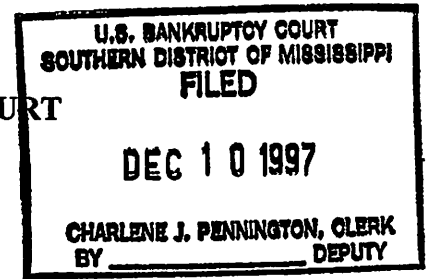


**IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION**



**IN RE: CANADIAN JACKSON
INVESTMENT CO., L.P.**

CASE NO. 9601691JEE

APME COMPANY, INC.

PLAINTIFF

VS.

ADVERSARY NO. 9700163JEE

**FOREMOST PROPERTIES, INC.,
CANADIAN JACKSON INVESTMENT
COMPANY, L.P., KMART CORPORATION,
and ROBERT G. NICHOLS, JR., Chapter 7 Trustee**

DEFENDANTS

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Debtor

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Defendant

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Chapter 7 Trustee

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This adversary proceeding is before the Court on the *Complaint for Injunctive and Declaratory Relief* and *Motion for Injunctive Relief* filed by APME Company, Inc. ("APME"), wherein APME requests the Court to set aside, or declare void, a quitclaim deed from the Debtor, Canadian Jackson Investment Co., L.P. ("Canadian Jackson" or "Debtor") to Foremost Properties ("Foremost"), to enjoin Foremost from attempting to collect rents from Kmart Corporation ("Kmart"), and to order Kmart to pay past and future rents to APME. APME also seeks an award of attorneys' fees and costs incurred in bringing this adversary proceeding before the Court.

After considering the evidence presented at trial along with the arguments of counsel, this Court holds that APME's *Complaint for Injunctive and Declaratory Relief* and *Motion for Injunctive Relief* are well taken and should be granted. In so holding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code on May 10, 1996. Subsequent to the transaction which is at issue in this adversary proceeding, the Debtor's case was converted to a Chapter 7 case. This adversary proceeding was later commenced by APME against Foremost, the Debtor, Kmart, and the Chapter 7 Trustee, Robert G. Nichols, Jr. ("Nichols").

At the time the Debtor filed its bankruptcy petition, it owned certain commercial property located in Hinds County, Mississippi (the "Property").¹ The Property is used as a retail shopping center, with Kmart being the largest tenant. The Property was encumbered by a deed of trust in favor of Mellon Bank. Prior to filing bankruptcy, the Debtor defaulted under the terms of its promissory note with Mellon Bank and Mellon Bank proceeded to foreclose on the Property. However, before the foreclosure sale was conducted, the Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code. Thereafter, Mellon Bank filed a *Motion to Lift Stay*, seeking to lift the automatic stay in order to foreclose on the Property. On November 7, 1996, an *Agreed Order* was entered by this Court on the *Motion to Lift Stay*. The *Agreed Order* provided that Mellon Bank held a valid security interest in the Property. The *Agreed Order* also allowed the Debtor to offer the Property for sale under 11 U.S.C. § 363 of the Bankruptcy Code,² to submit by motion a qualified bid to the Court by February 26, 1997, and required the § 363 sale be closed by March 28, 1997. The *Agreed Order* also enumerated seven events, the occurrence of any one of which would result in the lifting of the automatic stay and allow Mellon Bank to foreclose on the Property and collect the rents from the tenants at the Property. The *Agreed Order* further provided that it was

¹ This property is described in the *Agreed Order* dated November 7, 1995, which by stipulation was admitted into evidence as Exhibit P7.

² Hereafter, all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless otherwise noted.

binding upon the Debtor, any subsequently appointed trustee, and on all creditors and parties in interest.

On February 26, 1997, the Debtor submitted to the Court a bid and motion to approve the sale of the Property. Prior to a hearing on the matter, the bidder exercised its right to withdraw its bid. At the § 363 auction on March 20, 1997, two bids were received for the Property. However, the Debtor refused to sell the Property and withdrew its motion to sell the Property. Consequently, the deadlines set forth in the *Agreed Order* were not met and the automatic stay lifted to allow Mellon Bank to foreclose on the Property.

On March 21, 1997, a foreclosure sale to be held on April 17, 1997, was noticed by the Substituted Trustee for Mellon Bank. Prior to the foreclosure sale, the Debtor transferred the Property to Foremost by quitclaim deed dated April 7, 1997. This purported quitclaim deed was filed on April 16, 1997. On April 16, 1997, Foremost filed a petition in the United States Bankruptcy Court for the Southern District of New York. The New York Bankruptcy Court, upon motion by Mellon Bank and APME, subsequently lifted the automatic stay in Foremost's bankruptcy cases to allow APME to commence this adversary action. Foremost's bankruptcy case was ultimately dismissed by the New York Bankruptcy Court with prejudice effective nunc pro tunc as of the date of the filing of the petition.

The foreclosure sale noticed for April 17, 1997, proceeded as scheduled. The Property was sold at the foreclosure sale to the highest bidder, APME, for \$1.6 million. On April 21, 1997, the Substituted Trustee's Deed conveying the Property to APME was recorded. Both APME and Foremost claim ownership of the Property and are demanding rent from Kmart. This adversary proceeding was filed by APME on July 8, 1997. APME is requesting this Court to set aside the

quitclaim deed transferring the Property from the Debtor to Foremost and to order Kmart to pay past and future rents to APME.

CONCLUSIONS OF LAW

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

Although named as Defendants and properly served with process in this proceeding, Kmart and the Debtor failed to respond to the *Complaint*. Upon motion of APME, default judgments were granted against Kmart and the Debtor and judgment is being entered contemporaneously herewith. Therefore, the only issue remaining for decision is whether the purported transfer of the Property from the Debtor to Foremost should be declared void and set aside with past and future rents from Kmart being paid to APME.

Section 363(c)(1) allows a debtor-in-possession³ to enter into transactions involving property of the estate within the ordinary course of business without notice or hearing. However, where the transaction is outside the ordinary course of the debtor's business, as is the case now before the Court, § 363(b)(1) provides that the debtor may not sell property of the estate without providing notice and opportunity for a hearing. Section 363(b)(1) provides that the "[debtor-in-possession], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." Furthermore, Federal Rule of Bankruptcy Procedure 2002(a)(2)⁴ provides

³ Section 363 applies to Chapter 11 debtors-in-possession because pursuant to § 1107(a), a debtor-in-possession in a Chapter 11 case has the rights, powers and duties of a trustee.

⁴ Hereafter, all Rules refer to the Federal Rules of Bankruptcy Procedure unless specifically noted otherwise.

that at least twenty days notice should be given to the debtor, the trustee, and all creditors of “a proposed use, sale, or lease of property of the estate other than in the ordinary course of business”

The Second Circuit Court of Appeals recently addressed this issue in In re Lavigne, 114 F.3d 379 (2nd Cir. 1997). In Lavigne, the Second Circuit stated that “where the transaction is outside the ordinary course of the debtor’s business, the debtor ‘may not use, sell or lease’ estate property until creditors and other interested parties are given notice of the proposed transaction and the opportunity for a hearing if they object.” Id. at 384. Because the transaction was not in the ordinary course of business and because the debtor in Lavigne gave no notice of the transaction to his creditors, the transaction was declared null and void. See also In re Cedar Tide, 859 F.2d 1127 (2nd Cir. 1988)(postpetition transfer of property properly nullified where debtor-in-possession failed to provide notice and a hearing as required by § 363(b)(1)); In re First Intern. Services Corp., 25 B.R. 66 (Bankr. Conn. 1982).

Foremost contended at trial that the debtor-in-possession had no interest in the Property prior to the transfer to Foremost and therefore, it had been abandoned and was no longer property of the estate. Foremost relies upon language contained in paragraph 11 of the *Agreed Order* dated November 7, 1996, which provides that the *Agreed Order* shall be “binding on Debtor and on any subsequently appointed Trustee, no matter whether such Trustee is appointed under Chapter 11 or Chapter 7 of the Bankruptcy Code and on all creditors and parties in interest.” However, this argument is without merit. The language in the *Agreed Order* did not result in an abandonment of the property from the estate nor did it divest the debtor-in-possession of its interest in the Property. The *Agreed Order* fails to mention “abandonment” and furthermore, had the Substituted Trustee sold the Property for an amount in excess of the indebtedness, the excess would have been property of the estate and returned to the debtor-in-possession.

The Court finds that because the Debtor failed to follow the procedures required by § 363(b)(1), the transfer of the Property to Foremost by the Debtor, while the Debtor's Chapter 11 bankruptcy case was still open, was void and of no effect and the quitclaim deed should be set aside. Title to the Property properly vested in APME upon its purchase at the foreclosure sale and the filing of the Substituted Trustee's Deed conveying the property to APME. Since the transfer of the Property from the Debtor to Foremost was void for failure to follow the requirements of § 363(b)(1), the Property never became property of the estate in Foremost's New York bankruptcy case; thus, Foremost's bankruptcy filing had no effect on APME's ownership interest since there was no automatic stay which would apply to the Property. Additionally, any concern about Foremost's bankruptcy petition is obviated by the subsequent dismissal of Foremost's bankruptcy case with prejudice effective nunc pro tunc as of the date of the filing of the bankruptcy petition.

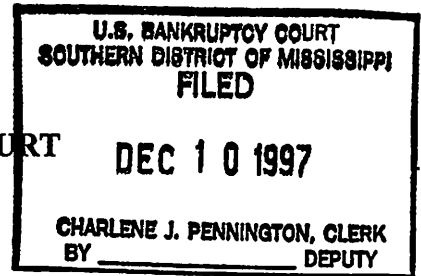
Accordingly, the Court finds that APME is the rightful owner of the Property and finds that the quitclaim deed conveying the Property from the Debtor to Foremost should be set aside. Therefore, all past (from April 17, 1997, the date APME acquired the Property) and future rents owing on the Property and any other obligations from Kmart should be paid to APME. Foremost is hereby enjoined from seeking to collect any rents from Kmart on the subject Property. The Court declines to award attorneys' fees and costs to APME.

Based on the foregoing, this Court holds that the *Complaint for Injunctive and Declaratory Relief* and *Motion for Injunctive Relief* filed by APME are well taken and should be granted. A separate final judgment consistent with this opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

This the 10th day of December, 1997.


UNITED STATES BANKRUPTCY JUDGE

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



IN RE: CANADIAN JACKSON
INVESTMENT CO., L.P.

CASE NO. 9601691JEE

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PLAINTIFF

VS.

ADVERSARY NO.: 9700163JEE

FOREMOST PROPERTIES, INC.,
CANADIAN JACKSON INVESTMENT
COMPANY, L.P., KMART CORPORATION,
and ROBERT G. NICHOLS, JR., Chapter 7 Trustee

DEFENDANTS

FINAL JUDGMENT

Consistent with the Court's opinion dated contemporaneously herewith, it is hereby ordered and adjudged that:

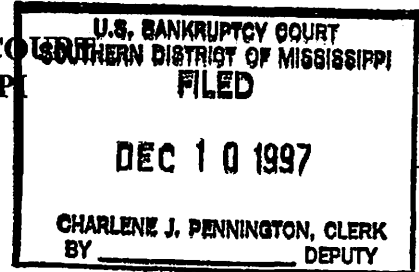
1. The transfer of the subject Property from the Debtor, Canadian Jackson Investment Company, L.P. to Foremost Properties, Inc. is void and the quitclaim deed recorded in the office of the Chancery Clerk of the First Judicial District of Hinds County, Mississippi, in Deed Book 4760 at page 105 purporting to transfer the property described therein from Canadian Jackson Investment Company, L.P. to Foremost Properties, Inc., should be, and hereby is, set aside, and held for naught.
2. All past (from April 17, 1997) and future rents and other obligations under the lease on the subject Property owed by Kmart Corporation should be paid to APME Company, Inc.;
3. Foremost Properties, Inc. is enjoined from attempting to collect rents from Kmart Corporation; and

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

SO ORDERED this the 10th day of December, 1997.


UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
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IN RE: CANADIAN JACKSON
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DEFENDANTS

DEFAULT JUDGMENT

The *ore tenus* Motion of Plaintiff, APME Company, Inc. ("APME"), for Default Judgment against Defendant, Canadian Jackson Investment Company, L.P., Debtor ("Canadian Jackson"), and Kmart Corporation ("Kmart") having come before this Court at a trial of the Complaint for Injunctive and Declaratory Relief ("Complaint") and of the Motion for Injunctive Relief ("Motion") on November 19, 1997, and the Court, having heard the evidence, finds:

1. APME filed its Complaint on July 8, 1997, naming Foremost Properties, Inc. ("Foremost"), Canadian Jackson, and Kmart as defendants. The Chapter 7 Trustee was named as an interested party.

2. APME filed the Motion on July 8, 1997.

3. The Complaint and the Motion arise out of and relate to the Chapter 11 case of Canadian Jackson Investment Co., L.P., Case No. 96-01691JEE on the docket of this Court. This

Court has jurisdiction of the Complaint and the Motion pursuant to 28 U.S.C. §§ 1334(b), 157(b)(1) and 2201 and 11 U.S.C. § 549(a) and Federal Rule of Bankruptcy Procedure 7065 and Federal Rule of Civil Procedure 65. The Complaint and the Motion constitute core proceedings under 28 U.S.C. § 157(b)(2). Venue is proper in the Southern District of Mississippi pursuant to 28 U.S.C. § 1409(a).

4. APME presented evidence that summons was issued to defendant Kmart and to defendant Canadian Jackson and that defendants Kmart and Canadian Jackson were duly served with a copy of the summons and Complaint. The Court finds that service of process on the defendants Kmart and Canadian Jackson was, and is, legally sufficient. The Court finds that the notice of the Motion and of the hearing on the Motion were legally sufficient.

5. The Court finds that the defendants Kmart and Canadian Jackson did not file answers to or otherwise defend against the Complaint or the Motion and did not appear at the trial of the Complaint and the Motion.

6. Default judgment should be entered against the defendants Kmart and Canadian Jackson pursuant to Federal Rule of Civil Procedure 55 for failure to plead or otherwise defend in this case as required by law.

THEREFORE, IT IS ORDERED that default judgment is hereby entered against Kmart Corporation pursuant to Federal Rule of Civil Procedure 55 for failure to plead or otherwise defend in this case as required by law. It is further ordered that default judgment is hereby entered against Canadian Jackson Investment Company, L.P. pursuant to Federal Rule of Civil Procedure 55 for failure to plead or otherwise defend in this case as required by law.

IT IS FURTHER ORDERED that Kmart pay all past and future rents, including all rents due from and after April 17, 1997, on the subject property described in Exhibit "A", commonly known as the Kmart Shopping Center located on Highway 80, Jackson, Mississippi, for the reasons set forth in the Court's Memorandum Opinion entered contemporaneously with this judgment.

THIS the 31st day of December, 1997.


UNITED STATES BANKRUPTCY JUDGE

A certain parcel of land being situated in Section 1, Township 5 North, Range 1 West, Hinds County, Mississippi and being more particularly described as follows:

Beginning at the Northwest corner of the Northeast Quarter of the Southeast Quarter of Section 1, Township 5 North, Range 1 West, thence the following bearings and distances: North 00 degrees 33 minutes West for a distance of 2.4 feet; thence North 89 degrees 27 minutes East for a distance of 58.97 feet; thence South 00 degrees 33 minutes East for a distance of 182.5 feet; thence South 78 degrees 49 minutes West for a distance of 29.47 feet; thence South 00 degrees 33 minutes East for a distance of 474.75 feet; thence West for a distance of 30.00 feet; thence South 00 degrees 33 minutes East for a distance 196.77 feet; thence South 89 degrees 27 minutes West for a distance of 108.36 feet; thence South 00 degrees 33 minutes East for a distance of 300.00 feet to the North right-of-way line of U. S. Highway 80 (as now laid out and in use, September, 1981); thence following said North right-of-way line of U. S. Highway 80, North 60 degrees 37 minutes West for a distance of 42.2 feet; thence North 29 degrees 23 minutes East for a distance of 5.0 feet; thence North 46 degrees 35 minutes West for a distance of 103.08 feet; thence North 03 degrees 38 minutes West for a distance of 23.29 feet; thence North 47 degrees 13 minutes 30 seconds West for a distance of 346.63 feet; thence North 60 degrees 37 minutes West for a distance of 134.16 feet; thence South 89 degrees 38 minutes 58 seconds West for a distance of 121.97 feet; thence leaving said North right-of-way line of U. S. Highway 80, run North 00 degrees 33 minutes West for a distance of 637.64 feet; along the East right-of-way line of a 50 foot street; thence leaving said East right-of-way line, run South 89 degrees 40 minutes East for a distance of 708.32 feet; thence North 00 degrees 33 minutes West for a distance of 104.67 feet to the POINT OF BEGINNING, containing 13.29 acres, more or less.

LESS AND EXCEPT:

A certain parcel of land situated in Section 1, Township 5 North, Range 1 West, Jackson, Hinds County, Mississippi, containing 0.52 acres, more or less, and being more particularly described as follows:

Commence at the Northwest corner of the Northeast Quarter of the Southeast Quarter of said Section 1, Township 5 North, Range 1 West; run thence South 00 degrees 33 minutes East for a distance of 104.67 feet; run thence North 89 degrees 40 minutes West for a distance of 708.32 feet to a point on the East right-of-way line of a fifty foot (50') wide street; run thence South 00 degrees 33 minutes East along said East right-of-way line of a distance of 426.64 feet to the POINT OF BEGINNING of the parcel of land herein described; continue thence South 00 degrees 33 minutes East along said East right-of-way line for a distance of 150.0 feet; leaving said East right-of-way line, run thence North 89 degrees 27 minutes East for a distance of 150.0 feet; run thence North 00 degrees 33 minutes West and parallel to the aforesaid East right-of-way line of a fifty foot (50') wide street for a distance of 150.0 feet; run thence South 89 degrees 27 minutes West for a distance of 150.0 feet to the POINT OF BEGINNING.

Subject to the following easements and right of ways of record:

1. A perpetual and irrevocable easement for the construction and maintenance of sanitary sewer, recorded in Book 2096, Page 107 in the Office of the Chancery Clerk of Hinds County, Mississippi, First Judicial District.

