UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of:	:	Chapter 13
MARJORIE LINDSEY,	:	
Debtor	:	Case No. 98-54195 RFH
NORWEST BANK MINNESOTA, N.A., AS TRUSTEE,	:	
Movant	:	
vs.	:	
MARJORIE LINDSEY, Debtor, and CAMILLE HOPE, Trustee,	:	
Respondents	:	

BEFORE

ROBERT F. HERSHNER, JR.
CHIEF UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For Norwest Bank Minnesota, N.A., As Trustee,:	EMMETT L. GOODMAN, JR. 544 Mulberry Street, Suite 800 Macon, Georgia 31201-2776
	BARBARA A. WRIGHT 544 Mulberry Street, Suite 800 Macon, Georgia 31201-2776
	KARL J. OSMUS 544 Mulberry Street, Suite 800 Macon, Georgia 31201-2776
	O. BYRON MEREDITH, III Suite 8-B 3300 N.E. Expressway Atlanta, Georgia 30341
For Marjorie Lindsey:	ELIZABETH L. McBREARTY 851 Walnut Street Macon, Georgia 31202
For Chapter 13 Trustee:	LAURA D. WILSON Post Office Box 954 Macon, Georgia 31202

MEMORANDUM OPINION

Marjorie Lindsey, Respondent, made an oral motion for sanctions on May 2, 2000. Respondent filed on May 11, 2000, a Motion for Attorney Fees Pursuant to Bankruptcy Code Section 105(a).[1] Norwest Bank Minnesota, N.A., as Trustee, Movant, filed a response on May 22, 2000. Respondent's motions came on for a hearing on May 31, 2000. The Court, having considered the evidence presented and the arguments of counsel, now publishes this memorandum opinion.

Respondent obtained a loan in October of 1995. The loan was secured by a lien on Respondent's residence. Respondent was to repay her loan by making monthly payments of $232.29. Movant, during the relevant period, owned the loan. The loan was first serviced by Wendover Financial Services Corporation. Respondent's account number at Wendover was 7376106 (the "Wendover account number").

Wendover sent Respondent a letter dated June 15, 1998, stating that Respondent's loan with Movant would be serviced by Ocwen Federal Bank effective July 2, 1998. The letter stated that Respondent would receive new payment instructions from Ocwen. Ocwen assigned Respondent a new account number, which was 3372844 (the "Ocwen account

[1] Respondent's oral motion for sanctions and motion for attorney's fees essentially request the same relief.

number”). Respondent did not receive a new payment book or notice of her new account number. Ocwen timely posted Respondent’s prepetition payments to her account even though Respondent used her Wendover account number. These payments were for August, September, and October of 1998.

Respondent suffered financial problems and filed a petition under Chapter 13 of the Bankruptcy Code on September 29, 1998. The Court entered an order on February 17, 1999, confirming Respondent’s Chapter 13 plan. The confirmed plan provided that Respondent would act as her own disbursing agent for Ocwen.

Respondent made her payments to Ocwen using her Wendover account number. Ocwen misapplied a number of Respondent’s payments. Ocwen did post, in February, March, and May of 1999, Respondent’s postpetition payments to her account.

Respondent concedes that she failed to make some of her postpetition payments to Ocwen. Respondent testified that she failed to make two or three payments. Ocwen believed that Respondent had failed to make fourteen payments.[2]

Movant filed on February 17, 2000, a motion for

[2] See Movant’s motion for relief, Exhibit B (filed Feb. 17, 2000). Respondent, in fact, made most of the fourteen payments using her Wendover account number.

relief from the automatic stay of the Bankruptcy Code.[3] Movant's motion was filed by O. Byron Meredith, III, an attorney located in Atlanta, Georgia. Emmett L. Goodman, Jr. is Movant's local counsel.

