UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK
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IN RE:

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| DONALD R. HAITIAN | CASE NO. 04-60348 |
| Debtor | Chapter 13 |

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APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

On April 20, 2004, the Court was asked to consider the motion of the United States, seeking relief from the automatic stay pursuant to § 362(d)(1) of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). In its motion, the United States took the position that the entire amount of a judgment of foreclosure, namely $86,074.16, was due, rather than simply the $13,000 in arrears provided in the chapter 13 plan of Donald R. Haitian ("Debtor"). At the hearing on April 20, 2004, the Court expressed the belief that case law supported the concept that a debtor can cure prepetition arrears in a chapter 13 plan despite the fact that a judgment of foreclosure was obtained prepetition, provided no sale had occurred before the case was commenced.

The Court adjourned the motion to May 18, 2004, with the request that the parties brief the issue. On May 6, 2004, counsel for the United States filed a memorandum of law in which it relied, in particular, on the case of *In re Roach*, 824 F.2d 1370 (3d Cir. 1987), for the proposition that "the right to such a cure expires when the mortgagee obtains a foreclosure judgment."

Counsel for the United States was presented with a copy of a memorandum of law by Debtor's counsel on the morning of the hearing on May 18, 2004. In that memorandum of law, it was pointed out that Congress had amended § 1322 of the Code in 1994 by adding § 1322(c)(1), which provides for the cure of a default on a mortgage encumbering a debtor's principal residence until such time as it is sold at a foreclosure sale. The legislative history, cited by Debtor's counsel, also indicates that § 1322(c)(1) was intended to overrule *Roach.*

At the hearing on May 18, 2004, the Court agreed to adjourn the motion once again but also indicated to counsel for the United States that he should be prepared to explain to the Court why he should not be sanctioned for filing a memorandum of law that was absolutely contrary to the existing law and for making an argument that was both "indefensible and ludicrous."[1]

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[1] The Court never formally entered a show cause order as required by Rule 11(c)(1)(B). However, "in many cases substantial compliance [with Rule 11(c)(1)(B)] may suffice." *Kaplan v. Daimler Chrysler, A.G.,* 331 F.3d 1251, 1257 (11th Cir. 2003); *see also Nuewsra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 92 n.2 (stating that "[w]e assume, without deciding, that a judge's statements on the record could satisfy the requirements of Fed.R.Civ.P. 11(c)(1)(B)

At the adjourned hearing on May 25, 2004, counsel for the United States acknowledged his error and represented to the Court that his law firm had agreed to reimburse Debtor's counsel $300 for having to hire a research assistant to research the Code § 1322(c)(1) issue. The Court indicated that such payment might not obviate the need for an evidentiary hearing in connection with the imposition of sanctions pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure, which incorporates Rule 11 of the Federal Rules of Civil Procedure ("Rule 11"). The Court agreed to take the matter under submission and to apprise the parties of its intention.

"Rule 11 imposes an affirmative duty on the signer to make a reasonable inquiry as to the viability, legally and factually, of claims made in pleadings, written motions, and other papers filed with the court." *DiMarco v. Rome Hosp. and Murphy Memorial Hosp.,* 899 F. Supp. 91, 95-96 (N.D.N.Y. 1995). The imposition of sanctions is discretionary with the court and is to be determined using an objective standard of reasonableness. *Id.* at 96. However, "[s]ua sponte Rule 11 sanctions . . . must be reviewed with 'particular stringency'" given that they do not involve the "safe harbor" provision found in Rule 11(c)(1)(A). *Kaplan*, 331 F.3d at 1255 (citing *In re Pennie & Edmonds LLP*, 323 F.3d 86, 89-90 (2d Cir. 2003)). Yet, there appears also to be a question whether this also requires that the Court make a finding of bad faith on the part of the attorney, as well, before it may award sanctions. *See Pennie*, 323 F.3d at 91 (stating that it was "arguable . . . that a 'bad faith' standard should apply to all court-initiated Rule 11 sanctions because no 'safe harbor' protection is available").

"Where a reasonable amount of research would have revealed that there was no legal

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in the absence of a written order to show cause"). Given the Court's ultimate conclusion herein, the Court finds its oral show cause order sufficient under the circumstances.

foundation for the position taken, Rule 11 sanctions are appropriate." *In re Faires*, 123 B.R. 397, 404 (Bankr. D. Colo. 1991). In this case, the legislative history of Code § 1322, a section cited by the United States in support of its position, clearly indicates that in 1994 the section was amended specifically to overrule the holding in *Roach.* Furthermore, "keyciting" of *Roach* reveals no less that twenty-five cases in which courts found that the holding in *Roach* had been superseded by statute. Indeed, this Court in a recent decision available on the Court's website specifically stated that "Code § 1322(c)(1) empowers, as Congress intended, the [d]ebtor to de-accelerate the full amount due under the due-on-sale clause and cure any defaults that have arisen under the note and mortgage in his chapter 13 plan so long as the [p]roperty has not been sold at a foreclosure sale." *In re Finley,* Case No. 03-62212, slip op. at 7 (Bankr. N.D.N.Y. Jan. 9, 2004). Thus, it is quite evident that a minimal amount of research would have revealed that the position taken by counsel on behalf of the United States was meritless.

As counsel has indicated, his firm is not a neophyte in the bankruptcy arena, having appeared before this Court "for the past 16 years in hundreds of motions and adversary proceedings." Letter of Douglas M. Fisher, dated March 19, 2003. Given the firm's extensive representation of creditors, which has included the filing of numerous motions seeking relief from the automatic stay in chapter 13 cases, it is somewhat incredulous to the Court that counsel would not have been aware of § 1322(c)(1), which has been part of the Code for the past ten years. Nonetheless, the Court finds that there has been nothing to indicate bad faith on the part of counsel. Furthermore, because counsel for the United States, upon receiving the Debtor's memorandum of law, did not continue to advocate its position after learning that it was without merit, the Court concludes that it need not conduct an evidentiary hearing for purposes of imposing further monetary sanctions. *See Binghamton Masonic Temple Inc. v. Bares*, 168 F.R.D. 121, 127 (N.D.N.Y. 1996) (quoting Fed.R.Civ.P. 11, Advisory Committee Notes for 1993 Amendments for the proposition that "'a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit'"). Accordingly, the Court will not impose any sanctions on counsel, other than to acknowledge its payment of $300 to Debtor's counsel, reimbursing him for his research expenses. Nevertheless, the Court cautions counsel that it will not tolerate such behavior in the future.

IT IS SO ORDERED.

Dated at Utica, New York

this 1st day of July 2004

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge