UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ANTHONY FRALLICCIARDI	CASE NO. 03-63908
Debtor	Chapter 13

APPEARANCES:

ANTHONY FRALLICCIARDI
Pro Se
118 Morgan Avenue
Syracuse, New York 13208

POLLACK, COOPERMAN & FISHER, P.C.
Attorneys for MERS
595 Stewart Avenue, Suite 700
Garden City, New York 11530

EUGENE KLINDIENST, ESQ.
HARRIS LAW OFFICE
Of Counsel

LYNN HARPER WILSON, ESQ.
Staff Attorney for Chapter 13 Trustee
250 S. Clinton St., Suite 504
Syracuse, New York 13202

HISCOCK & BARCLAY, LLP
Attorneys for Niagara Mohawk
221 South Warren Street
P.O. Box 4878
Syracuse, New York 13221-4878

SUSAN R. KATZOFF, ESQ.

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

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

Presently before the Court are several motions filed by Anthony J. Frallicciardi (the "Debtor"), which when considered collectively appear to seek primarily (1) the retroactive imposition of the automatic stay to invalidate the foreclosure sale of his residence located at 118

Morgan Avenue in Syracuse, New York (the "Residence"), conducted by Mortgage Electronic Registration Systems, Inc. ("MERS"), (2) the entry of an order of contempt and the imposition of sanctions against MERS's counsel, and (3) an order preliminarily enjoining MERS from continuing with an eviction proceeding in State Court. The Court also considers a cross-motion of MERS seeking clarification of the Court's Order of January 22, 2004, as well as relief from the automatic stay, either prospectively or nunc pro tunc to September 2, 2003, depending on the intended effect of the January 22nd Order. Argument was heard on May 18, 2004 during the Court's regular motion term in Syracuse. The Court provided the parties an opportunity to file memoranda of law, and heard argument again on June 15, 2004 in Syracuse, after which the matter was submitted for decision.[1]

JURISDICTIONAL STATEMENT

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

FACTS

On December 19, 2000, the Debtor executed a promissory note in the sum of $29,400 and

[1] The motions which the Court considers herein are styled as follows: Motion to Withdraw Emergency Motion to Set Aside Sale And Stay All Proceedings, filed Mar. 3, 2004; Motion in Further Support of Original Motion For Contempt And Sanctions, filed June 8, 2004; and Emergency Motion for Preliminary Injunction, filed Dec. 31, 2003.

a mortgage secured by the Residence in favor of MERS, who is the nominee for Full Spectrum Lending, Inc. Affirmation of Charles Fisher, Esq. in Opposition to Debtor's Motion, filed April 12, 2004 ("Fisher Aff."), ¶ 5.[2] According to MERS, the Debtor defaulted on the note after July 2002. *Id.* ¶ 7. After sending the Debtor a notice of default, MERS commenced a foreclosure action in New York State Supreme Court, Onondaga County on November 14, 2002. *Id.* A foreclosure sale was scheduled for June 10, 2003. *Id.* ¶ 8.

The Debtor filed a voluntary chapter 13 petition with the Court on June 4, 2003. Thereafter, in an Order signed on September 2, 2003, the Court dismissed the Debtor's chapter 13 case because he failed to file and serve a chapter 13 plan or provide notice of a confirmation hearing to his creditors, which was required by a Conditional Order of the Court dated July 24, 2003.

MERS then proceeded to re-schedule a foreclosure sale of the Residence on October 21, 2003. *Id.* ¶ 12. Debtor alleges that on or about October 17, 2003, his daughter attempted to file a new chapter 13 petition for him, along with a motion to waive the filing fee. However, the Clerk of the Bankruptcy Court refused to accept the filing because there was a balance due and owing on the filing fee from the dismissed case. The Residence was subsequently sold to the Bank of New York, which acted as the loan investor on the underlying note. The Referee's Deed was recorded on November 17, 2003. *Id.* ¶ 13. At that point, MERS sought to evict the occupants residing at the Residence. *Id.* ¶ 14.

