

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:)	CASE NO. 04-94413
)	
CECILLIA HAILEY,)	CHAPTER 13
)	
Debtor.)	
)	
CENTEX HOME EQUITY)	CONTESTED MATTER
COMPANY, LLC,)	
)	
Movant,)	
)	
v.)	
)	JUDGE BIHARY
CECILLIA HAILEY,)	
)	
Respondent.)	

ORDER

This case is before the Court on a motion filed by Centex Home Equity Company, LLC ("Centex") for relief from the automatic stay and to validate a June 1, 2004 foreclosure held by Centex, with respect to real property located at 7023 Glen Cove Lane, Stone Mountain, Georgia (the "Property"). The motion was filed by Centex on June 9, 2004, and a hearing was originally set for July 6, 2004. Debtor filed a request for a continuance on July 1, 2004; the Court granted the request and rescheduled the matter for August 17, 2004. At the August 17, 2004 hearing, Sidney Gelernter appeared for Centex, Melissa Carperos appeared on behalf of the Chapter 13 Trustee, and Charles Engelberger appeared for the debtor. Debtor had filed this case *pro se*, and Mr. Engelberger announced that he had been contacted by the debtor

less than an hour before the scheduled hearing and appeared solely to request a further continuance.

Centex opposed any further continuance of the hearing set for August 17, 2004, and the Chapter 13 Trustee announced that Mrs. Hailey had failed to file any Chapter 13 plan or schedules and had failed to appear for the first meeting of creditors. The Court directed counsel to proceed. Counsel for Centex made its presentation and established cause for granting relief from the stay and permitting it to record the deed and exercise its state law rights with respect to the Property. Debtor then asked to be heard and stated that she took issue with the payment history as represented by Centex's counsel. She argued that she did not believe she was given proper credit for all the payments she had made, but she had no proof of payments with her. The Court granted a brief recess to allow debtor, her newly retained attorney, and counsel for Centex to confer to see if they could clarify what dispute, if any, existed with respect to the payment history. Counsel then advised the Court that debtor left the courthouse to try to locate documentary evidence, and Mr. Engelberger advised the debtor that she had thirty (30) minutes to return to Court. The Court reconvened the hearing more than forty (40) minutes after the commencement of the recess, but debtor had not returned to the courtroom. Debtor later returned, but counsel had left for the day.

In order to clarify whether there were any payment disputes relevant to Centex's motion, the Court issued a notice on August 26, 2004, setting the matter

down for one last hearing on September 7, 2004. On August 27, 2004, Ann V. Broussard filed an appearance of counsel for the debtor. Counsel consented to reschedule the matter for September 20, 2004, and Sidney Gelernter and Hank Suessmith appeared for Centex, Ann Broussard appeared for the debtor, and Jimmy Bone appeared as the Chapter 13 Trustee. After hearing argument of counsel, the testimony of the debtor and a representative from Centex, and considering the record of this case and the debtor's husband's related case, the Court concludes that Centex's motion should be GRANTED.

This Chapter 13 case filed by Cecillia Hailey on June 1, 2004, is related to a Chapter 13 case filed by her husband, Carlton Dover Hailey, Sr., Case No. 03-70861. Mr. Hailey filed a Chapter 13 case on August 4, 2003, through counsel at Clark & Washington, PC. Centex filed a motion for relief from the automatic stay in Mr. Hailey's case on October 15, 2003, seeking to foreclose on the Property. A hearing was set for November 4, 2003, and counsel announced that a consent order would be presented. The parties presented a consent order which was entered on December 5, 2003. The consent order set forth the amount of the post-petition arrearage and provided terms upon which that arrearage could be cured. The December 5, 2003 Order further required Mr. Hailey to pay all future monthly mortgage payments when due and provided in pertinent part:

The Debtor shall be required, beginning in December 2003 to pay to Movant all future monthly mortgage payments when due. These mortgage payments as well as the payments necessary to cure the

postpetition mortgage arrearage shall be governed by a Strict Compliance Clause as outlined herein below and said Clause shall remain in effect for a period of six (6) months beginning in December 2003. Upon failure by the Debtor to make any of these payments to Movant when due, the Automatic Stay may be terminated as to Movant's secured property subject to the following conditions and allow Movant to proceed to foreclose or otherwise dispose of or take action including, but not limited to, dispossessory proceedings as necessary in order for the Movant to recover upon its secured claim to the property.

Upon failure by the Debtor to tender to Movant the above-stated funds as provided herein, and upon notice of default sent by first class mail to Debtor and Debtor's attorney and failure by Debtor to cure such default within ten (10) days of the date of receipt of such notice, Movant may file a motion and affidavit of default with the Court, with service upon Debtor and Debtor's attorney, and the Court may enter the order terminating the automatic stay, without further notice or hearing. Any excess proceeds derived from a foreclosure sale by Movant shall be remitted to the Chapter 13 Trustee. The parties stipulate that there is no equity in the property.

On March 29, 2004, Centex filed a default motion in which Centex stated that Mr. Hailey had not complied with the terms of the consent order. The motion was served on Mr. Hailey and counsel at Clark & Washington, PC. No response was filed to the motion, and the Court entered an Order lifting the automatic stay in favor of Centex on April 14, 2004.

On May 28, 2004, Mr. Hailey filed a *pro se* document entitled "Complaint Motion for Injunction and Temporary Restraining Order" in which he complained about the quality of his legal representation and asked that the stay be reinstated for sixty (60) days. The Court scheduled an emergency hearing on the matter for the morning of June 1, 2004, the scheduled date of the foreclosure. Mr. Hailey was

represented by attorney Ralph Goldberg at this hearing. Mr. Goldberg argued that Mr. Hailey disputed a recent payoff number provided by Centex, but Mr. Goldberg agreed that Mr. Hailey's post-petition arrearage was now some \$23,409.70 and that Mr. Hailey had not complied with the terms of the consent order. Given the fact that Mr. Hailey had significant post-petition arrearage, the Court announced in open court that it could not and would not reimpose the automatic stay. On July 8, 2004, the Court entered an Order on Mr. Hailey's request for injunction and temporary restraining order and denied any reimposition of the automatic stay as to Centex.

The June 1, 2004 hearing on Mr. Hailey's emergency motion concluded at 11:30 a.m. Nine (9) minutes later, Mrs. Hailey filed the instant Chapter 13 case *pro se* in a further attempt to stop the foreclosure. But Centex cried out the foreclosure on the courthouse steps at 10:11 a.m. on June 1, 2004, before Mrs. Hailey filed her case. In Centex's motion before the Court, Centex argues that it foreclosed on the Property at a time when no automatic stay was in place under either the husband's or the wife's case. Centex seeks relief to record the deed under power and to proceed with its state law remedies to recover possession of the Property.

At the September 20, 2004 hearing in Mrs. Hailey's case, Centex presented evidence that its loan to the Haileys originated in the spring of 2001, and the monthly payments are \$2,809.84. Mr. and Mrs. Hailey have not made any mortgage payments to Centex since Mrs. Hailey filed this case in June of 2004, and it is undisputed that they have not made any payments on this mortgage since at least February of 2004.

Debtor testified that she had not made her mortgage payments because she needed the money to defend a lawsuit brought by her brother in Texas involving a dispute over her father's estate. The post-petition payments that have come due in Mrs. Hailey's case alone now total \$8,899.65, and there is no equity in the Property.

Centex introduced the testimony of Mike Rawls, a senior vice president responsible for default loans. Mr. Rawls credibly testified about his familiarity with this loan, and he introduced a number of exhibits including a payment history identified as Exhibit M—4. He testified with respect to his conversations with the Haileys and his efforts to work with them by deferring payments in the early months of the loan and by agreeing to a lower payoff figure in July of 2003 in order to assist them with a possible refinancing.

Debtor testified about her efforts to refinance this loan. While it is apparent that the debtor and her husband have attempted to refinance this loan on several occasions, the Court does not conclude that debtor's inability to refinance this loan was the fault of Centex. Debtor did not present credible evidence of her ability to now refinance the loan or to make the \$2,809.84 monthly mortgage payment to Centex. Debtor testified that she was self-employed and owned a school uniform store. However, her testimony with respect to her income was confusing and vague. Debtor testified that she earned \$85,000 after taxes in 2003 and about \$45,000 so far in 2004. However, debtor's husband filed Amended Schedules in his bankruptcy on January 29, 2004, in which he stated that his wife, the debtor in this case, had been

unemployed for the previous fifteen (15) months. She also later testified that she hasn't worked much in 2004. The debtor testified that she received some \$100,000 from her father in October of 2002, but her testimony with respect to what she did with those funds was vague and not credible. She also testified that her husband could raise the funds for the post-petition payments totaling \$8,899.65 by the close of business on September 20, 2004, but she offered no credible evidence as to the source of those funds. The debtor and her husband have had a number of lawyers and a number of opportunities, but debtor has failed to offer sufficient adequate protection for Centex or any basis upon which the Court could decline to grant Centex's motion for relief from the automatic stay.

Finally, at the September 20, 2004 hearing, debtor testified that in January and February of 2004 she and her husband sent three moneygrams totaling \$3,809.54 to Centex for which they have not been given credit. Debtor did not introduce any documentary evidence supporting this testimony, and Mike Rawls credibly testified that Centex had not received these payments from the debtor or her husband. Centex is entitled to have its motion to validate granted even if debtor did make these three disputed payments, given the substantial defaults on debtor's loan, both pre-petition and post-petition, and the fact that the foreclosure took place while no automatic stay was in place.

In accordance with the above reasoning, the Court concludes that Centex has established cause for lifting the automatic stay to permit it to record its deed under

power and to proceed with its state law remedies to recover possession of the Property. Centex's motion is granted, and the foreclosure sale conducted by Centex prior to the filing of this case on June 1, 2004, is hereby validated to the extent that it is otherwise valid under state law.

IT IS SO ORDERED, this ____ day of September, 2004.

JOYCE BIHARY
UNITED STATES BANKRUPTCY JUDGE

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