

04-29186

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In Re:

Chapter 13 Case:

Case Number BKY 03-37617-DDO

Anthony Joseph
Linda Joseph,

Debtor(s)

**NOTICE OF HEARING AND MOTION
FOR RELIEF FROM STAY**

To: The Debtor and other entities specified in Local Rule 9013-3(a).

1. Ameriquest Mortgage Company moves the Court for relief requested below and gives Notice of Hearing.
2. The Court will hold a Hearing on this motion at 9:30 a.m., on September 27, 2004, in Courtroom No. 228A, at the United States Courthouse, at 316 North Robert Street, St. Paul, Minnesota.
3. Any response to this motion must be filed and delivered not later than September 22, 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 16, 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, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this Chapter 13 case was filed on November 10, 2003. The case is now pending in this court.
5. This Motion arises under 11 U.S.C. §362 and Bankruptcy Rule 4001. This motion is filed under Bankruptcy Rule 9014 and Local Rules 9013-1 - 9019-1(d). Movant Requests Relief with respect to exempt property of the debtor subject to a lien.
6. On February 21, 2003, Anthony Joseph, Jr. and Linda Joseph, husband and wife made, executed and delivered to Ameriquest Mortgage Company their Note (hereinafter referred to as the "Note"), in the original principal amount of \$157,250.00 bearing interest from the date thereof at the rate of 8.99% per annum until paid, payable in monthly installments of \$1,264.14 commencing on April 1, 2003 and on the first day of each and every calendar month thereafter

until the principal and interest were fully paid. A copy of the Note is attached hereto as Exhibit "A" and made a part thereof by reference.

7. On February 21, 2003, to secure the payment of the Note, Anthony Joseph, Jr. and Linda Joseph, husband and wife executed and delivered to Ameriquest Mortgage Company their Mortgage (hereinafter referred to as the "Mortgage"), mortgaging and conveying certain real estate in Olmsted County, Minnesota, legally described as follows:

Lot 9, Block 1, Sunset Terrace in the City of Rochester, Olmsted County, Minnesota

which has a property address of: 1628 18th Ave. NW, Rochester, MN 55901. The mortgage was filed for record in the office of the recorder, County of Olmsted, on June 27, 2003, as Document No. A975864, and was subsequently assigned to Movant by assignment of mortgage. A copy of the mortgage is attached hereto as Exhibit "B" and made a part hereof by reference.

8. The debtors have filed a modified plan dated February 26, 2004, which was confirmed by subsequent Court Order. The plan provided, among other things that:

"5. Home Mortgages In Default [§1322(b)(5)] - The trustee will cure defaults on claims secured only by a security interest in real property that is the debtor's principal residence as follows. The debtor will maintain the regular payments, which come due after that date the petition was filed. The creditors will retain their liens. The amounts of default are estimates only. The trustee will pay the actual amounts of default.

9. Notwithstanding the foregoing provisions of said plan, the debtors have not maintained current payments with respect to said note and mortgage, while this case is pending.

10. Debtors are in arrearage for monthly payments as shown below. The last payment received from Debtors was applied to the April, 2004 post-petition payment as that was the next payment due. Post-petition arrearage include the following:

4 payments @ \$1,371.89	\$5,487.56
4 late charges @ \$63.21	\$252.84
Property Inspections	\$60.00
Attorneys Fees & Costs	\$700.00
TOTAL POST - PETITION	<hr/> \$6,500.40

Through Debtors' failure to make current post-petition payments, amounts due and owing include the following:

Principal Balance	\$156,266.89
Interest	\$5,888.97
Escrow Shortage	\$670.86
Accumulated late fees	\$758.52
Property inspections	\$60.00
Attorneys Fees & Costs	\$700.00
TOTAL	<u>\$164,345.24</u>

11. Debtors have claimed said mortgaged property as exempt pursuant to 11 USC 522 (d) (1).

12. Debtors have represented the value of this property to be \$185,000.00 on the schedules which accompanied their petition. They therefore, have no equity in this property by their own admission.

13. By reason of the foregoing, good cause exists to lift the automatic stay imposed by 11 USC section 362 to allow Movant to pursue its remedies under State Law.

14. **This is an attempt to collect a debt and any information obtained will be used for that purpose.** This notice is required by the provisions of the Fair Debt Collection Practices Act and does not imply that we are attempting to collect money from anyone who has discharged the debt under the Bankruptcy Laws of the United States.

Wherefore, Ameriquest Mortgage Company moves the court:

1. For an Order granting creditor relief from the automatic stay of 11 USC section 362.
2. For such other and further relief as the Court finds just and proper.

Dated: 8.27.01

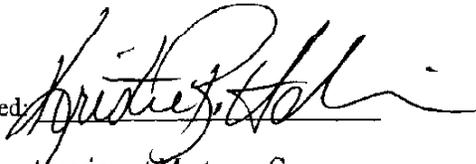
Signed: /e/ NANCY A. NORDMEYER

SHAPIRO & NORDMEYER, L.L.P.
Nancy A. Nordmeyer-121356
Lawrence P. Zielke-152559
Attorney for movant
7300 Metro Boulevard #390
Edina, MN 55439-2306
(952) 831-4060

VERIFICATION

I, Kristie Bottalico the Bankruptcy Counselor of Ameriquest Mortgage Company, the movant named in the foregoing notice of hearing and motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: 8/23/04

Signed: 
Ameriquest Mortgage Company
505 City Parkway West STE 100
Orange, CA 92868

Loan Number: 0044172294 - 5578

ADJUSTABLE RATE NOTE (LIBOR Index - Rate Caps)

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT. THIS NOTE LIMITS THE AMOUNT MY INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY. THIS LOAN HAS A PREPAYMENT PENALTY PROVISION.

February 21, 2003
Date

Orange
City

CA
State

1628 18th Avenue Northwest, ROCHESTER, MN 55901
Property Address

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$ 157,250.00 (this amount is called "principal"), plus interest, to the order of the Lender. The Lender is Ameriquest Mortgage Company.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of principal has been paid. I will pay interest at a yearly rate of 8.990 %. This interest rate I will pay may change in accordance with Section 4 of this Note. The interest rate required by this Section 2 and Section 4 of this Note is the rate I will pay both before and after any default described in Section 7(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making payments every month.

I will make my monthly payments on the first day of each month beginning on April 1, 2003.

I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. My monthly payments will be applied to interest before principal. If, on March 1, 2033, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my payments at: 505 City Parkway West, Suite 100 Orange, CA 92868

or at a different place if required by the Note Holder.

(B) Amount of My Initial Monthly Payments

Each of my initial monthly payments will be in the amount of U.S. \$ 1,264.14. This amount may change.

(C) Monthly Payment Changes

Changes in my monthly payment will reflect changes in the unpaid principal of my loan and in the interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with Section 4 of this Note.

4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

(A) Change Dates

The interest rate I will pay may change on the first day of March, 2005 and on that day every sixth month thereafter. Each date on which my interest rate could change is called a "Change Date."

(B) The Index

Beginning with the first Change Date, my interest rate will be based on an Index. The "Index" is the average of interbank offered rates for six-month U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in The Wall Street Journal. The most recent Index figure available as of the date 45 days before the Change Date is called the "Current Index."

If at any point in time the Index is no longer available, the Note Holder will choose a new Index that is based upon comparable information. The Note Holder will give me notice of this choice.

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding five and three-quarters percentage point(s) (5.750%) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percent (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date. The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

WE HEREBY CERTIFY THIS
TO BE A TRUE AND CORRECT
COPY OF THE ORIGINAL

BY:

AMERIQUEST MORTGAGE COMPANY



OFFICE OF COUNTY RECORDER
Olmsted County, Minnesota



I hereby certify that this document was filed in this office
on 8/27/2003 at 4:00:00 PM and was duly
recorded as document number A-975864
DANIEL J. HALL - County Recorder, by _____ Deputy.

Well Certificate: Record Not Required
Appl. - yes no
Fees: Total \$20.00

9-1 Sunset Terrace

(Space Above This Line For Recording Data)

MORTGAGE

Return To:

Ameriquest Mortgage Company
P.O. Box 11507
Santa Ana, CA 92711

Drafted by ↑

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated February 21, 2003 together with all Riders to this document.

0044172294 - 5578

MINNESOTA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

Form 3024 1/01

6/03 - 6/03/03
Page 1 of 15

[Signature]

WFO MORTGAGE FORMS - 000021-720

02/21/2003 12:24:17

403PAID 6-25-03#036

\$361.68 *MO.*

6.27 PM

STATE OF MINNESOTA
COUNTY OF OLMDSTED
I certify this to be a true copy of
the original record in my custody.
Dated _____
Daniel J. Hall
County Recorder/Licensing
By _____

UNITED STATES BANKRUPTCY COURT

DISTRICT OF MINNESOTA

In Re:

Case Number BKY 03-37617-DDO
Chapter 13

Anthony Joseph
Linda Joseph,

Debtor(s)

MEMORANDUM OF LAW

Ameriquet Mortgage Company ("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 Debtor(s) were delinquent in respect of payments due under the note and mortgage. Since this case was filed, Debtor(s) are in arrears in the total amount of \$6,500.40.

ARGUMENT

1. Under Section 362.(d)(1) of the Bankruptcy Code, relief from the automatic stay shall be granted upon request of a creditor "for cause, including the lack of adequate protection of an interest in property of such creditor." 11 U.S.C. Sec. 362 (d) (1). The Debtor(s) in this case have failed to make the payments required by the note and mortgage for a period of more than 03 months. Debtor(s) have not otherwise provided Movant with adequate protection of its interest in the property. Such circumstances constitute cause, within the meaning of Section 362 (d) (1), justifying relief from the stay. In Re Video East, Inc., 41 B. R. 176 (Bkrcty. E. D. Pa. 1984); In Re Frascatore, 33 B. R. 687 (Bkrcty. E. D. Pa. 1983).

2. Pursuant to Section 362 (d) (2) of the Bankruptcy Code, relief from the stay is also appropriate where Debtor(s) have no equity in the subject property and the property is not necessary to an effective reorganization. 11 U.S.C. Sec. 362 (d) (2). See, In Re Gellert, 55B.R. 970 (Bkrcty. D. N. H. 1983). In the present case the balance due Movant on the note and mortgage is \$164,345.24. [The property is encumbered by a second mortgage in favor of Bank One in the approximate amount of \$32,080.00] The fair market value of the property is approximately \$185,000.00. Clearly, the Debtor(s) have no equity in the property.

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

Dated:

8.27.01

Respectfully submitted,
SHAPIRO & NORDMEYER, L.L.P.

Signed: /e/ NANCY A. NORDMEYER

Nancy A. Nordmeyer-121356

Lawrence P. Zielke-152559

Attorney for Movant

7300 Metro Boulevard #390

Edina, MN 55439-2306

(952) 831-4060

SWORN CERTIFICATE OF SERVICE

STATE OF MINNESOTA)
) SS
COUNTY OF HENNEPIN)

I, **Stephanie Pilegaard** says that on August 27, 2004, I mailed copies of the annexed Memorandum of Law, Proposed Order for Relief from Stay, Notice of Hearing and Motion for Relief from Stay and Certificate of Service on the following interested parties at their last known address, by mailing to them, via first class mail, a copy thereof, enclosed in an envelope, postage prepaid and by depositing the same in the post office at Edina, Minnesota.

Anthony Joseph
1628 18th Ave NW
Rochester, MN 55901

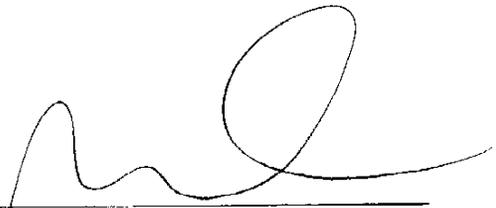
Linda Joseph
1628 18th Ave NW
Rochester, MN 55901

William Bodensteiner, Esq.
309 S. Main Street
Austin, MN 55912

Jasmine Z. Keller, Trustee
12 South 6th Street, #310
Minneapolis, MN 55402

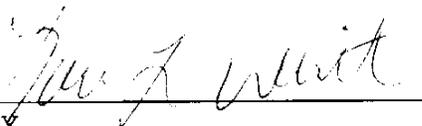
U.S. Trustee
1015 U.S. Courthouse
300 South 4th St.
Minneapolis, MN 55415

Bank One
201 N. Central Floor 11
Phoenix, AZ 85004



Stephanie Pilegaard

Subscribed and sworn to before me August 27, 2004.



Notary



04-29186
0044172294

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In Re:

Case Number BKY 03-37617-DDO

Anthony Joseph
Linda Joseph,

Debtor(s)

ORDER FOR RELIEF FROM STAY

The above-entitled matter came for hearing on September 27, 2004.

THIS CAUSE coming to be heard on the Motion of Ameriquest Mortgage Company, a creditor in the proceeding, the Court having jurisdiction, due notice having been given, and the Court having been advised in the premises;

IT IS HEREBY ORDERED,

That the automatic stay heretofore entered in this case is modified to the extent necessary to allow Ameriquest Mortgage Company, its successors and/or assigns, to foreclose the mortgage on the real property commonly known as:

Lot 9, Block 1, Sunset Terrace in the City of Rochester, Olmsted County, Minnesota

NOTWITHSTANDING Federal Rule of Bankruptcy Procedure 4001 (a)(3), this order is effective immediately.

Dated: _____

BY THE COURT:

Judge of Bankruptcy Court