

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

IN RE:

John Chapman Clements,

Debtor.

BANKRUPTCY CASE NO. 08-06969-jw

CHAPTER 13

ORDER

ENTERED

JUL - 5 2011

FILED
at 0'clock & min
JUL - 5 2011
United States Bankruptcy Court
Columbia, South Carolina (20)

This matter comes before the Court upon the motion of Wells Fargo Bank, N.A. ("Wells Fargo"), seeking relief from the automatic stay as to real property located at 2924 Park Street, Columbia, South Carolina ("Motion"). The Debtor filed an objection to the Motion ("Objection"), and a hearing was held on June 21, 2011. After considering the pleadings, evidence, and the statements of counsel at the hearing on the motion, the Court makes the following findings of fact and conclusions of law.¹

FINDINGS OF FACT

1. The Debtor filed his petition for relief under Chapter 13 of the United States Bankruptcy Code on October 31, 2008.
2. At the time of filing, the first mortgage on the Debtor's real property located at 2924 Park Street, Columbia, South Carolina, was held by Wachovia Mortgage, FSB. Subsequently, Wachovia Corporation and Wells Fargo & Company merged. At all times relevant herein, the mortgage on the Park Street property has been serviced by Wells Fargo.
3. Wells Fargo holds two mortgages that are secured by property of the Debtor. One mortgage is secured by property located at 2924 Park Street, Columbia, South Carolina. This is the property that is subject to the Motion. The other mortgage, securing a different note, encumbers real estate located at 2407 Cypress Street, Columbia, South Carolina.
4. On May 7, 2009, the Court entered an order confirming the Second Amended Plan,

¹To the extent any findings of fact constitute conclusions of law, they are adopted as such. To the extent any conclusions of law constitute findings of fact, they are so adopted.

which was filed by the Debtor on April 24, 2009. The plan provided that the payments to Wachovia Mortgage, FSB, and Wells Fargo Home Mortgage were current and that the Debtor would continue making regular payments directly to the creditors.

5. On April 5, 2011, Wells Fargo filed its Motion, alleging that the post-petition payments had not been made on the account secured by the Park Street property. Wells Fargo stated in the Motion that the Debtor was delinquent in the amount of One Thousand One Hundred Six and 75/100 (\$1,106.75) Dollars as of March 31, 2011.

6. In the Objection, the Debtor stated that he had tendered payments in a timely manner and that Wells Fargo had applied his payments to the wrong account. Attached to the Objection were Wells Fargo statements for the two mortgage accounts. The statements documented Wells Fargo's improper application of the payments that had been made by the Debtor.

7. The Objection requested that the Debtor be reimbursed the sum of \$600.00 as attorney's fees for defending the motion.

8. The Debtor appeared at the hearing at the hearing on the Motion held on June 21, 2011 and proffered the following testimony:

The Debtor has timely made all payments on the two Wells Fargo Bank, N.A. mortgage accounts. Payments are made by check with the account number listed on each check. The checks are mailed in separate envelopes and each envelope includes a billing statement from Wells Fargo with the account number on the statement.

In January 2011, the Debtor noticed that Wells Fargo had applied both payments to the account secured by the Cypress Street property. The Debtor called Wells Fargo in January and requested that it correct the improper application of the payment.

9. The Debtor's attorney stated that he had sent an e-mail on April 14, 2011 to a paralegal in the office of Wells Fargo's attorney stating that the Debtor would not consent to an order

requiring payments to cure the alleged default because the Debtor was not in default, and that Wells Fargo had posted the payments to an improper account.

10. After the Debtor filed an Objection, Wells Fargo investigated the matter further and discovered the Motion was filed in error. Wells Fargo attempted to withdraw its Motion, but the Debtor refused to consent because Wells Fargo would not agree to pay any of the Debtor's attorney's fees. At the hearing, Wells Fargo acknowledged that the only issue remaining between the parties was whether the Debtor was entitled to attorney's fees.

11. It appears the Debtor attempted to reach a settlement with Wells Fargo regarding the Debtor's attorney's fees the day prior to the hearing but settlement negotiations were unsuccessful.

12. Also at the hearing, the Debtor's attorney submitted an affidavit itemizing the fees he has incurred in defending the Motion in the amount of \$1,562.22 and cost of \$4.72 for a total of \$1,566.94. The attorney requested the Court not limit the award of fees to the amount requested in the objection, as he had incurred additional fees preparing for and attending the hearing. His motion to amend and update the request was granted.

13. Wells Fargo did not dispute the hourly rate or the reasonableness of the attorney's fees, but asked the Court to limit the fees to the \$600.00 stated in the original Objection.

CONCLUSIONS OF LAW

After reviewing the evidence presented at the hearing, the Court finds that the Debtor is not and has not been delinquent in making his post-petition mortgage payments to Wells Fargo. Because the Debtor is not in default in making the post-petition mortgage payments, Wells Fargo is not entitled to relief from the automatic stay pursuant to 11 U.S.C. §362(d).

The Court further concludes that Wells Fargo has failed to act reasonably and properly in asserting the Motion. Previously, when addressing creditor conduct in filing a motion for relief from stay, this Court stated:

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.

In Re Kilgore, 48 FED.R.Serv. 3d 195, 243 B.R. 179, 190-191, (Bkrtcy. D.S.C. 2000) quoting In Re Asbill, C/A No. 98-05819-W, Slip Op. (Bankr. D.S.C. Feb. 1, 1999), aff'd 3:99-0773-19 (D.S.C. Feb. 23, 2000).

