

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Daniel E. Sandahl
Karen A. Sandahl,

Debtors.

BKY No: 03-60990

Chapter 7 Case

**NOTICE OF HEARING AND MOTION TO ENFORCE
POST-PETITION DISCHARGE PURSUANT TO 11 U.S.C. § 524**

TO: All Interested Parties and the other entities specified in
Local Rule 1204(a).

1. Daniel and Karen Sandahl, debtors, moves the court for the relief requested below and gives notice of hearing.

2. The court will hold a hearing on this motion **on September 28, 2004, at 1:00 o'clock P.M.** or as soon thereafter as counsel can be heard in Courtroom #2, U.S. Post Office Building, 118 South Mill Street, Fergus Falls, Minnesota.

3. Any response to this motion must be filed and delivered not later than 1:00 o'clock P.M. on September 27, 2004, which is 24 hours before the time set for the hearing, or filed and served by mail not later than September 25, 2004, which is three days before the time set for the hearing. **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. Sections 157 and 1334, Bankruptcy Rule 5005 and Local Rule 201. This proceeding is a core proceeding. The Petition commencing this chapter 7 case was filed on August 12, 2003. The

debtors received their discharge on November 14, 2003.

This case was administratively closed. However, the Debtors moved that this case be reopened and this request was granted pursuant to an Order issued by the Court dated March 17, 2004 and filed March 18, 2004.

5. This motion arises under 11 U.S.C. § 524(a) (2) and 105(a). This motion is filed under Bankruptcy Rule 9014 and Local Rules 1201-1215. Movants request relief with respect to the court issuing an order enforcing the post-petition discharge granted to the Debtors so far as it relates to the creditor, ABN-AMRO Mortgage Corporation, Inc. Specifically speaking, the debtors request that the Court direct ABN-AMRO Mortgage Group, Inc. to refrain from any further collection on its unsecured, unrecorded mortgage.

6. This creditor does have a first mortgage with an original principle balance of \$31,500.00. This original mortgage and note were amended and increased to \$34,000.00. A copy of the original mortgage is attached hereto and incorporated herein as part of this motion by reference as exhibit "A". A copy of the amended note is attached hereto and incorporated herein as part of this motion by reference as exhibit "B". It should be noted that exhibits A and B were originally made by the debtors in favor of the Small Business Administration. The note and mortgage were eventually sold to ABN-AMRO Mortgage Group, Inc.

7. The debtors acknowledge that they did in fact sign a second promissory note and mortgage in favor of the Small Business Administration. This second note and mortgage were for

approximately \$65,000.00. The second mortgage was never recorded with the Polk County Recorder's Office prior to the chapter 7 Bankruptcy filing herein. Because of this fact, this second mortgage is not a perfected lien on the debtor's residence and has been discharged as an unsecured claim through the debtor's chapter 7 petition. The real property which secures all of the above referenced mortgages is the homestead of the debtors located in Polk County, Minnesota. The homestead was claimed as exempt by the debtors without objection.

Since the filing of their Chapter 7 bankruptcy petition, the debtors have received various forms of billing statements and payment vouchers from ABN-AMBRO requesting a monthly payment of \$442.00. This is the amount due and owing pre-petition for both the first and second mortgage. The debtors are currently paying \$560.00 to this creditor; said amount included the \$443.00 payment on the first and second mortgage and the balance on escrowed real estate taxes. The fact of the matter here is that the underlying monthly mortgage payment on the \$34,000.00 first mortgage should be \$163.00 as referenced in exhibit "B". The bottom line here is that the debtors have overpaid by \$280.00 for thirteen months which includes the month of September, 2004. The total overpayment equals \$3,640.00. This amount should be deducted from the underlying first mortgage and the debtors should be allowed to continue forward with their monthly payment of \$163.00.

8. Despite phone calls by the debtors and letters by counsel for the debtors to cancel the second note and mortgage, ABN-AMRO Mortgage Group, Inc. has refused to do so. It should

noted that prior to the chapter 7 filing in this case, the debtors made 1 combined mortgage payment to ABN-AMRO Mortgage Group, Inc. to cover both the first and second mortgages. ABN-AMRO Mortgage Group, Inc. is continuing to insist that the combined first and second mortgage payments be made by the debtors in order to avoid default. In an effort to avoid defaults, ruining their credit, and a foreclosure, the debtors have continued to pay the combined first and second mortgage payment as they did prior to the chapter 7 petition being filed in this case.

9. It is the position of the debtors that ABN-AMRO Mortgage Group, Inc. has been and continues to intentionally violate the injunction provided for in 11 U.S.C. § 524(a)(2) by refusing to stop collecting on the second mortgage. This creditor is also violating the injunction by continuing to insist on combine payment for both the first and second mortgage and threatening the debtors with foreclosure if full payments for both the first and second are not made in a timely fashion.

WHEREFORE, the debtors, Daniel and Karen Sandahl, request an Order from this Court as follows:

1. Directing the creditor, ABN-AMRO Mortgage Group, Inc. to forthwith cancel and or terminate any and all promissory notes and mortgages other than the first mortgage and the modified promissory note referred to in exhibit "A" and "B" attached hereto.

2. Directing ABN-AMRO Mortgage Group, Inc. to credit the debtors' first mortgage in the amount of \$3,640.00; said amount representing overpayments by the debtors on their first mortgage

since their chapter 7 bankruptcy filing.

3. For a determination that the creditor ABN-AMRO Mortgage Group, Inc. is only authorized to collect on its first mortgage and modified promissory note which has monthly payments of \$163.00 per month.

4. That the debtors shall be granted such other and further relief as to the Court may deem just and equitable.

Dated: September 15, 2004.

/e/ Kevin T. Duffy

Kevin T. Duffy
Attorney for Debtors
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(218) 681-8524
Attorney ID 134-600

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Daniel E. Sandahl
Karen A. Sandahl,

BKY No: 03-60990

Debtors.

Chapter 7 Case

DEBTORS MEMORANDUM

FACTS

The Debtors filed a voluntary chapter 7 bankruptcy petition with the Sixth District of Minnesota on August 12, 2003. They received their discharge on November 12, 2003. As part of their bankruptcy petition, the debtors claimed their homestead located in East Grand Forks, Polk County, Minnesota as exempt. There were no objections filed by any interested parties to the exemption of their homestead.

Prior to the debtors filing their voluntary chapter 7 petition, they were making a combined monthly mortgage payment to ABN-AMRO Mortgage Group, Inc. in the amount of \$443.00. This payment presented \$163.00 on the first mortgage and the balance for the second mortgage.

The first and second mortgage referenced above were originally granted by the debtors to the Small Business Administration. ABN-AMRO Mortgage Group, Inc. eventually purchased these mortgages on the secondary market.

Subsequent to the chapter 7 bankruptcy filing, the debtors discovered that the second mortgage had not been recorded with the

Polk County Recorder's Office and, therefore, the note and mortgage represented an unsecured claim not secured by the debtors homestead. Notwithstanding this fact, ABN-AMRO Mortgage Group, Inc. continued to send monthly statements and monthly vouchers to the debtors requesting payment on both the first and second mortgage. The Debtors made numerous phone calls to the mortgage company along with various letters by their counsel to cancel the second note and mortgage. Notwithstanding the phone calls and the letters, ABN-AMRO Mortgage Group, Inc. refused to cancel and terminate the second note and mortgage. This creditor continued to insist on a combined first and second mortgage payment in order for the debtors to avoid default on their underlying debt. In an effort to avoid default, ruining their credit and a foreclosure, the debtors have continued to pay the combined first and second mortgage payment even after their chapter 7 bankruptcy filing.

ARGUMENT

I.

THE DEBTORS HAVE THE RIGHT TO ENFORCE THE DISCHARGE OF THE UNRECORDED SECOND MORTGAGE BELONGING TO ABN-AMRO MORTGAGE GROUP, INC. PURSUANT TO 11 U.S.C § 524 (a) (2) AND 11 U.S.C. § 105 (a).

11 U.S.C. § 524 (a) (2) provides that "a discharge in a case under this title operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or off-set any such debt as a personal liability of the debtor, whether or not discharge of said debt is waived." When this section is viewed in light of facts of the present case, it is clear that ABN-AMRO Mortgage Group, Inc. has not continued with a lawsuit or begun a lawsuit

for the collection of its mortgages. Instead, it has continued to act in such a way that it is collecting on the second mortgage by refusing to split the second mortgage off of the monthly payment for the debtors and claiming that both the first and second mortgage along with the accompanying notes are all still due and payable.

