

**FILED**

at \_\_\_ O'clock & \_\_\_ min \_\_\_ M

**JUN 21 2004**

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

**BRENDAN K. MOORE, CLERK**  
United States Bankruptcy Court  
Columbia, South Carolina (33)

IN RE: )  
 ) Chapter 13  
**George N. Papp and** )  
**Suzann F. Papp,** ) **JUDGMENT**  
 )  
 ) Bankruptcy Case #01-01785-jw  
Debtors. )  
\_\_\_\_\_ )

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Debtors' Motion for Sanctions against GMAC Mortgage Company ("GMAC") is hereby granted with the following relief provided: the Affidavit of Default filed March 5, 2004 be withdrawn; that the Chapter 13 Trustee continue to make arrearage payments to GMAC under the Chapter 13 Plan; that the Debtors be allowed to bring the arrearage current without penalties, late fees, or attorney fees and that the Debtors be allowed to resume to make monthly payments outside of the Plan beginning July 1<sup>st</sup> 2004; that GMAC Mortgage Company provide the Debtors, within 20 days of the filing of this Order, a complete statement of mortgage account, arrearage and escrow status; that GMAC pay to the Debtors damages in the amount of \$1,000.00 in emotional distress and inconvenience costs such as the loss of time in conferring with counsel and attending hearings, as well as \$6,218.11 for attorney's fees and costs to be paid directly to counsel for Debtors; and that GMAC pay to the Debtors the amount of \$10,000.00 in punitive damages.

**AND IT IS SO ORDERED.**

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina

June 21, 2004

**ENTERED**

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**KPD**

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Debtors.

**KPD**

Chapter 13

Bankruptcy Case #01-01785-jw

**ORDER GRANTING RELIEF TO DEBTORS RE: MOTION FOR SANCTIONS**

This matter comes before the Court upon the Debtors' Motion for Sanctions against GMAC Mortgage Company ("GMAC") filed with the Court on April 12, 2004. The Motion seeks a monetary award for damages, punitive damages and attorney's fees and costs. The Court was advised that all parties in interest were served with the Motion. GMAC, through its attorney Tara Nauful, filed an Objection to the Motion on May 20, 2004. A hearing was held on May 27, 2004.

GMAC was represented by its counsel Tara Nauful but sent no representative or witness to present evidence at the hearing. The Debtors testified regarding their transactions with GMAC which led to the filing of the Motion.

**FINDINGS OF FACT**

1. George N. Papp and Suzann F. Papp ("Debtors") filed a petition for Relief under Chapter 13 of the United States Bankruptcy Code on February 22, 2001. The Debtors' Chapter 13 Plan was confirmed on May 1, 2001. The Debtors are current on their Chapter 13 Trustee payments.

2. On October 26, 2001 GMAC filed a Motion for Relief from the Stay under 11 U.S.C. § 362(d). Debtors' attorney timely filed an Objection to the Motion and the matter was subsequently settled on November 26, 2001.

3. The Settlement Order was subsequently filed with this

Court. Because there was substantial question over whether or not the Debtors were in arrears to GMAC, the Order addressed only the Attorney fee of \$425.00 which the Debtors paid over a six-month period ending in May 2002. The Settlement Agreement contained a "drop-dead" clause that stated "...should the Debtors default in any future monthly mortgage payment for more than 25 days, the stay shall be lifted upon receipt by the Court of an affidavit of noncompliance and the entry of an order...".

4. In January 2003 the Debtors received an escrow analysis from GMAC informing them that the account held an escrow surplus of \$2,434.83. An accompanying letter offered the Debtors the option of applying the Escrow Surplus Balance to monthly mortgage payments. The Debtors telephoned GMAC and requested that the Escrow Surplus be applied to their mortgage payments for February and March 2003, to which GMAC agreed. Therefore the Debtors did not send additional funds to GMAC for those two months.

5. Although the Debtors were not in default, on April 2, 2003 GMAC filed an Affidavit of Default and Proposed Order with the Court, stating that the Debtors had failed to make the February mortgage payment and were in default of the Settlement Order dated November 26, 2001. The Order Lifting the Stay was signed on April 3, 2003.

6. On April 25, 2003, the Debtors' attorney filed a Motion for Reconsideration and a Memorandum in Support of Motion. The Debtors' contended that the Affidavit of Default was filed by mistake and that GMAC was in error as to the Debtors' account because GMAC had agreed to apply the surplus escrow to payments due on the account. Counsel for GMAC filed an Objection to the Motion for Reconsideration.

7. The Motion for Reconsideration was resolved at a hearing on May 30, 2003 and resulted in an Order for Resumption

of Payments by the Chapter 13 Trustee and a separate Forbearance Agreement between the Debtors and GMAC. The Order, entered June 2, 2003, was consented to by counsel for both parties.

8. The Forbearance Agreement provided that the Debtors would pay to GMAC the sum of \$3,833.81 by June 6, 2003 and the regular June 2003 mortgage payment by June 25, 2003. The Forbearance Agreement further provided that the stay would remain lifted and that should the Debtors default pursuant to the terms of the Agreement or the previous Settlement Order, that GMAC would be permitted to proceed with foreclosure upon receipt by the Court of an affidavit of noncompliance.

9. On June 5, 2003 the Debtors timely sent the initial payment of \$3,833.81, as required by the Forbearance Agreement, via Western Union.

10. On or about June 11, 2003 the Debtors received notice from Western Union that the funds were refused by GMAC. On June 23, 2003 the Debtors mailed both the initial payment (which had been refused) and the June mortgage payment via certified mail.

11. On June 25, 2003 GMAC again refused the funds, returning the checks to the Debtors with a letter stating that the account had been transferred to Finkel & Altman, Attorneys, to begin foreclosure proceedings.

12. The Debtors were served with a Foreclosure Summons and Complaint (Docket No. 03CP402920; dated June 11, 2003 and filed June 12, 2003)

13. On June 30, 2003 Debtors' attorney mailed and faxed written notice to Finkel & Altman that the Debtors were in an active Chapter 13 and operating under a Forbearance Agreement. The letter also requested a 30-day extension to Answer the Foreclosure Summons. On July 1, 2003 Finkel & Altman responded by fax, consenting to the extension.

14. On June 30, 2003, attorney for Debtors also faxed

copies of the Forbearance Agreement and Court Order Allowing Resumption of Payments by Trustee to the Finkel & Altman office.

15. The Debtors next received a letter from Finkel & Altman dated July 2, 2003 informing them that the property was about to be foreclosed on.

16. On July 8, 2003 Debtors' attorney attempted to discuss the status of this case with GMAC's attorney, but GMAC had misplaced the file.

17. On July 24, 2003 the Debtors' attorney's office again phoned Finkel & Altman seeking a status/resolution of the situation. Debtors' attorney was informed that GMAC had again misplaced the documents and Finkel & Altman had to resend the information a second time.

18. Having no resolution and to prevent a default in the Foreclosure Action, attorney for the Debtors filed an Answer in State Court on August 13, 2003. (Despite the fact that Debtors' attorney was provided a 30-day written extension to reply to the Foreclosure, GMAC filed an Affidavit of Default and Non-military Service on August 13, 2003 even though Debtor George Papp is in fact a full-time active duty Marine.)

19. Subsequently, on September 23, 2003 the attorney for the Debtors served Requests for Admissions and Notice of Taking Deposition on Finkel & Altman. Neither witness nor counsel appeared for the deposition at the scheduled time.

20. On November 11, 2003 the attorney for the Debtors received a Consent to Order of Dismissal in the Foreclosure Action from Finkel and Altman. There was no communication as to the status of the mortgage amount due, or any actions the Debtors should take.

21. Some four (4) months later, the Korn Law Firm filed yet another Affidavit of Default in the U.S. Bankruptcy Court on behalf of GMAC. This Affidavit stated that the Debtors had

failed to make the initial payment (that was twice returned by GMAC) and that GMAC intended to proceed with a second foreclosure of its mortgage.

22. Subsequent to receiving notice of the Affidavit of Default, Debtors' attorney physically searched civil case records of the Foreclosure Proceeding 03CP402920 at the Richland County Courthouse. The file contained an Administrative Order Striking the Case from Active Roster due to Bankruptcy with Leave to Restore. This Order was filed August 22, 2003. No notice was provided to Debtors or Debtors' attorney. GMAC maintained for those 6 months that the matter was being researched.

23. The Debtors testified concerning the history of this loan. Mr. Papp testified that he was 39 years old. He was employed as a car salesman when the Chapter 13 case was filed but later became an active duty Marine in order to obtain a consistent pay level so the Debtors could remain current on their house payments.

24. Mrs. Papp testified that she was a full time mother and homemaker who keeps other children in the home as a part-time day care provider.

25. As the record reflects, the Debtors have been served with numerous Motions, Affidavits of Default and Lawsuits, all threatening foreclosure of their home in violation of the Forbearance Agreement and Order Allowing Resumption of Payments. They testified that the main reason they had filed Chapter 13 was the importance of keeping their home. Mrs. Papp testified she had been placed on medication for stress and anxiety by her family physician due to the uncertainty of the situation.

26. The Debtors' house payment is now sixteen (16) months in arrears as a direct result of GMAC's wrongful refusal to accept payments timely tendered by the Debtors. Living in this

constant state of anxiety has caused the Debtors undue emotional stress and loss of enjoyment of life.

27. Further, the Debtors testified they have had to retain counsel to defend them at numerous hearings, both in Bankruptcy Court and in State Court.

28. At the hearing the Debtors' attorney Gene Trotter presented an itemized accounting of legal fees and costs incurred in this matter from June 2003 through the date of hearing, May 27, 2004. It was introduced into evidence without objection.

29. I find that Debtors' counsel's fees and costs in the amount of \$6,218.11 to be reasonable for the work performed on this action.<sup>1</sup>

#### **CONCLUSIONS OF LAW**

This Court has already ruled that 11 U.S.C. § 105(a) provides the Court with the power to prevent abuse of judicial process, including the authority to sanction a creditor for misconduct in providing its attorney with incorrect information on which to base a motion requesting relief from the automatic stay and, ultimately, a foreclosure action. In re Asbill, No. 98-05819-W, 1999 WL 33486100, (Bankr. D.S.C. Feb. 1, 1999); aff'd, No. 3:99-773-19, slip op. (D.S.C. Feb. 23, 2000); In re Kilgore, 253 B.R. 179 (Bankr. D.S.C. 2000).

The Court notes that this matter was continued at GMAC's request for the purpose of allowing its representative and witnesses to attend the hearing, but despite being given an opportunity to appear, GMAC failed to send any witness or representative to the hearing. Lacking the ability to reliably assess subjective goodwill or lack of it on the part of an entity, the Court must resolve such issues based upon the objective facts. In re Gorshtein, 285 B.R. 118, 126 (Bankr.

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<sup>1</sup> Debtors' counsel's fees include four (4) hours for work performed post-trial.

S.D.N.Y. 2002).

The operative facts in the current situation are that each action by GMAC (i.e. refusal of funds, commencing Foreclosure Action, instructing attorney to file Affidavit) was willfully undertaken. Reasonable investigation into its own records could have revealed a situation requiring a very different action.

The Debtors in this case were operating under a Forbearance Agreement as the automatic stay had already been lifted. While strictly not a violation of 11 U.S.C. § 362(h), the outcome of the violation of the Forbearance Agreement proposes the same result for the Debtors, a potential foreclosure on their home.

This Court previously addressed a similar issue where a violation of a Consent Order was characterized as a direct violation of 11 U.S.C. § 362. Williams v. Fairbanks Capital Corp., (In re Williams), C/A No. 00-00770, Adv. Case No. 01-80105, 2001 WL 1804312 (Bankr. D.S.C. 2001). In the above case, this Court found that the actions and misrepresentations of the Lender (Fairbanks Capital) were serious enough to merit a punitive damages award. Similar circumstances exist in the current case where the Debtors sent payment to the creditor (GMAC), who wrongfully refused the funds, disregarded communications from its attorneys and filed a Foreclosure Action.

GMAC utilized the services of several different attorneys in this case, apparently failing to adequately communicate with them. This Court has previously noted that it is the client, not the attorney, who is in a better position to investigate the facts of the case and assure that the information ultimately provided to the Court is correct. Kilgore, 253 B.R. at 186. See also Business Guides, Inc. v. Chromatic Communications Enter., Inc., 892 F.2d 802, 809 (9<sup>th</sup> Cir. 1989).

The broad language of § 105, granting bankruptcy courts the



power to prevent abuse of the judicial process, must encompass the Court's authority to sanction a creditor for its misconduct in providing its attorney with incorrect information on which to base actions such as foreclosure and for its role in the rejection of payments and overall refusal to respond appropriately either to its own counsel or to the Debtors' counsel. Among other things, GMAC's actions in this case resulted in the improper filing of documents and proceedings with this Court which caused a waste of judicial resources. This Court finds the sanctionable conduct which is the focus of the Motion is that of the client, GMAC.

As this Court has previously noted in the case of In re Asbill:

The court must expect that parties, especially sophisticated creditors, base such motions on a proper factual basis and at least accurately represent the state of their own records. More and more frequently, in these days of National lenders and frequent assignments of notes and mortgages, this Court is confronted with creditors who file relief from stay motions asserting that debtors are in arrears when in fact, after a reasonable inquiry, it appears that they are current in their payments. Such a lack of diligence by the creditors is not only a problem for the Court and the debtors, who can not only least afford the additional costs in attorney's fees but whose reorganization in some cases is dependent upon the retention of the collateral which is the subject of such motions, but is also even a problem for the creditors' attorneys that file these motions. To effectively be able to prosecute these motions and represent the truth of the matter alleged, these attorneys must be able to rely upon their clients and the information provided to them.

No. 98-05819-W, 1999 WL 33486100, at \*4 (Bankr. D.S.C. Feb. 1, 1999); aff'd, No. 3:99-773-19, slip op. (D.S.C. Feb. 23, 2000).

This Court notes that creditors, especially sophisticated nationwide lenders who, like GMAC, deal on regular basis with debtors who are in bankruptcy and possibly in arrears on their

accounts, and who often appear before the bankruptcy court to request relief from the automatic stay, are expected to make true and accurate representations to their counsel and the Court. Creditors, who are in control of account information, are expected to communicate with their attorneys and provide them with accurate information upon which the lawyers can rely in advocating the creditor's position.

### **CONCLUSION**

In this case the Court concludes, based on the foregoing, that GMAC's conduct warrants sanctions and that this Court has the authority to award sanctions based upon a consideration of the totality of the circumstances present, including consideration of the lowest amount necessary to deter future abuses, the Court's authority to sanction pursuant to 11 U.S.C. § 105(a), and the Court's inherent authority to regulate litigants before it and to address improper conduct as recognized by the Fourth Circuit Court of Appeals in McGahren v. First Citizens Bank & Trust, Co. (In re Weiss), 111 F.3d 1159 (4th Cir. 1997).

The facts show that the Debtors have consistently abided by all Agreements with GMAC. However, GMAC has repeatedly ignored and violated its Agreements with the Debtor. Further, GMAC has demonstrated unreasonable behavior in responding to Debtors' attorney's requests and negligence in its record keeping. GMAC's actions have caused the Debtors actual damages including considerable distress and unnecessary attorney's fees and costs that warrant sanctions by this Court. This Court further finds that GMAC's conduct warrants the imposition of punitive damages as well. The Court feels punitive damages in an amount sufficient to act as a deterrent to a major sophisticated national corporation are warranted in this case.

**THEREFORE, IT IS ORDERED** that the Affidavit of Default filed March 5, 2004 be withdrawn, that the Chapter 13 Trustee continue to make arrearage payments to GMAC under the Chapter 13 Plan; and

**IT IS ORDERED** that the Debtors be allowed to bring the arrearage current without penalties, late fees, or attorney fees and that the Debtors be allowed to resume to make monthly payments outside of the Plan beginning July 1<sup>st</sup> 2004; and

**IT IS FURTHER ORDERED** that GMAC Mortgage Company provide the Debtors, within 20 days of the filing of this Order, a complete statement of mortgage account, arrearage and escrow status.

In regard to damages, including attorney's fees and costs, and punitive damages,

**IT IS ORDERED THAT** GMAC Mortgage Company pay to the Debtors damages in the amount of \$1,000.00 in emotional distress and inconvenience costs such as the loss of time in conferring with counsel and attending hearings, as well as \$6,218.11 for attorney's fees and costs to be paid directly to counsel for Debtors; and

**IT IS FURTHER ORDERED THAT** GMAC Mortgage Company pay to the Debtors the amount of \$10,000.00 in punitive damages.

**AND IT IS SO ORDERED.**

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina

June 21, 2004