In an Order dated January 22, 2004, the Court reopened the Debtor's chapter 13 case and

---

[2] Debtor contends that Full Spectrum Lending, Inc., d/b/a Countrywide Home Loans, held the mortgage on his residence.

reimposed the automatic stay. MERS suspended its pending eviction proceedings once it learned that the Debtor's case was reopened. *Id.* at ¶ 17.

The Debtor asserts that he was incarcerated on June 26, 2003 for violating the terms of his supervised release, which apparently arose out of a prior criminal conviction; he was finally released from prison on or about April 23, 2004. *See* Debtor's Motion to Further Support Original Motion for Contempt and Sanctions, filed June 8, 2004 ("Debtor's Contempt Mot."), ¶ 1; Debtor's Amended Motion to Reinstate Bankruptcy, filed December 31, 2003, ¶ 6. The Debtor alleges that on more than one occasion in April and May of 2004 a security agent retained by MERS tampered with the locks at the Residence. Debtor's Contempt Mot. ¶¶ 7-8. On the basis of those events, he requested that the Court also enter a contempt Order and impose sanctions against MERS's counsel as well as enjoin further eviction proceedings. MERS admits that a security agent did change the locks to secure the Residence following the foreclosure sale and then undid that action when the Debtor reopened his case, at which time the Residence appeared unoccupied. Affirmation of Charles Fisher, Esq. in Opposition to Debtor's Motion, filed June 14, 2004, ¶¶ 9-11.

DISCUSSION

The Debtor asks the Court to give retroactive effect to the imposition of the automatic stay upon the reopening of the chapter 13 case in order to nullify the foreclosure sale of the Residence, which occurred in the period between the close of the Debtor's case and its reopening. To answer this question, the Court need only echo the pithy statement of the Honorable John T. Laney III

in *In re Royal Gate Associates, Ltd.,* 81 B.R. 165 (Bankr. M.D. Ga. 1988): "The Court cannot retroactively impose an automatic stay to void a foreclosure sale." *Id.* at 168.

While the automatic stay may be modified retroactively under § 362(d) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), e.g., *Davies v. Commissioner*, 68 F.3d 1129, 1130 (9th Cir. 1995), the reverse—retroactively imposing the stay to operate from the close of a case to its reopening—is impermissible. *See In re Lashley*, 825 F.3d 362, 364 (11th Cir. 1987). The reason this is so is a matter of jurisdiction—or, more precisely, the lack thereof.

The United States District Court for the Northern District of New York in *Piccolo v. Dime Savings Bank*, 145 B.R. 753 (N.D.N.Y. 1992), encountered this very same issue on similar facts. *See also In re Nagel*, 245 B.R. 657, 662 (D. Ariz. 1999); *In re Hill*, 305 B.R. 100, 104-08 (Bankr. M.D. Fla. 2003) (summarizing several similar cases). Pursuant to a lift stay order, Dime Savings Bank foreclosed on the debtor's home. The bankruptcy court reimposed the stay and, using its equitable powers under Code § 105(a), struck down the sale. The district court reversed, holding that the bankruptcy court "erred in reimposing the stay because the collateral was no longer 'property of the estate' [and] improperly set aside the foreclosure sale because the circumstances of the case were neither 'compelling' nor 'unusual'" under Code § 105(a). *Piccolo*, 145 B.R. at 759.

This case is even clearer than *Piccolo* because the foreclosure sale of the Residence occurred after his case was closed, when the Court no longer had jurisdiction over property that formerly constituted property of the Debtor's estate. The Court could have acted in this case to prevent the foreclosure only if it had in rem jurisdiction over the Residence at the time of the sale. However, the case was not pending at that time. Consequently, there was no estate and hence the

Court did not have in rem jurisdiction over whatever might have been deemed property of such an estate under Code § 541.

While there is no doubt that the Debtor's ability to administer his case was seriously impeded by his incarceration, these circumstances do not fall into the category of "compelling" or "unusual" under Code § 105(a). *Cf. In re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 516 (2d Cir. 1985). Arguably, the closing of the Debtor's case could have been prevented had he monitored his case more closely or retained an attorney to protect his rights. Once the case was closed and the Residence sold, the Debtor could no longer move the Court for relief. The Court also cannot lose sight of the fact that Debtor's post-petition incarceration was due solely to the Debtor's conduct.

Furthermore, the Court's § 105(a) powers have little or no impact on the Debtor's circumstance because the Court lacked jurisdiction at the time the sale was conducted. Hence, it has no authority to exercise its Code § 105 powers to undo a valid foreclosure sale, as the Debtor now requests it to do. The court in *Jamo v. Katahdin Fed. Credit Union (In re Jamo)*, 283 F.3d 392 (1st Cir. 2002), succinctly states the scope of these powers:

> section 105(a) does not provide bankruptcy courts with a roving writ, much less a free hand. The authority bestowed thereunder may be invoked only if, and to the extent that, the equitable remedy dispensed by the court is necessary to preserve an identifiable right conferred elsewhere in the Bankruptcy Code.

Id. at 403. In this case, the Debtor, despite the detrimental impact that his incarceration had on his chapter 13 case, had no identifiable right in the interim period between the closing and reopening of his case that the Court had any authority to vindicate.

Therefore, it appears that the Court cannot overturn MERS's sale of the Residence, given

that it occurred in a facially valid state court proceeding. At this juncture, the Debtor's only recourse to permanently prevent his eviction from the Residence would be to reach a non-judicial resolution with MERS. Accordingly, the Court must deny the Debtor's motion to reimpose the automatic stay retroactively.

The Debtor also moved the Court to impose sanctions upon, and make a finding of contempt against, MERS and its counsel for allegedly allowing its agents to enter the Residence after the case was reopened and generally failing to cooperate with the Debtor. MERS cross-moved to lift the automatic stay to continue prosecuting its eviction proceedings, arguing that the Debtor has "no legitimate ownership or tenancy interest in the Property." Fisher Aff. ¶ 28.

Although the foreclosure sale was valid, the Debtor has retained an equitable possessory interest in the Residence, which is protected by the automatic stay. *In re 48th Street Steakhouse, Inc.*, 835 F.2d 427, 430 (2d Cir. 1987); *see 332-4 West 47th Street Assocs, L.P. v. Muniz (In re Muniz)*, No. 98 Civ. 6085 (AKH), 1999 WL 182588, at *2-*4 (S.D.N.Y. Mar. 31, 1999); *In re Reinhardt*, 209 B.R. 183, 187 (Bankr. S.D.N.Y. 1987). The *48th Street Steakhouse* court observed that "a mere possessory interest, without any accompanying legal interest, is sufficient to trigger the protection of the automatic stay." *48th Street Steakhouse*, 835 F.2d at 430. Furthermore, because the Bank of New York purchased the Residence at the foreclosure sale, only it has the right to evict the Debtor. It is unclear to the Court what interest, if any, MERS currently has in the Residence, thereby casting its standing to bring its cross-motion into doubt. Thus, the cross-motion in its present form fails to allege sufficient facts upon which the Court can grant the relief requested. Accordingly, MERS's cross-motion seeking to lift the automatic stay in order to continue prosecuting its eviction proceedings is denied without prejudice.

The Debtor characterizes the entries into the Residence by a security agent after the Debtor's case was reopened as violations of the automatic stay that give rise to sanctions and a finding of contempt. However, it appears that MERS retained the security agent after the foreclosure sale to change the locks of the Residence. After the case was reopened and the Debtor moved to impose the automatic stay retroactively, which threatened to nullify the foreclosure sale, MERS apparently authorized its agent to undo its prior action. The facts after this point are in dispute and are thus insufficient for the Court to invoke the drastic remedy of finding MERS in contempt and awarding sanctions against its counsel. Accordingly, the Debtor's motion is denied.

IT IS SO ORDERED.

Dated at Utica, New York

this 16th day of September 2004

_____

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge