UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

IN RE: **CHAPTER 11**

N. HANEY HUDSON **CASE NO. 9001464MC**

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON THE *MOTION TO DISMISS OR CONVERT TO CHAPTER 7*

This matter came before the Court on the *Motion To Dismiss or Convert to Chapter 7* filed by H. Alex Shields and the *Answer to Motion To Dismiss or Convert to Chapter 7* filed by the Debtor-in-Possession, N. Haney Hudson, proceeding *pro se*. After considering all testimony and evidence presented, the arguments of the parties, and the pleadings on file, the Court finds that the motion is well taken and that the case should be dismissed.

FINDINGS OF FACT

The parties to this proceeding have a long and litigious relationship. The parties began their relationship in 1988 when H. Alex Shields (Shields) leased 148 acres of real property to N. Haney Hudson (Debtor). In 1989, Shields agreed to sell the 148 acres to the Debtor for the sum of $350,000. Shields personally financed the sale to the Debtor. On May 11, 1989, the Debtor executed a deed of trust in favor of Shields for the full amount of the indebtedness. This deed of trust was duly filed in the land records in the office of the Chancery Clerk of Clarke County, Mississippi, on May 15, 1989.

On May 3, 1990, the Debtor filed a petition for relief under Chapter 12 of the United States Bankruptcy Code.[1] On July 2, 1990, the Debtor converted his case to a Chapter 11.

The Debtor's *Plan of Reorganization* filed on December 19, 1990, specifically provides for payments to be made upon confirmation to the Internal Revenue Service and Southeast Mississippi Bank. The *Addendum To Debtor's Plan* filed on March 22, 1991, provides for payments to Shields. In the addendum, the Debtor agreed to pay the principal amount of $365,000 plus $2,500 for attorney fees to Shields according to the following terms:

> 1. (I)n monthly installments with the principal amount being amortized over sixteen (16) years at ten percent (10%) interest. The payments will balloon on the 8th anniversary of the indebtedness and the principal balance then outstanding will be due and payable. The plan payments will begin on May 1, 1991, but an adequate protection payment will be made on April 1, 1991.
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> 2. Alex Shields will retain all the rights that he has under the existing Deed of Trust and will be allowed to commence foreclosure proceedings immediately upon default of the Debtor as subject to the

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[1]Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

> laws of the State of Mississippi. A "drop-dead" provision applicable ten (10) days after filing Notice of Default with the Court will allow Alex Shields to foreclose under this agreement.

Addendum To Debtor's Plan, # 1, pp. 1 and 2 (March 22, 1991). On June 7, 1991, the Debtor's *Plan of Reorganization* was approved by this Court.

On July 31, 1991, Shields conducted a foreclosure sale of the Debtor's property. This foreclosure sale then became the subject of adversary proceeding 920036MC which the Debtor filed in this Court. After trial on the adversary proceeding, this Court entered its opinion on May 7, 1993. In its opinion, the Court held that based upon the terms of the confirmed plan and the addendum, Shields was required to file with the Court a notice of default ten days prior to the commencement of foreclosure proceedings (ten day notice). The Court found that the ten day notice filed by Shields, through his attorney, was completely inaccurate, and therefore, it did not constitute adequate notice. The Court then held that the July 31, 1991, foreclosure sale was void and that the *Substituted Trustee's Deed* and the *Corrected Substituted Trustee's Deed* were void and should be set aside.

On July 7, 1993, this Court entered an *Order For Abstention* in which the Court abstained from hearing the remaining contested matters between the parties and allowed "the parties to proceed in the appropriate State Court forum to resolve the issues and disputes between them which relate to the foreclosure set aside by this Court and damages resulting therefrom." *Order For Abstention*, Adversary No. 920036MC, p. 2 (July 7, 1993). The Debtor appealed this order, and the Honorable David Bramlette, United States District Court Judge for the Southern District of Mississippi, affirmed this Court's order in Civil Action No. 3:93-cv-784-BrS on May 19, 1995. The Fifth Circuit Court of Appeals affirmed Judge Bramlette's opinion on September 18, 1996, in Case No. 96-60146.

While the above mentioned appeals were proceeding through the federal courts, the Chancery Court of Clarke County, in Civil Action No. A-3286-M, heard the matters relating to the foreclosure which this Court set aside in its May 7, 1993, opinion. After the chancellor entered his ruling, Shields noticed a foreclosure sale on the property based upon the ten day notice that Shields had filed with the Bankruptcy Court on June 2, 1993.[2] Prior to the foreclosure, the Debtor sought a temporary restraining order (TRO) and a preliminary injunction from the Mississippi Supreme Court. In Case No. 93-M-1248, the Mississippi Supreme Court dismissed the motion for a TRO and for a preliminary injunction. On November 3, 1993, Shields conducted a foreclosure sale on the property.

Approximately nine months after the Fifth Circuit had ruled on the Debtor's appeal, the Debtor filed, on July 14, 1997, a motion seeking to lift the order which was holding various motions (including the motion to dismiss which is the subject of this opinion) in abeyance pending the resolution of all issues in state court. On July 25, 1997, this Court entered *Order Setting Aside Order Holding Proceedings In Abeyance.*

A trial was held on March 4, 1998, on the *Motion To Dismiss or Convert To Chapter 7* filed by Shields and the response thereto filed by the Debtor.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A).

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[2]As stated previously, the Debtor's confirmed plan and addendum required Shields to give the Debtor a ten day notice upon the Debtor's default in the plan payments owed to Shields.

II.

The conversion or dismissal of a Chapter 11 case is controlled by 11 U.S.C. § 1112 of the United States Bankruptcy Code. "Section 1112(b) permits the court, in its discretion, to convert or dismiss a chapter 11 case, whichever is in the best interests of creditors and the estate, for cause. Any party in interest may move for relief under the section...." 7 L. King, Collier on Bankruptcy ¶ 1112.04 at 1112-20 (15th ed. Rev. 1998)(footnote omitted).

In the case at bar, a creditor of the Debtor, Alex Shields, is seeking to have the Debtor's Chapter 11 case dismissed or converted.[3] The pertinent parts of § 1112(b) provide:

> **11 U.S.C. § 1112 Conversion or dismissal.**
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> . . . .
>
> (b) (O)n request of a party in interest . . ., and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including--
>
> . . . .
>
> (7) inability to effectuate substantial consummation of a confirmed plan;
>
> (8) material default by the debtor with respect to a confirmed plan;....

In considering a § 1112(b) motion, the Court must be careful not to apply § 1112(b) "to thwart legitimate cases that merit the relief that chapter 11 affords." Collier, ¶ 1112.04[2] at 1112-22

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[3]In his brief, Shields cites § 1112(b)(1), (2), (3), (7), (8), and (10) as grounds for conversion or dismissal of the Debtor's case. However, the Court believes that the only two pertinent subsections of § 1112 which apply to the conversion or dismissal of the case at bar are subsections (7) and (8).

(footnote omitted). Therefore in the case at bar, the Court must determine if this Chapter 11 case is a "legitimate" case. "Because section 1112(b) is both nonexhaustive and discretionary, defining its application embraces two fundamental challenges. The first challenge involves fleshing out the particulars of the cause standard." Collier, ¶ 1112.04[3] at 1112-23.

A.

Cause is not defined in the Bankruptcy Code, and although § 1129(b) lists ten examples of *cause*, this list is not an exhaustive list.

> (However), (t)he common theme of the ten examples is straightforward. In general, each example identifies a condition or set of circumstances that is typically sufficient to demonstrate that it is unlikely that the benefits of reorganization will be achieved within a reasonable amount of time and in a manner that is consistent with the requirements and restrictions of the Code.

Collier, ¶ 1112-.04[5] at 1112-30. "In other words, each category defines in generic terms the general circumstances in which it is typically unreasonable for the chapter 11 process to proceed." Collier, ¶ 1112.04[3] at 1112-23.[4] The determination of whether or not cause exists to convert or dismiss a case under § 1112(b) lies in the sound discretion of the bankruptcy court. Sullivan Central Plaza I, Ltd. v. BancBoston Real Estate Capital Corp. (In re Sullivan Central Plaza I, Ltd.), 935 F.2d 723, 728 (5th Cir. 1991).

As stated previously, the two subsections of § 1112(b) which are applicable to the case at bar are subsections (7) and (8). The example of cause in subsection (7) is the debtor's "inability to

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[4]*See* In re Woodbrook Assocs., 19 F.3d 312, 316 (7th Cir. 1994); Humble Place Joint Venture v. Fory (In re Humble Place Joint Venture), 936 F.2d 814, 818 (5th Cir. 1991)(relief granted where 'the risk to secured creditors of a continuing Chapter 11 case outweighed the benefit.')(remainder of footnote omitted).

effectuate substantial consummation of a confirmed plan." 11 U.S.C. § 1112(b)(7). As the Debtor's plan was confirmed on June 7, 1991, the Court must determine if the Debtor has *substantially consummated* his plan.

Section 1101(2) defines substantial consummation:

> **11 U.S.C. § 1101. Definitions for this chapter**
>
> In this chapter--
>
> . . . .
>
> (2) "substantial consummation" means--
>
> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
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> (B) assumption by the debtor . . .of the business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan.

In order to achieve substantial consummation, all three elements must be met. In re Potts, 188 B.R. 575, 579 (Bankr. N.D. Ind. 1995). The question of whether a plan has been substantially consummated is a question of fact which must be determined by the court on a case by case basis. In re Stevenson, 148 B.R. 592, 596 (D. Idaho 1992).

At the trial on the motion, the Debtor testified that he had not made any payments to any of his creditors pursuant to his confirmed plan. (*Transcript* at lines 1-24, p. 16). Consequently, as the Debtor has not commenced distribution of payments under the plan as required by § 1101(2)(C), cause has been established to dismiss or convert his case pursuant to § 1112(b)(7) due to the Debtor's inability to effectuate substantial consummation of his confirmed plan.

The next subsection of § 1112(b) which is applicable to the case at bar is subsection (8). The example of cause in subsection (8) is the "material default by the debtor with respect to a confirmed plan." 11 U.S.C. § 1112(b)(8). As stated previously, the Debtor's plan was confirmed on June 7, 1991. The Debtor's largest creditor is Shields. The Debtor agreed to pay the principal amount of $365,000 plus $2,500 for attorney fees to Shields according to the following terms:

> (I)n monthly installments with the principal amount being amortized over sixteen (16) years at ten percent (10%) interest. The payments will balloon on the 8th anniversary of the indebtedness and the principal balance then outstanding will be due and payable. The plan payments will begin on May 1, 1991, but an adequate protection payment will be made on April 1, 1991.

Addendum To Debtor's Plan, # 1, p. 1 (March 22, 1991). The Debtor testified that he made the April 1, 1991, adequate protection payment to Shields and that he made a $3800 payment to Shields on May 1, 1991, pursuant to the *Addendum To Debtor's Plan*. (*Transcript* at lines 8-16, p. 18). However, he further testified that he had not made any further payments to Shields as required by the confirmed plan. In addition, the Debtor testified that he had not made any of the payments required by his confirmed plan to any of his other creditors. (*Transcript* at lines 1-24, p. 16). Consequently, cause has also been established to dismiss or convert the Debtor's case pursuant to § 1112(b)(8) due to the Debtor's material default with respect to his confirmed plan.

B.

Once cause has been established, the second challenge a court must address involves the determination of the parameters of the court's discretion.

> Generally speaking, the court may exercise its discretion and deny relief if mitigating factors demonstrate that, notwithstanding the presence of cause, it remains likely that the benefits of reorganization will be achieved at an acceptable cost consistent with the requirements

> and limitations of the Code. In other words, whereas cause defines the general categories of cases in which it is usually true that reorganization should not proceed, the discretionary aspect of section 1112(b) permits the court to conduct a tailor-made inquiry into whether the facts of the particular case remove the matter from the norm and justify continuance of the chapter 11 process.

Collier, ¶ 1112.04[3] at 1112-24(footnotes omitted).

As noted above, the Court has found that cause exists under § 1112(b)(7) and (8) to convert or dismiss this case. The Court must now determine if the facts of this particular case override the cause which has been established to convert or dismiss the case and justify the continuance of the Chapter 11 process.

As described in the above *Findings of Fact*, the litigation between the Debtor and Shields has been going on for many years. The Debtor and Shields have been to the Mississippi Supreme Court and to the Fifth Circuit Court of Appeals on various issues relating to the 148 acres of land which Shields sold to the Debtor in 1989. The Debtor's bankruptcy petition has been pending since 1990. At some point in time, there must be an end.

The Fifth Circuit Court of Appeals has stated:

> A principal goal of the reorganization provisions of the Bankruptcy Code is to benefit the creditors of the Chapter 11 debtor by preserving going-concern values and thereby enhancing the amounts recovered by all creditors....However, when there is no reasonable likelihood that the statutory objective of reorganization can be realized or when the debtor unreasonably delays, then the automatic stay and other statutory provisions designed to accomplish the reorganization objective become destructive of the legitimate rights and interests of creditors, the intended beneficiaries. In that situation it is incumbent upon the bankruptcy judge to effectuate the provisions of the Bankruptcy Code for the protection of creditors lest the judge keep the Code's word of promise to the ear of creditors and break it to

> their hope. The bankruptcy judge must meet head-on his obligation to decide, fairly and impartially, the hard questions.

United Savings Assoc. Of Texas v. Timbers of Inwood Forest Assoc., Ltd. (In re Timbers of Inwood Forest Assoc., Ltd.), 808 F.2d 363, 373 (5th Cir. 1987). Applying this edict to the decision of whether to dismiss or convert a Chapter 11 case requires the Court to make difficult choices--to allow the debtor to continue to try to reorganize, to convert and to liquidate the debtor's assets, or to dismiss the debtor's case. But that is one of the strengths of § 1112(b). "(I)t permits the court to evaluate whether the process is worth the effort, or, conversely, whether the process continues simply because the parties are forced to participate." Collier, ¶ 1112.04[4][b] at 1112-28.

After reviewing all of the facts in this case and keeping in mind the dictates of the Fifth Circuit, the Court does not find any mitigating factors which would justify the continuance of this Chapter 11. Rather, this is clearly a case where the "process continues simply because the parties (namely Shields) are forced to participate." Id. As Chief Judge Charles Clark stated in his concurring opinion in Timbers, "(R)eorganization is not a Holy Grail to be pursued at any length." Timbers, 808 F.2d at 374.

C.

Now that the Court has addressed the two fundamental challenges and found *cause* and has not found any mitigating factors to override the *cause*, § 1112(b) offers the Court a choice between converting the case to a Chapter 7 or dismissing the case--"whichever is in the best interest of creditors and the estate." 11 U.S.C. § 1112(b).

The "best interest of creditors and the estate" is not defined in the Bankruptcy Code. "(H)owever, the section speaks of the singular best 'interest' of creditors and the estate as a group,

and thus requires the decision to be based on their collective best interest." Collier, ¶ 1112.04[6] at 1112-49-50.(footnote omitted). "(I)n evaluating the interests, the court must consider the interests of *all* of the creditors." Rollex Corp. v. Associated Materials, Inc. (In re Superior Siding & Window, Inc.), 14 F.3d 240, 243 (4th Cir. 1994)(emphasis in original). "(T)he court should consider a totality of all the facts and circumstances based on 'the best interest of creditors and the estate' test." In re Great American Pyramid Joint Venture, 144 B.R. 780, 793 (Bankr. W.D. Tenn. 1992)

