UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	
Jeremiah Fogle,	Bankruptcy No: 03-13857-jw
	JUDGMENT
Debtor.	Chapter 13

Based upon the Findings of Fact and Conclusion of Law as recited in the attached Order of the Court, the Court orders Debtor to pay FHLMC, through its counsel, the amount of $1050.00 as sanctions, payable in six (6) equal monthly installments beginning on February 15, 2004 and to continue on the fifteenth day of each month thereafter. The award of sanctions shall survive dismissal of the case.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
February 6, 2004

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	)	
	)	Bankruptcy No: 03-13857-jw
Jeremiah Fogle,	)	Chapter 13
	)	
	)	**ORDER**
	)	
	)	
Debtor.	)	
	)	

This matter comes before the Court on the motion (the "Motion") of Federal Home Loan Mortgage Corporation ("FHLMC"), seeking an order 1) annulling the automatic stay pursuant to 11 U.S.C. § 362 to validate a post-petition foreclosure sale and 2) awarding sanctions against Jeremiah Fogle (the "Debtor") and Jason Moss, Debtor's attorney. The Court granted FHLMC's motion for an order annulling the stay by separate order. Accordingly, the only remaining issue for the Court is FHLMC's request for sanctions.

After considering the pleadings, the evidence presented, and the arguments of counsel at the hearing, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.[1] More detailed findings of fact are contained in the Order Annulling the Automatic Stay and are incorporated by reference in this Order.

FINDINGS OF FACT

1. FHLMC is the holder of the note and the first mortgage on the property located at

[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.

713 Kinlock Court, Columbia, South Carolina 29223 (the "Property").

2. FHLMC foreclosed against Debtor and the Property and obtained a foreclosure judgment in November 2002. The Property was scheduled for sale on December 2, 2002 at 12:00 noon. FHLMC, through counsel, notified Debtor of the date, time and place of the foreclosure sale.

3. Debtor, with Karl Jacobson as his counsel, filed a Chapter 13 bankruptcy in the District of South Carolina, Case Number 02-14458-jw, ("Debtor's First Filing") immediately prior to the scheduled sale, but did not immediately notify FHLMC, FHLMC's counsel or the Master in Equity for Richland County of the bankruptcy filing. Debtor did not disclose the pending foreclosure in his Statement of Affairs.

4. The sale took place as scheduled. Upon later being advised of the Debtor's First Filing, FHLMC's counsel and the Master in Equity performed significant additional work to void the sale.

5. Debtor's First Filing was dismissed on May 19, 2003 due to the failure to file a confirmable plan. FHLMC thereafter resumed foreclosure of the Property, and the Master in Equity again scheduled a sale of the Property for November 3, 2003. FHLMC, through counsel, again notified Debtor of the date, time and place of the sale.

6. The sale took place as scheduled and FHLMC was the highest bidder.

7. Immediately prior to the November 3, 2003 foreclosure sale, Debtor filed a petition for relief under Chapter 13 in this case, with Jason Moss as his counsel. Neither Debtor nor Debtor's counsel attempted to notify the Master in Equity, FHLMC, or FHLMC's counsel of the bankruptcy filing.

8. Debtor's Statement of Affairs does not disclose FHLMC's foreclosure action as an action pending.

9. FHLMC filed the Motion on December 12, 2003.

10. Debtor's counsel filed an objection to the Motion seeking denial of the Motion and an award of attorney's fees and costs. The objection did not address any of the substantive issues raised in the Motion.

11. Immediately prior to the hearing on the Motion, Debtor's counsel withdrew the objection and consented to the Motion. The last-minute withdrawal of the objection indicates that Debtor's counsel believed that FHLMC was in fact entitled to the relief it sought in the Motion.

12. At the hearing, counsel for FHLMC testified that the attorney's fees for filing the Motion, preparing for and attending the hearing, and preparing the order annulling the automatic stay were $900.00 and that counsel had advanced a filing fee of $150.00, for total fees and costs of $1,050.00. These fees and costs appear reasonable under the circumstances of the case, but do not appear procedurally recoverable as a part of the foreclosure sale because it was previously conducted and concluded.

13. Based upon the timing of the filings, it appears that Debtor knew of the pending foreclosure sale in each of his filings and therefore intended to delay the foreclosure sale by filing bankruptcy.

14. In the present case, Debtor's counsel knew or should have known of the pending foreclosure sale and, therefore, intended to delay the foreclosure sale.

CONCLUSIONS OF LAW

In order to award sanctions in this matter, the Court must first determine whether a debtor and a debtor's attorney have an affirmative duty to immediately notify a foreclosing creditor, its counsel or the state court of a bankruptcy filing made to stay an imminent foreclosure sale. FHLMC would have this Court adopt the reasoning of the United States Bankruptcy Court for the Western District of Missouri in the case of In re Fulmer-Vaught, 218 B.R. 56 (W.D. Mo. 1998). In considering facts almost identical to the present case, the Missouri Court ruled that the automatic stay should be annulled and that all debtors have the duty to notify a foreclosing creditor of the bankruptcy filing immediately by the most expeditious means and that failure to do so may result in sanctions. Id. In Fulmer-Vaught, the Court specifically stated,

> Finally, the Court is going to publish this decision for only one reason. . . . [T]he judge feels that it is essential to emphasize the obligations of counsel for a debtor when filing bankruptcy. The obligation is to notify the creditor who is going to foreclose immediately by the most expeditious means of communication available. That means telephone, telegraph, fax, e-mail, or whatever is required to notify prior to the foreclosure or at least prior to the conclusion of the foreclosure sale. This judge feels so strongly about this situation that this case is published to warn counsel for debtors that in the future, failure to do so may well result in sanctions against debtors' counsel for creating a problem which is not at all necessary or appropriate.

Id. at 58. In a later decision by the same court, the Court refused to annul the stay but nevertheless held that a debtor's counsel harmed the creditor by failing to notify it of the bankruptcy filing before the foreclosure sale and allowed the creditor to submit a fee application to document its fees and expenses. In re Smith, 245 B.R. 622 (W.D. Mo. 2000).

It is clear in this case that neither Debtor nor Debtor's counsel made any effort to immediately notify the foreclosing creditor's counsel or the state court of the bankruptcy filing.

It is equally clear that this failure and Debtor's second filing on the eve of the foreclosure sale caused FHLMC to incur additional costs in completing and validating a sale by requiring FHLMC to file the Motion seeking annulment of the stay and as a result of Debtor's objecting thereto. These costs were only partially mitigated by Debtor's counsel's ultimate consent to the annulment of the stay at the hearing. The circumstances in this case are further aggravated by Debtor's prior filing, similar failure to notify the foreclosing creditor and the eventual dismissal of his first case. All of these factors taken as a whole are indicative of bad faith. See In re Kinney, 51 B.R. 840, 845 (Bankr. C.D. Cal. 1985) ("As a general proposition, the [c]ourt must determine whether litigation is being pursued in good faith by considering all the facts and circumstances before it."). See also In re Harris, C/A No. 00-09631, slip op. (Bankr. D.S.C. Dec. 22, 2000) ("good faith is generally a prerequisite in filing a bankruptcy petition"). There appears no dispute between the parties that FHLMC is entitled to its attorney's fees and costs pursuant to its loan documents. However, due to the foreclosure sale being previously completed and due to FHLMC being the high bidder, there is no state court mechanism for FHLMC to effectively collect these costs in full, absent an award of sanctions. At the hearing, Debtor did not dispute the amount of fees and costs incurred by FHLMC. Debtor proposed that FHLMC be paid in full but be treated as an unsecured creditor with respect to its fees and costs in Debtor's present case. Debtor's Plan of reorganization proposes a dividend of 1% to unsecured creditors.

The reasoning in the Fulmer-Vaught case is appealing in that a debtor with knowledge of an impending foreclosure hearing and sale, and with a purpose to delay the action by the filing of a bankruptcy petition, should mitigate the costs in time, effort, fees and expenses to be incurred by the foreclosing creditor, its counsel and the state court. This is especially true in situations

where a debtor has filed a bankruptcy petition on more than one occasion in order to delay the same foreclosing creditor. Therefore, after determining that my colleague on the bankruptcy bench agrees with such a policy, the Court adopts the reasoning of Fulmer-Vaught and cautions the bar that otherwise unnecessary fees and costs incurred as a result of a failure to timely notify a foreclosing creditor, its counsel or the state court of a bankruptcy filing may be considered sanctionable conduct in future cases in this District.

Having concluded that debtors and their counsel have an affirmative duty to immediately notify a foreclosing creditor, its counsel or the state court of a bankruptcy filing with respect to an imminent foreclosure sale, the Court will now consider whether sanctions are warranted based on the facts and circumstances of this case. Inasmuch as the Court has addressed this notice issue as a matter of first impression, and there being no such previously existing rule or requirement, the Court is unwilling to sanction Debtor's counsel in this case.

Nevertheless, the Court recognizes Debtor's responsibility for the fees and costs incurred by FHLMC, and finding that Debtor's conduct was in bad faith, orders Debtor to pay FHLMC, through its counsel, the amount of $1050.00, payable in six (6) equal monthly installments beginning on February 15, 2004 and to continue on the fifteenth day of each month thereafter. The Court views this award in the nature of sanctions based upon Debtor's bad faith as demonstrated by his refiling to delay FHLMC and failure to demonstrate any change of circumstances herein. See, e.g., In re Brown, C/A No. 03-07515, slip op. (Bankr. D.S.C. Sept. 26, 2003) (actions of debtor relating to serial filing combined with failure to show change in circumstances evinced bad faith); In re Kilgore, 253 B.R. 179 (Bankr. D.S.C. 2000) (Court "possesses the inherent power to regulate litigants' behavior and to sanction a litigant for bad faith conduct" pursuant to § 105) (citing McGahren v. First Citizens Bank & Trust Co. (In re Weiss),

111 F.3d 1159, 1171 (4th Cir. 1997). Upon Debtor's failure to timely pay, FHLMC may file an Affidavit and Motion for Rule to Show Cause requesting a hearing on the dismissal of this case. The award of sanctions shall survive dismissal of the case.

AND IT IS SO ORDERED.

John E Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
February 6, 2004