UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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November 3, 2000

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Subject: *In re Lamont D. Hill,*
Chapter 11; Bankr. No. 00-30071

Dear Counsel:

The matter before the Court is the Motion for Terms filed by the United States and Debtor's and his attorney's response. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court will award costs of $2,236.87 against Debtor and his counsel.

SUMMARY. Lamont D. Hill ("Debtor") filed a Chapter 11 petition on August 16, 2000. The Farm Service Agency (FSA) immediately filed a motion for relief from the automatic stay because it had a foreclosure sale set for August 17, 2000, Debtor had been in a prior unsuccessful bankruptcy case in 1983-84, Debtor had not made a voluntary payment on FSA's claim since 1978 or timely paid real estate taxes for several years, and Debtor had involved FSA in protracted foreclosure proceedings.

Debtor filed a response to FSA's relief motion. He identified some problems he saw in the District Court foreclosure action, which he thought should be resolved first, and essentially requested more time to respond to the relief motion and to file a

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plan. Debtor stated he would voluntarily dismiss his case and pay the costs for re-advertising a foreclosure sale if he were unable to file a plan that was "acceptable and approved by the Court."

An evidentiary hearing on FSA's motion for relief was held on shortened notice the morning of August 17, 2000. The Court did not grant FSA's motion but instead gave Debtor an opportunity to file a feasible plan. If such a plan could not be filed, FSA's motion for relief would be granted. The continued hearing on the relief from stay motion was set for September 26, 2000. The Court cautioned Debtor that he would have to work quickly and earnestly in order to be prepared for the continued hearing.

In the interim, the United States Trustee's filed a motion to dismiss. She argued the case should be dismissed if FSA were granted relief from the automatic stay because Debtor would no longer have the ability or need to reorganize his ranch operation once FSA was free to complete its foreclosure action. Debtor did not file a timely response to the United States Trustee's motion. The dismissal motion was also set for hearing on September 26, 2000.

Debtor filed his plan timely as directed by the Court's continuance order on FSA's relief from stay motion. The plan contemplated the direct involvement of Debtor's sons in making the plan feasible. However, Debtor and his counsel appeared at the hearing on September 26, 2000, withdrew his plan and his opposition to FSA's relief motion, and presented Debtor's own motion to dismiss. Debtor's counsel stated that the decision to not go forward in bankruptcy had been made the afternoon of the previous day when an accountant advised them that Debtor's sons should not foster their father's Chapter 11 effort.

Based on Debtor's consent to relief from the stay for FSA and his inability to file a confirmable plan, the Court granted FSA's relief from stay motion. The Court then granted the United States Trustee's uncontested dismissal motion on the grounds that there was nothing left for Debtor to reorganize. The Court also advised counsel for FSA that FSA could seek the costs it incurred in preparation for the evidentiary hearing on September 26, 2000.

On October 13, 2000, FSA filed a Motion for Terms and an Affidavit of Costs. In the Motion, FSA recited its recent litigation history with Debtor. In the Affidavit, FSA requested $39,921.34: $1,848.15 for costs associated with the sale that had been scheduled for August 17, 2000; $156.00 for a transcript of the August 17, 2000 hearing; $388.71 for costs associated with preparing for the September 26, 2000 evidentiary hearing; $1,684.72

for estimated costs for a re-advertised foreclosure sale; $33,245.58 for interest from August 16, 2000 to the estimated new sale date of November 9, 2000; and $2,598.18 for interest due on accumulated real estate taxes for the sale time period.

Debtor and his attorney filed a response on October 25, 2000. Therein, Debtor acknowledged that at the August 17, 2000 hearing, he had agreed to pay FSA's re-advertising costs for a new foreclosure sale if he was unable to file a feasible plan. In direct response to FSA's motion, Debtor and his attorney defended the filing of the Chapter 11 petition. They said that Debtor's sons decided not to foster Debtor's reorganization effort because of possible tax consequences if the sons purchased Debtor's land through the bankruptcy proceeding, because they realized that they could not get a plan confirmed without FSA's assent, and because they felt they would be unable to establish an amicable working relationship with FSA. Debtor and his counsel also complained that they were not given enough time to complete a plan.

