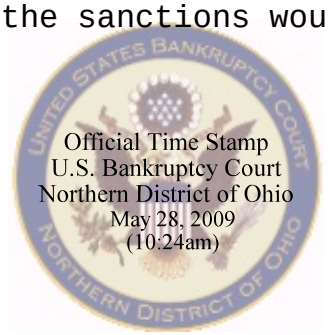
For all of you who attended my presentation in Cleveland, you will find this decision of some interest. For those of you who did not attend, you need to read the case. If the Court had known that John Cody actually works for Fidelity-LPS, and was not a Vice President of MERS, the sanctions would have been much more severe.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 04-16905
	)	
REBECCA FITCH,	)	Chapter 13
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**
	)	**AND ORDER**

This case is before the court because a motion for relief from stay was filed in the name of Mortgage Electronic Registration Systems, Inc., an entity that did not have standing to seek that relief. The entity that caused the motion to be filed—Select Portfolio Servicing, Inc.—compounded its error by filing two affidavits of default that purported to be on behalf of MERS. On review of the most recent affidavit and the underlying motion, the court issued an order to show cause. That order required the individual who signed the affidavit (attorney Jo-Ann Goldman), the attorney who filed the motion for relief (Michael Schlueter), the attorney who filed the most recent affidavit (Anthony Sottile), the employer of the affiant (Select Portfolio Servicing, Inc.), and the named movant (MERS) to appear and explain why the affidavit should not be stricken and the order entered based on the motion be vacated.[1]

PROCEDURAL BACKGROUND

The debtor Rebecca Fitch filed this chapter 13 case on June 1, 2004. On June 24, 2005, a motion for relief from stay was filed in the name of MERS, alleging that the debtor had obtained a loan from MERS and that the debtor was in default under a note secured by a mortgage on the

[1] Docket 60.

debtor's residence. The motion asked that the automatic stay be lifted to permit the creditor to pursue its state court remedies.[2] The parties resolved the motion by entering into an agreed order dated July 13, 2005 that required the debtor to make additional payments beyond her regular monthly payments.[3] The agreed order also permitted MERS to obtain relief from stay on filing an affidavit establishing a default under the agreed order.

On February 28, 2006, an affidavit of default was filed by John Cody, "bankruptcy OFFICER of Mortgage Electronic Registration Systems, Inc. c/o Select Portfolio Servicing, Inc" stating that the debtor was in default under the agreed order, and the court entered an order accordingly.[4] The parties resolved that matter by entering into a second agreed order on June 8, 2006 that reinstated the stay, required the debtor to tender certain funds, and permitted MERS to file a supplemental proof of claim for attorney fees and costs.[5]

On April 14, 2009, Jo-Ann Goldman filed another affidavit of default.[6] In it, she identified herself as "the Vice President of Bankruptcy of Select Portfolio Servicing, Inc. Movant, that in such job of Select Portfolio Servicing, Inc. Servicer for Mortgage Electronic Registration System, Inc. Movant [sic]; that in such job position she/he has the custody of and has personal knowledge of the information in the accounts of said company in bankruptcy, which

---

[2] Docket 22.

[3] Docket 25.

[4] Docket 30, 32. (Emphasis in original).

[5] Docket 46.

[6] Docket 59.

information is compiled in the ordinary course of business, and that affidant [sic] is familiar specifically with the account of Rebecca Fitch, debtor herein." Ms. Goldman, who is an attorney, went on to state that the debtor was in default of the July 13, 2005 agreed order in the amount of $1,103.09 as of November 2008, and also for subsequent monthly payments.[7] The affidavit asked the court to immediately issue an order granting relief from stay.

A review of the affidavit, the agreed orders, and the underlying motion for relief from stay, raised several issues:

1. The motion for relief states that the debtor obtained a loan from the movant MERS, and that neither the note nor the security agreement was transferred. The documents attached to the motion, however, show the following:

   A. The note was issued by the debtor to Full Spectrum Lending, Inc. There was no endorsement on the note as filed with the court and there was no allonge attached to the note. Therefore, the note as filed was still payable to Full Spectrum Lending, Inc.

