

<b>NS161, LLC v Amelio</b>
2018 NY Slip Op 33841(U)
September 27, 2018
Supreme Court, Sullivan County
Docket Number: 1592-2017
Judge: Stephan Schick
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF SULLIVAN

-----X  
 NS161, LLC,

Plaintiff,

- against -

**DECISION & ORDER**

ALFONSO AMELIO, CARMINE AMELIO, et al.

Defendants.  
 -----X

Motion Return Date: July 31, 2018

RJI No.: 52-39751-2017

Index No.: 1592-2017

**Appearances:**

*For Plaintiff*

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 Richland & Falkowski, PLLC  
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*For Defendants Carmine & Alfonso Amelio*

Carmine and Alfonso Amelio, *pro se*  
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Schick, J.:

Before the Court in this residential foreclosure action are two motions: (1) Carmine and Alfonso Amelio's motion for a good faith hearing pursuant to CPLR 3408(f) & (i) on the grounds of, *inter alia*, commencement of this proceeding during the operation of the automatic bankruptcy stay of 11 U.S.C. 362(a), and (2) plaintiff's cross-motion to release this matter from the foreclosure settlement conference on the grounds that neither Carmine nor Alfonso reside at the subject property, and thus this action is not settlement conference eligible as per CPLR 3408(a) and RPAPL 1304(6)(iii).<sup>1</sup>

Though the papers raise a host of issues, two undisputed facts are dispositive of this action and mandate dismissal: First, on September 1, 2017, Carmine Amelio filed a petition

<sup>1</sup> Alfonso is the sole obligor on the subject note, while both Alfonso and Carmine are mortgagors of the subject property. Affirmation of Michal Falkowski in Opposition to Defendants' Omnibus Motion ("Falkowski Aff. in Opp.") at Ex. B, paras. 7-8.

before the United States Bankruptcy Court for the Southern District of New York, thus triggering the automatic stay of 11 U.S.C. § 362(a). Affidavit of Carmine Amelio at para. 4; Falkowski Aff. in Opp. at para. 7; Supplemental Affirmation of Michal Falkowski at para. 3d.<sup>2</sup> Second, on September 5, 2017—four days after the automatic stay went into effect—plaintiff commenced the instant action by filing a summons and complaint. Falkowski Aff. in Opp. at para. 7; CPLR 304(a).

Because this action was commenced while the automatic bankruptcy stay was in effect, it is void *ab initio* and must be dismissed.<sup>3</sup> 11 U.S.C. § 362(a)(1) (“a [bankruptcy] petition filed . . . operates as a stay, applicable to all entities, of the commencement . . . of a judicial . . . action or proceeding against the debtor . . . .”); *Levant v. Nat’l Car Rental, Inc.*, 33 A.D.3d 367, 368 (1st Dep’t 2006) (holding that an action commenced against a debtor while an automatic bankruptcy stay was in effect was “void *ab initio*.”); *contra Baker v. Bloom*, 146 A.D.2d 859, 536 (3d Dep’t 1989) (holding that actions commenced during the automatic stay are “merely suspended” until the automatic stay is lifted).<sup>4</sup>

The court is cognizant of an apparent split of Appellate Division authority on this point. *Storini v. Hortiales*, 16 A.D.3d 1110, 1110 (4th Dep’t 2005) (noting split, but concluding that “the clear language of the Bankruptcy Code prohibited the filing of a complaint against defendant during the pendency of the bankruptcy action.”); *Yen-Ching Chen v. Dickerson*, 17

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<sup>2</sup> The automatic stay appears to have expired on October 1, 2017, as reflected in an order of the Bankruptcy Court. Falkowski Aff. in Opp. at para. 7, Ex. D.

<sup>3</sup> The parties argued as to the applicability of the automatic stay in their motion papers, and were given the opportunity to expound upon those arguments in the form of supplemental briefing. Even though the Amelios have not made a formal motion to dismiss for violation of the automatic stay, “[a] court may, *sua sponte*, raise issues regarding its subject matter jurisdiction.” *Signature Health Ctr., LLC v. State*, 42 A.D.3d 678, 679 (3d Dep’t 2007).

<sup>4</sup> The automatic stay also operates with regard to “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate” (11 U.S.C. § 362(a)(3)) and “any act to create, perfect, or enforce any lien against property of the estate” (11 U.S.C. § 362(a)(4)). These provisions would thus appear to have prohibited the commencement of this action against Alfonso alone, in as much as the complaint seeks foreclosure of real property belonging to Carmine’s bankruptcy estate. This action may therefore not continue against Alfonso alone, as the commencement of proceedings against him was also a nullity.

Misc. 3d 61, 63-65 (App. Term 2d Dep't 2007) (collecting cases and observing that the First and Fourth Departments hold that actions commenced during the automatic stay are "nullities," while the Second and Third Departments hold that such actions are only suspended).

This court agrees with the reasoning set forth in *Bell v. Niagara Mohawk Power Corp.*, 173 Misc. 2d 1042, 1043-44 (Albany Sup. Ct. 1997) (Graffeo, J.) that the holding of the Third Department in *Baker* has been called into serious doubt after the Second Circuit announced in *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 527 (2d Cir. 1994) that "any proceedings or actions described in section 362(a)(1) [which includes commencement of an action] are void and without vitality if they occur after the automatic stay takes effect." It is also of note that the chain of federal authorities upon which the *Baker* holding rests all involved cases where the subject litigations had been validly commenced *before* operation of the automatic stay, and thus the distinct question presented to those federal courts was whether subsequent steps taken in violation of a later automatic stay were void or merely voidable.

The "comfort order" obtained by plaintiff from the Bankruptcy Court on September 12, 2018 does not save this action. That order merely states that "the automatic stay imposed in this case by section 362(a) of the Bankruptcy Code is *vacated* under section 362(d)(1) and (2) of the Bankruptcy Code as to [NS161 LLC's] interests in [the subject property] . . . ." *In re: Carmine Amelio*, 17-12482 (SDNY) (CGM) Docket No. 174 (emphasis added). Only an order "*annulling* a stay . . . [has] retroactive effect, and thereby reaches back in time to validate proceedings or actions that would otherwise be deemed void *ab initio*." *E. Refractories Co. Inc. v. Forty Eight Insulations Inc.*, 157 F.3d 169, 172 (2d Cir. 1998) (emphasis added).

Here, plaintiff was aware, as evidenced by its attorney's affirmations, that this action was commenced during the operation of the automatic stay, in clear violation of the plain language of 11 U.S.C. § 362(a)(1). Nevertheless, in its motion to the Bankruptcy Court for a comfort order, plaintiff did not request a retroactive annulment of the automatic stay so as to validate this

otherwise void action. Indeed, the order of the Bankruptcy Court does not reference this pending foreclosure, let alone the fact that it was commenced during the operation of the automatic stay. Recognizing that “[o]nly the bankruptcy court has jurisdiction to grant relief from [the] stay” (*Levant*, 33 A.D.3d at 368) this court is without authority to afford plaintiff the retroactive relief that it failed to request from the Bankruptcy Court, regardless of whether or not the Amelios might be “serial bankruptcy filers,” as plaintiff contends.

This court has considered all other arguments and found them to be either academic or without merit. Accordingly, it is hereby:


**ORDERED** that the motion for a good faith hearing is **DENIED**, and it is further

**ORDERED** that the cross motion to release the action from the residential foreclosure settlement conference is **DENIED**, and it is further

**ORDERED** that this action is **DISMISSED** without prejudice and without costs or disbursements to any party. The Clerk is hereby directed to mark this action **DISPOSED**.

This shall constitute the Decision and Order of the Court. The original Decision and Order, along with all papers submitted for consideration, are being forwarded to the Sullivan County Clerk’s Office for filing. Counsel are not relieved from the provisions of CPLR 2220 regarding service with notice of entry.

Dated: September 27, 2018  
Monticello, New York

ENTER  
  
HON. STEPHAN G. SCHICK, JSC

Papers considered: Notice of Motion for Good Faith Hearing, Memorandum of Law in Support of Motion for Good Faith Hearing, Affidavit of Carmine Amelio and Alfonso Amelio in Support of Motion for Good Faith Hearing and exhibits attached thereto, Notice of Cross-Motion, Affirmation of Michal Falkowski in Support of Plaintiff’s Application to Release this Matter from the Settlement Conference Part and exhibits attached thereto, Affirmation of Michal Falkowski in Opposition to Defendants’ Omnibus Motion and exhibits attached thereto, Supplemental Affirmation of Michal Falkowski and exhibits attached thereto