UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 98-05819-W
Steve Westley Asbill,	**JUDGMENT**
Debtor.	Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Motion by GE Capital Mortgage Services to reconsider this Court's previous Order of November 24, 1998 awarding $500.00 in attorney's fees and costs to the Debtor is denied.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
February 1, 1999.

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:*

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DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

KELLEY MORGAN

Deputy Clerk

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Steve Westley Asbill,

Debtor.

C/A No. 98-05819-W

ORDER

Chapter 7

THIS MATTER comes before the Court upon the Motion by GE Capital Mortgage Services ("GE") to reconsider this Court's previous Order of November 24, 1998 awarding $500.00 in attorney's fees to the Debtor for GE's improperly filed motion for relief from the stay pursuant to 11 U.S.C. § 362.[1]

Based upon the arguments of counsel and a review of the pleadings, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Debtor filed a voluntary Chapter 7 bankruptcy petition on July 9, 1998. On October 13, 1998, GE filed its motion for relief from the automatic stay on the grounds that the "Debtor has continued to use the Movant's collateral without making payments due after August 1, 1998, to the further and continuing detriment of Movant." On October 20, 1998, the Debtor filed a response to GE's motion for relief from the stay which states in part as follows:

> 1. Several months ago, Defendant personally spoke with a representative of GE Capital named JoAnne Krall, who admitted improperly posting at least one payment to Defendant's account, and who assured Defendant the situation would be "straightened out" because it was not his fault;

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[1] Further references to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, shall be by section number only.

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2. Subsequently, Defendant personally spoke with a representative of GE Capital named Sandra Summers, who told Defendant she would stop all proceedings to collect past-due payments on his account, because the error was clearly the Plaintiff's and the Defendant's account was in fact current;

3. On October 19, 1998, Defendant personally verified with a representative of GE Capital that his account with them was current as of that date except for the payment due for October 1998;

4. Defendant's bank records indicate that the payments he made to GE Capital for the months of July, August and September 1998, had all cleared his bank before October 13, 1998;

5. When Plaintiff's Motion to lift the automatic stay was filed on or about October 13, 1998, Defendant's account was, in fact, current, and the motion was therefore groundless and improperly filed.

Plaintiff, therefore, is not entitled to relief from the operation of the automatic stay since its interest in the aforementioned property is adequately protected.

WHEREFORE, defendant respectfully requests that the court deny plaintiff's request for relief from the automatic stay, order that the stay remain in full force and effect, and award attorney's fees to the Defendant's attorneys in an amount no less that Five Hundred Dollars ($500.00) for having to respond to this groundless motion.[2]

On November 9, 1998, the Court conducted a hearing on GE's motion for relief from the automatic stay. At the hearing, the attorney for GE stated that there was no dispute that his client had made an error as to the July, August and September payments and instructed him to withdraw the motion; however, the Debtor maintained his request for attorney's fees against GE. Following the presentation by the attorneys and the filing of an affidavit of attorney's fees by counsel for the Debtor, the Court found that the Debtor was current in his payments to GE and awarded $500.00 in attorney's fees to be paid to the Debtor by GE based upon the attorney's fees incurred by the

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[2] The Debtor's references to the Plaintiff are to the Creditor GE and the references to the Defendant are to the Debtor.

Debtor in having to defend the relief from stay motion. The Court based its ruling upon its general powers pursuant to § 105 and its inherent ability to sanction parties whose actions cause other parties to incur undue expenses. At the November 9, 1998 hearing, the Court also reserved its right to supplement its ruling in a written order and asked counsel for the Debtor to submit a proposed order. On November 24, 1998, the Court entered an Order memorializing the oral ruling awarding attorney's fees to the Debtor based upon §105(a).

On December 3, 1998, GE filed the within Motion to Reconsider this Court's Order of November 24, 1998. The grounds for the motion were that the Debtor had not made the October 1, 1998 payment when the motion was filed and also that the award of attorney's fees was not warranted.

CONCLUSIONS OF LAW

Initially, the Court rejects the argument of GE that the November 24, 1998 was in error because it awarded attorney's fees to the Debtor for GE's filing of a relief from stay motion when the Debtor was current in his payments when in fact the Debtor was not current as he had not made his October 1998 payment. As stated at the hearing on the Motion to Reconsider, the October 1, 1998 payment was not late until October 15, 1998. The motion for relief from the stay was filed on October 13, 1998 and was based upon the fact that the Debtor had not made any payments due after August 1, 1998. In fact, the August and September payments had been made and cleared the Debtor's bank account prior to October 13, 1998. Additionally, it was uncontroverted that GE had incorrectly posted payments and that it had assured the Debtor that the collection efforts would cease prior to the hearing.

Secondly, GE takes the position that Congress did not provide for the recovery of

attorney's fees against the movant in these type situations because it is not expressly stated in § 362. The Court disagrees and finds a number of sources for such authority including Rule 9011 of the Federal Rules of Bankruptcy Procedure, 28 U.S.C. § 1927, § 105 of the Bankruptcy Code, as well as the Court's inherent power to regulate litigants' behavior and to sanction a litigant for improper or vexatious conduct.

Rule 9011(b) in part states that when an attorney files a motion, he is representing to the Court that to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the allegations and other factual contentions in the motion have evidentiary support. If this Rule has been violated, the Court may award sanctions pursuant to Rule 9001(c).

> If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, *subject to the conditions stated below, impose an appropriate* sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

Rule 9011(c), Federal Rules of Bankruptcy Procedure.

Additionally 28 U.S.C. § 1927 allows the imposition of costs and fees against attorneys whose conduct creates excessive costs. See Cain v. Roe and Associates, Inc. (In re Cain), C/A No. 4:95-3318-22 (D.S.C. 122/22/95)(Unpubl.). In this case, since the sanctionable conduct appears to have been primarily that of the creditor and not the attorney, sanctions were not imposed pursuant to 28 U.S.C. § 1927.

Section 105(a) of the Bankruptcy Code provides as follows.

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a

> party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a). This provision should be given its plain and literal meaning and according to the Fourth Circuit Court of Appeals, should not be limited.

> We see no reason to read into this language [11 U.S.C. § 105(a)] anything other than its plain meaning that a court of bankruptcy has authority to issue any order necessary or appropriate to carry out the provisions of the bankruptcy code.
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> . . .
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> We should not leave the subject without noting that the Ninth Circuit has come to the opposite conclusion in In re Sequoia Auto Brokers Ltd., Inc., 827 F.2d 1281 (9th Cir.1987). The opinion in Sequoia Auto Brokers seems largely based on the reasoning that that court did not believe Congress would have conferred contempt power on a bankruptcy court without limiting that power. While the argument may have some persuasive validity, we think it insufficient to overcome the plain language of the statute and the fact that former § 1481 of the Code, repealed by the 1984 amendments, rather plainly conferred civil contempt power upon the bankruptcy courts without explicitly restricting it. If Congress might confer such power on one occasion, it does not seem to us illogical that it might confer the power on another, and, in all events, the contempt power conferred on the bankruptcy courts by Congress is certainly subject to congressional regulation.

In re Walters, 868 F. 2d 665 (4th Cir. 1989).

Finally, the Fourth Circuit Court of Appeals has stated that a Federal Court possesses the inherent power to regulate litigants' behavior and to sanction a litigant for improper conduct citing Chambers v. NASCO, Inc., 501 U.S. 32, 43-44, 111 S.Ct. 2123, 2132-33, 115 L.Ed.2d 27 (1991).

> A federal court also possesses the inherent power to regulate litigants' behavior and to sanction a litigant for bad-faith conduct. See Chambers v. NASCO, Inc., 501 U.S. 32, 43-44, 111 S.Ct.

> 2123, 2132-33, 115 L.Ed.2d 27 (1991). A court may invoke its inherent power in conjunction with, or instead of, other sanctioning provisions such as Rule 9011. Id. at 46-50, 111 S.Ct. at 2133-36. See also In re Heck's Properties, Inc., 151 B.R. 739, 765 (S.D.W.Va.1992) ("It is well-recognized, however, quite apart from Rule 9011, that courts have the inherent authority to impose sanctions upon [litigants] who [are] found to have acted in bad faith, vexatiously, wantonly or for oppressive reasons.").

In re Weiss, 111 F.3d 1159 (4th Cir. 1997). Pursuant to the Court's equitable powers, an award of attorney's fees as a sanction is justified.

> The Rule 2016(b) statement indeed is a "statement" exempted from the reach of F.R. Bankr. P. 9011(a) and Ms. Deering's misstatements at the meeting of creditors were oral and hence not a writing covered by Rule 9011(a). But the court still has the inherent power and the power of 28 U.S.C. § 1927 to impose attorney's fees as a sanction.

In re Erin and Kyle Ltd. Partnership, 1997 WL 86318 (Bkrtcy. D.C. 1997). It therefore appears to the Court, and as recently recognized by the Bankruptcy Court for the District of Maryland, that the payment of attorney's fees incurred in defending a spurious pleading is an appropriate remedy.

> Relying upon its inherent authority to impose sanction, as well as the specific authority conferred by Rule 9011, and in the exercise of its discretion, see Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 381-82 (1990), and Cox v. Saunders (In re Sargent), 136 F.3d 349 (4th Cir.1998), this court finds that the proper sanction that should be imposed as the minimum necessary to the deter future litigation abuse is the reimbursement of the defendants' reasonable legal expenses generated in defending this groundless action. The imposition of sanctions in the amount of the defendants' reasonable costs and attorney's fees is necessary to deter future litigation and to educate the plaintiff and her attorney.

In re Allnutt, 220 B.R. 871 (Bkrtcy.D.Md. 1998).

The Order of November 24, 1998 was necessary to enforce the rules of the Court and to deter the misuse of process. This goal is especially important in the context of a relief from the automatic stay motion. This Court faces hundreds of such relief from stay motions on a monthly basis and the hearings on the motion, by statute, must take place within thirty (30) days of the date the motion is filed. 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. Additionally, the majority of relief from stay motions in this district are settled by the parties immediately prior to the scheduled hearing and the settlement agreements routinely provide, even in the situation of an under-secured creditor, for the payment of the creditor's attorney's fees which usually range between $375.00 and $500.00.

Therefore, for all of these reasons and based upon the totality of the circumstances, including consideration of the lowest amount of a sanction to deter future abuses by this creditor and consideration of the costs and attorney's fees incurred by the Debtor in having to defend this

motion, the Court feels that it was within its discretion in awarding sanctions in the amount of $500.00 to the Debtor based upon GE's filing of the subject motion for relief from stay. Therefore, the Motion by GE Capital Mortgage Services to reconsider this Court's previous Order of November 24, 1998 is denied.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
February 1, 1999.

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:

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DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

KELLEY MORGAN

Deputy Clerk