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

U. S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 07 1993
MOLLIE C. JONES- CLERK
BY ________ DEPUTY

IN RE:

N. HANEY HUDSON a/k/a
NORMAN HANEY HUDSON a/k/a
N. H. HUDSON

CASE NO. 9001464EEM

N. HANEY HUDSON — PLAINTIFF

VS. — ADVERSARY NO. 9200036

H. ALEX SHIELDS — DEFENDANT

J. Walter Newman, IV
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539 Trustmark National Bank Bldg.
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Attorney for Plaintiff

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Attorney for Defendant

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This adversary proceeding came on for hearing upon the complaint of N. Haney Hudson, wherein Hudson seeks a determination of whether the foreclosure of a certain parcel of real property located in Clarke County, Mississippi is valid. The foreclosure was conducted for the benefit of the Defendant, H. Alex Shields. In addition to the complaint filed by Hudson to determine the validity of the foreclosure, Shields filed a motion for sanctions against Hudson in Hudson's chapter 11 case, who in response filed a cross-motion for sanctions and for citation of contempt against

Shields. The motions for sanctions were then followed by a motion to dismiss or convert to chapter 7 filed by Shields. All of the foregoing motions were scheduled for hearing at the same time as the trial on Hudson's complaint to determine the validity of the foreclosure. However, on the day of the trial all parties agreed that the Court would only hear evidence on the issue of the validity of the foreclosure, and any proof as to damages, or the merits of the other motions will be heard once the Court's decision as to the validity of the foreclosure becomes final.

After considering the evidence presented at trial, along with the arguments set forth by counsel for the parties, the Court finds that the foreclosure of the Clarke County property was invalid and should be set aside. In so finding, the Court makes the following findings of fact and conclusions of law.

DISCUSSION

This adversary proceeding involves a dispute as to the validity of a foreclosure conducted for the benefit of H. Alex Shields on a 148 acre parcel of real property located in Clarke County, Mississippi, which was owned by N. Haney Hudson at the time of foreclosure.

The 148 acre parcel is a farm originally owned by Shields. Shields first leased the property to Hudson in 1988, and subsequently sold the property to him for $ 350,000. Shields personally financed the transaction, and Hudson in return granted a deed of trust on the farm in favor of Shields for the full amount

of the indebtedness, along with additional security. The deed of trust was executed by Hudson on May 11, 1989, and was duly filed in the office of the Chancery Clerk of Clarke County on May 15, 1989 for recording in the land records of Clarke County.

On May 3, 1990, Haney Hudson filed a petition for relief under Chapter 12 of the Bankruptcy Code.[1] In July of 1990, Hudson's chapter 12 case was converted to a case under chapter 11. During the pendency of the chapter 11 case, three orders were entered that are relevant to this proceeding; an Agreed Order Granting Adequate Protection, an Order Withdrawing Motion To Dismiss, and the Confirmation Order.

AGREED ORDER GRANTING ADEQUATE PROTECTION

Shortly after Hudson converted his case to chapter 11, Shields filed a motion for relief from the automatic stay alleging lack of adequate protection. The motion for relief from the stay was resolved by the entry of an agreed order dated October 23, 1990, granting adequate protection and conditional stay relief to Shields.

The adequate protection order provides in part as follows:

> 5. The Debtor shall pay the sum of $2,000.00 to Shields each month, commencing October 1, 1990, with subsequent monthly payments of $2,000.00 due no later than the 1st day of each succeeding month.

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

> 6. The Debtor shall sell enough cattle within ten (10) days of September 21, 1990 to raise $6,500.00 which will be deposited in a cash collateral account.
>
> 7. The Debtor shall immediately pay from the proceeds of the sale of cattle $4,500.00 to Shields to obtain insurance on the house and barn for one (1) year.
>
> ....
>
> 9. If the Debtor fails to make a payment within ten (10) days after its respective due date, then Shields may file an affidavit with the Bankruptcy Court noting the default, and send a copy to the attorney for Debtor, and the automatic stay provisions of 11 U.S.C. Section 362 and otherwise shall lift and terminate within ten (10) days of default if not cured as to Shields and all such persons acting on his behalf and as to its collateral without further order of this Court.