DISCUSSION. At the hearing on September 26, 2000, the Court advised the parties that it would consider an imposition of those costs incurred by FSA in preparation for that hearing. The Court did so because Debtor and his counsel had not timely informed opposing counsel or the Court that the evidentiary hearing set for September 26, 2000 would not be necessary since Debtor had decided not to continue his reorganization effort. The record established that Debtor's counsel could have advised opposing counsel of this probability by mid-afternoon on September 25 and that opposing counsel was available at her office through late evening on the 25. Nonetheless, no courtesy call was made that day or early on the 26th. Consequently, the Court's, FSA's counsel's, and FSA's witnesses' time was wasted, and unnecessary expenses were incurred. Accordingly, an imposition of costs is appropriate. 11 U.S.C. § 105(a); *Walton v. LaBarge (In re Clark)*, 223 F.3d 859, 864 (8th Cir. 2000) (Bankruptcy Court may prevent abuses of process through civil sanctions under § 105(a)); *Lamb Engineering & Construction Co. v. Nebraska Public Power Dist.*, 103 F.3d 1422, 1435 (8th Cir. 1997)(a federal court's inherent power to sanction a party or his attorney, as an exception to the American Rule for bad faith, does not depend on which party wins, but on how the parties conduct themselves during the litigation); *United States v. Western Contracting Corp.*, 935 F.2d 936, 942 (8th Cir. 1991)("'knowing and unreasonable conduct' constitutes 'bad faith' for purposes of justifying an award of attorneys' fees"); *In re Zepecki*, 224 B.R. 907, 911 (Bankr. E.D. Ark. 1998)(Bankruptcy Court has power through § 105(a) to regulate those who appear before it and impose sanctions for abuse of process or other harms).

When FSA's affidavit of costs is considered in light of the Court's directive that it would award costs associated in preparation for the September 26, 2000 hearing, it is clear that only some qualify. In particular, the Court will allow as costs the witness fees, Marshal's costs, and witness travel expenses totaling $388.71. Further, in light of Debtor's agreement in its response to FSA's relief motion that he would pay costs for re-advertising the foreclosure sale, the Court will allow all the costs of $1,848.15 associated with the August 17, 2000 foreclosure sale that was canceled due to Debtor's petition and resistance to FSA's relief from stay motion. Though Debtor agreed to pay the "re-" advertising costs, the costs associated with the August 17, 2000 hearing are a known sum.

All the August 17, 2000 sale costs of $1,848.15 shall be paid by Debtor. Debtor shall also pay one-half of the $388.71 costs incurred by FSA in preparation of the September 26, 2000 hearing ($194.36). It was Debtor's decision to get out of bankruptcy, a decision made well past the eleventh hour. That decision nullified his objection to FSA's relief motion and put an end to the necessity of the September 26 hearing. The facts needed by Debtor to file his plan and resist FSA's relief motion did not change from the time he contemplated filing his petition until the September 26, 2000 hearing; it was a decision that could and should have been made much earlier, and certainly before he filed his proposed plan as part of his continued objection to FSA's relief motion.

Debtor's counsel shall pay $194.36, the other half of the costs FSA incurred in preparation for the September 26, 2000 hearing. This recognizes her failure to promptly inform the Court and opposing counsel of the abrupt change in her client's intentions.

The imposition of these costs, totaling $2,236.87, is the narrowest sanction possible on the responsible parties that will remedy the damage caused by Debtor and his counsel's untimely actions regarding the September 26, 2000 hearing. *See Harlan v. Lewis*, 982 F.2d 1255, 12962 (8th Cir. 1993).

The transcript costs are not allowed because no necessity for the transcript has been shown. The other costs requested by FSA, lost interest and projected costs for the upcoming foreclosure sale, are more appropriately addressed through the foreclosure process. An imposition of those costs would also be more in the nature of a sanction against Debtor and his counsel for a bad faith filing of the petition. Although the Court acknowledged at the September 26, 2000 hearing that Debtor's petition likely had not

been filed in good faith and that Debtor had not improved his reorganization chances from their tenuous position on August 17, 2000, the Court did not conclude then, and does not conclude now, that sanctions should be imposed because Debtor filed either his petition or his objection to FSA's relief motion in bad faith. There is an insufficient record for the Court to reach that conclusion. The Court cautions Debtor's counsel, however, that a petition filed in bad faith may result in sanctions and that a lack of good faith cannot be excused solely because of time constraints created by the debtor himself. *See Grunewaldt v. Mutual Life Insurance Co.(In re Coones Ranch, Inc.)*, 7 F.3d 740 (8th Cir. 1993), *aff'g*, *In re Coones Rach, Inc.*, Bankr. No. 91-40183, slip op., 1992 WL 111110 (Bankr. D.S.D. March 9, 1992).

An order awarding costs of $2,236.87 shall be entered. The costs shall be paid as ordered on or before November 14, 2000 by cashier's check, certified check, or money order to the person or entity as directed by Assistant United States Attorney DuPris.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: case file (docket original; copies to parties in interest)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

NOV 03 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

NOV 03 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By

Case: 00-30071 Form id: 122 Ntc Date: 11/03/2000 Off: 3 Page : 1
Total notices mailed: 5

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Aty	Schrempp DuPris, Cheryl	Assistant U.S. Attorney,	225 South Pierre Street #337,	Pierre, SD 57501