

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
FAX (605) 224-9020

December 18, 1998

Robert M. Nash, Esq.
Counsel for Norwest Mortgage, Inc.
Post Office Box 1552
Rapid City, South Dakota 57709

Robert L. Chavis, Esq.
Counsel for Debtors
Post Office Box 248
Yankton, South Dakota 57078

Subject: *In re Terry R., Jr., and Amy M. Diefenderfer,*
Chapter 7; Bankr. No. 98-40319

Dear Counsel:

The matter before the Court is Norwest Mortgage, Inc.'s request for attorneys' fees and costs related to its motion for relief from stay and abandonment. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that no attorneys' fees and costs shall be awarded.

SUMMARY OF FACTS. Terry R., Jr. and Amy M. Diefenderfer filed a Chapter 7 petition on April 22, 1998. Among their secured creditors was Norwest Mortgage, Inc., which has the first mortgage on Debtors' homestead.¹

On July 27, 1998, Norwest Mortgage filed a combined motion for relief from automatic stay and to compel abandonment on the grounds that Debtors had failed to make monthly payments for principal, interest, insurance, and taxes. Norwest Mortgage also requested attorneys' fees and costs. Norwest Mortgage stated Debtors had no equity in the property.

¹ Debtors have **not** claimed their homestead exempt, although they have just over \$16,000.00 in equity in it.

Debtors responded on July 29, 1998. They said they had made the missing two monthly payments, although the payments were late because they had not received the usual payment coupon and envelope from Norwest Mortgage. Debtors stated they should now be current with this creditor except for some late charges, of which some, they claimed, could be erroneous.

A hearing was held September 1, 1998. Appearances included counsel as stated above. The matter was continued to the October term of court. On October 1, 1998, Norwest Mortgage's counsel filed an affidavit and itemization regarding his services for Norwest Mortgage. He stated his services totaled \$550.00, sales tax on services was \$33.00, and his costs (filing fee for the motion) were \$75.00. The total sought was \$658.00.

At the continued hearing on October 8, 1998, Attorney Nash reported a settlement. The settlement, filed October 13, 1998, provided that Norwest Mortgage could still request its attorneys' fees and costs in bringing the relief from stay motion. Debtors filed their response to the attorneys' fee request on October 16, 1998. They stated that Norwest Mortgage had previously accommodated their late monthly payments. They also stated that the deficiency had now been cured and that they should not be penalized further for their financial difficulties.

APPLICABLE LAW. Bankruptcy Rule 7054 states the Court may allow costs to the prevailing party in an adversary proceeding. Pursuant to Bankr. R. 9014, Bankr. R. 7054 is also applicable to contested matters, including motions to dismiss.

Section 1920 of Title 28 of the United States Code sets forth what may be taxed as costs by a "judge or clerk of any court of the United States²[" Attorneys' fees are not specifically listed under § 1920 and are not considered an ordinary item of cost under the "American Rule" absent application of other substantive law, generally a fee shifting statute, or in the presence of bad faith. See, e.g., *Lamb Engineering & Construction Co. v. Nebraska Public Power District*, 103 F.3d 1422, 1434-35 (8th Cir. 1997); *McNabb v. Riley*, 29 F.3d 1303, 1306 (8th Cir. 1994); and *United States v. 341.45 Acres of Land*, 751 F.2d 924, (8th Cir. 1984)

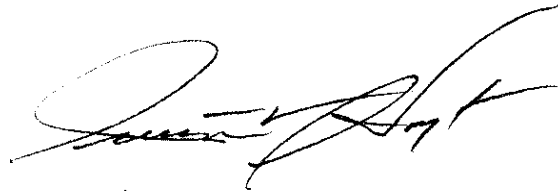
DISCUSSION. It is not uncommon for secured creditors to seek relief from the automatic stay or abandonment of their collateral

² While a bankruptcy court may not be a court of the United States, see 28 U.S.C. § 451, it is an adjunct of the district court, which may tax costs under § 1920. Therefore, § 1920 is applicable in bankruptcy cases. See COLLIER ON BANKRUPTCY, 15ed., ¶7054.05.

in a Chapter 7 case, regardless of whether the property is exempt, due to the debtor's failure to make timely installment payments. The circumstances here are not unusual. The costs incurred by Norwest Mortgage are more in the nature of a doing business cost, especially the cost of doing business before a bankruptcy court. The Court cannot find any substantive law that would shift Norwest Mortgage's fees to Debtors. Further, there is no evidence that Debtors' acted in bad faith or that any negligent delay by them contributed to the necessity of Norwest Mortgage filing the motion for relief and abandonment. Debtors cured the default as soon as their finances permitted. Finally, it is this Court's general policy not to award attorneys' fees in routine contested matters. Accordingly, no attorneys' fees and costs will be awarded Norwest Mortgage here.

An appropriate order shall be entered.

Sincerely,



Irvin N. Hoyt
Chief Bankruptcy Judge

NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

DEC 18 1998

INH:sh

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

CC: case file (docket original; copies ~~to parties of interest~~)

I hereby certify that a copy of this document
was mailed, hand delivered, or faxed this date
to the parties on the attached service list.

DEC 18 1998

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota

By  _____

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Total notices mailed: 6

Debtor Diefenderfer, Terry Ray, Jr. 1200 E 19th St, Yankton, SD 57078
Debtor Diefenderfer, Amy Marie 1200 E 19th St, Yankton, SD 57078
Aty Chavis, Robert L. 505 Broadway, Yankton, SD 57078-3921
Trustee Pierce, Lee Ann PO Box 524, Brookings, SD 57006
Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321
Aty Nash, Robert M. PO Box 1552, Rapid City, SD 57709