

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED

JAN 13 1987

MOLLIE C. JONES CLERK

IN RE:

EARNESTINE COOPER

CASE NO. 8600638JC

EARNESTINE COOPER

vs.

FLEET FINANCE, INC. AND
GARY BATES

ADVERSARY PROCEEDING NO. 860078JC

Houston J. Patton
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Jackson, MS 39213

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Earnestine Cooper

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Attorney for Defendant,
Fleet Finance, Inc.

Edward Ellington, Bankruptcy Judge

O P I N I O N

THIS MATTER came on for hearing on the Complaint of Earnestine Cooper to reinstate a deed of trust and revest title to real property in her; the Answer and Counter-Claim of Fleet Finance, Inc.; the Answer of Earnestine Cooper to the Counterclaim; the Motion for Summary Judgment of Earnestine Cooper; and the Response of Fleet Finance, Inc. to the Motion for Summary Judgment, all in the above styled Adversary

No. 860078JC; and also for hearing on the Motion for Contempt filed by Earnestine Cooper against Fleet Finance, Inc.; the Answer thereto and Cross-Motion for Removal of the Automatic Stay filed by Fleet Finance, Inc.; and, the Response of Earnestine Cooper to the Cross-Motion for Removal of Automatic Stay, all filed in the above styled Bankruptcy Case No. 8600638JC.

After hearing the facts and considering the same, this Court entered a written Order on October 1, 1986, in which the Court found that the Motion for Summary Judgment should be denied, the Complaint should be granted, the Motion for Contempt should be denied and the Motion to Lift the Stay should be denied. It is from this written Order that Fleet Finance, Inc. appeals and Earnestine Cooper cross-appeals.

STATEMENT OF THE CASE

The issues in this case revolve around an indebtedness from Houston Cooper and Earnestine Cooper, husband and wife, to Fleet Finance, Inc. The indebtedness was evidenced by a promissory note signed by Mr. and Mrs. Cooper and secured by a deed of trust on their home.

Earnestine Cooper filed a petition under Chapter 13 of the Bankruptcy Code on March 27, 1986, being Bankruptcy Case No. 8600638JC. A complaint was

filed on May 15, 1986 by Earnestine Cooper against Fleet Finance, Inc. and it was designated Adversary Proceeding No. 860078JC. Various motions and responses were filed in Earnestine Cooper's bankruptcy case and adversary proceeding and they came on for hearing on August 7, 1986.

The Court will reconstruct the circumstances surrounding these proceedings up to the trial date.

August 21, 1985

Houston Cooper, the husband of Earnestine Cooper, filed a petition under Chapter 13 of the Bankruptcy Code. His petition, being Bankruptcy Case No. 8501267JC, will be referred to as the husband's petition or case hereinafter. The Honorable Robert C. Grenfell, Jackson, Mississippi, was the attorney of record for Mr. Cooper. Upon the filing of Mr. Cooper's petition on this date, the automatic stay granted by 11 U.S.C. 362 went into effect for the protection of Mr. Cooper and the codebtor stay granted by 11 U.S.C. 1301 went into effect for the protection of Earnestine Cooper, his wife.

September 5, 1985

A Motion to Lift Stay was filed by the Honorable Gary L. Bates on behalf of Fleet Finance,

Inc., being Motion No. 85412. A Certificate of Service was filed which reflects that Mr. Grenfell, the husband's attorney, was noticed but does not indicate that the wife and codebtor, Earnestine Cooper, was noticed.

October 10, 1985

A hearing was set for 10:00 A.M. on this date on Fleet Finance, Inc.'s Motion to Lift Stay. The Court's records reflect that neither the attorney for Mr. Cooper or the attorney for Fleet Finance, Inc. appeared, but that the Court was contacted by the attorneys prior to the hearing and informed that a settlement agreement had been reached.

February 19, 1986

The Clerk's Office of the United States Bankruptcy Court sent a written notice to Fleet Finance, Inc.'s attorney, Mr. Bates, that no action had been taken on Fleet Finance, Inc.'s Motion to Lift Stay, Motion No. 85412, and without further instructions within 10 days, the Motion would be dismissed by the Court.

March 10, 1986

No communications were received by the Court in response to the notice dated February 19, 1986, and

an Order was entered by the Court dismissing Fleet Finance, Inc.'s Motion to Lift Stay.

March 27, 1986

At approximately 11:05 A.M., Fleet Finance, Inc. foreclosed on the real property and home of Houston Cooper and Earnestine Cooper.

At approximately 4:57 P.M., Earnestine Cooper filed a petition under Chapter 13 of the Bankruptcy Code. Her petition, being Bankruptcy Case No. 8600638JC, will be referred to as the wife's petition or case hereinafter. The Honorable Houston J. Patton, Jackson, Mississippi, was the attorney of record for Mrs. Cooper. Upon the filing of Mrs. Cooper's petition on this date, the automatic stay granted by 11 U.S.C. 362 went into effect for the protection of Mrs. Cooper and the codebtor stay granted by 11 U.S.C. 1301 went into effect for the protection of Houston Cooper, her husband.

April 1, 1986

Fleet Finance, Inc. filed a Complaint against Houston Cooper and Earnestine Cooper in the County Court of the First Judicial District of Hinds County, Mississippi, Civil Action No. 15-908. This Complaint alleged that Houston Cooper and Earnestine Cooper were

unlawfully withholding the house and lot from the possession of Fleet Finance, Inc. and Fleet Finance, Inc. requested eviction.

May 1, 1986

A Motion for Contempt was filed in the wife's case against Fleet Finance, Inc. The Motion alleged that Fleet Finance, Inc. recorded the Trustee's Deed from the foreclosure sale after having knowledge of the wife's bankruptcy petition and instituted eviction proceeding, both in violation of the automatic stay.

May 7, 1986

An Answer to the wife's Motion for Contempt and a Cross Motion for Removal of Automatic Stay were filed by Fleet Finance, Inc. Fleet Finance, Inc. alleged that its foreclosure sale was completed prior to the filing of the wife's bankruptcy petition and that the wife continued to be in the unlawful possession of the home. Thus, Fleet Finance, Inc. requested the Automatic Stay of 11 U.S.C. 362 be removed as the continuation of the stay would work real and irreparable harm to Fleet Finance, Inc. and deprive Fleet Finance, Inc. of adequate protection as provided by the Code. The Certificate of Service filed by the attorney for Fleet Finance, Inc. provided that a copy

of this Cross-Motion for Removal of the Stay was mailed to Mr. Patton, the wife's attorney. 11 U.S.C. 1301 requires that notice to lift the stay also be given to a codebtor under Chapter 13 of the Bankruptcy Code. There is no indication that Houston Cooper or his attorney received notice of said motion.

May 15, 1986

An Application was filed for the removal of Fleet Finance, Inc.'s Civil Action, No. 15-908, from the County Court of the First Judicial District of Hinds County, Mississippi, which had been filed on April 1, 1986.

Also, a Complaint was filed by Earnestine Cooper against Fleet Finance, Inc. and Gary Bates to reinstate the Deed of Trust and to revest title to real property, being Adversary Proceeding No. 860078JC.

May 21, 1986

Earnestine Cooper filed a response to the cross motion for removal of stay filed in her case by Fleet Finance, Inc. and denied that the stay should be removed.

May 29, 1986

Fleet Finance, Inc. filed an Answer to the

Complaint in the Adversary Proceeding and a Counter-Claim. The answer admitted that a foreclosure sale was conducted on March 27, 1986, but denied that the complaint should be granted and alleged in its counter-claim that costs and attorney's fees should be awarded to defend this frivolous matter.