ORDER WITHDRAWING MOTION TO DISMISS

In December of 1990, Hudson filed his chapter 11 plan of reorganization. In January of 1991 Shields filed a motion to dismiss Hudson's case based on various grounds. In an effort to resolve the motion to dismiss, on March 22, 1991, Hudson filed an addendum to his plan of reorganization which altered only the proposed treatment of Shields' claim. The addendum provides in part as follow:

> 1. Debtor will pay principal amount of $365,000.00 plus attorneys fees of $2,500.00 to Alex Shields in 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.
>
> 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 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.
>
> 3. Hudson will pay the 1990 real estates [sic] taxes on the Clarke County property prior to confirmation and will present a paid receipt to Shields. Hudson will thereafter pay all real estate taxes as they become due with a similar "drop-dead" provision applicable ten (10) days after filing Notice of Default with the Court.
>
> 4. Hudson will maintain insurance for coverage on the Clarke County property.

In response to the addendum to Hudson's chapter 11 plan, Shields and Hudson agreed to the entry of an order withdrawing the motion to dismiss. The Order Withdrawing Motion To Dismiss was entered on March 27, 1991, and contains provisions identical to those contained in Hudson's addendum to his chapter 11 plan as set forth above.

ORDER CONFIRMING PLAN

On June 7, 1991, the Order Confirming Plan was signed and entered. The confirmation order does not contain any language dealing specifically with the claim of Shields. Instead, the specific treatment of Shields' claim pursuant to the confirmation order is set forth in the addendum to Hudson's chapter 11 plan of reorganization. In general terms, under the confirmation order, Hudson's debt to Shields was restructured so that Hudson was required to make a monthly payment of $ 3,800 to Shields on the first day of each month for eight years, at which time the note

would become fully due and payable. Hudson was also required to pay real estate taxes and to maintain insurance on the property. Upon default by Hudson, Shields could exercise his rights under the deed of trust and proceed with foreclosure proceedings, except that the parties by agreement added the condition that Shields must first file notice of default with the Bankruptcy Court 10 days before beginning foreclosure proceedings.

COMMENCEMENT OF FORECLOSURE PROCEEDING

On June 11, 1991, Shields' counsel, Robert W. Hamill, filed an affidavit dated June 10, 1991 with this Court, stating as follows:

> 1. That he is counsel for H. Alex. Shields, Jr., a creditor in the Chapter 11 Proceedings filed by Haney Hudson.
>
> 2. That as of June 10, 1991, the adequate protection payment of $ 2,000.00 due on June 1, 1991, has not been paid by Debtor.
>
> 3. That under the provisions of that certain Agreed Order entered by the Court on the 23rd day of October, 1990, Debtor is now wholly in default and the provisions of said Agreed Order relating to the lifting of the automatic stay upon Debtor's default and the filing of this Affidavit are now in effect.

After filing the affidavit, Hamill commenced foreclosure proceedings. A Substituted Trustee's Notice of Sale was first published on July 10, 1990, setting July 31, 1991 as the date for the foreclosure sale.

Some time after Hamill filed the affidavit, he had discussions with both Hudson and Hudson's attorney regarding the

amount of money necessary to cure the default. At trial, Hamill testified as follows:

> Q. All right. What discussions did you have about Mr. Hudson's deficiencies or delinquencies under the plan or orders?
> A. The discussion was whether the default could be cured by paying the delinquent plan payment of whether it was necessary to go back to the contract terms of the note and cure the defect or default under the entire note.
> And at some point, I wrote Mr. Newman a letter setting out what it would take to cure the default under the note and setting out the foreclosure.

(Transcript, p. 107).

The letter to which Hamill referred in his testimony was dated July 24, 1991, the date of the third publication, wherein Mr. Hamill set forth Shields' position, stating in pertinent part as follows:

> Mr. Hudson has approached me about the amount necessary to stop the foreclosure sale which is now scheduled for July 31, 1991. As I advised you earlier, Mr. Hudson had failed to make any payments since the May, 1991 payment and the "drop-dead" provisions have gone into effect.
> The payoff amount necessary to stop the foreclosure sale and to bring the payments current under the terms of the Promissory Note is computed as shown on the attached schedule.

The schedule attached to the letter reflects that as of July 24, 1991, Shields' position, which was based on the original promissory note, was that Hudson needed to pay $114,328.83 to bring the note current and to stop foreclosure.

On Wednesday, July 31, 1991, the date of the foreclosure, Hamill wrote another letter to Hudson's attorney stating as follows:

> Mr. Hudson came by my office Tuesday and I told him that Alex Shields had agreed to accept 2 plan payments and the foreclosure expenses outlined to you, in order to stop the foreclosure sale. He said he would have that amount to me in cash or certified funds by 10:30 Wednesday morning. This morning he came by and told us that he had been unable to raise the funds although he still hoped to have some money later. We then proceeded to Quitman and went forward with the foreclosure sale on the property.

As reflected in the foregoing letter, in the Substituted Trustee's Deed and in the Corrected Substituted Trustee's Deed, the foreclosure sale took place as noticed on July 31, 1991, at which time Shields purchased the property with a bid of $350,000.

On January 30, 1992, Hudson commenced this adversary proceeding, alleging that the foreclosure was invalid and should be set aside. In determining whether the foreclosure was invalid, the Court must consider Hudson's performance under the three orders entered in his chapter 11 case along with the effect of Mississippi law on the foreclosure proceeding.

PAYMENTS MADE TO SHIELDS PURSUANT TO THE ADEQUATE PROTECTION ORDER

The adequate protection order is controlling as to payments due Shields from its entry in October, 1990 until entry of the March, 1991 order withdrawing Shields' motion to dismiss. Under the terms of the adequate protection order, Hudson was

required to make an adequate protection payment on the first day of each month in the amount of $ 2,000. If payment was not made within 10 days after the due date, then the automatic stay would lift upon 10 days notice being filed with the Bankruptcy Court and a copy of the notice being sent to Hudson's attorney. Additionally, the adequate protection order required Hudson to immediately pay $ 4,500 to Shields for the purpose of obtaining insurance on certain improvements located on the property.

Regarding payments made by Hudson pursuant to the adequate protection order, the following evidence was presented at trial in the form of copies of cashier's checks issued payable to Shields:

1. Check dated October 5, 1990 for $2,000, representing the October adequate protection payment.

2. Check dated October 5, 1990 for $4,500 as payment for insurance.

3. Check dated November 6, 1990 for $2,000, representing the November adequate protection payment.

4. Check dated December 10, 1990 for $2,000, representing the December adequate protection payment.

5. Check dated January 10, 1991 for $2,000, representing the January adequate protection payment.

6. Check dated February 11, 1991 for $2,000, representing the February adequate protection payment.

7. Check dated February 25, 1991, for $2,000, representing the March adequate protection payment.

This Court finds that Hudson complied with the terms of the adequate protection order from the time of the order's entry in October, 1990 through March, 1991, and therefore, Hudson was not in default under the terms of the adequate protection order. The Court next turns to Hudson's performance under the terms of the second order relevant to this proceeding.

PAYMENTS MADE TO SHIELDS PURSUANT TO THE ORDER WITHDRAWING MOTION TO DISMISS

As previously stated, on March 27, 1991, an order was entered withdrawing Shields' motion to dismiss. This order contained provisions identical to those contained in the addendum to Hudson's chapter 11 plan, and effectively superseded the adequate protection order. Under the terms of the Order Withdrawing Motion To Dismiss, Hudson was required to make an April, 1991 adequate protection payment of $ 2,000 and then to commence making plan payments of $ 3,800 per month on May 1, 1991. In addition to the foregoing payments, the order required Hudson to pay the 1990 real estate taxes on the property prior to confirmation and to present a paid receipt to Shields.

At trial, the following documents were introduced into evidence:

1. Check dated April 10, 1991 for $2,000, representing the April adequate protection payment.

2. Check dated May 1, 1991 for $1,800 and check dated May 1, 1991 for $2,000, representing the May plan payment.

Also admitted into evidence at trial was a copy of a check dated April 30, 1991, signed by Hudson and made payable to the Clarke County Tax Collector. The check was marked "insufficient funds." Shields testified at trial that he was unaware that Hudson's check for payment of 1990 taxes had been returned until some time after the foreclosure had taken place. The unpaid taxes were not mentioned in the affidavit filed with the Court, nor were they a factor in the decision to foreclose.

This Court finds that Hudson complied with those terms of the Order Withdrawing Motion To Dismiss concerning the $ 2,000 adequate protection payment to be made in April, 1990, and the $ 3,800 plan payment to be made in May, 1990.

PAYMENTS MADE TO SHIELDS PURSUANT TO THE ORDER CONFIRMING PLAN

On June 7, 1991, the Order Confirming Plan was entered, superseding the Order Withdrawing Motion to Dismiss, although the terms of the two orders that specifically concern Shields are identical. No substantial dispute exists regarding the facts prior to entry of the confirmation order, although the parties may not agree on the significance of certain facts. However, from and after June 7, 1991, the facts are very much in dispute.

Both Hudson and Shields contend differently regarding communications among Hudson, Shields and Shields' attorney, Robert Hamill, which ultimately resulted in foreclosure. While it is clear that Hudson never physically tendered any amount of money to Shields, or his counsel, after confirmation of the plan, Hudson

claims that he approached Shields some time after June 7, 1991 and prior to June 9, 1991 in an effort to make his $3,800 plan payment. Hudson further claims that Shields would not accept the payment, demanding instead the $ 3,800 plan payment plus a $ 2,000 adequate protection payment. At trial Hudson testified as follows:

> Q. Okay. Now, moving to the month of June, did you tender -- did you pay a June payment to Mr. Shields?
> A. No, sir.
> Q. What amount was that payment in June that you tendered? How much money did you offer Mr. Shields in June?
> A. Well, I made a tender of the plan payment, plus another $ 200.
> Q. I'm asking you for an amount, though. How much did you tender Mr. Shields in June, dollar figure?
> A. Four thousand dollars.
> Q. All right. Did Mr. Shields accept that $ 4,000?
> A. No, he didn't.
> Q. Why did you tender him $ 4,000?
> A. Well, when we were talking about the payments, all he wanted to talk about was the adequate protection payment. So, I said, "Well, if you want adequate protection payment, I'll tender you $ 200 and 38, and that will be two adequate protection payments, and you can have [it] the way you want to, but I've got a plan payment. That's the way I'll handle mine."
> But he wouldn't accept it and said he was going to foreclose and take a hundred -- over a hundred thousand dollars to cure the default.
> Q. Did you tender Mr. Shields an adequate protection payment and a plan payment in the month of June?
> A. Month of June?
> Q. Right.
> A. No. I tendered him the $ 3,800 plan payment, and I agreed to pay $ 200 that he could use at his discretion. If he wanted to add that to the $ 3,800, it would be two adequate payments, the same amount of two adequate protection payments.

Q. Okay. What happened as a result of your tendering the $ 3,800 and the 200 of the $ 4,000 to Mr. Shields? What happened at that point?

A. He said that he wouldn't accept it and that it was going to take over a hundred thousand dollars to cure the default. And I told him that if that was the case, he was going to have a wrongful foreclosure sale and I was going to fight it. He said, " Well, I'll be back in a minute. I want to go talk to my attorney."

So, he come back in about an hour and said that he talked to his attorney, which I think at that time was Mr. Hamill, and he said that was right and that's the way it was gonna [sic] be. This was at my house, he come [sic] to my house.

Q. Okay. What was the dollar figure that Mr. Shields told you you had to pay him in June of 1991?

A. It was -- it would have been in the 3,800 plus two thousand.

Q. Can you add that in your head for me?

A. Yeah. That's $ 5,800.

(Transcript, pp. 27-29).

On the other hand, Shields claims that Hudson never tendered any money to him either in the form of an adequate protection payment or a plan payment. He further claims that he never advised Hudson regarding the amount of payment, but instead relied on his attorney to determine all amounts due, and referred Hudson to Hamill. Shields also claims that he never refused any tender of money from Hudson, testifying at trial as follows:

Q. After June 1, when was the first conference you had with Mr. Hudson?

A. I really don't recall talking with Mr. Hudson at any time during that. I'm sure that I was confronted, but I never mentioned anything to him other than payment is due.

Q. When you made the determination that the June payment was due, did you talk with you attorney?

A. Yes.

> Q. And what did you instruct your attorney to do as a result of that payment not being made?
>
> A. I advised Bob that if, you know, if the payment is not paid on time, to foreclose.
>
> ....
>
> Q. Okay. Let's work through the month of June. Do you remember any conversations you had personally with Mr. Hudson, meetings or conversations with Mr. Hudson?
>
> A. The only conversations would be concerning the payments, that if he ever asked me -- which he said about a payment -- my comments to him was I never told him or advised him of what he owed me because I did not know, other than a plan payment or whatever, because I was depending on my attorney to determine what the law was, what he owed me. I did not -- I knew he owed me something, but I did not know what.
>
> Q. Okay. In the month of June, were any offers of payment by Mr. Hudson made to you?
>
> A. No.
>
> Q. Did you refuse to accept any payments from Mr. Hudson in June?
>
> A. No.

(Transcript, pp. 76-78).

This Court finds that upon entry of the order confirming Hudson's plan of reorganization, Hudson was required to make monthly plan payments to Shields in the amount of $ 3,800 on the first day of each month. These payments were to begin in June, 1991. If payment was not made when it became due, then upon ten days notice filed with the Bankruptcy Court, Shields could begin foreclosure proceedings pursuant to applicable Mississippi law. For whatever reason, it is clear that Hudson did not make his June plan payment. Therefore, as of June 10, 1991, Hudson was in default under the terms of his chapter 11 plan.

SUFFICIENCY OF NOTICE PURSUANT TO CONFIRMATION ORDER

While the Bankruptcy Code does not *per se* require a creditor to give notice of default after confirmation of a chapter 11 plan, § 1141(a) does provide as follows:

> **11 USC § 1141**
>
> **§ 1141. Effect of confirmation.**
> (a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in, the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

Since the terms of Hudson's confirmed plan require notice to be filed with the Bankruptcy Court 10 days prior to commencement of foreclosure proceedings under Mississippi law, and since the terms of the plan are binding on all creditors, notice filed with this Court was required. Contrary to Shields' assertion that the notice provision was only applicable prior to confirmation of the plan, the Court finds nothing in the language of the addendum to Hudson's plan to indicate that the notice provision became ineffective upon confirmation.

The affidavit filed by Shields' attorney, Bob Hamill, purported to give notice of default, stating:

> 2. That as of June 10, 1991, the adequate protection payment of $ 2,000.00 due on June 1, 1991, has not been paid by Debtor.

> 3. That under the provisions of that certain Agreed Order entered by the Court on the 23rd day of October, 1990, Debtor is now wholly in default and the provisions of said Agreed Order relating to the lifting of the automatic stay upon Debtor's default and the filing of this Affidavit are not in effect.

At trial, Hamill testified that at the time the affidavit was filed, he was unaware that the confirmation order had been entered. He also testified as follows:

> Q. Okay. What did you contend -- how much [do you] contend the payment had to be on June 1, 1991? What was the payment, the amount suppose [sic] to be?
> A. June 1, from my standpoint, he owed the adequate protection payment.

(Transcript, p. 122).

However, the October, 1990 agreed order ceased to be in effect upon entry of the March, 1991 order withdrawing motion to dismiss, which in turn was superseded by the order confirming Hudson's plan. Hudson could not possibly have defaulted in June under the terms of an order that was superseded in March and had not been in effect for over two months at the time the affidavit was filed.

Although Hudson was in default under the terms of his confirmed plan for failure to make his $ 3,800 June plan payment, he was not in default under the terms of the adequate protection order dated October 23, 1990. Therefore, the affidavit containing incorrect information which was filed with this Court constituted ineffective notice and did not comply with the terms of the confirmed plan.

DUTY TO TENDER MONEY

In addition to the issue of whether notice given pursuant to the confirmed chapter 11 plan was effective, the Court must consider the issue of whether Hudson had a duty to actually tender the amount that he believed was due in order to stop the foreclosure and in order to maintain his suit to set aside the foreclosure. Shields argues that Hudson had an opportunity pursuant to Mississippi law to stop the foreclosure by simply paying two $ 3,800 plan payments, for June and July, along with the cost of foreclosure, but that he failed to do so.

The applicable statute is found at Miss. Code Ann. § 89-1-59 (1972), and provides as follows:

> **§89-1-59. Accelerated debt may be reinstated by payment of all default before sale.**
>
> Where there is a series of notes or installment payments secured by a deed of trust, mortgage or other lien, and a provision is inserted in such instrument to secure them to the effect that upon a failure to pay any one (1) note or installment, or the interest thereon, or any part thereof, or for failure to pay taxes or insurance premiums on the property described in such instrument and the subject of such lien, that all the debt secured thereby should become due and collectible, and for any such reason the entire indebtedness shall have been put in default or declared due, the debtor, or any interested party, may at any time before a sale be made under the terms and provisions of such instrument, or by virtue of such lien, stop a threatened sale under the powers contained in such instrument or stop any proceeding in any court to enforce such lien by paying the amount of the note or installment then due or past due by its terms, with all accrued costs, attorneys' fees and trustees' fees on the amount actually past due by the terms of such instrument or lien,

> rather than the amount accelerated, and such taxes or insurance premiums due and not paid, with proper interest thereon, if such should have been paid by any interested party to such instrument. Any such payment or payments shall reinstate, according to the terms of such instrument, the amount so accelerated, the same as if such amount not due by its terms had not been accelerated or put in default.

Miss. Code Ann. § 89-1-59 (1972).

With respect to the question of whether Hudson was required to make a formal tender to Shields in order to both stop the foreclosure and to maintain his suit to set aside the foreclosure, the law in Mississippi seems to be well settled that formal tender is excused where it appears that the tender would be rejected. In McLain v. Meletio, 166 Miss. 1, 147 So. 878 (1933), the Supreme Court of Mississippi first stated that "[t]he law does not require one to do a vain and useless thing. A formal tender is never required where it appears that the money if tendered would not have been received." Id. at 879.

Likewise, the court stated in Bonds v. Rhoads, 203 Miss. 440, 35 So.2d 437 (1948), that "[f]ailure to make a formal tender may be excused if it appears that the tenderee would not have accepted the tender if made; but to avail himself thereof, the tenderer must show that he was able and desired to make the tender." Id. at 439 (quoting Sovereign Camp, W.O.W. v. McClure, 176 Miss. 536, 168 So. 611 (1936). This rule of law was again restated in Cooley v. Stevens, 240 Miss. 581, 128 So.2d 124 (1961).

Additionally, applying Mississippi law, the Fifth Circuit Court of Appeals has recognized that "[w]ith respect to the

question of tender, the law in Mississippi is that no tender is necessary where it would have been a useless act." Frostad v. Kitchens, 377 F.2d 475, 478 (5th Cir. 1967).

