

6TH CIRCUIT DISMISSING ROBO-SIGNING AND DEFECTIVE MERS ASSIGNMENT CLAIMS

In a decision issued yesterday (4/10/13), the United States Court of Appeals for the Sixth Circuit affirmed the dismissal of a complaint seeking to set aside a foreclosure sale based on an alleged defect in the assignment of the mortgage by Mortgage Electronic Registration Systems, Inc. (MERS). In *Conlin v. Mortgage Electronic Registration Systems, Inc.*, --- F.3d ---, (6th Cir. April 10, 2013), the Court rejected the borrower's claims of a defective assignment holding that it was "apparent that neither of Plaintiff's theories—the 'robo-signed' assignment or MERS's incapacity to assign—can support this action." In its decision the Court confirmed that a borrower must meet a "high standard" to set aside a foreclosure once the redemption period has expired. Moreover, to meet that standard, a borrower not only has to show a defect that would render the assignment void, but that the borrower must also establish that he was prejudiced as a result of the defect. Dykema represented defendants MERS and U.S. Bank in the matter.

In *Conlin*, the plaintiff attempted to invalidate a March 2011 foreclosure claiming that the assignment of mortgage from MERS to U.S. Bank in 2008 was defective because the assignment was "robo-signed" and MERS lacked the capacity to assign the mortgage. The Plaintiff, however, failed to file his complaint challenging the foreclosure before either the foreclosure sale occurred or the six-month statutory redemption period expired. Plaintiff attempted to excuse his untimely challenge by alleging fraud based on his belief that the assignment was invalid because it was forged, "robo-signed," or signed by a party without legal authority to sign.

MERS and US Bank moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The United States District Court for the Eastern District of Michigan dismissed the case, finding that plaintiff failed to state a plausible claim of fraud or irregularity to challenge the foreclosure after the redemption period expired. Plaintiff appealed, chiefly arguing that he had standing to challenge the assignment of mortgage after the redemption period expired.

In announcing its decision, the Sixth Circuit remarked that the Plaintiff's appeal required it "once again to wade into the morass of litigation involving mortgage foreclosures under Michigan law." The Court began by recognizing that Michigan's foreclosure by advertisement statute was intended to impose order on the foreclosure process while giving security and finality to purchasers of foreclosed properties. Thus, "[t]o effectuate this interest in finality, the ability for a court to set aside a sheriff's sale has been drastically circumscribed."

The Sixth Circuit recognized that, based on the holdings of various Michigan courts, once the statutory redemption period expires a foreclosure may be set aside only when the mortgagor has made a clear showing of fraud or irregularity related to the foreclosure process. These holdings, according to the Sixth Circuit, established a "high standard" for the plaintiff to satisfy in order to have his foreclosure set aside. Plaintiff attempted to meet his burden by arguing that the assignment of mortgage was forged or "robo-signed," and that the assignor had no capacity to assign the mortgage.

The Court stood on its precedent and rejected the plaintiff's challenge, stating that a non-party to an assignment lacks standing to challenge the assignment. The Court added that, even if plaintiff could show a defect in the assignment, he failed to allege any prejudice (*e.g.* that he was subject double liability, or that he would have been in a better position to keep the property absent the alleged defect) resulting from the defect, which would require the foreclosure to be set aside. As a result, the Court affirmed the dismissal pursuant to Fed. R. Civ. P. 12(b)(6). The Sixth Circuit's decision in *Conlin* is notable for several reasons. First, the Sixth Circuit confirmed that a borrower's ability to challenge a foreclosure by advertisement in Michigan once the redemption period has expired is extremely narrow and limited to fraud "related to the foreclosure procedure itself." Second, a borrower does not have standing to challenge an assignment of mortgage unless he can show a defect that would render the assignment absolutely invalid, ineffective, or void. Third, the court confirmed that even if the borrower can show a defect, the borrower must establish that he was prejudiced as a result of the defect in order to state a claim to contest a foreclosure by advertisement in Michigan.