

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Ricky Hayward Robison Sr. and Sandra Lee
Robison

Debtor.

C/A No. 00-07173-W

JUDGMENT

Chapter 13

FILED

at O'clock & min. M.

APR 26 2001

BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (3)

ENTERED

APR 26 2001

V. L. D.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, First Family Financial Services, Inc. shall pay the sum of \$1,537.50 for violating the automatic stay pursuant to 11 U.S.C. §362(h). The sum should be paid to Debtors by payment directly to the Chapter 13 Trustee to help fund payment of Debtors' confirmed Chapter 13 Plan; said sanctions to be paid within fifteen (15) days of the entry of this Order. Furthermore, in order to consider whether the proof of claim of First Family Financial Services, Inc. should be disallowed as a claim secured by a mortgage on real estate, Debtors or the Chapter 13 Trustee should initiate an adversary proceeding claiming avoidance powers pursuant to 11 U.S.C. §544.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,

April 26, 2001.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

APR 26 2001

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE *Via mail*

VANNA L. DANIEL

Deputy Clerk

*First Family at 3 addresses
as on order*

UNITED STATES BANKRUPTCY COURT
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IN RE:

Ricky Hayward Robison Sr. and Sandra Lee
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Debtor.

C/A No. 00-07173-W

ORDER

Chapter 13

ENTERED
APR 26 2001
V. L. D.

THIS MATTER comes before the Court upon the Ricky Hayward Robison Sr. and Sandra Lee Robison's (collectively "Debtors") objection to the secured claim filed by First Family Financial Services, Inc. and Debtors' request for sanctions and damages against said creditor for willfully violating the automatic stay. After considering the pleadings in this matter and the evidence proffered by Debtors' counsel, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52, made applicable in bankruptcy proceedings by Fed. R. Bankr. P. 7052.¹

FINDINGS OF FACT

1. Debtors filed for relief under Chapter 13 of the Bankruptcy Code on August 17, 2000. On September 1, 2000, Debtors filed their Schedules along with the proposed Chapter 13 Plan and Related Motions.
2. First Family Financial Services, Inc. is listed as a creditor on Debtors' Schedule D as

¹ The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such; and, to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

secured only by a 1975 Datsun truck and a non-purchase money, non-possessory security interest in household goods. First Family Financial Services, Inc.'s claim is listed in the amount of \$8,960.00; however, Schedule D reflects that the value of the truck is \$1,200; thus indicating \$7,760.00 as the unsecured portion of the claim. Furthermore, Schedules A and D reflect that although the First Family Financial Services, Inc. loan documents allege a second mortgage upon Debtors' principal residence, no such mortgage was recorded in the county in which the real estate is situated (i.e. Greenville County, South Carolina) prior to the filing of the bankruptcy case.

3. Schedule A reflects that Debtors are the joint owners of their principal residence; a house and lot with a current market value in the amount of \$75,000, encumbered by a first mortgage in the amount of \$70,000 to Fairbanks Capital Corporation.

4. Debtors' Chapter 13 Plan proposed to value the 1975 Datsun truck at \$1,200 and to avoid First Family's lien on the household goods. Debtors' plan provides that the claim of this creditor is unsecured as to any balance remaining after the \$1,200.00 secured claim is satisfied.²

5. The Chapter 13 Plan, dated September 1, 2000, was served upon First Family Financial Services, Inc. at 6134 White Horse Road, Greenville, SC 29611, reflecting the above-stated

² As it relates to the debt owed to First Family, the Plan provides as follows:

Secured debt--payments of \$56.00 or more per month to FIRST FAMILY (EASLEY) until the net value of lien plus ten (10%) percent interest has been paid in full. If claim is to be valued, the debtor hereby moves to value the lien at \$1,200 in accordance with SC LBR 3015-1 and the notice attached hereto. The basis of the debtors' value is as follows: Comparable sales used, vehicle mileage (if applicable) beyond mechanical limits. Liens senior to the above-named creditor are held by the following creditors in the following amounts: NA.

treatment. The notice attached to the Plan clearly stated that any person or entity could file an objection within twenty-five (25) days of service upon it. No such objection was filed by this creditor; therefore, the Plan dated September 1, 2000 was confirmed by the Court by Order entered October 5, 2000.