   B. The mortgage was given to MERS, solely as nominee for Full Spectrum Lending, Inc. There were no documents attached showing any assignment of the mortgage.

2. The agreed order of July 13, 2005 required the movant to give the debtor 10 days notice of a default and an opportunity to cure. The affidavit did not address that requirement.

As a result, the court declined to enter judgment in favor of MERS on the affidavit and issued the show cause order. Debtor's counsel then filed a reply to the Goldman affidavit,

[7] *Id.*

pointing out yet another problem: the debtor could not have been delinquent under the 2005 agreed order at all because the parties had replaced it with the 2006 agreed order.[8]

In response to the show cause order, MERS filed a motion to vacate the 2006 agreed order.[9] The court granted the motion to vacate the agreed order, and denied the underlying motion for relief from stay because it did not state a prima facie case for relief.[10] *See In re Foreclosure Cases,* No. 1:07CV2282, 2007 WL 3232430 (N.D. Ohio Oct. 31, 2007) (the movant has the burden of proving that the chain of title for the note ends with the movant, which also is the mortgagee). MERS then filed a supplemental motion to vacate, stating that it "was neither the note holder nor the mortgagee at the time the affidavit of default was filed in MERS' name."[11] MERS stated further that, originally, it was the mortgagee as nominee for Full Spectrum Lending, Inc., but that MERS transferred that interest to Select Portfolio Servicing, Inc. on March 30, 2006.[12]

In sum, at the time of the show cause hearing, the docket showed these facts:

1. MERS was never in the chain of title for the note and acknowledged that it did not have standing to file the original motion for relief or any subsequent affidavit claiming a default. Additionally, MERS had not held an interest in the mortgage for about three years.

---

[8] Docket 62.

[9] Docket 67.

[10] Docket 69.

[11] Docket 74.

[12] *Id.*

2. John Cody's affidavit stating that he was acting on behalf of MERS was not true.

3. To the extent that Jo-Ann Goldman's affidavit referenced that her actions were authorized by MERS, the affidavit was not true. Moreover, the affidavit was factually inaccurate in that it invoked a default of the July 13, 2005 agreed order, when that order was no longer in effect. Additionally, the June 8, 2006 agreed order required the creditor to give the debtor 10 days notice of any alleged default, and an opportunity to cure that default. No one gave the debtor that notice before the Goldman affidavit was filed.

THE SHOW CAUSE HEARING[13]

At the hearing, counsel for MERS stated, without opposition, that MERS did not authorize the filing of the motion for relief or the filing of the affidavits of default, and in fact that it did not know anything about this case until receiving the show cause order. MERS also reiterated what it had previously told this court in hearings held in other cases in 2008:[14] MERS is an electronic registration and tracking system with respect to beneficial ownership interests and servicing rights in loans secured by home mortgages. "Almost every entity involved in home lending or servicing is a MERS member."[15] A fundamental part of this system is that MERS holds mortgages as nominee for other named parties. MERS does not originate consumer loans

---

[13] The hearing was attended by attorney Jo-Ann Goldman, attorney Edward Boll substituting for Michael Schlueter, attorneys Anthony Sottile, Brad Reisenfeld, and Martha Spaner for Select Portfolio Servicing, Inc., attorney K. Isaac de Vyver (outside counsel for MERS), attorney Sharon Horstkamp (general counsel to MERS), William Hultman (a MERS officer), attorney Lauren Helbling for the debtor, and attorney Holly Davala for the chapter 13 trustee.

[14] *See, for example, In re Cartier*, case no. 04-15754, docket 105.

