UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

DAVID MORENUS — CASE NO. 01-66672

Chapter 13

Debtor

APPEARANCES:

LYNN HARPER WILSON, ESQ.
Attorney for Chapter 13 Trustee
250 S. Clinton St., 5th Floor
Syracuse, New York 13202

LEVENE, GOULDIN & THOMPSON — DAVID M. GOULDIN, ESQ.
Attorneys for Joseph A. Ermeti — Of Counsel
P.O. Box F-1706
Binghamton, New York 13902-0106

PETER A. ORVILLE, ESQ.
Attorney for Debtor
30 Riverside Drive
Binghamton, New York 13905

TERENCE P. O'LEARY, ESQ.
Attorney for David Morenus in State Court Proceeding
49 North Street
P.O. Box 177
Walton, New York 13856

GOZIGIAN, WASHBURN & CLINTON — PHILIP L. WASHBURN, ESQ.
Attorneys for First Pioneer Farm Credit, ACA — Of Counsel
Key Bank Building
P.O. Box 431
Cooperstown, New York 13326

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion ("Motion") filed by David Morenus ("Debtor") on August 9, 2002, by way of an Order to Show Cause seeking a stay of the enforcement by the Delaware County Sheriff of a Warrant of Eviction, dated July 29, 2002, which required that the Debtor vacate the premises at 170 Crane Hill Road, Unadilla, New York ("Premises"), by August 10, 2002. Debtor also requests a determination that First Pioneer Farm Credit ("Pioneer") and Joseph A. Ermeti ("Ermeti") willfully violated the automatic stay and an award of damages pursuant to § 362(h) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code").

A hearing was held on August 20, 2002, at the Court's regular motion term in Binghamton, New York. Following oral argument, the Court afforded the parties an opportunity to file memoranda of law. The matter was submitted for decision on September 9, 2002.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(G) and (O).

FACTS

On November 13, 2001, the Debtor filed a voluntary petition seeking relief pursuant to chapter 13 of the Code. Pioneer is listed in the Debtor's schedules as a secured creditor with a claim of $54,458.14. According to the Certificate of Mailing, Notice of the filing of the case was served on Pioneer by first class mail on November 20, 2001.

Pioneer conducted a sale of the Premises on November 19, 2001, pursuant to a Judgment of Foreclosure and Sale, dated October 10, 2001. Ermeti was the successful bidder at the sale with a final bid of $61,200. According to Pioneer's counsel, it did not receive notice of the case filing until November 26, 2001. Upon learning of the bankruptcy case, allegedly Pioneer's counsel contacted the chapter 13 trustee to apprize him of the sale and took no further action relative to the foreclosure proceedings.

On February 21, 2002, the Court signed an Order confirming the Debtor's chapter 13 plan ("Plan"). According to the terms of the Debtor's Plan, Pioneer's mortgage was to be reinstated and it was to be paid $535 per month through the Plan on prepetition arrears of $8,322.81. In addition regular monthly payments on its mortgage on the Premises were to be paid directly by the Debtor, beginning December 13, 2001.[1] On or about April 3, 2002, Pioneer sent a letter to the Debtor that as a result of his failure to make any direct payments to Pioneer postpetition it was availing itself of the rights set forth in ¶ 7 of the Plan. According to an Affidavit of Service, received by the Court on April 29, 2002, the Debtor, as well as his bankruptcy attorney, Peter A. Orville, Esq., was served with a Notice of Default on April 24, 2002, by first class mail. On or about May 8, 2002, Pioneer submitted an application for "an order terminating the automatic stay to permit enforcement of secured creditor's lien" in which it represented to the Court that "more than fifteen days had elapsed since the mailing of the Notice of Default."[2] On May 13, 2002, the Court signed an *ex parte* Order terminating the

---

[1] According to the Order of Confirmation, Pioneer's claim totaled $62,264.

[2] Actually, May 8, 2002, was the fifteenth day after the mailing of the Notice of Default on April 24, 2002. However, since the Court did not sign the Order until May 13, 2000, the Debtor's entitlement to notice that relief was being sought by Pioneer and an opportunity to

automatic stay pursuant to Code § 362(d)(1) "as to secured creditor's lien interest" in the Premises as a result of the Debtor's failure "to justify the continuation of the automatic stay within fifteen days after mailing" of the Notice of Default. According to Pioneer's counsel, a copy of the Order was sent to the Debtor, as well as his attorney, on May 14, 2002. On May 21, 2002, a referee's deed was delivered to Ermeti transferring ownership of the Premises to him. According to the affirmation of Pioneer's counsel, the referee filed his report with the office of the Delaware County Clerk on May 23, 2002, without objection from the Debtor to the sale.

It appears that on July 1, 2002, a Notice of Petition of Removal was issued by Ermeti against the Debtor, returnable July 11, 2002. Debtor's regular counsel, Terence P. O'Leary, Esq., appeared at the hearing before the Honorable Steven T. Rose, Sidney Town Justice. The matter was reserved for decision with each party being given an opportunity to submit their arguments by July 16, 2002. Judge Rose found in an undated decision that

> Absent a parallel proceeding being heard in another court of competent jurisdiction, dealing with the same issue, and absent a request from a "higher" court for a stay in this matter, this court has no other alternative but to render a decision with the plain facts presented during this proceeding.
>
> It is the decision of this court that Petitioner Ermeti holds legal title to the property in question pursuant to a Referee's Deed by Walter L. Terry, III and is in his legal right to take possession of said property.
>
> * * * The court further advises that it would retain the option to Stay the execution of this order, if petitioned by a court of competent jurisdiction or if Respondent's attorney were to petition this court with adequate argument to warrant a Stay . . .

See Exhibit C of Ermeti Answering Affidavit, filed September 11, 2002.

Pursuant to the warrant of eviction, dated July 29, 2002, and signed by Judge Rose,

---

object were clearly met.

Debtor was served with a Notice of Eviction, dated August 7, 2002, notifying him that he must vacate the Premises by August 10, 2002. *See* Exhibits A and B of Debtor's Motion. It was that notice which precipitated the filing of the Debtor's Motion on August 9, 2002, presently under consideration by this Court.

On September 11, 2002, the Honorable Joseph P. Hester, Jr., Justice of the New York State Supreme Court, County of Delaware, signed an order confirming the sale, there having been no appearance by the Debtor when the matter came before him on September 9, 2002.[3]

DISCUSSION

Whether this Court should permanently enjoin the enforcement of the Warrant of Eviction, dated July 29, 2002, requires a close examination of the facts in this case. The Debtor filed his petition on November 13, 2001. Six days later a foreclosure sale was conducted on November 19, 2001. Learning of the Debtor's filing on or about November 26, 2001, Pioneer ceased any actions to complete the foreclosure sale by means of delivery of a referee's deed to Ermeti, the high bidder at the sale. It did not seek to have the stay annulled subsequent to the

[3] The Order to Show Cause issued by this Court on August 9, 2002, contained a temporary restraining order which barred Pioneer and Ermeti from taking further action to enforce the Warrant of Eviction or to otherwise remove the Debtor from the premises in Unadilla, New York pending the hearing on August 20, 2002. Though the temporary restraining order was not specifically extended beyond the August 20, 2002, hearing before this Court, Debtor's counsel has suggested that the execution of the order confirming the sale by Judge Hester on September 11, 2002, was the result of certain "deviousness" on the part of his adversaries' counsel. This Court takes no position on this dispute other than to accept the explanation provided by Ermeti's counsel in his correspondence to the Court, dated September 27, 2002, that the order in question was submitted to Judge Hester prior to the issuance of the temporary restraining order and was executed without any knowledge of the existence of the latter order.

sale.