May 30, 1986

An answer to Cross-Complaint was filed denying any relief should be granted.

A Motion for Summary Judgment was filed by Earnestine Cooper on the grounds that there was "no material issue as to the material facts in these proceedings." The motion requested Summary Judgment on:

- 1) The Motion for Contempt of Earnestine Cooper.
- 2) The Cross-Motion for Removal of Stay of Fleet Finance, Inc.
- 3) The Complaint to Reinstate Deed of Trust of Earnestine Cooper.
- 4) The Counter-Claim of Fleet Finance, Inc. and Gary Bates.

June 4, 1986

A Response to Motion for Summary Judgment was filed.

June 9, 1986

The Motion for Contempt and the Cross-Motion for Removal of the Automatic Stay, both filed in the wife's case, and the Motion for Summary Judgment filed in the Adversary Proceeding were set for hearing at 11:00 A.M. The attorneys for both parties appeared and the Motions were discussed before the Court and continued until August 7, 1986, at which time the Complaint and Counter-Claim were set for trial.

July 21, 1986

The bankruptcy case of Houston Cooper, the husband, came on for hearing and was dismissed on the Trustee's motion for failure of the debtor to fund his Chapter 13 plan.

August 7, 1986

The matter presently before the Court came on for hearing on August 7, 1986, on the Complaint of Earnestine Cooper to reinstate a deed of trust and re-vest title to real property in her; the Answer and Counter-Claim of Fleet Finance, Inc.; the Answer of Earnestine Cooper to the Counter-Claim; the Motion for Summary Judgment of Earnestine Cooper; and the Response of Fleet Finance, Inc. to the Motion for Summary Judgment, all in Adversary Proceeding No. 860078JC; and

also for hearing on the Motion for Contempt filed by Earnestine Cooper against Fleet Finance, Inc.; the Answer thereto and Cross-Motion for Removal of Automatic Stay filed by Fleet Finance, Inc.; and, the Response of Earnestine Cooper, all filed in Bankruptcy Case No. 8600638JC, the wife's case.

The parties hereto, along with their respective counsel, appeared on said date and answered ready for trial. The Court, after hearing all evidence presented, together with argument of counsel, issued its oral opinion from the bench and found that Earnestine Cooper's Motion for Summary Judgment should be denied; the foreclosure sale conducted by Fleet Finance, Inc. should be held to be void and set aside; Fleet Finance, Inc. should return all household goods and furnishings to Earnestine Cooper and pay all costs related thereto, including storage; Fleet Finance, Inc. should pay the sum of \$1,500.00 to Earnestine Cooper as compensation for damages and \$1,500.00 to her for attorney's fees; and the Motion to Lift Stay by Fleet Finance, Inc. should be denied with all costs assessed to Fleet Finance, Inc. Due to the attorneys' conflict in drafting the order following the Court's ruling, the Court was delayed in entering its written Order until October 1, 1986. It is from this decision that Fleet Finance, Inc. appeals and Earnestine Cooper cross-appeals.

**STATEMENT OF ISSUES ON APPEAL AS SET FORTH BY FLEET
FINANCE, INC.**

1. Did the Court error in failing to remove the Automatic Stay?

2. Did the Court error in awarding damages and attorney fees to the debtor?

**STATEMENT OF ISSUES ON CROSS-APPEAL AS SET
FORTH BY EARNESTINE COOPER**

1. Did the Court error in holding that the recording of the Trustee's Deed subsequent to the filing of bankruptcy did not constitute a violation of the automatic stay of 11 U.S.C. 362 and was not void?

2. Did the Court error in refusing to award the damages outlined in the Affidavit of Cross-Appellant, where Cross-Appellee filed no Counter-Affidavit, nor offered any testimony to refute the Affidavit?

3. Did the Court error in denying Cross-Appellant's Motion for Summary Judgment?

DISCUSSION

I. Did the Court error in failing to remove the Automatic Stay?

11 U.S.C. 362 provides in part:

Automatic Stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section

5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

. . .
(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property under subsection (a) of this section of such party in interest; or

(2) with respect to a stay of an act against property, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

. . .

11 U.S.C. 1301 provides:

Stay of Action Against Codebtor

(a) Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless--

(1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or

(2) the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title.

(b) A creditor may present a negotiable instrument, and may give notice of dishonor of such an instrument.

(c) On request of a party in interest and after notice and a hearing the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that--

(1) as between the debtor and the individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;

(2) the plan filed by the debtor proposes not to pay such claim; or

(3) such creditor's interest would be irreparably harmed by continuation of such stay.

(d) Twenty days after the filing of a request under subsection (c)(2) of this section for relief from the stay provided by subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the debtor or any individual that is liable on such debt with the debtor files and serves upon such party in interest a written objection to the taking of the proposed action.

Houston Cooper, the husband of Earnestine Cooper, filed a petition under Chapter 13 of the Bankruptcy Code on August 21, 1985. Upon the filing of Mr. Cooper's petition, the automatic stay granted by section 362 went into effect for the protection of Mr. Cooper and the codebtor stay granted by section 1301 went into effect for the protection of Earnestine Cooper, his wife.

Fleet Finance, Inc. filed a motion to have the automatic stay lifted pursuant to Section 362 on September 5, 1985. The motion was set for hearing on October 10, 1985, but the Court's records reflect that the Court was contacted by the attorneys prior to the hearing and informed that a settlement agreement had been reached. Nothing was received by the Court on this motion subsequent to that hearing date. . On February 19, 1986 the Clerk's Office sent written notice to Fleet Finance, Inc.'s attorney that no action had been taken and without further instructions within 10 days, the Motion would be dismissed by the Court. No action was taken and an Order was entered by the Court on March 10, 1986, dismissing Fleet Finance, Inc.'s motion. Thus, the automatic stay granted pursuant to §362 and the codebtor stay granted pursuant to §1301 remained in effect until July 21, 1986, when Houston Cooper's case was dismissed. (See 11 U.S.C. 362(c)(2)).

Prior to the aforesaid July 21, 1986, Earnestine Cooper filed a petition under Chapter 13 of the Bankruptcy Code on March 27, 1986. Upon the filing of Mrs. Cooper's petition, the automatic stay granted by section 362 went into effect for the protection of Mrs. Cooper and the codebtor stay granted by section 1301 went into effect for the protection of Houston Cooper, her husband.

Therefore, after the time of the filing of Mrs. Cooper's petition at 4:57 P.M. on March 27, 1986, Houston Cooper was protected by the automatic stay of his bankruptcy petition and the codebtor stay from his wife's separate petition. Also, Earnestine Cooper was protected by the automatic stay of her bankruptcy petition and the codebtor stay from her husband's separate petition.

On May 1, 1986, Earnestine Cooper filed a Motion for Contempt against Fleet Finance, Inc. in her bankruptcy case, No. 8600638JC. Fleet Finance, Inc. timely filed an Answer to the Motion for Contempt and also a Cross Motion for Removal of the Automatic Stay. Fleet Finance, Inc. requested the section 362 automatic stay be removed as the continuation of the stay would work real and irreparable harm to Fleet Finance, Inc. and deprive Fleet Finance, Inc. of adequate protection as provided by the Code. The Certificate of Service

filed by the attorney for Fleet Finance, Inc. provided that a copy of this Cross-Motion for Removal of the Stay was mailed only to Mr. Patton, the wife's attorney. There is no indication that Houston Cooper or his attorney, Mr. Grenfell, received proper notice of said motion. It is obvious Fleet Finance, Inc. had knowledge of the husband's petition as it had previously filed a motion to lift the stay in his case.

