U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

IN RE:	§	
	§	
PHAEDRA DEANNE DAVIS AND	§	CASE NO. 02-10389-RLJ-13
BRIAN LEE DAVIS,	§	
	§	
DEBTORS.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court considers the motion of Phaedra Deanne Davis and Brian Lee Davis, the above-named debtors, seeking the court's order vacating the agreed order entered by the court June 27, 2003, and imposing sanctions against the law firm of Barrett, Burke, Wilson, Castle, Daffin & Frappier, L.L.P., attorneys for Wells Fargo Home Mortgage, Inc., as servicer for Federal Home Loan Mortgage Corp.

Findings of Fact

1. Wells Fargo Home Mortgage, Inc., as servicer for Federal Home Loan Mortgage Corp. (Wells Fargo), filed its motion for relief from stay on April 22, 2003. The motion was set on the court's June 4, 2003, docket.

2. At the court's June 4, 2003, docket, the court was advised that the parties had reached an agreement regarding the motion and that Wells Fargo's counsel, Barrett, Burke, Wilson, Castle, Daffin & Frappier, L.L.P. ("Barrett, Burke"), would electronically upload an agreed order to the court.

3. The order that was electronically uploaded to the court was approved by the court and

entered June 27, 2003 (the "entered order"). The entered order is materially different than the form of order approved by the parties at the docket call. Despite this, the entered order, as submitted, reflects to be approved both as to form and substance by Barrett, Burke as counsel for Wells Fargo, Phil Black as counsel for the Debtors, and Walter O'Cheskey, the Chapter 13 Trustee.

4. The parties approved a form of an agreed order that contained counsels' initials next to handwritten changes made to the form of order (such form of order will be referred to as the "agreed order"). The initialed changes to the agreed order reflect that regular plan payments would begin June 1, 2003, rather than July 1, 2003; the plan would be amended to include a total amount owing of $8,604.63, arising from a pre-petition escrow shortage, post-petition arrearages, and attorney's fees and costs; this amount would be paid through the Chapter 13 plan; and a payment had been received in the amount of $2,411.76, resulting in a total balance of $6,192.87. The agreed order with such changes was signed by Melissa A. Dennis (with Barrett, Burke), as attorney for Wells Fargo, by Dan Wallis for the Debtors, and by Mark McBeath for the Chapter 13 Trustee.

5. The entered order recites that, in addition to the balance of $6,192.87, the Debtors owe a pre-petition escrow shortage of $3,409.63. The entered order states that payments will be made direct and contains a payment schedule calling for monthly payments of $664.81 per month. In effect, the entered order increased the amount owing by the Debtors by $3,409.63, changed the manner in which payments would be made, and added a specific payment schedule.

6. Debtors' counsel, Dan Wallis, was advised by the Chapter 13 Trustee that a different

order had been submitted to the court. Dan Wallis forwarded a July 18, 2003, letter to Yvonne Knesek, attorney with Barrett, Burke, advising her that the entered order was "substantially different" than the agreed order. The specific differences were noted with a demand that the entered order be corrected no later than July 24, 2003.

7. Several phone calls were made by Debtors' counsel and Wells Fargo's counsel to each other. Wells Fargo's counsel told Debtors' counsel that a corrected order would be submitted. Despite such assurance, Barrett, Burke took no action to correct the entered order prior to the Debtors' filing and serving their motion seeking to vacate the order and for sanctions, which was filed August 20, 2003.

8. If appropriate, these findings of fact shall be considered conclusions of law.

Conclusions of Law

9. The Debtors contend that Barrett, Burke either fraudulently changed the order or mistakenly and recklessly submitted an incorrect order. Such conduct, the Debtors contend, fundamentally undermines the electronic submission of orders. The Debtors request sanctions be awarded under Bankruptcy Rule 9011 or in accordance with the court's inherent power to award sanctions.

10. Wells Fargo's counsel, Barrett, Burke, submits that its submission of the entered order was an honest mistake, compounded by its further mistake in failing to timely submit a corrected order.

11. This court has jurisdiction of this matter under 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (G), and (O).

12. The critical question is whether the submission of the entered order by Barrett, Burke was a mistake. Other than stating that the wrong order was uploaded, Barrett, Burke offered no explanation as to how the so-called mistake was made. Yvonne Knesek, senior attorney with Barrett, Burke, testified that she instructed Connie Giangrosso, a case manager (not an attorney), to upload an order to the court. She also testified that after she was apprised that the entered order did not reflect the parties' agreement, she instructed Ms. Giangrosso to immediately correct the order.

13. Connie Giangrosso testified that she gave the wrong order to another attorney with Barrett, Burke to upload. She also testified that she failed to timely submit a corrected order.

14. The testimony by both Ms. Knesek and Ms. Giangrosso fails to explain how a materially different order than that which was agreed to was uploaded. The changes in the entered order address specific and critical terms. The implication is that Barrett, Burke discovered, or was told by its client, that the terms did not correctly reflect the status of the loan, and, rather than address such mistake with Debtors' counsel, simply corrected such terms and submitted the order with the representation that all counsel were in agreement.

15. Without an explanation as to how an incorrect order was submitted, the court can only conclude that the changes made to the agreed order were intentional. Barrett, Burke's failure to promptly cure the problem when confronted reflects, at worst, a cavalier attitude towards the situation, or, at best, a failure to implement internal procedures that insure that any such "mistakes" are corrected. The attorneys at Barrett, Burke failed to take responsibility for the situation. They have only offered the explanation that the paralegal was to correct the order.

16. Barrett, Burke argues that its submission of the entered order cannot be fraudulent because the parties had announced their agreement on the record prior to submission of the entered order. Without an explanation of how the submission of the entered order was a mistake, the court cannot accept the premise that the submission must be a mistake because of the likelihood of getting caught.

17. The court must be totally confident that agreed orders submitted do in fact represent the parties' agreement. An intentional misrepresentation cannot be tolerated. If unintentional, i.e. a mistake, prompt corrective action is expected. Any other expectation undermines the very integrity of the system.

18. Exercise of the court's inherent power to sanction is reserved for only those situations in which an attorney has acted in "bad faith, vexatiously, wantonly, or for oppressive reasons, or has defiled the very temple of justice." *Matta v. May*, 118 F.3d 410, 416 (5th Cir. 1997) (quoting *Chambers v. NASCO*, 501 U.S. 32, 45-46 (1991)). The court must specifically find that the offending parties acted in bad faith. *In re Smyth*, 242 B.R. 352, 361 (Bankr. W.D. Tex. 1999) (citing *Crowe v. Smith*, 151 F.3d 217, 236 (5th Cir. 1998)).

19. Barrett, Burke's conduct goes beyond mere inadvertence, mistake, or negligence. Making material changes to an agreed order and representing opposing counsel's agreement, and then failing to take prompt corrective action when confronted, satisfies the bad faith requirement for imposition of sanctions.

20. The court finds that sanctions should include attorney's fees and costs incurred by Debtors. In this regard, the court allows Debtors' attorney's fees and costs of $3,500. In

addition, the court awards an additional sanction of $2,500 to be paid by Barrett, Burke to the Debtors.

21. The entered order shall be vacated and the parties are instructed to submit an order that correctly reflects their announced agreement.

22. If appropriate, these conclusions of law shall be considered findings of fact.

DATED: December 2, 2003.

ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE