

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:

Nicholas Cook  
Mellissa Cook

NOTICE OF HEARING AND  
MOTION FOR RELIEF FROM  
AUTOMATIC STAY

Debtors

Chapter 7, Case No. 04-43951  
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TO: Nicholas Cook and Mellissa Cook, INCLUDING TRUSTEE AND OTHER  
INTERESTED PARTIES

1. Wells Fargo Bank, N.A., (“Movant”), a corporation, by its attorneys, moves the Court for the relief requested below and gives notice of hearing.
2. The Court will hold a hearing on this motion at 2:30 pm on September 30, 2004, in Courtroom 7 West, 300 South Fourth Street, Minneapolis, MN 55415 or as soon thereafter as counsel can be heard.
3. Any response to this motion must be filed and delivered not later than on September 27, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than September 21, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays and holidays). UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.
4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, FRBP Nos. 5005 and Local Rule 1070-1. This is a core proceeding. The Chapter 7 case was filed on July 16, 2004, and is now pending in this court.

5. This motion arises under 11 U.S.C. § 362 and Federal Rules of Bankruptcy Procedure 4001, and is filed under Federal Rules of Bankruptcy Procedure 9014 and Local Rules 1201-1215. Movant requests relief with respect to the property of Debtors, subject to a mortgage to Movant.

6. Debtors above-named are the owners of certain real property located at 13142 8th Avenue, Zimmerman, MN 55398, legally described as follows, to-wit:

Lot 7, Block 2, Forest Oaks Third Addition, according to the plat thereof on file and of record in the office of the County Recorder in and for Sherburne County, Minnesota.

7. The indebtedness of Nicholas Cook and Mellissa Cook is evidenced by a Promissory Note and Mortgage dated August 1, 2002, filed of record in the Sherburne County Recorder's office on August 9, 2002, and recorded as Document No. 477009. A true and correct copy of the front page of the recorded mortgage is attached as Exhibit A. Said mortgage was subsequently assigned to Movant.

8. The Debtors have failed to pay monthly mortgage payments since July 1, 2004, and are in default in the amount of \$2,824.14 together with reasonable attorneys fees and costs incurred pursuant to the note and mortgage. Debtors have failed to make any offer of adequate protection. Accordingly, Movant's interest is inadequately protected.

9. The total amount due under the mortgage and note as of the date of hearing is approximately \$150,500.00.

10. The Debtors have estimated the value of the homestead as \$155,000.00, and accordingly, Debtors have limited equity in the premises and, presuming typical selling costs, have no equity in the property and therefore cause exists to find lack of adequate protection.

11. By reason of the foregoing, Movant is entitled to have the automatic stay lifted and vacated so it can recommence the mortgage foreclosure action pursuant to Minnesota Statutes.

WHEREFORE, Movant by its undersigned attorney, moves the Court for an Order that the automatic stay provided by 11 U.S.C. Section 362 (A) be terminated to permit Movant to foreclose its mortgage on the subject property, and for such other and further relief as may be just and equitable.

Dated: September 7, 2004

USSET & WEINGARDEN P.L.L.P

By: /E/ Paul A. Weingarden/Brian H. Liebo  
Paul A. Weingarden, #115356  
Brian H. Liebo #277654  
Attorney for Movant  
4500 Park Glen Road, #120  
Minneapolis, MN 55416  
(952) 925-6888

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

IN RE:

Nicholas R. Cook  
Melissa Cook

AFFIDAVIT OF PETITIONER

Debtors

Chapter 7, Case No. 04-43951  
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STATE OF GEORGIA

COUNTY OF FULTON

Diane Sanders, being first duly sworn, deposes and states she is authorized representative of Movant and has direct real-time access to the computer records of Movant which are maintained in the ordinary course of business and that she has read the annexed Notice of Hearing and Motion for Relief From Automatic Stay, and that it is true of her knowledge to the best of her information.

Diane Sanders

Subscribed and sworn to before me this  
19th day of August, 2004.

Dunnoch Weeden  
Notary Public



8-6-7  
3

477009

477009

NO 11539 DATE 8/7/02  
MTG REGISTRY TAX OF \$39.25 PAID

COUNTY RECORDER  
SHERBURNE CO. MN.

MICHELLE ASHE  
*Michelle For Ashe*

*Laura Koehler*  
County Auditor/Treasurer

\*02 AUG 9 PM 3 38

*Corrie Gunnison*  
Deputy Auditor/Treasurer

[Space Above This Line For Recording Data]

State of Minnesota

MORTGAGE

PHA Case No.

271-8747348 729

THIS MORTGAGE ("Security Instrument") is given on AUGUST 01, 2002  
The Mortgagor is Nicholas R. Cook, a single person

("Borrower"). This Security Instrument is given to HOMESERVICES LENDING, LLC DBA EDINA REALTY  
MORTGAGE

which is organized and existing under the laws of THE STATE OF DELAWARE, and  
whose address is P.O. BOX 5137, DES MOINES, IA 503065137

("Lender"). Borrower owes Lender the principal sum of  
ONE HUNDRED FIFTY TWO THOUSAND FOUR HUNDRED FIFTY THREE AND 00/100

Dollars (U.S. \$\*\*\*\*\*152,453.00).

This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which  
provides for monthly payments, with the full debt, if not paid earlier, due and payable on AUGUST 01, 2012  
and for interest at the yearly rate of 4.000 percent. This Security

Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals,  
extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph  
7 to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements

0855667

FHA Minnesota Mortgage - 4/96  
AR(MN) (8702)

Page 1 of 8

Initials: *NC*

VMP MORTGAGE FONDS - (800)521-7291



477009

under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to the Lender, with power of sale, the following described property located in ~~SEEBORNE~~ County, Minnesota:  
~~SEE ATTACHED~~

\*SEE ADJUSTABLE RATE RIDER  
THIS IS A PURCHASE MONEY SECURITY INSTRUMENT.  
TAX STATEMENTS SHOULD BE SENT TO: WELLS FARGO HOME MORTGAGE, INC., P.O. BOX  
5137, DES MOINES, IA 503065137

which has the address of 13142 8TH AVENUE, ZIMMERMAN (Street, City),  
Minnesota 55398 (Zip Code) ("Property Address");

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

Borrower and Lender covenant and agree as follows:

**UNIFORM COVENANTS.**

1. **Payment of Principal, Interest and Late Charge.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and late charges due under the Note.

2. **Monthly Payment of Taxes, Insurance and Other Charges.** Borrower shall include in each monthly payment, together with the principal and interest as set forth in the Note and any late charges, a sum for (a) taxes and special assessments levied or to be levied against the Property, (b) leasehold payments or ground rents on the Property, and (c) premiums for insurance required under paragraph 4. In any year in which the Lender must pay a mortgage insurance premium to the Secretary of Housing and Urban Development ("Secretary"), or in any year in which such premium would have been required if Lender still held the Security Instrument, each monthly payment shall also include either: (i) a sum for the annual mortgage insurance premium to be paid by Lender to the Secretary, or (ii) a monthly charge instead of a mortgage insurance premium if this Security Instrument is held by the Secretary, in a reasonable amount to be determined by the Secretary. Except for the monthly charge by the Secretary, these items are called "Escrow Items" and the sums paid to Lender are called "Escrow Funds."

Lender may, at any time, collect and hold amounts for Escrow Items in an aggregate amount not to exceed the maximum amount that may be required for Borrower's escrow account under the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. Section 2601 *et seq.* and implementing regulations, 24 CFR Part 3500, as they may be amended from time to time ("RESPA"), except that the cushion or reserve permitted by RESPA for unanticipated disbursements or disbursements before the Borrower's payments are available in the account may not be based on amounts due for the mortgage insurance premium.

477009

Lot 7, Block 2, Forest Oaks Third Addition, according to the plat thereof on file and of record in the office of the County Recorder in and for Sherburne County, Minnesota.

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:

Nicholas Cook  
Mellissa Cook

MEMORANDUM OF LAW

Debtors

Chapter 7, Case No. 04-43951  
-----

Wells Fargo Bank, N.A. ("Movant"), submits this memorandum of law in support of its motion for relief from the stay in the above-entitled matter.

**FACTS**

Movant holds a valid, duly perfected mortgage on real property owned by the Debtors. On the date this case was filed, the Debtors were delinquent in respect of payments due under the note and mortgage. Since this case was filed Debtors have made no payments to Movant and as of this date the total debt is in the amount of \$150,061.46. The Debtors estimate the property value at \$155,000.00.

**ARGUMENT**

Under Section 362(d)(1), the Court shall grant relief from the automatic stay upon a creditors request "for cause, including the lack of adequate protection of an interest in property." Under Section 362(d)(2) relief shall be granted "if the debtor has no equity in the property and the property is not necessary for an effective reorganization".

Under the "equity cushion" theory, a creditor is adequately protected if the Debtors have equity in the property sufficient to shield the creditor from either the declining value of the collateral or an increase in the claim from accrual of interest or expenses. Equitable Life Assurance Society vs. James River Assocs. (In re James River Assoc.), 156 B.R. 494 (E.D. Va. 1993). The amount of equity cushion sufficient to adequately protect a creditor is made on a case-by-case basis. Kost vs. First Interstate Bank (In re Kost), 102 B.R. 829, 831 (D. Wyo. 1989). In Kost, the court observed the following:

Case law has almost uniformly held that an equity cushion of 20% or more constitutes adequate protection. . . . Case law has almost uniformly held that an equity cushion under 11% is insufficient to constitute adequate protection. . . . Case law is divided on whether a cushion of 12% to 20% constitutes adequate protection.

Id. at 831-32 (citations omitted).

Here, the equity cushion is less than 5 percent. This slight equity cushion, coupled with other factors, shows that Movant is not adequately protected. Debtors have failed to make any payments on the loan for 3 months and interest continues to accrue. Moreover, even if the Debtors succeed in selling the property for a price near the estimated value, the equity will be depleted after payment of the sale and closing costs. Accordingly, Movant is not adequately protected. See In re Kerns, 111 B.R. 777, 789-90 (S.D. Ind. 1990); Bargas vs. Rice (In re Rice), 82 B.R. 623, 627 (Bankr. S.D. Ga. 1987); First Agricultural Bank vs. Jug End in the Berkshires, Inc. (In re Jug End in the Berkshires, Inc.), 46 B.R. 892, 899 (Bankr. D. Mass. 1985); In re Kertennis, 40 B.R. 895, 899 (Bankr. D.R.I. 1984).

Since Movant is not adequately protected, it is entitled to relief from the automatic stay pursuant to §362(d)(1). As there is no true equity here, and the property in a Chapter 7 is not necessary for a reorganization, relief is also appropriate under §362(d)(2).

Accordingly, Movant is entitled to an Order terminating the stay and authorizing it to foreclose its mortgage on the property.

Dated: September 7, 2004

USSET & WEINGARDEN P.L.L.P

By: /E/ Paul A. Weingarden/Brian H. Liebo  
Paul A. Weingarden, #115356  
Brian H. Liebo #277654  
Attorney for Movant  
4500 Park Glen Road, #120  
Minneapolis, MN 55416  
(952) 925-6888

U.S. BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:

Nicholas Cook  
Mellissa Cook

Debtors

UNSWORN DECLARATION  
FOR PROOF OF SERVICE

Chapter 7, Case No. 04-43951  
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Erin Kay Buss, employed on this date by USSET & WEINGARDEN, attorney(s) licensed to practice law in this court, with office address of Suite 120, 4500 Park Glen Road, Minneapolis, Minnesota 55416, upon penalty of perjury, declares that on September 7, 2004, I served the annexed Notice of Hearing and Motion for Relief from Automatic Stay upon each of the entities named below by mailing to them a copy thereof by enclosing same in an envelope with first class mail postage prepaid and depositing same in the post office at Minneapolis, Minnesota, addressed to each of them as follows:

Office of the United States Trustee  
1015 U.S. Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415

Terri A. Georgen  
Chapter 7 Trustee  
P. O. Box 16355  
St. Paul, MN 55116

Sheldon M Vie, Esq.  
Attorney at Law  
503 Jackson Avenue NW  
Elk River, MN 55330

Nicholas Cook  
Mellissa Cook  
13142 8th Avenue North  
Zimmerman, MN 55398

/E/ Erin Kay Buss  
Erin Kay Buss

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In Re:

Nicholas Cook  
Mellissa Cook

ORDER

Debtors.

Chapter 7, Case No. 04-43951  
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The above entitled matter came on for hearing upon motion of Wells Fargo Bank, N.A., (“Movant”), pursuant to 11 U.S.C. Section 362 on September 30, 2004, at the U.S. Bankruptcy Court, Minneapolis, Minnesota. Appearances were as noted in the record. Based upon the evidence adduced at said hearing, the arguments of counsel, and the Court being fully advised of the premises,

IT IS HEREBY ORDERED THAT:

The automatic stay imposed by 11 U.S.C. §362 is hereby terminated as to the real property over which the Movant, its successors and/or assigns, has an interest, said property legally described as follows, to-wit:

Lot 7, Block 2, Forest Oaks Third Addition, according to the plat thereof on file and of record in the office of the County Recorder in and for Sherburne County, Minnesota.

Movant may proceed to foreclose its mortgage in accordance with Minnesota Statutes. Movant's request for attorneys fees and costs shall not be considered as this is governed by state law. Notwithstanding Federal Rules of Bankruptcy Procedure 4001(a)(3), this order is effective immediately.

Dated this \_\_ day of \_\_\_\_\_, 2004.

\_\_\_\_\_  
Judge of the Bankruptcy Court