More recently, the Mississippi Supreme Court again reiterated the court's view on the issue of tender in Rogers v. Commercial Credit Corp., 354 So.2d 259 (Miss. 1978) where, in reversing a replevin judgment, the court explained:

> Appellees contend that since Rogers did not have the cash money in his hand and hold it out as a tender to Wilkerson and the Commercial Credit representative, that this did not amount to a legal tender. The law on this point is clear and has been announced by this Court in several cases, mainly: Cooley v. Stevens 240 Miss. 581, 128 So.2d 124 (1961); Lauchly v. Shurley, 217 Miss. 728, 64 So.2d 989 (1953); Bonds v. Rhoads, 203 Miss. 440, 35 So.2d 437 (1948); Sovereign Camp, W.O.W. v. McClure, 176 Miss. 536, 168 So. 611 (1936); McClain v. Meletio, 166 Miss. 1, 147 So. 878 (1933); See also, Frostad v. Kitchens, 377 F.2d 475 (5th Cir. 1976).
>
> All of the above cases hold that "the law does not require one to do a vain and useless thing. A formal tender is never required where it appears that the money, if tendered, would not have been received. Failure to make a formal tender may be excused if it appears the tenderee would not have accepted the tender if made, but to avail himself thereof, the tenderor must show that he was able and desired to make the tender."

Id. at 262-263. See also National Mortgage Co. v. Williams, 357 So.2d 934 (Miss. 1978).

As evidenced by the July 24, 1991 letter to Hudson's attorney, and by his testimony at trial, it is clear that Hamill took the position until the day before foreclosure that the payment of $ 114,328.83 was necessary to bring the note current and to stop

the foreclosure. Hamill's calculation of the amount due was based on the terms of the original promissory note executed by Hudson. During examination by the Court, Hamill testified as follows:

> Q. And so, the latter part of June, your position was, in order for him to reinstate the note, bring it current, ... he would have to pay whatever was under the original note, which was basically the amounts that were due under your letter of July the 24th?
> A. That's correct.
> Q. So, if he had offered you $ 3,800 in the latter part of June before you had had any publication costs or anything, if he had offered you $ 3,800, you would have said that's not adequate? I mean, legally, that was your position?
> A. Legally, that would have been my position except that Mr. Shields and I discussed that possibility, and we might have taken it had he made an offer. But he didn't make an offer.

(Transcript, pp. 129-30).

Hamill's assumption that upon default Hudson became liable under the terms of the original promissory note was erroneous. "[C]onfirmation of a plan of reorganization discharges the debtor from all claims arising prior to the date of confirmation, subject to the following exception[]: (1) To the extent that the plan or order of confirmation provides for payment of a claim, such claim is not discharged." 5 Collier On Bankruptcy, ¶ 1141.01 (Lawrence P. King, et al. eds., 15th ed. 1993). As one court explained, "[t]he effect of confirmation is to discharge the entire preconfirmation debt, replacing it with a new indebtedness as provided in the confirmed plan. The plan is essentially a new and binding contract, sanctioned by the Court,

between a debtor and his preconfirmation creditors." In re Ernst, 45 B.R. 700, 702 (Bankr. D. Minn. 1985).

As stated previously, under the terms of the confirmation order, Hudson was required to pay $ 3,800 per month to Shields. Upon Hudson's default under the terms of the confirmation order, Hudson's obligation to Shields did not revert back to the payment terms of the original promissory note. At the time of the foreclosure, all that Hudson was required to pay Shields in order to bring the note current under Mississippi law was two payments of $ 3,800 each, representing the June and July plan payments, along with costs of foreclosure.

Based on the actions of the parties between June 7, 1991 and July 31, 1991, as evidenced by the testimony of Hudson, Shields and Hamill along with the July 24, 1991 and July 31, 1991 letters, the Court finds that Hudson reasonably believed until July 30, 1991, one day before the foreclosure took place, payment of any amount other than the $ 144,328.83 demanded by Shields' attorney would have not been accepted. Based on the past performance of Hudson in making adequate protection payments and the May plan payment, the Court finds that Hudson would have paid the June and July plan payments had there been any indication, prior to one day before foreclosure, that Hamill would have accepted the payments on Shields' behalf. Although Hamill informed Hudson on July 30, 1991, that Shields would accept two plan payments and foreclosure expenses to stop the foreclosure, instead of the $ 114,328.83 demanded prior to July 30, 1991, one day was not sufficient time

within which to require Hudson to tender $ 8,161.06 in light of Shields' drastic change of position only one day before foreclosure.

CONCLUSION

This Court holds that under the terms of the confirmation order, notice of default was required to be filed with this Court 10 days prior to commencement of foreclosure proceedings. The notice filed by Shields, through his counsel, was completely inaccurate and therefore did not constitute adequate notice. Furthermore, it is this Court's opinion that actual tender of the plan payments plus foreclosure expenses should be excused, as Hudson reasonably believed that any such payment would not have been accepted by Shields.

Based on the foregoing findings of fact and conclusions of law, this Court holds that the foreclosure conducted for the benefit of H. Alex Shields on July 31, 1991 was invalid. The Court's holding is based on two independent grounds, insufficient notice under the terms of the confirmed plan, and the actions of Shields and Hamill which deprived Hudson of his statutory right to cure his default prior to foreclosure. Therefore, the Substituted Trustee's Deed and the Corrected Substituted Trustee's Deed recorded in the land records of the Office of the Chancery Clerk of Clarke County, Mississippi are void and should be set aside.

A separate judgment consistent with this opinion will be entered in accordance with Rules 7045 and 9021 of the Federal Rules of Bankruptcy Procedure.

DATED this the 7th day of May, 1993.

UNITED STATES BANKRUPTCY JUDGE

U. S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 21 1993
MOLLIE C. JONES- CLERK
BY ______ DEPUTY

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

IN RE:

N. HANEY HUDSON a/k/a
NORMAN HANEY HUDSON a/k/a
N. H. HUDSON

CASE NO. 9001464EEM

N. HANEY HUDSON — PLAINTIFF

VS. — ADVERSARY NO. 9200036

H. ALEX SHIELDS — DEFENDANT

FINAL JUDGMENT

Consistent with the opinion dated May 7, 1993, it is hereby ordered and adjudged that the July 31, 1991 foreclosure of the 148 acre parcel of real property located in Clarke County for the benefit of H. Alex Shields was invalid and that the Substituted Trustee's Deed recorded in Book 149 at Page 210 along with the Corrected Substituted Trustee's Deed recorded in Book 149 at Page 705 in the land records of the Office of the Chancery Clerk of Clarke County, Mississippi are void and should be and hereby are set aside and held for naught.

A certified copy of this Judgment may be filed in the Office of the Chancery Clerk of Clarke County, Mississippi and recorded in the land records of that county. The Chancery Clerk is requested to index this Judgment in the direct and sectional indices under the name of H. Alex Shields as grantor and N. Haney

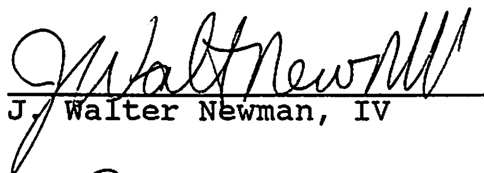
Hudson as grantee. The clerk is authorized to charge fees for her services as authorized by state law.

This is a final judgment for the purposes of Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

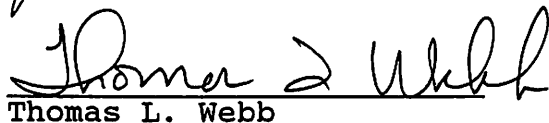
ORDERED AND ADJUDGED this the 21 day of May, 1993.

UNITED STATES BANKRUPTCY JUDGE

SUBMITTED TO AND READ BY:



J. Walter Newman, IV



Thomas L. Webb