

UNITED STATES BANKRUPTCY COURT

DISTRICT OF MINNESOTA

CHAPTER 7 CASE

In Re:
Margaret M. Hughes-Husbands
SSN XXX-XX-6725
JAMES F. HUSBANDS
SSN XXX-XX-915,

CASE NO. 04-50570 GFK

Debtors.

NOTICE OF RESPONSE TO MOTION FOR RELIEF FROM AUTOMATIC STAY

TO: Movant of Motion for Relief From Automatic Stay and other parties specified in Local Rule 9013-3(a):

Daniel R. Bina, attorney for Debtor hereby responds to Provident Funding Associates, L.P.'s, hereafter (Secured Creditor) motion for relief of automatic stay dated July 2nd 2004.

I.

Respondent/ Debtors, assert that there is equity existing in Debtors' homestead so as to qualify for the relief provided in 11 U.S. C. Section 362.

II.

Therefore Respondent/ Debtor requests that Secured Creditor's motion be denied.

III.

Respondent/ Debtors response to Secured Creditor is based on debtors' attached Memorandum of Law.

IV.

In regards to Trustee's claim that the value stated for Debtors' homestead cited in debtors petition is incorrect, Debtors believe that the amount stated for the homestead value is adequate and will respond in more detail if further proceedings are initiated by Trustee.

By: /e/ Daniel R. Bina
Daniel R. Bina
Attorney for Debtors
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Lic. 200621

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**MEMORANDUM SUPPORTING DEBTORS RESPONSE TO MOTION FOR
RELIEF OF STAY**

HISTORY

Debtors refinanced their homestead, in 2002 with Creditor/ Movant, Provident, Funding Associates, L.P. (hereafter referred as “ Secured Creditor). For the purposes of valuation, Secured Creditor appraised the house through its own procedures at \$290,000.00. This was the last time the property has been appraised by a professional/ private institution. In May of 2004, Debtors’ filed bankruptcy and received protection under the automatic stay provisions of Section 362 of the United States Code.

At the time of filing, Debtor had a balance on the loan securing their homestead of \$266,419.60, leaving Debtors with over \$22,000.00 in equity. Secured Creditor is now seeking relief from the stay so as to foreclose on Debtors’ property in a state court action. Secured Creditor’s argument is that Debtors do not have equity in the home so as to qualify for the automatic stay granted under Section 362 of the United States Code.

Debtor is now requesting that the court deny Secured Creditor's request of relief from the automatic stay. Debtors' request are based on the following argument

ARGUMENT

1. Debtors have enough equity in their homestead to be guaranteed the stay provisions entitled to them by Federal Law 11 U.S.C. 362 d (2)

"Equity" for purposes of determining whether secured creditor is entitled to relief from stay is difference between value of debtors' interest in property and total of all encumbrances against property. In re Harvey Road Associates VIII, Bkrtcy. D. Mass. 1992, 136 B.R. 848. "Term equity in this section providing for relief from automatic stay for property in which debtor does not have equity refers to difference between value of property which is subject of relief and all encumbrances against it, not only lien which is subject of relief In re Faires, Bkrtcy. W.D. Wash. 1983, 34 B.R. 549.

Currently, Secured Creditor is arguing that there is not currently equity in the property due to the fact that costs of foreclosure would exceed the value of the property. However this line of argument is not proper. As seen in the above-mentioned case law, equity as used section 362 d(2) of 11 USC, is defined as the difference between the value of the property and all encumbrances that exist against it. Currently, the liens on the property total \$265, 000.00. The value of the property has been listed as \$290,000.00. This equates to equity in the amount of over \$22,000.00. Based on the strict reading of

the 11 USC Section 362 subd d (2), equity does exist. Therefore Secured Creditor's request for relief should not survive.

2. There is enough equity in the property to qualify as giving Secured Creditors adequate protection under 11 USC Section 362 d(1).