Pursuant to Code § 362(a), the filing of a bankruptcy petition stays creditors from attempting to collect pre-petition debts. *See In re Moss,* 270 B.R. 333, 341 (Bankr. W.D.N.Y. 20001) (stating that the automatic stay is "'designed to effect an immediate freeze of the status quo by precluding and nullifying *post*-petition actions . . . against the debtor or affecting the property of the estate.'" (quoting *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 585 (9th Cir. 1993)). Actions taken in violation of the stay are void. *See Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 527 (2d Cir. 1994), citing *48th Street Steakhouse, Inc. v. Rockefeller Group, Inc.*, 835 F.2d 427, 431 (2d Cir. 1987), *cert. denied,* 485 U.S. 1035 (1988). This is true even when the creditor has no actual notice of the bankruptcy filing. *See In re Hall*, 216 B.R. 702, 706 (Bankr. E.D.N.Y 1998) (noting that "even if the foreclosing creditor did not have actual knowledge of the bankruptcy filing and, therefore, of the automatic stay, one would expect that a bankruptcy court would determine that the postpetition sale was a 'nullity.'").

Some courts have also held that in limited circumstances, a bankruptcy court can annul the stay, thereby validating what occurred postpetition in violation thereof. *See Riedel v. Marine Midland Bank,* 1997 WL 176306 (N.D.N.Y. 1997) (*dicta*), citing *In re Bressler*, 119 B.R. 400, 404 (Bankr. E.D.N.Y. 1990). The power to retroactively annul the automatic stay must be exercised sparingly, however. *See In re Plachotnick*, slip op. at 12 (Bankr. N.D.N.Y March 11, 1994) (citations omitted).

Based on the facts set forth herein, the foreclosure sale conducted on November 19, 2001, was nullity despite the fact that neither Pioneer nor Ermeti had any knowledge of the bankruptcy. Unlike the situation in *Bressler*, there was no motion made to have the automatic stay annulled

nunc pro tunc in order to proceed with the closing of the sale to Ermeti. *See Bressler*, 119 B.R. at 401. It was not until the Debtor's default in payment of its mortgage following confirmation of his plan, on May 8, 2002, that Pioneer sought to have the stay terminated to permit enforcement of its lien. It again did not seek to have the stay annulled *nunc pro tunc* to the petition date. Thus, the foreclosure sale conducted on November 19, 2001, remained a nullity, and the notice requirements imposed by state law required that Pioneer begin the process to enforce its judgment granted on October 10, 2001 all over again. *See id.* at 404 (noting that if the creditor had been unable to persuade the court to annul the stay, "she would have had to conduct another foreclosure of the property.").

Pioneer refers the Court to a decision issued by the New York Supreme Court, Appellate Division, Third Department, in support of its contention that the automatic stay merely "suspended the proceedings"and that once the stay was lifted, "the dormant action was revived,." thereby allowing transfer of the deed to Ermeti as the high bidder at the sale on November 19, 2001. *See Baker v. Bloom,* 146 A.D.2d 859-860 (N.Y. App. Div. 1989). In *Bloom* the summons and complaint commencing the foreclosure action had been served on the debtors postpetition. There had been no judgment of foreclosure issued. The court determined that the proceeding could go forward to judgment based on a finding of no prejudice to the debtors or their creditors. *Id.* at 860. In *Bell v. Niagara Mohawk Power Corp.*, 173 Misc.2d 1042 (N.Y. Sup. Ct. 1997), the state court pointed out that the decision in *Bloom* was rendered prior to *Rexnord Holdings* and declined to adopt the view of the Third Department. Instead, it adopted the rule and reasoning of the Second Circuit that "an action commenced during the pendency of a bankruptcy is void *ab initio* absent narrow circumstances giving rise to a limited exception." *Id.* at 1044-

1045.[4] The state court in *Bell*, relying on the plain meaning of Code § 362, found

> [i]f the action is dormant until the lifting of the stay, the language in the statute stating that the commencement of an action is stayed would be superfluous and meaningless. Moreover, the purpose of the statute is to provide fundamental protection to the debtor from not only the continuation of actions already commenced but the commencement of new actions as well. (citation omitted).

Id. at 1044. Thus, since Pioneer had not sought relief *nunc pro tunc*, it was required to proceed with the enforcement of its judgment of foreclosure as if there had never been a foreclosure sale. According to the facts as presented, there was no notice of another sale of the Premises. Instead, a referee's deed was delivered to Ermeti on or about May 21, 2002, and a report of sale filed with the Delaware County Clerk on May 23, 2002, by the referee indicating that a sale had occurred on November 19, 2001. *See* Exhibit C of Reply Affidavit of Terence P. O'Leary, filed August 19, 2002. As discussed above, that sale was void since the automatic stay was in effect at the time and there was never a motion seeking to have the stay annulled retroactive to the petition date by this Court.

Accordingly, any actions taken based on that sale were without effect, including delivery of the referee's deed to Ermeti and the filing of the Notice of Petition of Removal by Ermeti, as well as the issuance of the warrant of eviction against the Debtor.

The question then arises whether or not those actions were in violation of the automatic stay and serve as a basis for an award of damages and costs, including attorney's fees, to the

---

[4] For purposes of this Decision, it is not necessary to address whether the court in *Bell* had the authority to make such a determination. Certainly, it is within the authority of federal courts to determine the scope and applicability of the automatic stay. *See In re Gruntz,* 202 F.3d 1074, 1083 (9th Cir. 2000). However, *"Gruntz* should not be read to mean that states lack jurisdiction to determine the applicability of [ ] the stay . . . but only that they lack jurisdiction to modify [it]." *In re Lenke*, 249, B.R. 1, 8 (Bankr. D. Ariz. 2000).

Debtor pursuant to Code § 362(h).

Code § 362(h) provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages." The Court of Appeals for the Second Circuit in *Crysen/Montenay Energy Co. v. Esselen Assoc., Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098 (2d Cir. 1990) set forth the standard for awarding damages pursuant to Code § 362(h). According to the Second Circuit, "[a]ny deliberate act taken in violation of a stay, which the violator knows to be in existence, justifies an award of actual damages." *Id.* at 1105. Furthermore, "[a]n additional finding of maliciousness or bad faith on the part of the offending creditor warrants the further imposition of punitive damages pursuant to 11 U.S.C. § 362(h).

At the time that the foreclosure sale took place on November 19, 2001, neither Pioneer nor Ermeti were aware that the Debtor had filed a petition on November 13, 2001. Thus, despite the fact that the sale violated the automatic stay, it does not warrant the award of damages against either Pioneer or Ermeti. Furthermore, they reasonably believed that the issuance of the Court's Order of May 13, 2002, allowed them to proceed with the sale since the stay was no longer in existence. Unfortunately, their respective actions in delivering the deed , filing of the Notice of Petition of Removal and obtaining the warrant of eviction were based on a sale which was void. The actions were not taken knowing of the existence of the automatic stay. Therefore, the Court does not believe that their actions form a basis for a finding that they willfully violated the automatic stay and should be required to pay damages to the Debtor pursuant to Code § 362(h).

Based on the foregoing, it is hereby

ORDERED that the transfer of the referee deed of the Premises to Ermeti on May 21, 2002, is void; it is further

ORDERED that the warrant of eviction, dated July 29, 2002, as well as the Notice of Eviction, dated August 7, 2002, was void; and it is further

ORDERED that the order confirming the sale, signed by Judge Hester on September 11, 2002, is void; and it is finally

ORDERED that the Debtor's motion seeking damages pursuant to Code § 362(h) is denied.

Dated at Utica, New York

this 11th day of October 2002

_____

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge