

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:) Chapter 7
)
GEI-RP) Case No. 11-06098
) (Substantively Consolidated)
Consolidated Debtor.)
) Honorable Eugene R. Wedoff
)
) Hearing: June 5, 2012 at 9:30 a.m.

NOTICE OF MOTION

PLEASE TAKE NOTICE that on June 5, 2012, at 9:30 a.m., the undersigned will appear before the Honorable Eugene R. Wedoff in Courtroom 744, or whomever may be sitting in his place and stead, at the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, 219 S. Dearborn Street, Chicago, Illinois and will then and there present the *Motion of Unsecured Creditor, Marina Sallas, (1) to Enforce Automatic Stay by Declaring District Court's Dismissal of Class Action Lawsuit to Violate Automatic Stay and to be Void Ab Initio, or in the Alternative, for Relief from Automatic Stay for the Limited Purpose of Moving to Vacate the Dismissal Entry, and (2) For Shortened Notice*, a copy of which is attached hereto and herewith served upon you.

Dated: June 1, 2012

MARINA SALLAS, unsecured creditor

By: /s/ Konstantine Sparagis

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Her Counsel



UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:) Chapter 7
)
GEI-RP) Case No. 11-06098
) (Substantively Consolidated)
Consolidated Debtor.)
) Honorable Eugene R. Wedoff
)
) Hearing: June 5, 2012 at 9:30 a.m.

CERTIFICATE OF SERVICE

I, Konstantine Sparagis, an attorney, hereby certify that on June 1, 2012, I caused a true and correct copy of the foregoing *Motion of Unsecured Creditor, Marina Sallas, (1) to Enforce Automatic Stay by Declaring District Court’s Dismissal of Class Action Lawsuit to Violate Automatic Stay and to be Void Ab Initio, or in the Alternative, for Relief from Automatic Stay for the Limited Purpose of Moving to Vacate the Dismissal Entry, and (2) For Shortened Notice* to be filed with the Court and served electronically upon each of the parties receiving electronic notice in the above-captioned cases through the Court’s CM/ECF system.

/s/ Konstantine Sparagis

Service List

CM/ECF Notice List

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:

GEI-RP,

Consolidated Debtor.

Chapter 7

Case No. 11-06098
(Substantively Consolidated)

HON. EUGENE R. WEDOFF

Hearing: June 5, 2012 at 9:30 a.m.

MOTION OF UNSECURED CREDITOR, MARINA SALLAS, (1) TO ENFORCE THE AUTOMATIC STAY BY DECLARING THE DISTRICT COURT'S DISMISSAL OF CLASS ACTION LAWSUIT TO VIOLATE THE AUTOMATIC STAY AND TO BE VOID AB INITIO, OR IN THE ALTERNATIVE, FOR RELIEF FROM THE AUTOMATIC STAY FOR THE LIMITED PURPOSE OF MOVING TO VACATE DISMISSAL ENTRY; AND (2) FOR SHORTENED NOTICE

Unsecured Creditor, Marina Sallas ("Sallas"), hereby respectfully moves the Court for an Order enforcing the automatic stay by declaring the Minute Entry dismissing her lawsuit against the Debtor in the District Court for the Northern District of Illinois to be in violation of the automatic stay imposed pursuant to 11 U.S.C. § 362, and therefore to be void *ab initio*, or in the alternative, granting her relief from the automatic stay for the limited purpose of filing her motion in the District Court to vacate the entry dismissing her action without prejudice, and for shortened notice with respect thereto, and in support of this motion, states as follows:

I. Procedural Events Giving Rise to this Motion

1. On February 17, 2011, Giordano's Enterprises, Inc. ("Giordano's") filed a voluntary bankruptcy petition with this Court.

2. At the time Giordano's filed its bankruptcy petition with this Court, it was the defendant in a putative class action lawsuit brought by Sallas in behalf of all other similarly situated individuals, *Sallas v. Giordano's Enterprises, Inc.*, United States District Court for the

Northern District of Illinois, Case No. 09-CV-3745, pending before the Honorable Joan Lefkow (the “Action”).

3. On February 17, 2011, the automatic bankruptcy stay went into effect, staying all pending proceedings against Giordano’s, including without limitation the Action.

4. Notwithstanding the automatic stay, on June 7, 2011, Judge Lefkow held a status conference which Sallas’ counsel did not attend because they presumed the hearing would be precluded by the stay. Following the status conference, and again notwithstanding the automatic stay, the District Court entered an order dismissing the Action without prejudice.

II. The Entry of Dismissal Violates the Automatic Stay and is Void.

5. The District Court’s dismissal entry violates the provisions of the automatic stay under Section 362(a) of the Bankruptcy Code and is void *ab initio*. It is well-established that actions taken in violation of the automatic stay imposed under Section 362(a) of the Bankruptcy Code are deemed void *ab initio*, rather than merely voidable, and lack force and effect. *See Middle Tenn. News Co. v. Charnel of Cincinnati, Inc.*, 250 F.3d 1077, 1082 (7th Cir. 2001) (“[a]ctions taken in violation of an automatic stay ordinarily are void”), *citing Matthews v. Rosene*, 739 F.2d 249, 251 (7th Cir. 1984) (orders issued in violation of automatic stay provisions of Bankruptcy Code ordinarily are void); *York Ctr. Park Dist. v. Krilich*, 40 F.3d 205, 207 (7th Cir. 1994) (judgment issued against debtors without a modification of the automatic stay must be vacated); *In re Benalcazar*, 283 B.R. 514, 521 (Bankr. N.D. Ill. 2002) (Wedoff, J.) (same); *In re Halas*, 249 B.R. 182, 191 (Bankr. N.D. Ill. 2000) (Schmetterer, J.); *Garcia v. Phoenix Bond & Indem. Co. (In re Garcia)*, 109 B.R. 335, 340 (Bankr. N.D. Ill. 1989) (“[T]he fundamental importance of the automatic stay to the purposes sought to be accomplished by the Bankruptcy Code requires that acts in violation of the automatic stay be void, rather than voidable. Concluding that acts in violation of the automatic stay were merely voidable would have the

effect of encouraging disrespect for the stay by increasing the possibility that violators of the automatic stay may profit from their disregard of the law, provided it goes undiscovered for a sufficient period of time”). *See also Hood v. Hall*, 747 N.E.2d 510, 512 (Ill. App. Ct. 2001) (“There is no question that judgments entered in violation of the automatic stay in bankruptcy are void *ab initio* . . . and that void judgments may be attacked at any time.”); *Concrete Prod., Inc. v. Centex Homes*, 721 N.E.2d 802, 804 (Ill. App. Ct. 1999) (“acts in violation of the section 362(a) automatic stay are void *ab initio*”).

III. Relief Requested

6. Sallas’ counsel respectfully requests this Court to enforce the automatic stay provisions of Section 362(a) by declaring that the dismissal order of the District Court violated such automatic stay provisions and is therefore void *ab initio* and of no force and effect.

7. In the alternative, Sallas moves the Court for an order lifting the bankruptcy stay for the limited purpose of filing a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate and set aside the dismissal of her claims in the Action (the “Motion to Vacate”), retroactive to May 31, 2012. Out of an abundance of caution, Sallas filed the Motion to Vacate with the District Court on May 31, 2012; to the extent that this Court determines that the Minute Entry is void *ab initio*, Sallas will immediately withdraw the Motion to Vacate. Copies of the Motion to Vacate and the proposed order granting the same are attached hereto as Exhibits “A” and “B,” respectively, and are incorporated by reference herein.

8. Additionally, Sallas submits that good cause exists to shorten notice of the Motion pursuant to Bankruptcy Rule 9006 in the manner set forth herein. While Sallas originally intended to file this Motion on the standard notice required under the Bankruptcy Rules and Local Rules, a last-minute issue arose which prevented Sallas’s counsel from obtaining ECF filing privileges in this District in a timely manner. As a result, Sallas was required to locate

local bankruptcy counsel to file this Motion on her behalf – a task which could not be completed in time to file the Motion on standard notice. Accordingly, Sallas requests leave to file this Motion on two (2) business days’ (or four (4) calendar days’) notice. In light of the fact that Sallas must appear before the District Court on this matter on June 5, 2012, coupled with the fact that no prejudice will be caused to the Trustee or other creditors of these estates by submitting this Motion on shortened notice, Sallas submits that shortened notice is appropriate in this case.

Dated: June 1, 2012

Respectfully submitted,

/s/ Konstantine Sparagis

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*Attorneys for Unsecured Creditor,
Marina Sallas*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically on June 1, 2012. Notice of this filing will be sent by operation of the Court’s electronic filing system to all counsel of record who may access this filing through the Court’s CM/ECF system.

/s/ Konstantine Sparagis

Konstantine Sparagis

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARINA SALLAS, *et al.*,
Individually and On Behalf of
All Others Similarly Situated,

Plaintiff,

vs.

GIORDANO'S ENTERPRISES, INC.,

Defendant.

CASE NO. 1:09-cv-03745

JUDGE JOAN H. LEFKOW

MAGISTRATE JUDGE ARLANDER KEYS

**PLAINTIFF'S MOTION TO VACATE
MINUTE ENTRY OF JUNE 7, 2011 (DOC. #55)
DISMISSING CASE WITHOUT PREJUDICE**

Plaintiff, Marina Sallas, on behalf of herself and all others similarly situated, hereby respectfully moves the Court, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, for an Order vacating the Minute Entry of June 7, 2011 (Doc. #55) that dismissed this case without prejudice and terminated this civil action, and in support of this motion, states as follows:

1. This action was commenced on or about June 22, 2009 as a putative class action on behalf of all persons whose rights under the Fair and Accurate Credit Transactions Act of 2003 ("FACTA") amendment to the Fair Credit Reporting Act, 15 U.S.C. § 1681c(g)(1), were violated by Defendant's business practices in over 93,000 transactions.

2. This case was being vigorously litigated and Plaintiff was engaged in extensive discovery efforts. By Minute Entry of January 6, 2011 (Doc. #48), the Court had scheduled a settlement conference for February 23, 2011. In accordance with the Order, Plaintiff served her written settlement demand on Defendant's counsel and submitted a copy to the Court by February 15, 2011, but in violation of the Order Defendant never exchanged a written settlement

proposal by that date.

3. Instead, on February 17, 2011, Defendant filed a voluntary petition for protection under Chapter 11 of the Bankruptcy Code in an action styled *In re: Giordano's Enterprises, Inc., et al., Debtors*, United States Bankruptcy Court for the Northern District of Illinois, Case No. 11-B-06098 (Jointly Administered), assigned to Judge Wedoff. An automatic stay of all litigation, including this action, was promptly entered by the Bankruptcy Court pursuant to 11 U.S.C. § 362.

4. Under 11 U.S.C. § 362, all proceedings against a debtor who has filed for bankruptcy are automatically stayed until the bankruptcy court lifts the stay. This case does not fall under any of the exceptions under 362(b) which allow the continuation of civil proceedings.

5. This situation was accurately reflected in the Minute Entry of February 23, 2011 (Doc. #52) in which Magistrate Judge Keys noted that “within the last week, Defendant filed for Chapter 11 reorganization ... an automatic stay has been imposed by the bankruptcy Court.” Judge Keys then returned the case back to Judge Lefkow.

6. The stay was also accurately reflected in the Minute Entry of March 2, 2011 (Doc. #54) in which the Court stated: “Status hearing held on 3/1/2011 and continued to 6/7/2011 at 08:30 AM. Proceedings are stayed pending bankruptcy disposition.”

7. In light of the stay, Plaintiff's counsel understood the Minute Entry (Doc. #54) to be, in essence, a placeholder. In other words, the Court wanted to proceed with this case at the earliest practicable time that the bankruptcy laws would permit. So, under Plaintiff's counsel's understanding of the Court's intention, there would be a status hearing on June 7, 2011 if and only if the bankruptcy stay had been lifted (for whatever reason) by then. On the other hand, Plaintiff's counsel believed, if the stay had not been lifted by June 7 and the status hearing could

not proceed in light of the stay, the Court might be expected to continue the status hearing further to another future date to be held if the stay were no longer in effect by that date.

8. Plaintiff's counsel did not appear for a status hearing on June 7, 2011 at 8:30 a.m. because the bankruptcy stay was still in effect. Plaintiff's counsel realizes in hindsight that he should have called the Court and confirmed that the status hearing would not be going forward in view of the stay, and sincerely apologizes to the Court for not thinking to do so in advance. Plaintiff's counsel would never insult the Court by deliberately failing to show for a scheduled hearing or event. Moreover, Plaintiff's counsel had no indication from Defendant's counsel at any time that they thought the status hearing would proceed, and that they intended to appear for it, notwithstanding the stay.

9. Rule 60(b) of the Federal Rules of Civil Procedure provides that "on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

* * *

(4) the judgment is void;

* * *

(6) any other reason that justifies relief."

10. Plaintiff respectfully submits that the circumstances set forth above constitute valid, proper and appropriate reasons for setting aside the dismissal for mistake, inadvertence, surprise or excusable neglect pursuant to Rule 60(b)(1), or for good cause shown and any other reason justifying such relief pursuant to Rule 60(b)(6).

11. Moreover, any judgment entered in an action stayed under 11 U.S.C. § 362 without first obtaining an order from the bankruptcy court modifying or vacating the stay is void

ab initio. As this Court has held, “[a]ctions taken in violation of an automatic stay are void ... Because this court has no authority to annul or in any way modify the automatic stay, the judgment entered in this case was in violation of it and is void.” *Jones v. Confidential Investigative Consultants, Inc.*, Case No. 92 C 1566, 1994 WL 127261 (N.D. Ill. Apr. 12, 1994), citing *Richard v. City of Chicago*, 80 B.R. 451, 453 (N.D. Ill. 1987). Therefore, relief from the entry of dismissal is also warranted pursuant to Rule 60(b)(4).

12. It is also well-established by decisions of the Seventh Circuit and the Bankruptcy Court for the Northern District of Illinois that actions taken in violation of the automatic stay imposed under Section 362(a) of the Bankruptcy Code are deemed void *ab initio*, rather than merely voidable, and lack force and effect. See *Middle Tenn. News Co. v. Charnel of Cincinnati, Inc.*, 250 F.3d 1077, 1082 (7th Cir. 2001) (“[a]ctions taken in violation of an automatic stay ordinarily are void”), citing *Matthews v. Rosene*, 739 F.2d 249, 251 (7th Cir. 1984) (orders issued in violation of automatic stay provisions of Bankruptcy Code ordinarily are void); *York Ctr. Park Dist. v. Krilich*, 40 F.3d 205, 207 (7th Cir. 1994) (judgment issued against debtors without a modification of the automatic stay must be vacated); *In re Benalcazar*, 283 B.R. 514, 521 (Bankr. N.D. Ill. 2002) (Wedoff, J.) (same); *In re Halas*, 249 B.R. 182, 191 (Bankr. N.D. Ill. 2000) (Schmetterer, J.); *Garcia v. Phoenix Bond & Indem. Co. (In re Garcia)*, 109 B.R. 335, 340 (Bankr. N.D. Ill. 1989) (“[T]he fundamental importance of the automatic stay to the purposes sought to be accomplished by the Bankruptcy Code requires that acts in violation of the automatic stay be void, rather than voidable. Concluding that acts in violation of the automatic stay were merely voidable would have the effect of encouraging disrespect for the stay by increasing the possibility that violators of the automatic stay may profit from their disregard of the law, provided it goes undiscovered for a sufficient period of time”). See also *Hood v. Hall*, 747 N.E.2d 510, 512 (Ill. App. Ct. 2001) (“There is no question that judgments entered in

violation of the automatic stay in bankruptcy are void ab initio . . . and that void judgments may be attacked at any time.”); *Concrete Prod., Inc. v. Centex Homes*, 721 N.E.2d 802, 804 (Ill. App. Ct. 1999) (“acts in violation of the section 362(a) automatic stay are void *ab initio*”).

13. Plaintiff has requested permission from the Bankruptcy Court for the Northern District of Illinois to file this motion retroactively effective as of May 31, 2012.

14. Accordingly, Plaintiff respectfully requests the Court to vacate and set aside its dismissal entry (Doc. #55) in this case pursuant to Rules 60(b)(1), (4) and/or (6) of the Federal Rules of Civil Procedure.

Dated: May 31, 2011

Respectfully submitted,

/s/ Eric H. Zagrans

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically on May 31, 2011. Notice of this filing will be sent by operation of the Court's electronic filing system to Defendant's counsel of record who may access this filing through the Court's system.

/s/ Eric H. Zagrans

Eric H. Zagrans

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARINA SALLAS, *et al.*,
Individually and On Behalf of
All Others Similarly Situated,

Plaintiff,

vs.

GIORDANO'S ENTERPRISES, INC.,

Defendant.

CASE NO. 1:09-cv-03745

JUDGE JOAN H. LEFKOW

MAGISTRATE JUDGE ARLANDER KEYS

[PROPOSED] ORDER

The matter having come on for hearing on Plaintiff's motion to vacate and set aside the minute entry of June 7, 2011 (Doc. #55) dismissing this action without prejudice, and it appearing to the Court that the motion is well-taken, it is therefore in the interests of justice and for good cause shown ORDERED that said Motion is hereby GRANTED and the minute entry of June 7, 2011 (Doc. #55) dismissing this action without prejudice is hereby VACATED and SET ASIDE. This case is hereby restored to the active docket of the Court but remains stayed pursuant to the provisions of 11 U.S.C. § 362 until further Order of the Court.