6. On November 13, 2000, First Family Financial Services, Inc.'s Bankruptcy Service Center filed a Proof of Claim in the amount of \$8,106.36, stating that First Family Financial Services, Inc. was secured by real estate in that amount. The Proof of Claim was signed on November 2, 2000. Attached to the Proof of Claim are loan documents dated May 18, 1999 and mortgage documents dated May 22, 1999. However, the face of the mortgage documents bears a stamp that reflects that the creditor recorded the mortgage in Greenville County, South Carolina on August 21, 2000, four days after the bankruptcy petition date.

7. On January 30, 2001, Debtors filed the Objection, which is at issue in this Order, asking the Court to disallow First Family Financial Services, Inc.'s claim and requesting sanctions against said creditor for willfully violating the automatic stay pursuant to 11 U.S.C. §362(h).³

8. The notice accompanying Debtors' Objection clearly stated that the creditor had thirty

³ Debtors' Objection to Claim also requests that sanctions be imposed pursuant to Fed. R. Bankr. P. 9011 in that the Court may on its own initiative consider sanctioning this creditor for its action. However, the Court finds that the imposition of sanctions in this case pursuant to that Rule is not procedurally proper because the requirements of Fed. R. Bankr. P. 9011(c)(1)(B) were not complied with. Furthermore, Debtors argue that sanctions should also be imposed on First Family Financial Services, Inc. for having filed its Proof of Claim on November 13, 2000, which was eighty-eight (88) days after the filing of the bankruptcy filing, and alleging that it was secured by a mortgage on real estate, when it knew or should have known that it perfected said mortgage by recordation after the filing of the bankruptcy and in direct violation of the automatic stay. However, the latter argument also fails because this Court has held that the filing of a Proof of Claim under such circumstances does not constitute a violation of the automatic stay pursuant to 11 U.S.C. §362(h). See, e.g. *In re Sammon*, 253 B.R. 672, 681 (Bankr. D.S.C. 2000).

(30) days to file any response, return, or objection if it so desired. Debtors' attorney advised the Court that his office served by United States mail a copy of the objection to claim and request for sanctions on the creditor at the two following addresses: (1) First Family Financial Services, Inc., 5809 Calhoun Memorial Hwy. Ste K, Easley, South Carolina 29640, which is the address reflected on the contract the creditor attached to its Proof of Claim and (2) First Family Financial Services, Inc., Bankruptcy Service Center, P.O. Box 9039, Des Moines, IA 50368-9039, which is the address as reflected on the Proof of Claim filed with this Court. The notice also reflected a hearing date of March 8, 2001 at 9:30 a.m. Neither this Court nor Debtors or their attorney received any such response to Debtors' Objection; therefore, the creditor is in default. Despite the fact that no response was received by the Court, a second notice was issued by the Clerk of this Court, scheduling a second hearing on the matter for April 5, 2001, at 9:30 a.m. This notice gave parties a deadline for responses of five days prior to the scheduled hearing.

9. At the April 5, 2001 hearing no party representing First Family Financial Services, Inc. appeared, and no response had been received by Debtors, their attorney, or the Court prior to that date.

10. At the hearing, Debtors' attorney proffered evidence that, upon discovering the post-petition perfection of the mortgage, he had informed Debtors that the recording of the mortgage after the bankruptcy petition date was improper and if uncorrected, would cause their Chapter 13 plan payments to increase considerably, all to their great distress. Mr. Cooper proffered that he had other discussions with Debtors regarding the issue, and that they were emotionally distressed each time he discussed the matter with them. Moreover, he stated that Debtors had incurred additional attorney's fees to that date in the amount of \$437.50 for the work he had done in conjunction with this matter.

CONCLUSIONS OF LAW

Debtors' Objection requests that the Court disallow the claim of First Family Financial Services, Inc. in the amount of \$8,960.00 as secured by a mortgage on the real estate and further requests that sanctions be imposed on the creditor for the willful violation of the automatic stay. The Court will address each issue separately.

A. Section 362(h) and Sanctions for Willful Violation of the Automatic Stay

Section 362 of Title 11 immediately invokes an automatic stay upon the filing of a bankruptcy petition which prohibits, among other things, "any act to create, perfect, or enforce any lien against property of the estate," and "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under the title." 11 U.S.C. §§362(a)(4)- (5). Furthermore, §362(h) was enacted to award actual damages including costs and attorney's fees, for a willful violation of the automatic stay and also provides that in "appropriate circumstances" punitive damages may be awarded for damages incurred by a debtor due to such willful violation.

Pursuant to this Court's authority under 11 U.S.C. §362(h) and the Court's general authority under 11 U.S.C. §105 to fashion any order necessary to do justice, and further due to the circumstances in this case and the fact that First Family Financial Services, Inc. did not respond to Debtors' Objection; the Court finds that the post-petition recordation of the mortgage as a means of perfecting its lien was in violation of the automatic stay; thus, the recordation is void and should be canceled or stricken. The Court further finds that First Family Financial Services, Inc.'s recordation of the mortgage more than 15 months after its execution by Debtors was an apparent willful act, thus subjecting it to sanctions and damages under 11 U.S.C. §362(h).

Therefore, the Court finds that in this case, the imposition of sanctions is appropriate and

orders First Family Financial Services, Inc. to pay as damages the total sum of \$1,537.50 to be paid directly to the Chapter 13 Trustee to help fund payment of Debtors' confirmed Chapter 13 Plan.⁴

Before leaving the subject of the effect of the automatic stay on the recordation of a mortgage post-petition, the Court is compelled to also address the recent decision in the case of In re Scott, 2001 WL 315366 (Bankr. D.S.C. 2/1/2001). In that case, the creditor recorded its mortgage after the filing of the debtor's Chapter 7 petition; subsequently, the creditor sought to annul the stay and retroactively validate its post-petition recording of the mortgage. The debtor responded to the creditor's motion maintaining that "cause" did not exist under 11 U.S.C. §362(d) to warrant the annulment of the automatic stay and requested an award of attorney's fees, costs, and other appropriate damages in connection with the alleged willful violation of the automatic stay pursuant to 11 U.S.C. §362(h). In asserting his objection to the creditor's motion, the debtor argued that if the automatic stay were to be retroactively annulled, such post-petition validation of the recording would "rob" the debtor of his ability to file an avoidance action under 11 U.S.C. §544. However, the Court concluded that a debtor may not assert the strong-arm powers of a Chapter 7 Trustee to avoid the creditor's mortgage as an unperfected lien and thus the mortgage was binding between the debtor and creditor and held that the circumstances of the case warranted the annulment of the automatic stay; thus denying the debtor's request for sanctions.

The Court finds that the facts of the present case can be differentiated from In re Scott. First of all, despite the fact that First Family Financial Services, Inc. has been properly served

⁴ The sanctions of \$1,537.50 are for the following damages: \$100.00 for emotional distress; \$437.50 for attorney's fees; and \$1,000 in punitive damages.

with Debtors' Objection to Claim and notice of the opportunity to respond on two separate occasions, it has failed to respond to Debtors' request for sanctions or to appear at two hearings on said Objection to Claim to defend its position, and has not moved to retroactively annul the automatic stay in an attempt to remedy its faults. Furthermore, this case is a Chapter 13 case and a number of courts have held that a Chapter 13 debtor, as opposed to the debtor in a Chapter 7 case, such as In re Scott, has standing to assert the avoidance powers granted by 11 U.S.C. §544. See, e.g., Thacker v. Untied Companies Lending Corp., 2000 WL 1899300 (W.D. Ky. 2000); In re Bonner, 206 B.R. 387, 289 (Bankr. E.D. Va. 1997); Freeman v. Eli Lilly Fed. Credit Union, 72 B.R. 850, 853-55 (Bankr. E.D. Va. 1987). Finally, unlike In re Scott, where the Court concluded that the fact that there was no equity in the property and that no reorganization by the debtor was being attempted in the Chapter 7 case weighed in favor of annulling the stay; in this case, there appears to be equity above the first mortgage in Debtors' real estate and, being in Chapter 13, Debtors are attempting to reorganize their financial situation. Therefore, the Court notes that the case of In re Scott, 2001 WL 315366 (Bankr. D.S.C. 2/1/2001) can be differentiated from the case presently before the Court.

B. Objection to Claim

Debtors also request that First Family Financial Services, Inc.'s claim be disallowed as a secured claim on the real estate. Debtors argue that First Family Financial Services, Inc.'s claim in the amount of \$8,106.36, as reflected in the Proof of Claim filed with the Court on November 13, 2000, should be allowed only as secured by the 1975 Datsun truck valued at \$1,200.00, and that any balance remaining beyond that amount should be deemed unsecured. The Court disagrees with Debtors' argument that the voiding of the post-petition recordation of the mortgage at issue would result in the automatic avoidance of the underlying secured claim of

First Family Financial Services, Inc.

There is no question that the post-petition recordation of the subject mortgage as a means of perfecting it as to third parties pursuant to the state recording statute was void. In fact, any action taken in violation of the automatic stay is considered void *ab initio*. See, e.g. Boone v. Federal Deposit Ins. Corp. (In re Boone), C/A No. 88-03864-W; Adv. Pro. No. 97-80163-W (Bankr. D.S.C. 6/2/1998); McGuffin v. Barman (In re BHB Enter., LLC), C/A No. 97-01975-W; Adv. Pro. 97-80201-W (Bankr. D.S.C. 8/27/1997) (citing In re Clarkson, 168 B.R. 93, 94 (Bankr. D.S.C. 1994)). However, the fact that the recordation of the mortgage on August 21, 2001 was of no legal effect, does not automatically avoid the underlying secured debt granted by Debtors pursuant to the loan documents and mortgage to First Family Financial Services, Inc. on which the secured claim is based.

In fact, “[a]s between [the mortgagor and the mortgagee], it is not necessary to the validity of any instrument contemplated by said act that it be recorded. Recording becomes material only when there are double conveyances, etc., by the same person.” Epps v. McCallum Realty, Co., 138 S.E. 297, 302 (S.C. 1927) (citing Martin v. Quattlebam, 3 McCord, 205); see also Leasing Enter., Inc. v. Livingston, 363 S.E.2d 410, 412 (S.C. Ct. App. 1987) (noting that despite the fact that a deed containing the signature of only one witness could not be recorded in county in which property was located, “a deed or mortgage without competent or sufficient witnesses is good *as between the parties*.”).

Even though the improper recordation of the mortgage in violation of the automatic stay causes the recordation to be void, state law indicates that the recording statute is aimed at protecting third parties who rely on the public record. See, e.g. Dunes Hotel Assoc. v. Hyatt (In re Dunes Hotel Assoc.), 194 B.R. 967 (Bankr. D.S.C. 1995) (citing Burnett v. Holliday Bros.,

Inc., 305 S.E. 2d 238, 240 (S.C. 1983)) (“It is generally recognized that the purpose of the South Carolina recording statute is to provide notice and to protect parties with subsequent interest in property.”). Thus, the voiding of the recordation does not also void the secured nature of the obligation itself as between Debtors and First Family Financial Services, Inc. In order for Debtors to attack the underlying obligation and treat it as unsecured, Debtors must assert a standing as a hypothetical lien creditor or a bona fide purchaser pursuant to 11 U.S.C. §544.

Therefore, in order for the Court to procedurally consider whether First Family Financial Services, Inc.’s claim should be disallowed as a claim secured by the mortgage on real estate, Debtors or the Chapter 13 Trustee should initiate an adversary proceeding⁵ claiming avoidance powers pursuant to 11 U.S.C. §544. Until such time, the Court cannot make such a determination based only on the Objection to the claim.

CONCLUSION

It is therefore;

ORDERED that First Family Financial Services, Inc. shall pay the sum of \$1,537.50 for violating the automatic stay pursuant to 11 U.S.C. §362(h). The sum should be paid to Debtors by payment directly to the Chapter 13 Trustee to help fund payment of Debtors’ confirmed Chapter 13 Plan; said sanctions to be paid within fifteen (15) days of the entry of this Order.

IT IS FURTHER ORDERED that in order to consider whether First Family Financial Services, Inc.’s secured claim should be disallowed except to the extent of the value of the 1975 Datsun truck, Debtors or the Chapter 13 Trustee should initiate an adversary proceeding

⁵ “[I]nitiating adversary proceedings is a necessary precursor to bringing a section 544 avoidance action.” *Saline State Bank v. Mahloch*, 834 F.2d 690, 695 (8th Cir. 1987); see also Advisory Committee Notes to Fed. R. Bankr. 7001.

claiming avoidance powers pursuant to 11 U.S.C. §544.

AND IT IS SO ORDERED.

Columbia, South Carolina,

April 26, 2001.


UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

APR 26 2001

First Family all three addresses:
DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE via mail

VANNA L. DANIEL

Deputy Clerk

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