Respondent's counsel contacted, on a number of occasions, Ocwen, Mr. Meredith, Mr. Goodman, and Barbara A. Wright.[4] Respondent's counsel requested a copy of Respondent's account history.[5] Respondent's counsel made a number of local telephone calls and sent several letters attempting to resolve this matter. Respondent's counsel made sixteen long-distance telephone calls between March 9 and March 28, 2000, to Ocwen and Mr. Meredith's office. Respondent's counsel received no response to some of her requests. Some responses provided incomplete or incorrect information concerning Respondent's account. Ocwen was unable to promptly provide an accurate account history. Movant's counsel, Mr. Meredith, concedes that Respondent's account history "was unquestionably incorrect" because some of Respondent's payments were not posted properly.

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[3] 11 U.S.C.A. § 362(d) (West 1993 & Supp. 2000).

[4] Ms. Wright is an attorney in Mr. Goodman's office.

[5] Respondent's counsel attempted to resolve this matter on an informal basis in accordance with local practice. Respondent's counsel did not seek formal discovery under the Federal Rules of Bankruptcy Procedure. See Fed. R. Bankr. P. 9014.

A hearing on Movant's motion for relief was scheduled for March 9, 2000. Respondent and her counsel were present. The hearing was continued so that Ocwen could reconcile Respondent's account history.

Janet Piecara is a paralegal for Mr. Meredith. Respondent's counsel contacted Ms. Piecara on March 9, 2000. They reviewed Respondent's account history. Ms. Piecara stated to Respondent's counsel that Ocwen would withdraw its proof of claim because it was filed in error. Ocwen withdrew its proof of claim on March 15, 2000.[6]

Respondent's counsel sent Ms. Wright a letter dated March 22, 2000. Respondent's counsel provided copies of nine payments that Ocwen had not posted to Respondent's account. Respondent's counsel enclosed two checks drawn on her trust account that were payable to Movant, which totaled $1,800. The checks were to be applied to Respondent's arrearage.

The hearing on Movant's motion for relief was rescheduled for April 24, 2000. Respondent's counsel was to be out of town on that date. Danny L. Akin, an attorney at law, agreed to "stand in for" Respondent's counsel at the hearing. On April 21, 2000, Respondent's counsel met with Mr. Akin and provided information concerning this matter. Mr. Akin believed that the matter was not ready for a hearing

[6] The Withdrawal of Proof of Claim was filed with the Court on March 15, 2000.

and that a continuance should be requested. The Court granted a continuance until May 2, 2000.

Ms. Piecara testified that she telephoned Ms. Wright on April 21, 2000, which was three days prior to the hearing scheduled for April 24, 2000. Ms. Piecara stated that Ocwen had reconciled Respondent's account. Ms. Piecara stated that with the funds that Respondent's counsel had sent to Ms. Wright, Respondent's account was current. Ms. Piecara told Ms. Wright that Movant's motion for relief should be withdrawn. Ms. Piecara did not ask Ms. Wright to seek attorney's fees or costs.

Respondent's counsel stated that Ms. Wright contacted her at 2:43 p.m. on April 21, 2000. Ms. Wright stated that Respondent still owed $53. Respondent's counsel stated that she had just sent $400. Ms. Wright stated that she would review the matter.

Respondent's counsel stated that Ms. Wright contacted her again at 4:05 p.m. on April 21, 2000. Ms. Wright stated that the proposal to cure the arrearage made by Respondent's counsel on March 22, 2000, would be accepted. Ms. Wright stated that Ocwen still was demanding its attorney's fees and costs.

Movant's motion for relief came on for a hearing on

May 2, 2000. Movant's counsel, Karl J. Osmus,[7] announced that he had spoken with Movant that morning. Mr. Osmus stated that Respondent's account was current and that Movant was withdrawing its motion for relief. The Court declined to accept Movant's withdrawal because Respondent's counsel made an oral motion for sanctions.

Respondent's counsel stated that she finally received on May 30, 2000, an accurate account history from Ocwen. The account history showed that Respondent's account was overpaid by $173.52.

Respondent, in the motions before the Court, contends that Movant was not responsive to her requests for a copy of her account history. Respondent contends that Movant, despite its failure to respond, continued to demand its attorney's fees and costs. Respondent seeks to recover the attorney's fees and damages that she incurred in trying to resolve this matter. Respondent relies upon section 105(a) of the Bankruptcy Code,[8] which provides as follows:

> **§ 105. Power of court**
>
> **(a)** 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,

[7] Mr. Osmus is an attorney in Mr. Goodman's office.

[8] 11 U.S.C.A. § 105(a) (West 1993).

> 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.A. § 105(a) (West 1993).

Section 105 grants the Court statutory contempt powers to award monetary damages and other relief as "necessary and appropriate" to carry out the provisions of the Bankruptcy Code. Hardy v. United States (In re Hardy), 97 F.3d 1384, 1389-90 (11th Cir. 1996). "[T]he plain meaning of § 105(a) encompasses any type of order, whether injunctive, compensative or punitive, as long as it is 'necessary or appropriate to carry out the provisions of' the Bankruptcy Code." Jove Engineering, Inc. v. Internal Revenue Service, 92 F.3d 1539, 1554 (11th Cir. 1996) (emphasis original).

In In re Volpert,[9] the Seventh Circuit Court of Appeals stated:

> [U]nder 11 U.S.C. § 105(a), bankruptcy courts may punish an attorney who unreasonably and vexatiously multiplies the proceedings before them. See Caldwell v. Unified Capital Corp. (In re Rainbow Magazine), 77 F.3d 278, 283-84 (9th Cir. 1996); Courtesy Inns, 40 F.3d 1084, 1089 (10th Cir. 1994). . . . The ability to prevent the type of behavior exhibited in this case is necessary if the bankruptcy courts are to carry out efficiently and effectively the duties assigned to them by Congress.

110 F.3d at 500.

"'Vexatious' means 'without reasonable or probable

[9] 110 F.3d 494 (7th Cir. 1997).

cause or excuse." United States v. Gilbert, 198 F.3d 1293, 1298 (11th Cir. 1999).

The Court also may sanction certain conduct through its inherent contempt powers, which arise independent of any statute or rule. Jove, 92 F.3d at 1553. The inherent powers of a court can be invoked even if procedural rules exist which sanction the same conduct. Chambers v. NASCO, Inc., 501 U.S. 32, 49, 111 S. Ct. 2123, 2135, 115 L. Ed. 2d 27 (1991). The court has the inherent power to assess attorney's fees against a party or counsel that has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Chambers, 501 U.S. at 45-46, 111 S. Ct. at 2133; Glatter v. Mroz (In re Mroz), 65 F.3d 1567, 1574-76 (11th Cir. 1995).

Turning to the case at bar, Respondent's counsel attempted to resolve Movant's motion for relief on an informal basis in accordance with local practice. Movant was unable to timely provide a copy of Respondent's account history. Movant also failed to respond to a number of requests made by Respondent's counsel. The Court has serious concerns about Movant's conduct. The Court is not persuaded, however, that in this case, it should sanction Movant.

The Court notes that Movant's local counsel, Mr. Goodman, continued to seek attorney's fees after Movant's motion for relief had been resolved. Ms. Piecara told Ms. Wright on April 21, 2000, that Respondent's account was

current and that Movant's motion for relief should be withdrawn. Movant's motion for relief was at an end. There was no reason for Respondent to incur any additional attorney's fees. The additional attorney time expended by Respondent's counsel after April 21, 2000, was in response to actions taken by Mr. Goodman's law firm. The Court is persuaded that Mr. Goodman should be held responsible for the attorney's fees incurred by Respondent after April 21, 2000. The itemization filed by Respondent's counsel discloses four hours of attorney time. Respondent's counsel's usual hourly rate is $125 per hour. Accordingly, Mr. Goodman will be ordered to pay Respondent's counsel $500 in attorney's fees.

An order in accordance with this memorandum opinion will be entered this date.

DATED the 14th day of September, 2000.

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ROBERT F. HERSHNER, JR.
Chief Judge
United States Bankruptcy Court