

**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**

**TELEPHONE (605) 224-0560**  
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October 13, 1989

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356 Dakota Avenue South  
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Brent A. Wilbur, Esq.  
Post Office Box 160  
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Re: Marvin Leroy and Ellen Marie Speck  
Chapter 11 88-30065

Dear Counsel:

On April 6, 1989, Brent Wilbur, attorney for Farm Credit Bank of Omaha (FCBO) , filed a motion for terms under Bankruptcy Rule 9011 against William L. Needler, Ronald J. Volesky, and their clients, Marvin and Ellen Speck, jointly and severally. After reviewing all the facts, the record, and the legal authority provided by counsel, the Court concludes that Attorney Wilbur's motion must be dismissed.

**FACTS**

Debtors filed under Chapter 11 of the Bankruptcy Code on October 11, 1988. On January 9, 1989 an adversary proceeding was

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initiated by the debtors for the removal of a foreclosure action which was pending in the Circuit Court for the Fourth Judicial Circuit of the state of South Dakota. The theory of the adversary proceeding was that the FCBO had violated the Agricultural Credit Act of 1987. Pub. L. No. 100-233, 101 Stat. 1568-1718, because it foreclosed on the Specks, appointed a receiver, sold the land to FCBO and then it leased the land to a third party without offering such lease to the Specks. A Section 543 motion for the turnover of property was filed on January 31 in order to avoid the sale of certain of the Specks' farm land to the FCBO and for the return of Specks' land to the bankruptcy estate. The turnover also asked for removal of the receiver, the return of monies to the estate and an accounting for all funds received by the receiver. These matters are currently pending before this Court.

On December 22, 1988, (prior to the filing of the adversary) Attorney Wilbur wrote to James Truax of Attorney Needler's firm, informing Truax that the Speck property could only be redeemed by a cash payment in the necessary amount for redemption, relying on *Johnson v. First Bank of Montevideo*, 719 F.2d 270 (8th Cir. 1983)~ and *Federal Land Bank v. DeMers*, 89 B.R. 48 (Bkrtcy. D.S.D. 1987) aff'd. 853 F.2d 605 (8th Cir. 1988). Attorney Wilbur further warned that "any attempt to restructure or otherwise alter the Federal Land Bank's current position (payment in full, in cash, or the issuance of a sheriff's deed at the end of the redemption period) is an action which would be frivolous, given the case law which has developed in the Eighth Circuit."

On January 31, 1989, Wilbur wrote Attorney Needler's firm and Attorney Volesky, enclosing a stipulation authorizing relief from the automatic stay on behalf of the FCBO. Attorney Wilbur stated in his letter that "relief from the stay where a sheriff's certificate has earlier been issued is a matter of settled case law in the Eighth Circuit; therefore, we would suggest that any resistance of our motion by the debtors would entitle us to claim costs and attorney's fees against both debtors and their counsel." The stipulation proposed by Attorney Wilbur was never filed with this Court. On February 1, 1989, Attorney Wilbur filed a motion for relief from the automatic stay. Attorney Wilbur's motion was granted and an order was entered on March 30, specifying that such relief was granted in order for FCBO to record a sheriff's deed to certain of Specks' property.

On April 6, 1989, Attorney Wilbur filed a motion for terms against the Specks, Attorney Needler, and Attorney Volesky. Wilbur therein contended that debtors' failure to enter into the stipulation, their disregard for settled law, and their attempt to

avoid relief from the automatic stay were meritless and not based on a good faith belief in the propriety of their legal position. By way of response, Attorney Needler claimed that Specks' complaint and motions were filed in good faith and based upon a sound legal claim, namely that Johnson and DeMers, supra and In re Donaldson, 43 B.R. 506 (Bkrtcy. D.S.D. 1984) provide that fraud, mistake, accident or erroneous conduct on the part of the foreclosing officer serve as an exception to the general rule that 11 U.S.C. §105(a) may not be invoked to toll or suspend the statutory period of redemption in foreclosure proceedings.

#### DECISION

Bankruptcy Rule 9011 provides, in salient part:

Every petition, pleading, motion or other paper served or filed in a case under the Code on behalf of a party represented by an attorney ... shall be signed by at least one attorney of record.] ... The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. ... If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

Rule 11 is designed to discourage the filing of frivolous court papers or those that are legally unreasonable or without factual foundation. Hartman v. Hallmark Cards, 833 F.2d 117 (8th Cir. 1987). See also Kurkowski v. Volcker, 819 F.2d 201 (8th Cir. 1987). In Lupo v. R. Rowland & Co., 857 F.2d 482 (8th Cir. 1988)

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the Eighth Circuit also stated that the purpose of Rule 11 is to compensate the offended party for the expenses caused by a violation, as well as to penalize the offender.

A violation of Rule 9011 occurs when a party or attorney files or serves a document (1) not well grounded in fact, warranted by existing law or containing a good faith argument for a change of the existing law or (2) for an improper purpose. See Byrne, Sanctions for Wrongful Bankruptcy Litigation, 72 Am. Bankr. L.J. 109, 114 (1988). See also Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987). The Rule is intended to be vigorously applied to curb frivolous pleadings and other papers. Adduono v. World Hockey Association, 824 F.2d 617 (8th Cir. 1987). However it is not a panacea intended to remedy all matter of attorney misconduct. Id.

Under Rules 11 and 9011 the conduct of the non-movant is to be judged under a standard of "objective reasonableness." E.E.O.C. v. Milavetz and Associates, P.A., 863 F.2d 613 (8th Cir. 1988). See also Hartman supra, Adduono supra, Kurkowski supra, and O'Connell v. Champion International Corp., 812 F.2d 393 (8th Cir. 1987). Good faith is not a defense under Rule 11. See Milavetz and Hartman supra. See also Robinson supra and Byrne at 114.

In this case, Specks contend that FCBO's actions constituted "wrongdoing" and "specific violations of the law" (i.e., the Agricultural Credit Act) . Their theory is that FCBO acted improperly in continuing the foreclosure action, appointing a receiver, selling the property to FCBO and then leasing the property to a third party. The holdings in Johnson, DeMers and Donaldson all make it clear that fraud, mistake, accident or erroneous conduct on the part of a foreclosing officer serve as an exception to the rule that the Bankruptcy Code may not be invoked to toll or suspend a statutory period of redemption in foreclosure proceedings.

The Court finds that Specks' contention that FCBO's conduct fell within the exception to the above noted rule is well grounded in fact and warranted by existing law and is not interposed for an improper purpose. In this regard, the Court notes that FCBO threatened Specks and their counsel with sanctions if the Specks did not sign the stipulation giving FCBO relief from the automatic stay; Specks resisted, and although this Court ultimately granted the requested relief, such was granted for the sole purpose of allowing FCBO to record a sheriff's deed to the property. Thus, the underlying question concerning Specks' claim that FOBO violated the Agricultural Credit Act still exists and theoretically could

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still succeed. The Court concludes that Specks' action does not constitute sanctionable conduct under B.R. 9011.

The Court notes that Attorney Wilbur warned Specks and their counsel that he would move for terms if they did not assent to his position. While the Court believes that it is good practice for an adversary to state an intention to seek sanctions prior to filing the motion therefor, see Byrne at 124, the Court sees little benefit emanating from such a warning where an opponent's theory may have some degree of merit. Instead, it may be advisable to reserve such warning for those cases where the attorney himself possesses a well-grounded belief that his opponent's conduct violation B.R. 9011. The Court can envision a scenario where filing a motion for terms could itself constitute sanctionable conduct. Thus, the Court urges all counsel to take pause before invoking Rule 9011 against their opponent.

This constitutes the Court's findings of fact and conclusions of law in this matter. This is a core proceeding under 28 U.S.C. §157(b). The Court will enter an order dismissing the motion for sanctions.

Very truly yours,

Irvin N. Hoyt  
Chief Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA

IN RE: ) CASE NO. 88-30065  
)  
MARVIN LEROY SPECK and ) CHAPTER 11  
ELLEN MARIE SPECK, )  
)  
Debtors. ) ORDER DISMISSING FARM  
) CREDIT BANK'S MOTION FOR  
) TERMS UNDER BANKRUPTCY RULE 9011

Pursuant to the letter opinion filed in this matter and  
executed this same date

IT IS HEREBY ORDERED that the motion of Farm Credit Bank of  
Omaha for terms under Bankruptcy Rule 9011 is hereby dismissed.

Dated this 13th day of October, 1989.

BY THE COURT:

Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By: \_\_\_\_\_  
Deputy

(SEAL)

(SEAL)