Section 362(d) provides the court with the power to grant relief from the automatic stay but only after notice and a hearing. Section 1301(c) provides the Court with the power to grant relief from the codebtor stay but also only after notice and a hearing. Bankruptcy Rule 9014, Contested Matters, provides in part, "In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. ...The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004,...". Rule 7004 allows service by first class mail.

Thus, the status of the debtor and codebtor stays between Earnestine Cooper, Houston Cooper and Fleet Finance, Inc. after the filing of the Cross-Motion of Fleet Finance, Inc. on May 7, 1986, and up

until the hearing of the matters on August 7, 1986, was:

(1) Earnestine Cooper had been notified of Fleet Finance, Inc.'s request for removal of the §362 automatic stay in her case, No. 8600638JC;

(2) Houston Cooper had not been notified of the removal of the §1301 codebtor stay in his wife's case, No. 860638JC;

(3) No request for the removal of the §362 automatic stay of Houston Cooper was pending in his case, No. 8501267JC, because the motion of Fleet Finance, Inc. had been dismissed by the Court on March 10, 1986, and the §362 stay was still in full force and effect.

(4) No request for the removal of the §1301 codebtor stay pertaining to Earnestine Cooper had ever been made in Houston Cooper's case, No. 8501267JC, and it remained in full effect.

The Court finds that in the case at hand there were two Chapter 13 bankruptcy petitions, one for a husband and the other for his wife. As previously discussed, there was an automatic stay and a codebtor stay in effect in both cases. This Court simply finds that both the husband and wife should receive proper notice before the Court can be allowed to grant relief from the automatic stay and codebtor stay. Therefore, as the Court indicated at trial, Fleet Finance, Inc.'s

Cross-Motion for Removal of the Stay should be denied. Note that this Court has not made any determinations or adjudications concerning the questions of whether Fleet Finance, Inc. has adequate protection or whether the continuation of the stay would work real and irreparable harm to Fleet Finance, Inc.

II. Did the Court error in awarding damages and attorney fees to the debtor?

As discussed earlier, Houston Cooper, the husband of Earnestine Cooper, filed a petition under Chapter 13 of the Bankruptcy Code on August 21, 1985. Upon the filing of Mr. Cooper's petition, the section 362 automatic stay and the section 1301 codebtor stay went into effect. Although Fleet Finance, Inc. filed a Motion to Lift the Automatic Stay, it was dismissed as earlier noted herein. However, Fleet Finance, Inc. proceeded with a foreclosure sale on Houston Cooper and Earnestine Cooper's home on March 27, 1986 at approximately 11:05 A.M. This was in direct violation of the automatic stay and codebtor stay as provided by the Bankruptcy Code.

Subsequent to the foreclosure sale, Earnestine Cooper filed a petition under Chapter 13 of the Bankruptcy Code on March 27, 1986 at approximately 4:57 P.M. Again, upon the filing of Mrs. Cooper's petition, the section 362 automatic stay and the section 1301 codebtor stay went into effect.

Relying upon the assumption that the foreclosure sale was valid, Fleet Finance, Inc. filed eviction proceedings in state court on April 1, 1986, and subsequently received a judgment. Fleet Finance, Inc. proceeded with its judgment and removed Houston Cooper and Earnestine Cooper from their premises along with all household goods and furnishings which were put into storage by Fleet Finance, Inc. Fleet Finance, Inc. takes the position that at the time of this civil action the property was not part of the property of the debtor's estate, but belonged to Fleet Finance, Inc. The Court concludes that the foreclosure sale was in violation of the automatic stay and codebtor stay of the husband's bankruptcy petition and not valid. Thus, the Court finds that this civil action for eviction was in violation of the automatic stay and codebtor stay of both the husband's bankruptcy petition and the wife's bankruptcy petition.

If the issue had been simply whether or not the foreclosure that was held on March 27th at 11:05 A.M. was valid or not because a bankruptcy petition had been filed that same day, the Court's opinion would be that the foreclosure was good. In a state such as Mississippi, where there is no redemption period after foreclosure, once the foreclosure sale is conducted prior to the filing of a bankruptcy petition, it

becomes final. See In Re Taddeo, 685 F.2d 24 (2nd Circuit, 1982); Grubbs v. Houston First American Savings Assn., 730 F.2d 236 (5th Circuit, 1984); and Federal Land Bank of Louisville v. Glenn, 760 F.2d 1428 (6th Circuit, 1985). However, that is not the case at hand since the husband had filed a previous petition some seven months prior to his wife's petition.

11 U.S.C. 105(a) provides:

The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

11 U.S.C. 362(h) provides:

An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

Section 362(h) clearly provides the sanctions that may be imposed by the willful violation of the automatic stay. Note that the subsection provides that an individual "shall" recover actual damages, including costs and attorneys' fees and may, in the Court's discretion, recover punitive damages.

Whether or not Fleet Finance, Inc. believed it was justified in foreclosing on the home and evicting the Coopers is of no consequence. The fact

remains that the automatic stay and codebtor stay intervenes upon the filing of the debtor's bankruptcy petition and all that is necessary to trigger the sanctions under subsection (h) is that the creditor willfully violate the stay. There is no question Fleet Finance, Inc. violated the stay by foreclosing on the home and evicting the Coopers.

11 U.S.C. 362(a)(3) provides in part:

. . . a petition filed under section 301. . . of this Title. . . operates as a stay applicable to all entities, of--

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

Fleet Finance, Inc. admittedly caused the foreclosure sale of the home and the eviction of the Coopers. Therefore, it is without question that Fleet Finance, Inc. violated the stay.

The issue then becomes whether Fleet Finance, Inc.'s actions were willful. Reference must be made as to the meaning of "willful" in the context of the Bankruptcy Code. Section 523(a)(6) relates to nondischargeability of a debt caused by willful and malicious injury by the debtor to the person or property of another entity. This same "willful" language has been construed by Courts to mean

intentional or deliberate. See: Matter of Langes, 12 B.R. 957, 959, 7 B.C.D. 1323, 1324 (D.N.D. 1981); In re Stanfield, 8 B.C.D. 170 (Bankr. N.D. OH 1981); In re Glaser, 25 B.R. 329, 330, 10 B.C.D. 178, 179 (BAP 9th Cir. 1982); In re Marvin L. Nuckols, 12 B.C.D. 1125 (E.D. Va. 1985); In re Joseph John Cecchini, 13 B.C.D. 1074 (CA-9 Calif. 1985); In re Roland C. Vaughn, 14 B.C.D. 127 (CA-4 Va. 1985); In re Lyle Robert Ertz, 10 B.C.D. 883 (D.C.D.S.D. 1983); In re Tel-A-Communication Consultants, Inc., 13 B.C.D. 119 (D.Conn. 1985). See also Legislative History, H.R. Rep. No. 96-595, 95th Cong., 1st Sess. 365 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 77-79 (1978).

The facts here clearly demonstrate that Fleet Finance, Inc. not only acted deliberately and intentionally but in disregard of federal law. Fleet Finance, Inc. proceeded with a foreclosure sale when it had certain knowledge of Houston Cooper's bankruptcy petition and then proceeded with an eviction proceeding after learning of Earnestine Cooper's petition.

This Court finds that the evidence presented demonstrates the willful violation of the automatic stay and entitles Houston Cooper and Earnestine Cooper to damages and attorney's fees. This Court further finds that \$1,500 for compensatory damages and \$1,500 for attorney fees is reasonable and appropriate due to

the circumstances and should be awarded to Earnestine Cooper, in addition to the Coopers having their household goods and furnishings returned to them.

III. Did the Court error in holding that the recording of the Trustee's Deed subsequent to the filing of bankruptcy did not constitute a violation of the Automatic Stay of 11 U.S.C. 362 and was not void?

As discussed earlier, in a state such as Mississippi, where there is no redemption period after foreclosure, once the foreclosure sale is conducted prior to the filing of a bankruptcy petition, it becomes final. See In re Taddeo; Grubbs and Glenn, cited earlier. Once the foreclosure is final, all rights in the property vests in the creditor and the foreclosed property is no longer considered property of the estate belonging to the debtor. Thus, a mere recording of a deed by a creditor after a valid foreclosure does not affect property of the estate or violate the automatic stay of Section 362.

However, in the case at hand, this Court did find that the foreclosure conducted was in violation of the automatic stay and should be set aside and held for naught. The Court held Fleet Finance, Inc. violated the automatic stay by conducting the foreclosure sale and the Court awarded the debtor damages along with having the land records corrected to reflect the debtor's ownership in the property.

The recording of the Trustee's Deed by Fleet Finance, Inc. was merely a conclusion of the foreclosure sale conducted. The Court has held the foreclosure to be void, thus the recording of the Trustee's Deed is also void and the land records should be corrected.

IV. Did the Court error in refusing to award the damages outlined in the Affidavit of Cross-Appellant, where Cross-Appellee filed no Counter-Affidavit, nor offered any testimony to refute the Affidavit?

The Affidavit of Earnestine Cooper provided for damages as follows:

Increased Rent and Food costs	\$ 800.00
Additional Transportation costs	\$ 150.00
Furniture Storage	\$ 600.00
Moving and Returning Furniture to Home	\$ 511.98
Humiliation and Emotional Distress	\$4,000.00
	<hr/>
Total	\$6,061.98

This Court ordered Fleet Finance, Inc. to pay the furniture storage and to pay the costs of having the furniture returned, thus satisfying \$1,111.98 (\$600.00 + \$511.98) of the damages requested. The Court further ordered Fleet Finance, Inc. to pay the Debtor \$1,500.00 in damages. This amount includes the

increase for rent and food, the increase in transportation costs and for humiliation and emotional distress.

Admittedly, the Court did not break down the \$1,500.00 damages into categories for arriving at the figure but found the amount to be fair and just due to the circumstances. There was no detailed proof presented that there was an \$800.00 increase in food and rent or an \$150.00 increase in transportation costs or \$4,000.00 worth of humiliation and emotional distress. All such findings are in the Court's discretion and the Court finds it has an independent duty to award what is reasonable and appropriate due to the circumstances, regardless of what a party may claim in its affidavit.

Thus, the Court finds that \$1,500.00 is reasonable and appropriate for the Debtor's increase in food, rent and transportation and for the Debtor's humiliation and emotional distress.

V. Did the Court error in denying Cross-Appellant's Motion for Summary Judgment?

A Motion for Summary Judgment is governed by Bankruptcy Rule 7056 which incorporates Federal Rule of Civil Procedure 56.

Rule 56 provides in part:

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may,

at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

. . .

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

. . .

Subsection (a) requires expiration of at least 20 days after the commencement of the action before the claimant may file a motion for summary judgment. The Court finds that Earnestine Cooper simply did not wait the required 20 day period as provided for. However, no harm resulted as Fleet Finance, Inc. had filed an Answer and Counterclaim prior to the plaintiff's motion.

Subsection (c) provides that the judgment sought by the movant shall be rendered if it is shown that there is "no genuine issue as to any material fact

and the the moving party is entitled to a judgment as a matter of law." The purpose of this summary judgment method is to dispose of actions in which there is no genuine issue as to any material fact prior to having a trial. The plaintiff's motion for summary judgment did not come on for hearing until the trial date and therefore the purpose of Rule 56 was gone as both parties appeared with counsel and announced they were ready for trial.

Also, examination of the motion reveals that there did exist a genuine issue as to a material fact and that the plaintiff was not entitled to a judgment as a matter of law. The motion requested summary judgment as to:

- 1) The Motion for Contempt of Earnestine Cooper,
- 2) The Cross-Motion for Removal of Stay of Fleet Finance,
- 3) The Complaint to Reinstate Deed of Trust of Earnestine Cooper,
- 4) The Counterclaim of Fleet Finance, Inc. and Gary Bates.

Prior to testimony taken at the trial, the question seemed to be whether the foreclosure sale conducted by Fleet Finance, Inc. prior to Earnestine Cooper's bankruptcy petition filed the same day as the foreclosure, would be considered a final sale and determine the property as not part of the debtor's

estate. Note that nothing in the pleadings or affidavits submitted to the Court indicated that the husband, Houston Cooper, had filed a Chapter 13 petition in August, 1985. This information was brought out only by testimony at the trial.

The Motion for Contempt of Earnestine Cooper alleged that Fleet Finance, Inc. recorded the Trustee's Deed from foreclosure after having knowledge of the wife's bankruptcy petition and initiated eviction proceedings, both in violation of the automatic stay. Before this issue could have been decided, the Court would have to first determine if the foreclosure sale was final and if the property was vested in Fleet Finance, Inc. Usually in a state such as Mississippi where there is no redemption period, the foreclosure is final. See In re Taddeo; Grubbs and Glenn cited earlier. Therefore, a genuine issue as to a material fact did exist and there was a possibility that the Court would have denied Earnestine Cooper's motion for contempt.

Fleet Finance, Inc. filed a Cross-Motion for Removal of the Automatic Stay asserting that the continuation of the stay would work real and irreparable harm to Fleet Finance, Inc. and deprive Fleet Finance of adequate protection as provided by the Code. Again, the Court had to first determine if the

foreclosure sale was final and if not, if Fleet Finance had been afforded adequate protection. The Court determined that testimony would be needed before it could possibly render a decision on this point.

Finally, the motion requested summary judgment on the Complaint to Reinstate the Deed of Trust and Counter Claim of Fleet Finance, Inc. The Court denied the request for the same reason as stated previously that there had to be a determination as to whether the foreclosure sale was final at the time of Earnestine Cooper's petition. Also, there was a possibility Earnestine Cooper's request for relief pursuant to her complaint would be denied.

This Court did not find sufficient grounds to grant summary judgment in favor of Earnestine Cooper on her Motion for Contempt, Fleet Finance, Inc.'s Cross Motion for Removal of Automatic Stay, Earnestine Cooper's Complaint, or Fleet Finance, Inc.'s and Gary Bates' Counterclaim.

CONCLUSION

This matter really came on for hearing in Earnestine Cooper's case where the real issue at the time seemed to be whether a foreclosure sale, conducted prior to a bankruptcy petition filed hours later, would


be a final and valid sale. It was upon this issue that the Court relied in denying all requests for summary judgment.

However, after the trial commenced, testimony revealed the existence of a separate pending petition of Houston Cooper, the husband of Earnestine Cooper, during all times material herein. After closely examining the facts, the Court found that Fleet Finance, Inc. had indeed violated the automatic stays and codebtor stays provided for by the Bankruptcy Code. Thus, the Court was compelled to follow the law as it is written in Section 362(h) and grant the debtor, Earnestine Cooper, damages and attorney's fees.

The Court further entertained Fleet Finance, Inc.'s Motion to Remove the Automatic Stay but found that it should be denied. The Code provides the Court the power to grant relief from the Section 362 automatic stay and the Section 1301 codebtor stay, but the law also requires proper notice and a hearing. The Court finds that proper notice was not given to both Houston Cooper and Earnestine Cooper and therefore denied the motion on those grounds alone without making any other determinations.

Thus, this Court finds that its Order of October 1, 1986 was in line with the facts and appropriate due to the circumstances.

Dated this the 13TH day of January, 1987.


U. S. BANKRUPTCY JUDGE