[15] *Id.*

and is not an original party to notes secured by mortgages on residences. Given this situation, there are limited circumstances in which MERS would have standing in its own name to file a motion for relief from stay in a bankruptcy case. Perhaps in recognition of this, the MERS membership agreement provides that a MERS member is "strictly prohibited from . . . pleading MERS as the note-holder in any action[.]"[16]

Essentially, MERS would have standing if–at the time a motion for relief was filed–MERS had become entitled to enforce the note[17] and MERS also was the mortgagee on the mortgage that secured the note. That was not the case here. Here, Select Portfolio Servicing, Inc. filed a motion and affidavits in the name of MERS, without a legal or factual basis for doing so. *See* FED. R. BANKR. P. 9011. Because MERS did not authorize or know about the actions taken in its name, and because there was no evidence that MERS was negligent in connection with the situation, the court concludes the show cause as against MERS.

At the hearing, Ms. Goldman produced the original note which—unlike the note attached to the motion for relief—showed undated endorsements, first from Full Spectrum Lending, Inc. to Countrywide Home Loans and then from Countrywide Home Loans to Select Portfolio Servicing, Inc. As of the last endorsement, therefore, Select Portfolio Servicing, Inc. was the entity entitled to enforce the note. *See* OHIO REV. CODE § 1303.31. Nevertheless, Ms. Goldman initially vigorously defended filing the motion and the affidavits in MERS's name, arguing that

---

[16] *Id.*

[17] For example, this might be because the note was specifically endorsed to MERS or because the note was endorsed in blank, with MERS having physical possession of the note. *See* OHIO REV. CODE §§ 1303.22, 1301.01(T)(1).

the filings were correct because MERS at some point had been the nominee on the mortgage. This is both incorrect as a matter of law, and also contrary to MERS's own position.

Ultimately, Ms. Goldman conceded that she and Select Portfolio Servicing, Inc. had erred in their filings, although she blamed the outside lawyers representing that entity. While it is true that the two law firms should have counseled against filing the documents, that does not excuse Ms. Goldman from her own act of signing an affidavit that was untrue, knowing that she was asking the court to take adverse action against the debtor based on the affidavit. Under the circumstances, an affidavit is probative evidence, *see Gray v. U.S. Dept. of Agric.*, 39 F.3d 670, 676 n.6 (6th Cir. 1994), and the court is entitled to and does rely on the integrity of all affiants that they have a factual and legal basis for presenting sworn testimony. The reality that an affidavit is signed as part of a volume business does not change this obligation. In this case, the actions of Select Portfolio Servicing, Inc. and Ms. Goldman needlessly consumed court resources. They also caused MERS—through its outside counsel, general counsel, and a corporate officer— to incur cost, expense, and inconvenience in connection with researching and responding to the issues raised. The court trusts that this will not happen again.

IT IS, THEREFORE, ORDERED that Select Portfolio Servicing, Inc. is to conduct an audit and address these issues:

1. Identify any cases in the Northern District of Ohio in which it filed an affidavit of default in the name of MERS;

2. State whether the case is open or closed;

3. Audit each open case to determine whether MERS is improperly named as the movant, either directly or indirectly.

The results of the audit are to be filed by **June 4, 2009**. The hearing is adjourned to **June 9, 2009 at 8:30 a.m.** As the court has concluded the show cause against MERS and its representatives, they need not appear at the adjourned hearing. If the audit results show that other incorrect affidavits have been filed, both attorney Sottile and attorney Goldman are to appear at the adjourned hearing. If the audit results are to the contrary, attorney Goldman is excused from attending.

IT IS FURTHER ORDERED that, with the 2006 agreed order vacated, Select Portfolio Servicing, Inc. is to return to the chapter 13 trustee any payment received on claim no. 9 for $500.00 because that claim was permitted only under the terms of the now-vacated order. The funds are to be remitted to the chapter 13 trustee within 10 days after the date on which this order is entered and the trustee is to apply them in accordance with the confirmed plan.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge