

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

HEARING DATE:	MARCH 11, 2014
TIME:	10:00 A.M.

-----X
**In re: Mark Anthony
a/k/a Mark Naidu**

**Chapter 7
Case No: 13-13588-jmp**

Debtors,

-----X
**Mark Anthony
a/k/a Mark Naidu**

Movant,

NOTICE OF MOTION

-against-

Prime Properties USA 2011, LLC

Claimants/Respondents.

-----X

NOTICE OF MOTION

PLEASE TAKE NOTICE, that a motion has been made by Debtor, Mark Anthony, by and through, Brian McCaffrey Attorney at Law, P.C., attorneys for the above captioned debtor, the date, time and relief sought set forth below.

RETURN DATE:
AND TIME:

March 11, 2014
10:00 in the forenoon

JUDGE:

HON. ROBERT E. GROSSMAN

COURTROOM:

Manhattan
One Bowling Green, Room 601
New York, NY 10004-1408

RELIEF SOUGHT:

Motion for an order declaring foreclosure action commenced post petition *void ab initio* and awarding damages for violation of the automatic stay.

PLEASE TAKE FURTHER NOTICE, that answering papers, if any, must be filed with the Clerk of the United States Bankruptcy Court and must be served upon Brian McCaffrey Attorney at Law, P.C. as attorney for the debtor at least seven (7) days prior to the return date of this motion.

Dated: Jamaica, NY
February 3, 2014

Brian McCaffrey Attorney at Law, P.C.

/s/ Brian McCaffrey

By: Brian McCaffrey, Esq.
Attorneys for Debtor
88-18 Sutphin Blvd., 1st Floor
Jamaica, NY 11435
(718) 480-8280

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**Mark Anthony
a/k/a Mark Naidu**

Movants,

MOTION

V

Prime Properties USA 2011, LLC

Claimants/Respondents.

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**AFFIRMATION IN SUPPORT OF MOTION FOR AN ORDER DECLARING
FORECLOSURE ACTION COMMENCED POST PETITION VOID AB INITIO AND
HOLDING CREDITOR IN CONTEMPT FOR VIOLATION OF THE AUTOMATIC STAY**

**TO: THE HONORABLE ROBERT E. GROSSMAN
UNITED STATES BANKRUPTCY JUDGE**

Brian McCaffrey, an attorney duly admitted to practice in the Southern District of New York affirms the following under the penalty of perjury:

Debtor, by his attorney of record, Brian McCaffrey, move the Court for an order:

- (a) Declaring the foreclosure action commenced post-petition *void ab initio*.
- (b) Compelling the Creditor to withdraw the State Court foreclosure action commenced in violation of the automatic stay, and

(c) Awarding actual and punitive damages against Prime Properties, LLC pursuant to 11 U.S.C. 362(k)(1), and 11 U.S.C. 362(h).

(d) Granting such other relief as this court deems just and proper.

BACKGROUND

1. I am an attorney for the Debtor, Mark Anthony (“Debtor”) and in that capacity I am fully familiar with the facts and circumstances surrounding this case.

2. I make this affirmation in support of Debtors motion for an order: (a) Declaring the foreclosure action commenced post-petition *void ab initio*; (b) Compelling the Creditor to withdraw the State Court foreclosure action commenced in violation of the automatic stay; (c) Awarding actual and punitive damages against Prime Properties, LLC pursuant to 11 U.S.C. 362(k)(1), and 11 U.S.C. 362(h); (d) Granting such other relief as this court deems just and proper.

3. The Debtor herein filed a voluntary bankruptcy petition for relief under Chapter 7 of the Bankruptcy Code on November 4, 2013 (the “Bankruptcy Filing”). The Bankruptcy Filing was a bare bones petition without schedules, filed *inter alia*, because of a pending deposition where the Debtor was a named defendant as a personal guarantor of corporate debt filed in the Superior Court of New Jersey, Law Division Hudson County under Docket No. HUD-DJ-018698-13, involving Creditor SMS Financial Services. Subsequently the State Court dismissed the case as to the personal liability of the Debtor herein due to the Bankruptcy Filing.

4. On November 8, 2013, Debtor filed an amended petition which added creditors, and included all of the relevant schedules. Said amended petition named Prime Properties USA 2011, LLC (“Prime”), as a secured creditor in mortgage which was trade debt against 24 Meadowlands Parkway, Secaucus NJ 07094. Prime appears on the Creditor matrix in the Bankruptcy Filing. See Amended Petition annexed hereto as Exhibit A

5. Debtor scheduled Meadowlands Development, LLC as a corporation being 100% owned by Debtor on his statement of financial affairs (“SOFA”).
6. At the time of the Bankruptcy Filing, Meadowlands Development, LLC was engaged in affirmative litigation against Prime in the Supreme Court of New York, County of New York under Index No: 653632/2013 (the “NY Affirmative Litigation”). The basis of the case *inter alia*, is, conversion, tortuous interference and breach of contract.
7. On November 27, 2013, Respondent Prime having being fully informed of the Bankruptcy Filing commenced a foreclosure action in Superior Court of New Jersey, Chancery Division of Hudson County under Docket No. F-045436-13 (the “NJ Foreclosure Action”). See complaint annexed hereto as Exhibit B
8. In the NJ Foreclosure Action Respondent Prime named the Debtor personally as “an individual” in the caption and further identified the Debtor at Paragraph 3 of their complaint as shown below:

3. Upon information and belief, defendant MARK NAIDU, an individual, is the principal manager and owner of Borrower, with an address at 779 8th Street, Secaucus, New Jersey 07094.

9. Respondent further outlined its claim against the Debtor as a personal guarantor at paragraph 24 of their complaint as shown below:

24. Also on January 10, 2008, to induce Lender to give the Loan and to further secure its repayment, Defendant MARK NAIDU executed an individual General and Continuing Guaranty of Payment (the “Guaranty”), whereby he unconditionally and irrevocably guaranteed payment of the Loan, and agreed to be bound by all terms and conditions of the Note.

10. Respondent continued to identify its claims against the Debtor as a personal guarantor at Paragraph 38 as shown below:

38. MARK NAIDU is joined as a party defendant herein because he is a guarantor under the Loan Documents, and to extinguish any interest that he has or may have in and to the Mortgaged Property.

11. It axiomatic that under both, New York and New Jersey law, the Creditor, Prime, would be entitled to the imposition of a deficiency judgment against the Guarantor of the loan in the event that the property was sold at auction. Here, it is indisputable that Prime identified the Debtor personally as the guarantor in their complaint and sought relief as against him personally.

12. Because the commencement of the Foreclosure Action is a substantial step in a process that could lead to recovery of a deficiency judgment from Debtor, it falls within the contours of "any act to collect, assess, or recover a claim against the debtor," which is prohibited by the automatic stay under Section 362(a)(6) of the Code. This provision of the code prevents evasion of the purpose of the bankruptcy laws by sophisticated creditors."); H.R. Rep. No. 95-595, at 342 (1978) (same); Demel v. Group Benefits Plan for Employees of N. Telecom, Inc., No. 07 CV 00189(GBD), 2010 U.S. Dist. LEXIS 2340, 2010 WL 167947, at *2 (S.D.N.Y. Jan. 8, 2010) (citing Matthews v. Rosene (In re Matthews), 739 F.2d 249, 251 (7th Cir. 1984)). 11 U.S.C. § 362(a)(6)

13. In their prayer for relief the Respondent request an order A. Fixing the amount due to the Plaintiff pursuant to the Note and Mortgage; B. Directing the Plaintiff be paid the amounts due pursuant to the Note and Mortgage, with interest, advances, other charges, attorneys' fees and costs;

14. It is axiomatic that the Respondent is involved in the NY Affirmative Litigation against it has interposed an answer in that action and is fully informed as to the Debtor's Bankruptcy Filing.

15. Counsel for Respondents in the NJ Foreclosure Action has certified to the state court that as a part of their due diligence they received and reviewed a title search of the public record. It is standard

for a title search to include bankruptcy searches as part of proper due diligence. See certification below:

CERTIFICATION PURSUANT TO RULE 4:64-1(a)

I hereby certify that the Plaintiff has received and reviewed a title search of the public record for the purpose of identifying any lienholder or other persons and entities with an interest in the property that is subject to this foreclosure.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.


ROBERT I. KUFSEESER

Dated: November 26, 2013

16. Counsel for Respondent herein, acting in the NJ Foreclosure Action has either been kept in the dark by their client or have purposefully misrepresented to the State Court in the Foreclosure Action that there are no other actions pending in any other court as shown below:

CERTIFICATION PURSUANT TO RULE 4:5-1

I hereby certify that, to the best of my knowledge and belief, the matter in controversy is not the subject of any action pending in any other court or of a pending arbitration proceeding, nor is any other action or arbitration proceeding contemplated, except that Plaintiff may also file an action in the Law Division, Hudson County, for judgment under the Note (and Guaranty). I know of no other parties other than the parties set forth in this pleading who should be joined in the above action. I recognize the continuing obligation of each party to file with the Court and serve on all parties an amended Certification if there is a change in the facts stated in the original Certification.


ROBERT I. KUFSEESER

Dated: November 26, 2013

17. Notwithstanding the fact that the Respondent has filed an answer in the New York State affirmative litigation and were notified of the Debtor's bankruptcy filing, the Respondents caused the NJ Foreclosure action to be commenced on November 27, 2013, and while certifying that no other actions were pending in any other courts, Respondents purposefully acted in a clear violation of the automatic stay.

**THE COMMENCEMENT OF AN ACTION AGAINST THE DEBTOR WAS IN VIOLATION
OF THE AUTOMATIC STAY, AND IS NULL AND VOID AB INITIO**

18. Subject to a number of specific exceptions not applicable here, filing a voluntary bankruptcy petition operates as an automatic stay applicable against all persons and entities, prohibiting, inter alia, the commencement of a judicial action against the debtor. 11 U.S.C.S. § 362(a)

19. In the Second Circuit, actions taken in violation of the automatic stay are generally *void ab initio*. Further, an individual debtor injured by a willful violation of the stay can recover actual damages, and in certain circumstances, punitive damages. 11 U.S.C.S. § 362(k)(1). In re Ebadi, 448 B.R. 308, 2011 Bankr. LEXIS 1048 (Bankr. E.D.N.Y. 2011)

20. Here, there is no question that the Foreclosure Action was commenced post petition by a creditor named in the Bankruptcy Filing.

21. In *Ebadi*, like here, although the debtor owned the corporation and did not have a personal ownership interest in the property, the court held that “where the debtor is a guarantor of the underlying debt and a named defendant in a foreclosure judgment. The Court finds that such a foreclosure sale does violate the automatic stay.” In re Ebadi, 448 B.R. 308, 313, 2011 Bankr. LEXIS 1048 (Bankr. E.D.N.Y. 2011)

22. In *Ebadi*, the Court distinguished the fact that the stay violation was predicated on the creditors actions taken in furtherance of the Foreclosure Judgment against, inter alia, Debtor himself. Here, it is axiomatic that the Respondent commenced the action against the Debtor himself as a guarantor.

23. In the present case, the automatic stay was in effect on November 4, 2013, prior to the commencement of the Foreclosure Action. Although Debtor did not personally hold an ownership interest in the Property involved in the Foreclosure Action, Respondent nonetheless violated the stay by commencing the Foreclosure Action.

24. In *Ebadi*, the Courts well reasoned decision clearly shows it is well settled that in the Second Circuit an action in violation of the automatic stay is *void ab initio*. See *In re Olejnik*, No. 09-76714-AST, 2010 Bankr. LEXIS 3860, 2010 WL 4366183, at *5 (Bankr. E.D.N.Y. Oct. 28, 2010); see also *E. Refractories Co. v. Forty Eight Insulations Inc.*, 157 F.3d 169, 172-73 (2d Cir. 1998); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 527 (2d Cir. 1994) (citing *48th St. Steakhouse, Inc. v. Rockefeller Grp., Inc. (In re 48th St. Steakhouse, Inc.)*, 835 F.2d 427, 431 (2d Cir. 1987)) ("[A]ny proceedings or actions described in section 362(a)(1) are void and without vitality if they occur after the automatic stay takes effect."); *In re MarketXT Holdings Corp.*, No. 04-12078 (ALG), 2009 Bankr. LEXIS 1897, 2009 WL 2957809, at *3 & n.3 (Bankr. S.D.N.Y. July 20, 2009) (noting split among circuits, stating "the Second Circuit adheres to the view that stay violations are void"); *In re WorldCom, Inc.*, 325 B.R. 511, 519 (Bankr. S.D.N.Y. 2005) *In re Ebadi*, 448 B.R. 308, 317, 2011 Bankr. LEXIS 1048 (Bankr. E.D.N.Y. 2011)

25. In light of the foregoing this Court must declare that the Foreclosure Action was commenced in violation of the automatic stay and is *void ab initio*.

**RESPONDENTS WILLFUL ACTIONS IN VIOLATION OF THE AUTOMATIC STAY
WARRANT ACTUAL AND PUNITIVE DAMAGES**

26. 11 U.S.C.S. § 362(k) provides that subject to limited exceptions, an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages. 11 U.S.C.S. § 362(k)(1).

27. A deliberate action that violates the automatic stay, taken while the violator knew that the stay was in effect, justifies an award of actual damages, with no further showing necessary. The action itself being deliberate suffices to constitute a willful violation of the stay, even if the fact that the action would violate the stay was unknown to the offender. *In re Ebadi*, 448 B.R. 308, 2011 Bankr. LEXIS 1048 (Bankr. E.D.N.Y. 2011)

28. Subsection (h) of 11 U.S.C. § 362 provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

29. The enactment of subsection (h) granted bankruptcy courts an independent statutory basis, apart from their contempt power, to order sanctions against violators of automatic stays. Some circuits accordingly have read the provision as allowing a standard less stringent than maliciousness or bad faith to govern the imposition of sanctions in bankruptcy cases. See *In re Atlantic Business and Community Corp.*, 901 F.2d 325 (3d Cir. 1990) (knowledge of existence of stay and deliberate act violating stay are sufficient for award of sanctions); *In re Taylor*, 884 F.2d 478, 482-83 (9th Cir. 1989) (creditors' alleged good-faith reliance on advice of counsel that stay had been validly terminated was not defense to claim brought by debtor for actual damages based on creditors' alleged willful violation of stay); *In Re Bloom*, 875 F.2d 224, 227 (9th Cir. 1989). ("A "willful violation" does not require a specific intent to violate the automatic stay. Rather, the statute [11 U.S.C. § 362(h)] provides for damages upon a finding that the defendant knew of [1105] the automatic stay and that the defendant's actions which violated the stay were intentional." (quoting *In re INSLAW, Inc.*, 83 Bankr. 89, 165 (Bankr. D.D.C. 1988))). *In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1104-1105, 1990 U.S. App. LEXIS 7787, 11 U.C.C. Rep. Serv. 2d (Callaghan) 881, Bankr. L. Rep. (CCH) P73,394, 22 Collier Bankr. Cas. 2d (MB) 1385, 20 Bankr. Ct. Dec. 807 (2d Cir. N.Y. 1990)

30. Here, in light of the above enunciated standard, this Court should find persuasive the reasoning adopted by the other circuits and conclude that any deliberate act taken in violation of a stay, which the violator knows to be in existence, justifies an award of actual damages.

31. By commencing the Foreclosure Action in a knowing and willful violation of the automatic stay, without first seeking relief from the automatic stay, the Respondent has clearly subjected itself to the imposition of sanctions, actual damages and punitive damages.

32. Respondent purposefully concealed the New York Affirmative Litigation and the Bankruptcy Filing by misrepresenting to the New Jersey Court in the New Jersey Foreclosure Action, and as such their violation is elevated to level of bad faith and maliciousness.

33. In order to justify an award of punitive damages for a violation of section 362(h), a debtor must make a showing of "maliciousness or bad faith on the part of the offending creditor." In re Crysen/Moneteny Energy Co., 902 F.2d 1098, 1105 (2d Cir. 1990).

34. Because the Creditor here chose to ignore the Bankruptcy Filing, violate the automatic stay, and conceal "other actions" from the New Jersey court in the Foreclosure Action, the only explanation for the bank's violation of the automatic stay can be malice or bad faith. In re Baker, 140 B.R. 88, 1992 U.S. Dist. LEXIS 7680, 8 (D. Vt. 1992).

35. On January 15, 2014 counsel for Respondent Prime sent a letter to Chapter 7 Trustee Roy Babitt, Esq. which included a copy of the complaint in the NJ Foreclosure Action. See Exhibit C.

36. Inasmuch as counsel for Prime's letter to the Trustee included a demand for copies of "all pleadings to date", but was not filed on the Court's Electronic Document Filing System it fails to comply with the requirements to file a notice of appearance in accordance with FRBP Rule 9010. To date counsel for Respondent has not filed a notice of appearance in this case.

37. As a result of the Respondent's violation of the automatic stay, the Debtor has been forced to make the instant motion and retain local counsel in New Jersey to communicate with the Court in the NJ Foreclosure Action regarding this matter.

WHEREFORE, Debtors respectfully request the entry of an order:

- (a) Declaring the foreclosure action commenced post-petition *void ab initio*.
- (b) Compelling the Creditor to withdraw the State Court foreclosure action commenced in violation of the automatic stay, and
- (c) Awarding actual and punitive damages against Prime Properties, LLC pursuant to 11 U.S.C. 362(k)(1), and 11 U.S.C. 362(h).

(d) Granting such other relief as this court deems just and proper.

Dated: Jamaica, NY
February 3, 2014

Brian McCaffrey Attorney at Law, P.C.

/s/ Brian McCaffrey

By: Brian McCaffrey, Esq.
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