IT IS SO ORDERED.

Dated: June ____, 2012

Hon. Joan H. Lefkow
United States District Judge
Northern District of Illinois

Copies to:

All Counsel of Record

**REQUIRED STATEMENT
TO ACCOMPANY MOTIONS FOR RELIEF FROM STAY**

All Cases: Debtor(s) _____ Case No. _____ Chapter _____

All Cases: Moving Creditor _____ Date Case Filed _____

Nature of Relief Sought: Lift Stay Annul Stay Other (describe) _____

Chapter 13: Date of Confirmation Hearing _____ or Date Plan Confirmed _____

Chapter 7: No-Asset Report Filed on _____
 No-Asset Report not Filed, Date of Creditors Meeting _____

1. Collateral
 - a. Home
 - b. Car Year, Make, and Model _____
 - c. Other (describe) _____
2. Balance Owed as of Petition Date \$ _____
Total of all other Liens against Collateral \$ _____
3. In chapter 13 cases, if a post-petition default is asserted in the motion, attach a payment history listing the amounts and dates of all payments received from the debtor(s) post-petition.
4. Estimated Value of Collateral (must be supplied in *all* cases) \$ _____
5. Default
 - a. Pre-Petition Default
Number of months _____ Amount \$ _____
 - b. Post-Petition Default
 - i. On direct payments to the moving creditor
Number of months _____ Amount \$ _____
 - ii. On payments to the Standing Chapter 13 Trustee
Number of months _____ Amount \$ _____
6. Other Allegations
 - a. Lack of Adequate Protection § 362(d)(1)
 - i. No insurance
 - ii. Taxes unpaid Amount \$ _____
 - iii. Rapidly depreciating asset
 - iv. Other (describe) _____
 - b. No Equity and not Necessary for an Effective Reorganization § 362(d)(2)
 - c. Other "Cause" § 362(d)(1)
 - i. Bad Faith (describe) _____
 - ii. Multiple Filings
 - iii. Other (describe) _____
 - d. Debtor's Statement of Intention regarding the Collateral
 - i. Reaffirm
 - ii. Redeem
 - iii. Surrender
 - iv. No Statement of Intention Filed

Date: _____
Counsel for Movant

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

In Re:) BK No.: 11-06098
)
) (Jointly Administered)
GEI-RP,)
) Chapter: 7
)
) Consolidated Debtor.) Honorable Eugene R. Wedoff
)
)
Debtor(s))

ORDER GRANTING MOTION OF UNSECURED CREDITOR, MARINA SALLAS, (1) TO ENFORCE STAY BY DECLARING DISTRICT COURT'S DISMISSAL OF CLASS ACTION LAWSUIT IS IN VIOLATION OF AUTOMATIC STAY AND VOID AB INITIO, OR IN THE ALTERNATIVE, FOR RELIEF FROM THE AUTOMATIC STAY FOR THE LIMITED PURPOSE OF MOVING TO VACATE DISMISSAL ENTRY, AND (2) FOR SHORTENED NOTICE

Upon consideration of the Motion of Unsecured Creditor, Marina Sallas, (1) For Determination that District Court's Dismissal of Class Action Lawsuit is in Violation of Automatic Stay and Void Ab Initio, or in the Alternative, for Relief From the Automatic Stay for the Limited Purpose of Moving to Vacate Dismissal Entry, and (2) For Shortened Notice (the "Motion"); the Court having reviewed the Motion and having heard the statements of counsel at a hearing (the "Hearing") before the Court; it appearing to the Court that: (a) the Court has jurisdiction over this matter pursuant to sections 157(a) and 1334 of title 28 of the United States Code and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois; (b) this is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2); the Court further finding that due and adequate notice of the Motion and the Hearing, as shortened, was provided; and the Court being fully advised in the premises and having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein;

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

A. The Motion shall be, and hereby is, granted.

B. The entry of the Minute Entry dismissing the lawsuit styled Sallas v. Giordano's Enterprises, Inc., Case No. 09-CV-3745, by the United States District Court for the Northern District of Illinois on June 7, 2011, was in violation of the automatic stay of 11 U.S.C. § 362(a) and is void ab initio.

Enter:

Dated:

United States Bankruptcy Judge

Prepared by:

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