Wells Fargo's lack of diligence in maintaining its records and failure to provide its attorneys with accurate information in this case resulted in the Debtor incurring attorney's fees in defending a motion that was filed without cause. Such conduct is egregious in light of the fact that the Debtor contacted Wells Fargo in January of 2011, approximately 3 months before the filing of the motion, to inform Wells Fargo that it had posted his payment to the wrong account. In addition, the Debtor attempted to resolve this matter with Wells Fargo prior to the hearing, but Wells Fargo was unwilling to offer the Debtor's attorney any fees for the work necessarily involved in defending the Motion. Wells Fargo provided no evidence or explanation for its improper record keeping or a justification for filing its Motion or refusing to pay the Debtor's attorney any of his fees. As the Court noted in In Re Kilgore, this improper conduct results in significant consequences to the Debtor, distorts the procedures relied upon by the Court, and causes of waste of judicial time and resources. In Re Kilgore at 193.

Because of its conduct, sanctions against Wells Fargo appear warranted under 11 U.S.C. §105, which grants bankruptcy courts broad powers "to implement the provisions of Title 11 and to prevent an abuse of the bankruptcy process." In Re Kilgore at 190. "The broad language of §105

... must encompass the Court's authority to sanction a creditor for its misconduct in providing its attorney with incorrect information on which to base a motion requesting relief from the automatic stay ...” In Re Kilgore at 190.

The Court believes Wells Fargo should pay the Debtor's attorney the fees and costs that the Debtor has incurred in defending this motion as sanctions for its misconduct. In support of his request for fees, the Debtor's attorney has submitted a supplemental affidavit, which includes fees incurred after the hearing in preparing an order as directed by the Court, setting out total fees and costs of Two Thousand Fifty-Two and 22/100 (\$2,052.22) Dollars. While Wells Fargo requested the attorney fees be limited to the amount requested in the Objection, it is clear that the Debtor incurred significant additional fees and expenses after the filing of the Objection in order to bring this matter to its correct resolution. To limit the fees to the amount in the Objection would be unjust and prejudicial to the Debtor, who was required to defend this unwarranted Motion. The Court concludes that attorney's fees in the amount requested are reasonable and should be paid by Wells Fargo.

The Court further concludes that Wells Fargo is not entitled to assess late charges, or other default charges, resulting from its posting the Debtor's payments to an improper account, or attorney's fees which Wells Fargo has incurred in the filing of this motion.

Before entering a final order, however, the Court notes that a party facing sanctions is entitled to notice and an opportunity to be heard. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). “No fast rule dictates the content of due process in all cases,” but involves a balancing of factors such as fairness to the sanctioned party, risk of error and likely value of an additional notice and a hearing, and judicial and administrative efficiency. In re Cohen v. Fox, 122 F.3d 1060, 1997 WL 577583, *2 (4th Cir. 1997) (unpublished). Generally, parties subject to sanctions should be given “prior notice of the specific authority for the sanction, as well as the specific conduct which is alleged to be sanctionable.” In re Glasco, 321 B.R. 695, 699 (D. W.D.N.C. 2005) However, the specific authority for sanctions may not be required where prior notice of the specific conduct

subject to sanctions is provided. Id. (citing Fellheimer, Eichen & Braverman, P.C. v. Charter Techn., Inc., 57 F.3d 1215, 1225 (3d Cir.1995) (affirming sanctions under court's inherent power without particularized notice where the party sanctioned is plainly on notice that he is facing sanctions for conduct involving subjective bad faith)).

Wells Fargo had prior notice of the Debtor's request for attorney fees and the specific conduct alleged to be sanctionable. The Debtor's Objection sets forth the facts alleging misconduct by Wells Fargo. The Objection appears to be what led Wells Fargo to investigate the matter further and realize that the Motion had been filed in error. The only issue remaining at the time of the hearing was whether the Debtor was entitled to attorney's fees. However, Wells Fargo may not have been given prior notice of the specific authority for the sanction.

To the extent Wells Fargo would like the opportunity to be heard on the authority of the Court to award sanctions under 11 U.S.C. § 105(a) under the facts of this case, Wells Fargo should file a written response within 10 days of the entry of this Order. Upon the filing of such a response, the Debtor may respond within 7 days and the Court may issue a final order or may have an additional hearing on the limited issue of its authority to award sanctions in this case on **August 18, 2011 at 9:30 a.m. at the J. Bratton Davis United States Bankruptcy Courthouse, 1100 Laurel Street, Columbia South Carolina 29201**. If such a hearing is held or the Debtor files a further response, the Court may consider any additional fees incurred by the Debtor in defending the award of sanctions. It is therefore,

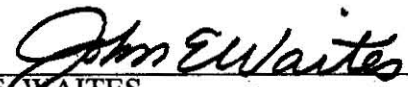
ORDERED that the relief sought by Wells Fargo is denied. It is further

ORDERED that if no response is filed within 10 days of the entry of this order, Wells Fargo is ordered to pay Bird & Smith, PA, the Debtor's attorney, the sum of \$2,052.22 within 10 days thereafter. It is further

ORDERED that Wells Fargo reverse any and all default charges including, but not limited to: late charges, inspection fees or attorney's fees arising as a result of its posting the Debtor's payments to an improper account. It is further

ORDERED that upon Wells Fargo's further response and request to be heard on the issue of the Court's authority to award sanctions, a further order may be entered as indicated herein.

AND IT IS SO ORDERED.



JOHN E. WAITES
Chief Bankruptcy Judge

Columbia, South Carolina

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