It is the position of the debtors that ABN-AMRO Mortgage Group, Inc. has been and continues to intentionally violate the injunction provided for under 11 U.S.C. § 524(a)(2) by refusing to stop collection on the second mortgage which clearly is an unsecured claim discharged in the debtors chapter 7 proceeding. This creditor is also violating the injunction by continuing to insist on a combined payment for both the first and second mortgage and threatening the debtors with foreclosure if full payments for both the first and second are not made in a timely fashion.

11 U.S.C. § 105 (a) provides as follows:

The Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the Court from, Sua Sponte, taking any action or making any determination necessary or appropriate to enforce or implement Court orders or rules or to prevent an abuse of process.

When this statute is viewed in light of the facts of the present case, it is clear that this Court clearly has the authority to issue and Order directing ABN-AMRO Mortgage Group, Inc. to cease and assist from insisting on a combined first and second mortgage payment. This Court certainly has the right to

direct this creditor to only collect \$163.00 per month which is the principal amount due and owing by the debtors under the terms of their amended promissory note. This Court also has the authority to direct that ABN-AMRO Mortgage Group, Inc. credit the debtors for the excessive and extra payments that they have made since the filing of their chapter 7 bankruptcy petition on August 12, 2003. There is not only statutory authority for the Court providing relief to the debtors under Section 105 (a) but also case law which indicates that relief is available to the debtors under this particular section see Besette v. Avco Fin. Servs., Inc., 230 F.3d 439, 444 (1st Cir.2000).

CONCLUSION

The second mortgage purchased by ABN-AMRO Mortgage Group, Inc. is an unsecured claim because it was not filed prior to the debtors' chapter 7 petition on August 12, 2003. As a result of this fact, this second mortgage is an unsecured claim that was discharged in the debtors' chapter 7 case. The actions by the creditor to collect on the first and second mortgage by way of a combined monthly mortgage payment of \$443.00 violates the protection afforded to the debtors pursuant to 11 U.S.C. § 524(a)(2). The debtors have overpaid their first mortgage at the rate of the \$280.00 per month for thirteen (13) months for a total of \$3,640.00. This amount should be credited to the underlying first mortgage principal amount. The debtors have the right to begin making regular monthly mortgage payments of \$163.00 pursuant to the terms of the underlying, first mortgage and modified promissory note. This would be in addition to any escrow real

estate taxes due and owing on a monthly basis by the debtors. There is no reason whatsoever why the creditor here should not be directed the Court to terminate and/or cancel any and all promissory notes and or mortgages which were discharged as unsecured claims in the debtors' chapter 7 bankruptcy petition. The Bankruptcy Court has both statutory and case law authority under 11 U.S.C. § 105 (a) to grant the debtors the relief outlined above.

Dated: September 15, 2004.

Respectfully Submitted,

/e/ Kevin T. Duffy
Kevin T. Duffy
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218-681-8524
Attorney ID # 134-600

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Daniel E. Sandahl
Karen A. Sandahl,

Debtors.

BKY No: 03-60990

Chapter 7 Case

ORDER TO ENFORCE DISCHARGE PURSUANT TO 11 U.S.C. § 524(a) (2)

Fergus Falls, Minnesota
September 28, 2004

The above-entitled matter came on for hearing before the undersigned pursuant to a motion filed by Kevin T. Duffy on behalf of the debtors to enforce the discharge granted to the debtors under 11 U.S.C. § 524 (a) (2).

Kevin T. Duffy, Attorney at Law, Thief River Falls, Minnesota appeared by and on behalf of the debtors who were also present. Other appearances were noted of record.

Based upon on of the files, records and proceedings herein, the arguments of counsel relative thereto and the Court being fully advised in the premises,

IT IS HEREBY ORDERED:

1. That ABN-AMRO Mortgage Group, Inc. shall forthwith cancel and/or terminate any and all promissory notes and mortgages other than the first mortgage and the modified promissory note for \$34,000.00.

2. That ABN-AMRO Mortgage Group, Inc. shall forthwith credit the debtors mortgage in the amount of \$3,640.00; said

amount representing overpayments by the debtors on their first mortgage since their chapter 7 bankruptcy filing.

3. That ABN-AMRO Mortgage Group, Inc. is hereby authorized to collect on its first mortgage and modified promissory note which has monthly payments of \$163.00 per month.

THIS ORDER dated and entered this _____ day of September, 2004.

Dennis D. O'Brien
United States Bankruptcy Judge
Sixth District of Minnesota