In balancing the interest of the estate and the creditors, some factors the Court can consider are: (1) whether there would be a loss of rights granted in the case if it were dismissed rather than converted, In re Mechanical Maintenance, Inc., 128 B.R. 382, 385-88 (E.D. Pa. 1991); (2) the ability of the trustee in a Chapter 7 case to reach assets for the benefit of creditors, In re Staff Inv. Co., 146 B.R. 256, 261 (Bankr. E.D. Cal. 1992); (3) in assessing the interest of the estate, whether conversion or dismissal of the estate would maximize the estate's value as an economic enterprise, Staff Inv. Co., 146 B.R. at 261; (4) whether any remaining issues would be better resolved outside the bankruptcy forum, In re Gonic Realty Trust, 909 F.2d 624, 627 (1st Cir. 1990). *See* Collier, ¶ 1112.04[6] at 1112-50-51.

In examining these factors and considering the totality of the facts and circumstances surrounding this case, the Court does not find any benefit to the estate or to the creditors to justify the conversion of this case to a Chapter 7. In his schedules, the Debtor lists the 148 acres of land, some equipment, and cattle as his only assets with any value. Shields held a lien on the real property and the cattle. Shields foreclosed on his note and deed of trust in 1993. Assuming for the sake of argument that the Debtor still has the equipment, per the schedules the Debtor filed, Southeast Mississippi Bank appears to have a lien on the equipment. Therefore, there are no assets for a

Chapter 7 trustee to liquidate for the benefit of the Debtor or his creditors. One court has held that "(a)bsent a plan provision requiring conversion upon default, viable avoidance actions or other valid reason, post-confirmation conversion is not in the best interest of creditors." State of Ohio, Dept. of Taxation v. H.R.P. Auto Center, Inc. (In re H.R.P. Auto Center, Inc.), 130 B.R. 247, 257 (Bankr. N.D. Ohio 1991). In the case at bar, there is not a plan provision requiring conversion upon default, any avoidance actions, or any other valid reason which would make conversion of this case to a Chapter 7 in the best interest of the estate or the creditors.

CONCLUSION

In Katchen v. Landy, 382 U.S. 323, 86 S. Ct. 467, 15 L. Ed. 2d 391 (1966), the United States Supreme Court held that "a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts.'" Katchen, 382 U.S. at 328-29(citation omitted). *See also* Federal Rule of Bankruptcy Procedure 1001 (the Bankruptcy Rules are to be construed in order "to secure the just, speedy, and inexpensive determination of every case and proceeding."). This Chapter 11 case has been pending since 1990. The Debtor's plan was confirmed on June 7, 1991, however, the Debtor has failed to make a single payment to any of his creditors as required by his confirmed plan. Rather, he has been litigating the issues surrounding the foreclosure of his real property by Shields in both the federal and the state courts.

Based upon his material default with respect to his confirmed plan and his inability to effectuate substantial consummation of his confirmed plan, this Court finds that it is in the best interest of the estate and of the creditors to dismiss the Debtor's Chapter 11 case pursuant to 11 U.S.C. § 1112(b). Upon confirmation of a plan, a court retains jurisdiction for limited purposes. However, "(f)ollowing dismissal, the bankruptcy court has no further jurisdiction and creditors are

free to enforce their plan-created contractual rights in the appropriate state court forum." In re Page, 118 B.R. 456, 460 (Bankr. N.D. Tex. 1990).

A separate judgment will be entered in accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021.

THIS the 8th day of May, 1998.

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI EASTERN DIVISION

IN RE: **CHAPTER 11**

N. HANEY HUDSON **CASE NO. 9001464MC**

FINAL JUDGMENT

Consistent with the opinion dated contemporaneously herewith:

IT IS THEREFORE ORDERED that the *Motion To Dismiss or Convert to Chapter 7* is well taken and that pursuant to 11 U.S.C. § 1112(b), the above styled case is hereby dismissed.

SO ORDERED this the 8TH day of May, 1998.

UNITED STATES BANKRUPTCY JUDGE