



**SO ORDERED.**

**SIGNED this 10 day of March, 2005.**

*Dale L. Somers*

Dale L. Somers  
UNITED STATES BANKRUPTCY JUDGE

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In re:**

**BRIAN JUDE HOLINDE and  
KIMBERLY JOANN HOLINDE,**

**DEBTOR.**

**CASE NO. 03-16374-DLS  
CHAPTER 7**

**ORDER DENYING STAY RELIEF MOTION FILED BY FEDERAL HOME LOAN  
MORTGAGE CORPORATION, AND DETERMINING THAT ATTORNEY'S FEES  
SOUGHT IN CONNECTION WITH THE MOTION MUST ALSO BE DENIED**

This matter is before the Court on Debtors' objection to a Motion for Relief From the Automatic Stay filed by the Federal Home Loan Mortgage Corporation ("FHLM"). Debtors appear by counsel Ryan Hodge of Ray Hodge & Associates, Wichita, Kansas. FHLM appears by counsel Chelsea Herring of South & Associates, P.C., Kansas City, Missouri. The Court has reviewed the relevant materials and is now ready to rule.

## **FACTS**

Debtors filed for relief pursuant to Chapter 7 of the Bankruptcy Code on November 18, 2003. The First Meeting of Creditors pursuant to § 341 of the Code began on December 22, was continued to December 30, 2003, and was concluded then.

When Debtors filed for bankruptcy, they were current on their payments to FHLM, which held a mortgage on their residence, so FHLM had not initiated any foreclosure proceeding. The Chapter 7 Statement of Intention that Debtors filed indicated they would retain the residence and keep the original debt current. Debtors claimed the residence as exempt property with an equity of \$3,679.13.

FHLM filed its Motion for Relief from the Automatic Stay (“the Motion”) on January 15, 2004. At that time, Debtors were one, or arguably two, payments in arrears, having failed to make the payment due on December 4, 2003, and the payment due on January 4, 2004. At the time the Motion was filed, the grace period provided for in the mortgage instruments to make the January payment had not expired, so Debtors could have made both payments then, plus a December late fee, without being in default for January and without incurring a second late fee. Before filing the Motion, FHLM’s counsel did not attempt to contact Debtors’ counsel to discuss the arrearage and the possibility of its being cured.

Debtors filed a response to the Motion on January 21, 2004. About the same time, and certainly after the Motion was filed, Debtors’ counsel tendered the two payments and one late fee that would have brought the loan current. FHLM refused to accept the tender unless Debtors also paid the attorney fees it had incurred in filing the Motion. Debtors were unwilling to pay fees in the amount requested by FHLM’s counsel.

The issues were briefed and argued to the Court. The Court took the matter under advisement.

## DISCUSSION

### *1. FHLM is not entitled to stay relief.*

Section 362 of the Bankruptcy Code provides in part as follows:

(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 of such party in interest.

Based on the facts of this case, the Court believes cause does not exist to grant the Motion. The following circumstances lead the Court to this conclusion: (1) Debtors were current with their payments when they filed the bankruptcy; (2) they stated they wanted to retain the house and stay current on the loan; (3) they believed they had at least a small amount of equity in the property; (4) they claimed the house as exempt, and (5) they were, in reality, only one payment behind, not two.

Debtors' refusal to add attorney's fees to the money they tendered to FHLM does not amount to a lack of adequate protection of FHLM's mortgage interest or other "cause" that would justify granting the Motion.

### *2. FHLM has not shown that it is entitled to attorney's fees.*

Because the Court is not convinced that FHLM is entitled to stay relief, the Court must also deny the attorney's fees FHLM has sought in connection with the Motion. Based on the facts in this case, FHLM's counsel should have asked Debtors' counsel about the missed payments before incurring the attorney's fees and expenses associated with filing a stay relief motion. While there is nothing to prevent FHLM from filing such a motion at any point in the proceedings, under this particular set of circumstances, it was not reasonable for FHLM to do so without first trying to resolve the issue informally, especially if it wanted to recover the attorney's fees it would incur in filing the motion. The

Court also notes it described in *In re Biazio*<sup>1</sup> a number of other hurdles that FHLM would have to be able to overcome in order to establish any right to recover the attorney's fees it incurred in filing the Motion. Because the reasons stated earlier already preclude an award of fees here, it is not necessary to consider those obstacles.

## **CONCLUSION**

For these reasons, FHLM's Motion for Relief from the Automatic Stay, and its related request for attorney's fees, must both be denied.

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<sup>1</sup>314 B.R. 451 (Bankr.D.Kan. 2004).