirmation FRBP 7001(6) – Dischargeability <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny (continued next column)	FRBP 7001(6) – Dischargeability (continued) <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other FRBP 7001(7) – Injunctive Relief <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other FRBP 7001(8) Subordination of Claim or Interest <input type="checkbox"/> 81-Subordination of claim or interest FRBP 7001(9) Declaratory Judgment <input type="checkbox"/> 91-Declaratory judgment FRBP 7001(10) Determination of Removed Action <input type="checkbox"/> 01-Determination of removed claim or cause Other <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §78aaa <i>et seq.</i> <input type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)	
<input checked="" type="checkbox"/> Check if this case involves a substantive issue of state law	<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23	
<input type="checkbox"/> Check if a jury trial is demanded in complaint	Demand \$ XX	
Other Relief Sought Invalidation of foreclosure sale and other relief as determined through the Discovery process.		

B104 (FORM 104) (08/07), Page 2

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR <i>Richard P. Lotfy + Shari D. Lotfy</i>		BANKRUPTCY CASE NO. <i>08-40106</i>
DISTRICT IN WHICH CASE IS PENDING <i>Massachusetts</i>	DIVISION OFFICE <i>Worcester</i>	NAME OF JUDGE <i>Rosenthal</i>
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) <i>Rosaleen Clayton</i>		
DATE <i>5.13.08</i>	PRINT NAME OF ATTORNEY (OR PLAINTIFF) <i>Rosaleen J. Clayton</i>	

INSTRUCTIONS

The filing of a bankruptcy case creates an "estate" under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor's discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 104, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court's Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 104 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.