

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
CENTRAL DIVISION

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.

FDIC, as Receiver for
INDYMAC BANK, FSB
Defendant

ADVERSARY PROCEEDING
CASE NO. 08-04071

**PLAINTIFFS', RICHARD P. LOTFY AND SHARI D. LOTFY, MEMORANDUM
OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

I. SUMMARY JUDGMENT STANDARD

Fed.R.Civ.P. 56(c) provides in pertinent part that a court shall grant summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. "Motion for summary judgment should be granted if material facts, construed in light most favorable to nonmoving party, are not in dispute, and movant is entitled to judgment as matter of law." In re Taylor 196 BR 197 (Bankr. M.D.Fla. 1996).

Summary judgment is not viewed as a disfavored procedural shortcut, but rather an integral part of the Federal Rules of Civil Procedure, which are designed to secure just, speedy, and inexpensive determination of every action. In Re Harvard Knitwear, Inc. 193 BR 389 (Bankr. E.D.N.Y. 1996).

II. UNDISPUTED FACTS

1. Plaintiffs filed a bankruptcy petition under Chapter 13 January 14, 2008.
2. On May 13, 2008, Plaintiffs commenced this adversary proceeding against IndyMac Bank, FSB.
3. On May 5, 2009, the FDIC was added to the matter as Receiver for IndyMac Bank, FSB.
4. Plaintiffs instituted this action alleging the Defendant violated M.G.L. ch. 244 and violated 548 U.S.C. wrongfully foreclosed on their real property located at 145 Hazel Street, Uxbridge, Massachusetts (the "Property").
5. Plaintiffs purchased the Property on May 16, 2006.
6. Plaintiffs granted two security interests in the Property to MERS/IndyMac.
7. The Plaintiffs subsequently defaulted on their loan obligations.
8. On June 15, 2007 a Complaint for authority to foreclose on the first mortgage was executed and 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. See Attached Exhibit A
9. 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. See Attached Exhibit E.
10. 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. Said Foreclosure Deed was recorded with the Worcester County Registry of Deeds on December 10, 2007 in Book 42172, Page 27. See Attached Exhibit D.
11. At all relevant times above, **Citibank, N.A.**, not **IndyMac Bank, FSB** was the Trustee of BSALTA 2006-4. See Attached Exhibit B.
12. The Assignment of Mortgage executed on July 20, 2007 from MERS, as nominee for IndyMac assigning the Mortgage securing the Property to

IndyMac Bank, FSB as Trustee was executed *after* the institution of the foreclosure proceedings. See Attached Exhibit C.

III. ARGUMENT

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...".

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.

It is clear that the statute requires the proper party, the holder of the Mortgage, to foreclose on the mortgage.

In the instant case, the Defendant failed to comply with G.L. c. 244, §14, because the actual owner of the Note/Mortgagee was not the party that initiated foreclosure proceedings and/or actually foreclosed on the property.

First, all relevant documents, the assignment of mortgage, the order of notice, the entry and possession and the foreclosure deed all refer to the foreclosing party as "IndyMac Bank, F.S.B. as Trustee under the Pooling and Servicing Agreement Series BSALTA 2006-4"

IndyMac Bank, F.S.B. is not the Trustee of the BSALTA 2006-4 Trust and therefore had no legal standing to foreclose on the Property. Second, Foreclosure proceedings were begun on June 15, 2007 by IndyMac Bank, F.S.B. as Trustee under the Pooling and Servicing Agreement Series BSALTA 2006-4.

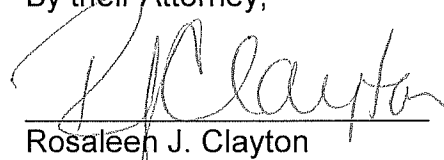
IndyMac Bank, F.S.B. as Trustee under the Pooling and Servicing Agreement Series BSALTA 2006-4 didn't obtain an interest in the Property until July 20, 2007, one full month after instituting foreclosure proceedings.

IV. CONCLUSION

IndyMac Bank, F.S.B. was not the Trustee under the Pooling and Servicing Agreement Series BSALTA 2006-4. Therefore all foreclosure proceedings were void as a matter of law due to the strict compliance required by Massachusetts General Laws, chapter 244, §14.

Dated: November 6, 2009

Richard P. Lotfy
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Plaintiffs
By their Attorney,



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