

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Case No. 04-33826-DDO

Chapter 7

Dale A. Witherington and Susan L. Witherington,

Debtor(s).

***NOTICE OF HEARING AND
MOTION FOR RELIEF FROM STAY***

TO: Debtor(s) and Attorney for Debtor(s); Michael S. Dietz, Chapter 7 Trustee; U.S. Trustee; and other parties in interest.

1. Countrywide Home Loans, Inc., a secured creditor of Debtor(s), by its undersigned attorney, moves the Court for the relief requested below, and gives notice of hearing herewith.

2. The Court will hold a hearing on this motion at **9:30 am on Wednesday, October 6, 2004**, before the Honorable Dennis D. O'Brien, in Courtroom No. 228A, at the U.S. Federal Courthouse, 316 North Robert Street, St. Paul, Minnesota 55101.

3. Any response to this motion must be filed and delivered not later than Friday, 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 Monday, 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 motion arises under 11 U.S.C. §362 and Fed. R. Bankr. P. 4001. This motion is filed under Fed. R. Bankr. P. 9014 and Local Rules 9006-1, 9013-1 through 9013-3. Countrywide Home Loans, Inc. seeks relief from the automatic stay of 11 U.S.C. §362 with respect to certain personal property owned by Debtor(s).

5. The petition commencing this Chapter 7 case was filed on June 30, 2004 and the case is now pending in this Court. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 1334 and 157(a), Fed. R. Bankr. P. 5005 and Local Rule 1070-1. This proceeding is a core proceeding.

6. Debtor(s) (whether one or more) executed a promissory note in favor of Countrywide Home Loans, Inc. in consideration for a real estate loan (the "Note"). To secure repayment of the Note, Debtor(s) granted to Countrywide Home Loans, Inc. a mortgage dated on the following real property (the "Property"):

Lot 4, Block 4, of the rearrangement of "Countryside", Le Sueur County, Minnesota

A copy of the first two pages of the Mortgage is attached hereto.

7. Payments due under the terms of the Mortgage for the months of March through July 2004 totaling \$4,741.40 plus late charges, have not been made by the Debtor(s).

8. The balance due under the Mortgage is \$152,778.87 as of the date hereof. On information and belief, the fair market value of the Property is approximately \$240,000.00 less other applicable mortgages. After consideration of the applicable liens, there is no appreciable equity in the Property.

9. Countrywide Home Loans, Inc.'s interest is depreciating, while Debtor(s) are failing to make payments. Countrywide Home Loans, Inc. does not have, and has not been offered, adequate protection of its interest in the Property. There is no appreciable equity in the Property and, in view of the fact that this is a Chapter 7 liquidation proceeding, the Property is not necessary for an effective reorganization.

10. The failure of the Debtor(s) to make payments pursuant to the Mortgage or otherwise provide Countrywide Home Loans, Inc. with adequate protection of its interest in the Property constitutes cause, within the meaning of 11 U.S.C. § 362(d)(1) and 362(d)(2), entitling Countrywide Home Loans, Inc. to relief from the stay.

11. Countrywide Home Loans, Inc. requests that any order modifying the automatic stay be effective immediately as allowed under Federal Bankruptcy Rule 4001(a)(3).

12. If testimony is necessary as to any facts relevant to this motion, S. Young, or some other representative of Movant, will testify on behalf of Countrywide Home Loans, Inc..

13. THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

WHEREFORE, Countrywide Home Loans, Inc. respectfully moves the Court for an order (i) modifying the automatic stay of 11 U.S.C. §362 so as to permit Countrywide Home Loans, Inc. to foreclose its interest in the Mortgage in accordance with Minnesota law, (ii) finding that Bankruptcy Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure is not applicable, and (iii) granting such other relief as may be just and equitable.

Dated: September 7, 2004

STEWART, ZLIMEN & JUNGERS

By /e/ Bradley J. Halberstadt
Bradley J. Halberstadt (#215296)
Attorneys for Movant
430 Oak Grove Street, Ste. 200
Minneapolis, Minnesota 55403
(612) 870-4100

C. As of July 28, 2004, the total indebtedness was \$152,778.87. Debtors are in default on 5 contractual payments (March 2004 through and including July 2004 payments). The amount of the current monthly mortgage installment payment is \$948.28, and the monthly late charge is \$47.41.

