

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 05-08894

ORDER

The relief set forth on the following pages, for a total of 9 pages including this page, is hereby ORDERED.

FILED BY THE COURT
03/26/2008



Entered: 03/26/2008

US Bankruptcy Court Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

In re:)	C/A No. 05-08894-hb
)	
Cynthia Seay Holder,)	Chapter 13
)	
Debtor.)	
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ORDER FINDING ASC IN CONTEMPT OF COURT

This matter comes before the Court on the debtor’s motion seeking sanctions for contempt against Wells Fargo Home Mortgage, Inc., d/b/a America’s Servicing Company (ASC). The debtor contends ASC has failed to comply with an Order Authorizing Use of Cash Collateral filed December 7, 2007. The Court held a hearing on March 13, 2008 at which the debtor and her counsel appeared. ASC did not file a response to the motion or appear at the hearing, nor did anyone contact the court on behalf of ASC.

Based on the evidence adduced at the hearing and documents on file in this case, the Court finds as follows:

FINDINGS OF FACT

1. The debtor filed for Chapter 13 relief on August 5, 2005.
2. Among the debts scheduled by the debtor and treated by her plan was a home mortgage then held by Wilshire Credit Corporation as servicer for FV-1, Inc. At some point servicing was transferred to ASC. Although no notice of that transfer was filed with the Court, in April 2007, ASC appeared in the case as successor in interest to Wilshire Credit regarding a motion otherwise unrelated to the present controversy.
3. On July 23, 2007, the debtor experienced substantial water damage to her home

when a pipe burst. She contacted Nationwide, her homeowner's insurance carrier, who referred her to a contractor, ServPro of Aiken. ServPro immediately performed some limited work in mitigation of the water damage and later provided an estimate of the cost of repairs.

4. Nationwide reviewed the ServPro estimate and on August 8, 2007, forwarded to ServPro a check for \$14,890.06 to cover the completed mitigation work and the estimated repairs. Nationwide made the check jointly payable to the debtor, ServPro, and ASC.

5. ServPro then contacted ASC about negotiating the check so that the repairs could begin. ASC instructed the debtor and ServPro to endorse the check and forward it by overnight carrier to the Loss Draft Department, which is responsible for handling insurance benefits of this kind. ASC indicated the processing time for return of the funds would be three to five days. On August 28, 2007, ServPro overnighted the check, bearing two of the required three endorsements, to ASC.

6. Over the next month or so, ServPro and the debtor followed up with several telephone calls to the Loss Draft Department. During these communications, ASC expressly acknowledged receipt of the funds. Instead of returning them, however, ASC repeatedly asked for additional information or paperwork that had not been mentioned previously. ASC also promised on at least one additional occasion that it would process and forward the funds in three to five days. These promises did not come to fruition.

7. In October 2007, the debtor asked for the assistance of her attorney in obtaining the promised funds. Although ASC had notice of counsel's representation in this case, its agents initially refused to communicate with him until the debtor gave written authorization. Debtor's counsel obtained and forwarded that authorization, but ASC still declined to communicate, indicating the authorization was not yet in its system. Counsel then forwarded a second

authorization, which ASC ultimately acknowledged. However, the pattern of demands for additional information continued. ASC demanded a death certificate for the debtor's husband, who was initially on the account but had died some ten years earlier – even though the debtor had previously provided a death certificate to a prior servicer in connection with the probate of his estate. ASC also indicated that if it were to release the funds, it would not do so immediately but would remit three partial payments as the work progressed.

8. At this point the debtor concluded the matter required the assistance of this Court. The debtor filed a Motion to Use Cash Collateral, which the Court granted on December 7, 2007. The order required that ASC “shall forthwith remit the previously paid benefits in the amount of \$14,890.06 to the debtor’s attorney.”

9. On December 9, the Bankruptcy Noticing Center served the Order Authorizing Use of Cash Collateral by first class mail on McCalla Raymer, LLC, a Georgia law firm that had previously filed a notice of appearance on behalf of ASC, and on ASC’s Loss Draft Department. Thereafter, on December 28, debtor’s counsel served the order on the manager of the Loss Draft Department by facsimile and by certified mail with restricted delivery. In a cover letter, counsel indicated he would seek contempt sanctions if the manager refused to forward the funds. On January 2, 2008, an agent of ASC signed a return receipt acknowledging delivery of the certified mail. In addition, on January 4, 2008, ASC wrote the debtor acknowledging receipt of “the enclosed correspondence.” Enclosed was a copy of the order along with the December 28 cover letter from debtor’s counsel.

10. When ASC failed to comply with the order, debtor’s counsel again contacted ASC by telephone on January 10, 2008. When ASC indicated the mortgage had been transferred to another entity, counsel replied that the order required ASC’s compliance nonetheless. Counsel

confirmed this conversation in a letter indicating that he would seek contempt sanctions if ASC did not comply by January 21, 2008. ASC has not remitted the funds nor communicated with counsel since.

11. The debtor filed the present Motion for Contempt on February 12, 2008. At the same time, debtor's counsel served the motion by mail on McCalla Raymer, on local counsel who had appeared for ASC in April 2007, and on ASC's agent for service of process. In addition, on February 16, the Bankruptcy Noticing Center served notice of the motion hearing on the same entities.

12. Since ASC received the insurance funds, conditions at the debtor's home have worsened. Water damage has spread, and mold has become a serious problem. She has been unable to occupy her bedroom for eight months and therefore has been sleeping on a couch. Her bedroom furniture has remained in her kitchen, and her kitchen cabinets are rotting. The record does not reflect the extent to which these damages occurred or worsened since issuance of the Order Authorizing Use of Cash Collateral.

13. Based on the affidavit of counsel, counsel for the debtor has reasonably devoted 10.1 hours of legal services and 1.0 hours of non-professional time to the enforcement of the order, beginning after ASC's initial non-compliance and continuing through the prosecution of the contempt motion. A reasonable hourly rate is \$200.00 per hour for professional services and \$30.00 per hour for non-professional time.

DISCUSSION AND CONCLUSIONS OF LAW

Notice and Service

Because ASC did not respond to the contempt motion or appear at the hearing, the Court deems it important to ensure that ASC received due process, including adequate notice of the

order it is charged with violating and proper service of the contempt motion. ASC received adequate notice and was properly served.

Fed. R. Bank. P. 2002(g)(1) requires that notice to creditors must generally be sent to the address that the creditor or an authorized agent has directed in its last filed request. If the creditor files a proof of claim designating a mailing address, that constitutes a request for notice at that address. Fed. R. Bank. P. 2002(g)(1)(A); *In re Johnson*, 274 B.R. 445, 448 (Bkrcty. D.S.C. 2001). Here ASC did not file a proof of claim; instead, it succeeded to the claim filed by its predecessor, Wilshire Credit. The only request for notice on behalf of ASC was filed by McCalla Raymer, LLC. The Bankruptcy Noticing Center served McCalla Raymer with the Order Authorizing Use of Cash Collateral on December 9, 2007. In addition, the debtor served the order on the Loss Draft Department by certified mail and received a receipt showing delivery on January 2, 2008. Moreover, in a letter directly to the debtor, ASC acknowledged receipt of the order by at least January 4. Clearly the method by which ASC was given notice of the order was “reasonably calculated, under all the circumstances, to apprise” ASC of the requirement to forward funds to debtor’s counsel. *Johnson*, 274 B.R. at 449 (quoting *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950)). ASC received both technically proper notice of the order and actual notice of its provisions.

A different procedure governs service of motions. Rule 9014 requires that motions be served in the manner provided for service of a summons and complaint under Rule 7004. Fed. R. Bank. P. 9014(b). In turn, Rule 7004, with exceptions not relevant here, permits service on a corporation by first class mail to a designated agent for service or to any other entity authorized by local state law. Fed. R. Bank. P. 7004(b)(3), (7), (8). Here the debtor served the contempt motion not only on ASC’s agent for service but also on McCalla Raymer and on local counsel

that had appeared previously for ASC. Moreover, debtor's counsel expressly apprised ASC's Loss Draft Department, by letter in advance of the motion, of his intention to seek contempt sanctions, and ASC acknowledged receipt of that letter. ASC was properly served with the contempt motion.

Contempt Power

All federal courts have inherent authority to punish contempt. *Campbell v. Kern (In re Kern)*, No. 98-80092-W, 1999 WL 33486096, at *4 (Bkrtcy. D.S.C. Oct. 25, 1999) (quoting *Ex Parte Robinson*, 86 U.S. 505, 510 (1873)). In addition, 11 U.S.C. § 105(a) provides statutory authority for a court to sanction a creditor for misconduct and to sanction any party for civil contempt. *Workman v. GMAC Mortgage LLC (In re Workman)*, Adv. Pro. No. 07-80108-JW, slip op. at 5 (Bkrtcy D.S.C. Nov. 21, 2007) (citing *In re Walters*, 868 F.2d 665, 669 (4th Cir. 1989)).

Violation of the Order

The Order Authorizing Use of Cash Collateral requires ASC to forward the \$14,890.06 that it previously received to counsel for the debtor. Based on the record before the Court, ASC did not comply with this provision.

Based on a disclosure by debtor's counsel and a reference in a letter admitted into evidence, it appears that ASC or its principal at some point assigned the debtor's account to another holder. Had it appeared in response to the contempt motion, ASC might have contended that because of this assignment, it was unable to pay over the money. However, a party may not plead inability to turn over a sum of money where the inability arose due to circumstances within its control – especially where it has converted the money into other assets. *In re Babbidge*, 175 B.R. 708, 721 (Bkrtcy. W.D. Mo. 1994). In any event, if ASC had issues with the scope of its

turnover obligations, it was incumbent on it to raise such issues with the court, not to simply ignore the Order. *Jennings v. R & R Cars and Trucks (In re Jennings)*, No. 01-80044-W, 2001 WL 1806980, at *7 (Bkrcty. D.S.C. Sept. 17, 2001). ASC is in contempt for failure to comply with the order.

Appropriate Sanctions

A bankruptcy court has broad discretion to fashion a remedy for civil contempt. *Workman*, slip. op. at 6 (citing *In re General Motors Corp.*, 61 F.3d 256, 259 (4th Cir. 1995)). Sanctions may include actual damages, attorney's fees, and, when appropriate, punitive damages. *Montoya v. Penland Financial Services, Inc. (In re Montoya)*, Adv. Pro. No. 05-80110, slip op. at 5 (Bkrcty. D.S.C. July 8, 2005). Punitive damages may be appropriate where the creditor's actions are blatant, egregious, or malevolent. *Id.*, slip op. at 6; *Workman*, slip op. at 8. However, because the purpose of civil contempt is remedial – to enforce compliance with an order and to compensate for losses sustained because of non-compliance – the court may impose sanctions regardless of the intent shown by the contemnor. *Montoya*, slip op. at 4. If compensatory damages appear unlikely to prevent further harm to the debtor, § 105 also authorizes the court to award equitable relief. *Workman*, slip op. at 8.

Here the debtor has undoubtedly suffered inconvenience and has testified to additional damage to her home because ASC failed to return the insurance proceeds as promised in August 2007. But those losses were primarily caused by ASC's inaction before the Order Authorizing Use of Cash Collateral, not by its failure to comply with that order. There is therefore no basis in the record for an award of compensatory damages.¹

¹ The Court takes no position at this time as to whether such damages may be compensable in a separate action should such be initiated by the debtor.

Similarly, ASC's delay in the summer and fall of 2007 cannot itself be a basis for punitive damages. However, that delay, coupled with the failure of ASC to comply with the order at this juncture, gives rise to an inference that its current non-compliance is not inadvertent or merely negligent but the product of deliberate intransigence. It appears that ASC has blatantly disregarded the Court's directive, not bothering even to defend the contempt motion. Punitive sanctions are both appropriate and necessary for deterrence of ASC and others who would ignore orders of this Court to the extreme detriment of individual litigants before it.

Punitive sanctions for contempt may be both retrospective and prospective and may be proportioned to the period of non-compliance. Accordingly, the Court imposes a sanction of \$3800.00, representing \$50.00 per day from January 10, 2008, to the date of this order, with additional sanctions of \$100.00 per day accruing until ASC proves compliance with the Order Authorizing Use of Cash Collateral filed December 7, 2007 or until further order of this Court to the contrary.

Finally, the debtor is hereby awarded \$2,050.00 in attorney's fees for efforts since January 10, 2008, to remedy ASC's noncompliance, including the prosecution of the contempt motion.

IT IS THEREFORE ORDERED that the debtor shall have judgment against ASC in the amount of \$5850.00. In addition, the Court will entertain a request for prospective sanctions as outlined above in the event of continued noncompliance.

AND IT IS SO ORDERED.