

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

OCT 12 2000

Clerk, U.S. District Court
District of Columbia

CLYDE HARGRAVES, *et al.*,

Plaintiffs,

v.

Civil Action No. 98-1021 (JHG)

CAPITAL CITY MORTGAGE CORP.,
et al.,

Defendants.

ORDER

On February 18, 1999, this Court issued a preliminary injunction which stayed foreclosure on plaintiffs Nancy Hilliard and Angela Birth's ("plaintiffs") property prior to the entry of final judgment in this case. An Order dated July 5, 2000, denied defendants Capital City Mortgage Corporation ("Capital City") and Thomas K. Nash's ("Nash") motion to vacate that preliminary injunction, and denied plaintiffs' motion to modify the preliminary injunction. Pending are Capital City and Nash's renewed motion to vacate the stay of foreclosure, their motion for contempt and sanctions for violations of the February 18 and July 5 Orders, and the plaintiff's renewed motion to modify the preliminary injunction.

The opposition to the defendants' motion is accompanied by a number of papers and declarations describing the particular circumstances that have beset the plaintiffs, and their resulting financial distress. The plaintiffs have made an attempt, however modest,

to make the required payments, and the defendants unequivocally rejected that offer. It is unquestioned that plaintiffs are behind on their payments, and the Court has not, and does not now, modify the amount of payment specified in the February 18 Order. The Court addressed this matter in July, and expected plaintiffs to comply. Plaintiffs have now represented that they “have taken steps to ensure that we can from this point forward make monthly payments as ordered.” They report that because their “finances have now stabilized,” they were able to tender an amount sufficient to cover one monthly payment on August 28, and unequivocally state that they “will be able to continue to make these payments.”

The Court accepts plaintiffs’ representations. It is clear from the defendants’ papers that while in the past the plaintiffs have had difficulty making payments, and making those payments in a timely manner, nonetheless the plaintiffs did make their payments until their recent difficulty. Plaintiffs are expected to tender their payment for October within 15 days, and each month thereafter to make timely payments in accordance with the February 18, 1999, Order, in addition to partial payments to diminish their arrearage.¹ It is therefore

¹ As to the motion for contempt, defendants bear the burden to establish, by clear and convincing evidence, that the plaintiffs have violated a court order. *See National Organization for Women v. Operation Rescue*, 37 F.3d 646, 662 (D.C. Cir. 1994). Although “bad faith on the part of the contemnor is not required,” and “failure to comply with the court decree need not be intentional,” *Food Lion, Inc. v. United Food and Commercial Workers Int’l Union*, 103 F.3d 1007, 1016 (D.C. Cir. 1997), impossibility of performance is a defense. Thus “[i]f a party lacks the financial ability to comply with an order, the court cannot hold him in contempt for failing to obey.” *Tinsley v. Mitchell*, 804 F.2d 1254, 1256 (D.C. Cir. 1984). Plaintiffs have offered

ORDERED that Capital City and Nash's renewed motion to vacate stay of foreclosure is denied; it is

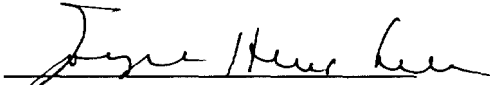
FURTHER ORDERED that Capital City and Nash's motions for contempt and sanctions are denied; it is

FURTHER ORDERED that Angela Birth and Nancy Hilliard's renewed motion to modify the Court's preliminary injunction order is denied; and it is

FURTHER ORDERED that Angela Birth and Nancy Hilliard proffer a payment of \$2,118.45, in addition to a partial payment to diminish their arrearage, within 15 days, and on the first of each month thereafter during the pendency of the preliminary injunction.

IT IS SO ORDERED.

October 12, 2000


JOYCE HENS GREEN
United States District Judge

support for their contention that they have been financially unable to comply with this Court's Orders, therefore defendants' motion for contempt is denied.