"If debtors' equity exceeds the interest of the secured creditor, that interest is adequately protected by the so-called "equity cushion," and relief from automatic stay is not warranted." In *Re Grant, Bkrcty.* M.D.Pa. 1983, 29 B.R. 375. Currently there exists at least \$22,000.00 in equity in the subject property. Based on that fact, there should exist adequate protection in the property. However, Secured Creditor asserts that there is not enough equity in the property based on transactional costs. In the event that costs of sale for the property could be included to determine whether there is adequate equity in the property, Secured Creditor must provide appropriate evidence that the equity existing would not cover such costs. Secured Creditor is merely speculating that the costs of selling the property would be ten percent of the value of the property. In fact, similar situations have been held too speculative to be included in the debt portion for purposes of determining if there was equity in the property.¹ The *Firgueroa* case, cited in footnote 1, is similar to the situation at hand, where the creditor attempted to allege that ten percent should be added to the secured debt to cover transaction costs. The court

¹ See *In re Figueroa Ruiz*, D. Puerto Rico 1990, 121 B.R. 419 ; (where Mortgage's provision of ten percent attorney fees to cover foreclosure or other judicial action could not be added to mortgage's secured debt in order to determine amount of equity debtor had in property, for purposes of determination whether mortgage was entitled to relief from stay on ground of lack of equity in property, it was too early to determine reasonableness of attorney fees, as required for fees to be part of allowed secured claim.

held that it was too early to determine the reasonableness of attorneys' fees and costs. Similarly, there is not enough information provided to conclude that the equity existing is not sufficient. Therefore it should be presumed that there is adequate protection due to the equity that exists.

Also, adequate protection exists due to the fact that payments will be made. "Creditor would be provided with adequate protection with respect to the secured portion of its claim by the fact that Debtor is making payments and therefore creditor is not entitled to relief from automatic stay." In re Williams, Bkrcty. M.D.Ga. 1980 7 B.R. 234. In the present situation, Debtors pledged their intent to reaffirm the debt of Secured Creditor. This should be an adequate assurance that the debt accruing on the homestead shall soon be decreasing.

CONCLUSION

In the present case, there is over \$22,000 of equity existing in the homestead. This is adequate protection to survive a motion for relief of stay. This fact should survive a motion brought under 11 U.S.C 362 subd d (1) and (2). Further the fact that Debtors are committed to repaying the amounts owing on their homestead as evidenced by their Bankruptcy Petition, should give the Secured Creditor assurances that they have or will have adequate protection. For these reasons lifting of the automatic stay to allow the Secured Creditor to commence foreclosure procedures would be improper at this time.

By: /e/ Daniel R. Bina
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Attorney for Debtors
1639 Main Street North
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Dated July 26, 2004

In Re:

CHAPTER 7 CASE

Margaret M. Hughes-Husbands
SSN XXX-XX-6725
SSN XXX-XX-9915

Debtor.

CASE NO. 04-50570

SWORN DECLARATION FOR PROOF OF SERVICE

MacKenzie Guptil, being duly sworn, states the following:

That on July 26, 2004, he served Response to Motion For Relief From Automatic Stay And the supporting Memorandum of Law via United States Mail on the following entities at their corresponding addresses

Margaret M. Hughes-Husbands
James F. Husbands
4178 County Road 77
Tower, MN 55790-8132

Robert R. Kanuit
4815 W Arrowhead Rd Ste 230
Ste 230
Hermantown, MN 55811

U.S. Trustee

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

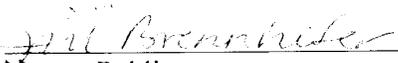
James A. Geske
Attorney for Secured Creditor
7650 Currell Blvd., Ste 300
Woodbury, MN 55125
651-209-3300

Provident Funding Associates
PO Box 11448
Burlingame, CA 94010

FURTHER AFFIANT SAYETH NAUGHT


MacKenzie Guptil

Subscribed and Sworn Before Me
This 26 day of July, 2004


Notary Public

JILL C. BRENNHOLER
NOTARY PUBLIC - MINNESOTA
MY COMMISSION EXPIRES
JANUARY 01, 2005