

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Irwin Frizzell
Connie Frizzell

NOTICE OF HEARING AND
MOTION FOR RELIEF FROM
AUTOMATIC STAY

Debtors

Chapter 7, Case No. 04-50813

TO: Irwin Frizzell and Connie Frizzell, INCLUDING TRUSTEE AND OTHER
INTERESTED PARTIES

1. Mortgage Electronic Registration Systems, Inc., (“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 1:30 pm on October 6, 2004, in Courtroom 2, 515 West Fifth Street, Duluth, MN 55802 or as soon thereafter as counsel can be heard.

3. Any response to this motion must be filed and delivered not later than on October 1, 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 27, 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 631 North West 20th Avenue, Grand Rapids, MN 55744, legally described as follows, to-wit:

Lot Six (6), Block Three (3), First Addition to Singing Pines Court, Itasca County, Minnesota

7. The indebtedness of Irwin Frizzell and Connie Frizzell is evidenced by a Promissory Note and Mortgage dated August 16, 2002, filed of record in the Itasca County Recorder's office on August 20, 2002, and recorded as Document No. A-544327. 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 \$2,809.82 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 \$75,000.00

10. The Debtor has estimated the value of the homestead as \$85,000.00, 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:

Irwin Frizzell
Connie Frizzell

AFFIDAVIT OF PETITIONER

Debtors

Chapter 7, Case No. 04-50813

STATE OF CALIFORNIA)

COUNTY OF SAN DIEGO)

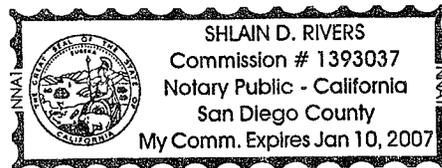
CANDICE HOBBS, being first duly sworn, deposes and states on oath that she/he is employed by Chase Manhattan Mortgage Corporation, the movant in this action, that she/he has read the annexed Notice of Hearing and Motion for Relief From Automatic Stay, and that it is true of her/his knowledge to the best of her/his information.

Candice R. Hobbs

Subscribed and sworn to before me this

13 day of August, 2004.

Shlain D. Rivers
Notary Public



OFFICE OF THE COUNTY RECORDER
ITASCA COUNTY, MINNESOTA

Doc. No. **A 544327**

Certified filed and recorded on
08/20/2002 at 8:20 am

Jean E. Bengston, Itasca County Recorder
by CU, Deputy

544327

91 533.0330

Registration Tax of \$ 165.60 paid
ITASCA CO. NO. 37619

Robert D. Zuehlke, Auditor/Treasurer

[Signature] Deputy

MORTGAGE

After Recording Return To:
FLAGSTAR BANK, FSB
5151 CORPORATE DRIVE, MAIL STOP W-530-3
TROY, MICHIGAN 48068
Loan Number: 998828353

MIN: 1000525-9988283538-8

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 **AUGUST 16, 2002**, together with all Riders to this document.
- (B) "Borrower" is **IRWIN J. FRIZZELL AND CONNIE L. FRIZZELL**

Borrower is the mortgagor under this Security Instrument.

(C) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

(D) "Lender" is **CHARTER WEST MORTGAGE**

Lender is a _____ organized and existing under the laws of **MINNESOTA**. Lender's address is **110 NW 5TH ST, GRAND RAPIDS, MINNESOTA 55744**

(E) "Note" means the promissory note signed by Borrower and dated **AUGUST 16, 2002**. The Note states that Borrower owes Lender **SEVENTY TWO THOUSAND AND 00/100** Dollars (U.S. \$72,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than **SEPTEMBER 1, 2032**.

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- (F) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
- (G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.
- (H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower (check box as applicable):

- | | | |
|--|---|---|
| <input type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider | <input type="checkbox"/> Second Home Rider |
| <input type="checkbox"/> Balloon Rider | <input type="checkbox"/> Planned Unit Development Rider | <input type="checkbox"/> Other(s) [specify] |
| <input type="checkbox"/> 1-4 Family Rider | <input type="checkbox"/> Biweekly Payment Rider | |

- (I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.
- (J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.
- (K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.
- (L) "Escrow Items" means those items that are described in Section 3.
- (M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.
- (N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.
- (O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amount under Section 3 of this Security Instrument.
- (P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.
- (Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

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TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with power of sale, the following described property located in the

COUNTY of ITASCA
[Type of Recording Jurisdiction] [Name of Recording Jurisdiction]
LOT 6, BLOCK 3, FIRST ADDITION TO SINGING PINES COURT, ACCORDING TO THE PLAT THEREOF ON FILE AND OF RECORD IN THE OFFICE OF THE COUNTY RECORDER IN AND FOR ITASCA COUNTY, MINNESOTA.

which currently has the address of 631 NW 20TH AVENUE

GRAND RAPIDS, Minnesota 55744 ("Property Address")
[City] [Zip Code] [Street]

TOGETHER WITH all the improvements now or hereafter created 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 understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised 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.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Irwin Frizzell
Connie Frizzell

MEMORANDUM OF LAW

Debtors

Chapter 7, Case No. 04-50813

Mortgage Electronic Registration Systems, Inc. ("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 \$75,000.00. The Itasca County Assessor estimates the property value at \$85,000.00.

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).

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 4 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:

Irwin Frizzell
Connie Frizzell

Debtors

UNSWORN DECLARATION
FOR PROOF OF SERVICE

Chapter 7, Case No. 04-50813

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

Robert R. Kanuit
Chapter 7 Trustee
4815 W. Arrowhead Rd. Suite 230
Hermantown, MN 55811

John P. Dimich
Dimich Law Office
102 NE 3rd Street, Suite 120
Grand Rapids, MN 55744

Irwin Frizzell
Connie Frizzell
631 North West 20th Avenue
Grand Rapids, MN 55744

/E/ Erin Kay Buss
Erin Kay Buss

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Irwin Frizzell
Connie Frizzell

ORDER

Debtors.

Chapter 7, Case No. 04-50813

The above entitled matter came on for hearing upon motion of Mortgage Electronic Registration Systems, Inc., ("Movant"), pursuant to 11 U.S.C. Section 362 on October 6, 2004, at the U.S. Bankruptcy Court, Duluth, 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 Six (6), Block Three (3), First Addition to Singing Pines Court, Itasca 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