5. By failing to make the regular monthly installment payments due pursuant to the Note, Debtors have not provided adequate protection to Fannie Mae.

6. Fannie Mae has had to retain counsel to represent it before this Court and is incurring legal expenses and attorneys' fees for which it is entitled to reimbursement under the terms of its Note.

The foregoing facts are of my own personal knowledge and belief, and if called upon to appear as a witness, I could, and would, testify competently thereto. I declare under penalty of perjury that to the best of my knowledge the foregoing facts are true and correct.

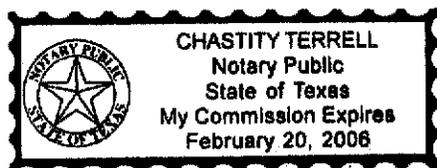
Countrywide Home Loans, Inc.

By: Windale Bafford
Windale Bafford
Bankruptcy Representative

DATED: August 24, 2004

SUBSCRIBED AND SWORN TO BEFORE ME on August 24, 2004.

Chastity Terrell
Notary Public in and for the State of Texas



8312-N-0118
minn

292905

Registration Tax hereon at \$ 349.60
paid this 26 day of Nov 2001
Joseph M Koettke
County Treasurer
Counter and payment recorded.
Ron Bernsclaw
County Auditor

Document No. 292905 OFFICE OF COUNTY RECORDER
County of Le Sueur, MN



No. of Pages: Well Certificate NOT REC'D
11 Well Certificate Rec'd

I hereby certify that the within instrument was filed in this office
for record on 11-28-2001 at 09:00 AM PM



David A. Sexe
DAVID A. SEXE,
COUNTY RECORDER

[Space Above This Line For Recording Data]

MORTGAGE

MIN 1000157-0000638713-4

Countrywide Home Loans



610 000426733 D2 001 002

000042673342104

[Doc ID #]

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 NOVEMBER 13, 2001, together with all Riders to this document.
- (B) "Borrower" is

DALE A. WITHERINGTON AND SUSAN L. WITHERINGTON, HUSBAND AND WIFE

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

COUNTRYWIDE HOME LOANS, INC.

Lender is a CORPORATION

organized and existing under the laws of NEW YORK

Lender's address is

4500 PARK GRANADA, CALABASAS, CA 91302-1613

Cornerstone Title# 10653

MINNESOTA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

Page 1 of 11

Initials: DAW/SW

08/00 - 0A(MN) (0006)

CHL (08/00)

VMP MORTGAGE FORMS - (800)521-7281

Form 3024 1/01

CON/V/A



* 2 3 9 9 1 *



* 0 0 0 4 2 6 7 3 3 0 0 0 0 2 0 0 8 A *

①

(E) "Note" means the promissory note signed by Borrower and dated NOVEMBER 13, 2001 . The Note states that Borrower owes Lender ONE HUNDRED FIFTY TWO THOUSAND and 00/100

Dollars (U.S. \$ 152,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than DECEMBER 01, 2031

(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]:

- Adjustable Rate Rider
- Balloon Rider
- VA Rider
- Condominium Rider
- Planned Unit Development Rider
- Biweekly Payment Rider
- Second Home Rider
- 1-4 Family Rider
- Other(s) [specify]

(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 amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 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.

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 LE SUEUR :

[Type of Recording Jurisdiction] [Name of Recording Jurisdiction]
LOT 4, BLOCK 4, OF THE RE-ARRANGEMENT OF "COUNTRYSIDE"

Parcel 07-730-0230

Initials: *[Signature]*
Form 3024 1/01

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Case No.04-33826-DDO
Chapter 7

Dale A. Witherington and Susan L. Witherington,
Debtor(s).

***MEMORANDUM IN SUPPORT OF
MOTION FOR RELIEF FROM STAY***

Countrywide Home Loans, Inc. submits this memorandum of law in support of its motion for relief from the stay in the above-entitled matter.

FACTS

Countrywide Home Loans, Inc. holds a perfected interest in the following real property owned by Debtor(s) (the "Property"): Lot 4, Block 4, of the rearrangement of "Countryside", Le Sueur County, Minnesota. Payments due under the terms of the Mortgage for the months of March through July 2004 totaling \$4,741.40 plus late charges, have not been made by the Debtor(s). The balance due under the Mortgage is \$152,778.87 as of the date hereof. On information and belief, the fair market value of the Property is approximately \$240,000.00, less applicable mortgages. After applicable mortgages and costs of foreclosure, there is no appreciable equity in the Property.

ARGUMENT

Pursuant to Section 362(d)(1) of the Bankruptcy Code, relief from the automatic stay shall be granted upon request of a creditor "for cause, including the lack of adequate protection of an interest in property of such [creditor]." 11 U.S.C. Section 362(d)(1). No payments have been made as required by the Mortgage between the Debtor(s) and Countrywide Home Loans, Inc. has otherwise not been provided with adequate protection of interest in the Property. Such failure constitutes cause, within the meaning of Section 362(d)(1), entitling Countrywide Home Loans, Inc. to relief from the stay. United Savings Assn.

of Texas v. Timbers of Inwood Forest Assoc., Ltd. (In re Timbers of Inwood Assoc., Ltd.), 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).

Pursuant to Section 362(d)(2) of the Bankruptcy Code, relief from the stay is also appropriate where no equity exists and the property is not necessary to an effective reorganization. In re Albany Partners, Ltd., 749 F.2d 670 (11th Cir. 1984). The balance due under the Contract is \$152,778.87 as of the date hereof. The fair market value of the Property is approximately \$240,000.00. After applicable mortgages and costs of foreclosure, there is no appreciable equity in the Property. Finally, as this a Chapter 7 case, the Vehicle is not necessary to an effective reorganization.

CONCLUSION

For all the reasons set forth herein, Countrywide Home Loans, Inc. is entitled to an order terminating the automatic stay of 11 U.S.C. § 362 and authorizing it to foreclose its interest in the Vehicle in accordance with Minnesota law.

Dated: September 7, 2004

STEWART, ZLIMEN & JUNGERS

By /e/ Bradley J. Halberstadt
Bradley J. Halberstadt (#215296)
Attorneys for Movant
430 Oak Grove Street, Ste. 200
Minneapolis, Minnesota 55403
(612) 870-4100

U.S. BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Dale A. Witherington and Susan L. Witherington

Debtor(s).

UNSWORN DECLARATION

FOR PROOF OF SERVICE

Bky. No. 04-33826-DDO

Bradley J. Halberstadt, an agent of Stewart, Zlimen & Jungers, attorney(s) licensed to practice law in this court, with office address of 430 Oak Grove Street, Ste. 200, Minneapolis, Minnesota 55403, declares that on the date set forth below, I served the annexed **Notice of Hearing and Motion For Relief From Stay** upon each of the entities named below by mailing to each of 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:

United States Trustee
Suite 1015
300 South 4th Street
Minneapolis, MN 55415

(Attorney for Debtor(s))
Jeffrey Michael Bruzek
Prescott & Pearson
443 Old Hwy 8, Ste. 208
New Brighton, MN 55112

(Trustee)
Michael S. Dietz
505 Marquette Bldg.
PO Box 549
Rochester, MN 55903

(Debtor(s))
Dale A. Witherington
1258 Hillside Ave. SW
New Prague, MN 56071

Susan L. Witherington
1258 Hillside Ave. SW
New Prague, MN 56071

And I declare, under penalty of perjury, that the foregoing is true and correct.

Date: September 7, 2004

Signed: /e/ Bradley J. Halberstadt

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Case No. 04-33826-DDO
Chapter 7

Dale A. Witherington and Susan L. Witherington,

Debtor(s).

**ORDER GRANTING
MOTION FOR RELIEF FROM STAY**

The above-entitled matter came before the Court for hearing on Wednesday, October 6, 2004 on the motion of Countrywide Home Loans, Inc. seeking relief from the automatic stay of 11 U.S.C. §362. Appearances were noted in the Court's record. Based upon the proceedings on said date, the statements of counsel, and all of the files and records herein, the Court now finds that cause exists entitling Countrywide Home Loans, Inc. to the relief requested.

NOW, THEREFORE, IT IS HEREBY ORDERED that the automatic stay of 11 U.S.C. §362 is immediately terminated as to Countrywide Home Loans, Inc., and Countrywide Home Loans, Inc., and/or its successors and assigns, is authorized to foreclose its interest in the subject Lot 4, Block 4, of the rearrangement of "Countryside", Le Sueur County, Minnesota, in accordance with Minnesota law. Notwithstanding Fed R. Bankr. P. 4001(a)(3), this order is effective immediately.

Dated: _____

Dennis D. O'Brien
United States Bankruptcy Judge