

IN THE UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Case no. 8:05-bk-26287-CPM
Chapter 7

HARRIETT NOBLE RUSSELL,

Debtor.

**ORDER DENYING MOTION FOR
RECONSIDERATION OF ORDER
DENYING SELECT PORTFOLIO SERVICING,
INC'S MOTION FOR RELIEF FROM STAY AND
GRANTING ADEQUATE PROTECTION**

This case came on for consideration of the Debtor's Motion for Reconsideration of Order Denying Select Portfolio Servicing, Inc.'s Motion for Relief from Stay and Granting Adequate Protection ("Debtor's Motion"). The Debtor's Motion seeks reconsideration of the Court's Order Denying Select Portfolio Servicing, Inc. [sic] Motion for Relief from Stay and Granting Adequate Protection (the "Order") (Docket #15). The Order denies a creditor's motion for relief from the automatic stay but, in lieu thereof, grants adequate protection to the creditor of its mortgage lien interest in the debtor's homestead property. This type of order is routinely entered in this district on contested stay litigation matters involving a debtor's homestead and is authorized by 11 U.S.C. section 361. The form of the Order is one that the Court has adopted for use as its standard order ("Standard Order") awarding adequate protection to the holder of a mortgage lien on a debtor's homestead when relief from the automatic stay is denied. See <http://www.flmb.uscourts.gov/documents/tampa/ReliefAdequateProtection.doc>.

The Debtor's Motion also requests sanctions under Rule 9011, Federal Rules of Bankruptcy Procedure, against the creditor's attorney for his allegedly making an *ex parte* communication to the Court. The sanctions requested are reimbursement of the debtor's attorneys' fees. One may infer by reading the Debtor's Motion that the Court accepted and acted upon an *ex parte* communication, but the Court did neither.

The gist of the debtor's allegations supporting the relief requested is that the Court actually ruled in a way different from that reflected in the proposed order that was submitted to the Court's chamber by the creditor's attorney. That order was entered as the Order. The Debtor's Motion characterizes the proposed order as "not in substantial accordance with the Court's determinations and ruling at hearing...." See paragraph 6 of the Debtor's Motion.

The Court considers the allegation of *ex parte* communications between the Court and a party seriously.

So seriously, in fact, that the Court ordered a transcript of the proceedings held in open court on the creditor's motion. The Court did this to determine whether the Court's bench notes and own recollection of the proceedings are consistent with the actual record.

The Court's review of the transcript, which has been filed and docketed in this case (Docket #22), indicates that the Order is indeed in substantial accordance with the Court's determinations and ruling at hearing. The Order is consistent with the proceedings recorded in open court as well as this Court's bench notes and recollection of what transpired during the hearing, with one relatively nonmaterial exception, discussed below. The Debtor's Motion states that "[a]t the hearing the Court denied all relief sought by the Creditor." The transcript shows otherwise. The Court denied relief from the stay, but, in lieu thereof, the Court granted the creditor's alternative request for adequate protection. The Debtor's Motion also states that the Order provides for relief that is contrary to the Court's ruling, citing the 72-hour notice to cure and attorneys' fee provisions. The transcript shows that the Court directed the giving of the 72-hour notice.

The attorneys' fee provision in the Order is identical to that which is included in the Standard Order, discussed above, and is, by its terms, effective only if the debtor was in default at the time the creditor's motion was filed. Although the attorneys' fee provision was not discussed at the hearing, the debtor did not dispute the authenticity of the loan documents attached to the creditor's motion, which documents include an attorneys' fee clause. Moreover, the debtor conceded that she was in default on two pre-petition installments at the time the creditor's motion was filed (although one of the two delinquent pre-petition installments had been paid by the time of the hearing) and did not proffer that she had tendered any payment on such installments that was rejected. Therefore, the creditor's entitlement to an award of attorneys' fees is supported by the record. It is true that the amount of the attorneys' fees was not discussed at the hearing, but the amount of the fees awarded is no more than is set by the Standard Order.

Accordingly, the Court finds that the allegations of the Debtor's Motion are not well founded*. It is thereupon

* The Court notes that counsel who signed the Debtor's Motion is not the same person who appeared at the hearing on behalf of the debtor. Giving counsel the benefit of the doubt, the Court assumes that there must have been some miscommunication between the two as to what occurred at the hearing. Because the Court has assumed that a miscommunication occurred between the Debtor's two counsel, the Court will not enter an order to show cause why they or one of them should not be sanctioned in the form of reimbursing the federal government the expense of the transcript. The Court suggests that, in the future, if counsel is not present at a hearing, then counsel should confer with any substitute counsel and order a transcript of the proceeding if necessary before making allegations of what occurred at the hearing or accusations of improper conduct in connection with the hearing.

ORDERED that:

1. The Debtor's request for reconsideration of the Order is denied as the basis alleged therefor is wholly without merit.

2. The Debtor's request for the imposition of sanctions against the creditor's attorney is denied as the basis alleged therefor is wholly without merit.

3. If the debtor desires to seek reconsideration of the amount of attorneys fees awarded in the Order, then the debtor may do so within ten days, and the Court will thereupon schedule a trial to determine the amount of reasonable fees to be awarded to the creditor.

DONE AND ORDERED at Tampa, Florida on April 16, 2007.

/s/ Catherine Peek McEwen
CATHERINE PEEK McEWEN
United States Bankruptcy Judge

C:

Thomas P. Gill, Jr.
Onofre Citron
Jay D. Passer
Scott R. Weiss
Andrea P. Bauman
United States Trustee