

court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On March 30, 1971, plaintiff Johnny Grissom entered into a written agreement with defendant, C & S, for a loan of money. As security for the repayment of the loan, Mr. Grissom gave C & S a security deed on his residence located at 2415 Lisbon Road, Barton Village Subdivision, Augusta, Richmond County, Georgia. The debtor subsequently defaulted on the loan, and defendant, C & S, gave the debtor notice that it intended to foreclose on the residence in April, 1989. The debtor received notice by certified mail and the defendant published the proper notice for a nonjudicial foreclosure sale.

2. The foreclosure sale was held on April 4, 1989, and the property was sold to the highest bidders, the Johnsons for Fourteen Thousand Fifty-Nine and No/100 (\$14,059.00) Dollars. This amount was the exact amount owed defendant C & S on the plaintiffs' loan plus the cost of foreclosure.

3. On April 5, 1989, the plaintiffs filed for protection from their creditors under Chapter 13 of Title 11 U.S. Code.

4. On April 10, 1989, the deed under power of sale conveying the property to the Johnsons was recorded in the Office of the Clerk of the Superior Court of Richmond County, Georgia.

5. The parties cannot agree as to the fair market value of the residence. The only independent evidence of value submitted

was that of the Richmond County Tax office which valued the house at Twenty-Six Thousand Five Hundred Eighty and No/100 (\$26,580.00) Dollars. At trial, defendant, Birnet Johnson, testified, that he had offered to sell the residence back to the plaintiffs for Twenty- Six Thousand and No/100 (\$26,000.00) Dollars. There being no other evidence of the fair market value of the home, the court finds the fair market value of the house to be Twenty-Six Thousand and No/100 (\$26,000.00) Dollars.

6. The house in question was the plaintiffs only asset of value, and the foreclosure sale rendered them insolvent.

7. Defendants, Birnet and Leslie Johnson, filed no responsive pleadings in this adversary proceeding.

CONCLUSIONS OF LAW

Count one of the complaint alleges that defendant C & S violated the automatic stay of §362 by recording a deed under power of sale conveying the property to the Johnsons five days after the plaintiffs filed for protection under the Bankruptcy Code. The property was sold in a foreclosure sale conducted the day before the plaintiffs filed their petition in bankruptcy. Whether a stay violation occurred depends on when the debtors' interest in the property was terminated.

The plaintiffs urge the court to adopt the reasoning set forth in the case of In re: Wheeler, 5 B.R. 600 (N.D.Ga. 1980) and set aside the foreclosure sale. In Wheeler, the court held that

the debtor retained an "equity of redemption" even after a valid foreclosure since, under Georgia law, all that passed to a purchaser at a foreclosure sale conducted by a grantee under a deed to secure debt was the right to enforce a contract if the purchaser could prove the contract was fair and equitable. In Wheeler, the debtors were notified of the pending foreclosure sale which was to be conducted on May 6, 1980. At 9:30 a.m. on the morning of May 6, the debtor's attorney notified the creditor that the debtor planned to file a petition for relief under Chapter 13 of the Bankruptcy Code. Yet, at 10:05 a.m. on May 6, the property was sold on the courthouse steps. At 10:34 a.m., the same day, the debtor filed his petition. At 11:15 a.m., the purchaser at the foreclosure sale delivered a check to the attorney for the selling creditor and obtained a deed to the property. At 2:00 p.m., the bankruptcy court entered an injunction prohibiting the parties from taking any further action to transfer the property. At 2:45 p.m. the deed was recorded. The court found that under Georgia law, "the only thing that passed to [the purchaser] when his bid was accepted was the right to enforce a contract for sale of the property if he could prove that 'the contract was fair, just and not against good conscience.'" (footnote omitted). This left in the debtor a property right which could be called the 'equity of redemption,' subject to [the purchaser's] right of specific performance." In re: Wheeler, supra. The court found that the creditor, by accepting the check and delivering the deed after the petition was filed violated the

automatic stay.

The court in Wheeler, however, reaches its conclusion based upon the limited facts of that decision. The creditor in Wheeler acted with knowledge of the debtor's pending petition and recorded the deed in violation of a court order. No consideration was paid until after the debtor's petition was filed. In addition, the opinion ignores clear precedent in the Georgia courts to establish that the right of redemption is terminated at the time of the foreclosure sale. The Georgia Supreme Court has held that, "a sale under power in a security deed divests the title of the grantor, and he has no legal right several days thereafter, on tender of the amount of the debt secured by the deed to the grantee, who is purchaser at the sale, to demand a conveyance of the land or a cancellation of the security deed. Where a sale of land is made under a power contained in a security deed . . . the grantor can not defeat the purchaser's right to have the sale fully consummated by tender of the amount of his indebtedness to the grantee before the actual execution of the deed pursuant to the terms of the sale." Carrington v. Citizens Bank of Waynesboro, 144 Ga. 52, 53, 85 S.E. 1027 (1915). "A valid foreclosure sale under power in a security deed, when properly advertised and conducted, is equivalent to a judicial sale under decree of a court of equity, and not only extinguishes the right of redemption, but divests all junior encumbrances on the property." (emphasis added) 2 G. Pindar, Georgia Real Estate Law and Procedure §21-89 (1986).

While Wheeler has never been expressly overruled, subsequent decisions have held that the debtor's right of redemption is extinguished when the high bid is accepted at the foreclosure sale. In re: Gray, 37 B.R. 532 (Bankr. N.D. Ga. 1984); In re: Pearson, 75 B.R. 254 (Bankr. N.D. Ga. 1985). These subsequent opinions rely on the Carrington decision and other decisions by the Georgia courts to establish that as a matter of law in Georgia, a debtor's right to redemption is terminated at the time of the foreclosure sale regardless of when the deed under power of sale is recorded. See, e.g., Sanders v. AmSouth Mortgage Co. (In re: Sanders), Ch. 13 Case No. 488-01081, Adv. No. 488-0079 (Bankr. S.D. Ga. filed June 15, 1989).¹

If the property was sold and the debtors' right to redeem the property was terminated at the time that the high bid was accepted, the debtors had no interest in the property at the time the debtors filed for relief under Title 11. The foreclosure sale was conducted on April 4, 1989, the debtor's right to redemption was

terminated under State law and the property was not a part of the

¹In Federal Deposit Insurance Corp. v. Dye, 642 F.2d 837 (5th Cir. 1981), the Fifth Circuit analyzed whether a challenged foreclosure sale was either void or in the alternative never "consummated" so as to allow FDIC to sue for the outstanding balances due on the notes which were secured by the real property in question. The Fifth Circuit reasoned that until a deed was transferred and consideration passed that the sale itself had not occurred, but there existed only a contract to buy and to sell. Id. at 843. The Fifth Circuit did not, resolve, however, the issue presented by the case at bar - - the time at which a debtor's interest (right to redemption) in the property subject to foreclosure is terminated. See In re: Gray, supra; Sanders, supra.

bankruptcy estate on April 5, 1989, when the debtors filed their petition. As the debtors had no interest in the property, the automatic stay of §362 did not restrain the defendants from recording the deed under power of sale. No violation of the automatic stay occurred, and the plaintiffs are entitled to no recovery on count one of the complaint.

Under count two of the complaint, the plaintiffs allege that as a result of the property being transferred for less than a reasonably equivalent value, the plaintiffs became insolvent, and such a transfer is avoidable under 11 U.S.C. §548(a)(2).² As defendants, Birnet L. Johnson and Leslie R. Johnson, filed no responsive pleadings, this court must hereby find them in default. Defendant Birnet Johnson appeared at the trial of this proceeding and testified as a witness for defendant C & S. Defendant Birnet Johnson testified that he believed he did not need to retain an

attorney or file a responsive pleading in this action even though he knew that he had been named as a defendant, along with C & S

²11 U.S.C §548(a)(2) provides, in part, as follows:

The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily - -

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

and Leslie Johnson. Where defendants have been properly served with a summons and complaint and fail to file responsive pleadings, the entry of a default against such defendants is appropriate. H & F Barge Company v. Garber Brothers, 71 F.R.D. 5 (E.D. La. 1976), aff'd, 534 F.2d 1103 (5th Cir. 1976). The effect of such default is that the defendants who failed to file responsive pleadings have admitted the factual allegations of the plaintiffs' complaint, and their liability is established by the entry of default against them. See, Buchanan v. Bowman, 820 F.2d 359 (11th Cir. 1987).

Although C & S filed a responsive pleading in this litigation, the pleading fails to establish a convincing defense to the plaintiffs' allegations. The parties all agree that the transfer left the plaintiffs insolvent and that the Johnsons paid C & S Fourteen Thousand Fifty-Nine and No/100 (\$14,059.00) Dollars for the property at the foreclosure sale. The amount paid for the property reflected the exact amount required to pay off the indebtedness and costs of foreclosure owed by plaintiffs to defendant C & S on the property being sold. Based on the evidence the property has a fair market value of Twenty-Six Thousand and No/100 (\$26,000.00) Dollars. The amount paid by the Johnsons does not represent the reasonably equivalent value of the property transferred, and, therefore, the transfer may be set aside as a fraudulent conveyance. The long standing rule in this circuit has

been that in determining whether a debtor received reasonably equivalent value for the transferred property, the court should

use seventy (70%) percent of the market value as a guideline. See Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir.1980).³ See also Walker v. Littleton, 888 F.2d 90 (11th Cir. 1989). The court in Littleton noted that "[t]he term 'reasonably equivalent value' cannot in every case be arrived at by blindly applying a percentage rule." Littleton, supra at 93 [quoting In re: Fargo Biltmore Motor Hotel Corp., 49 B.R. 782 (Bankr. N.D. 1985)]. However, the Littleton court did indicate that Durrett remained the law for this circuit and stopped short of adopting the reasoning of other circuits that have held that the consideration paid at a foreclosure sale should be presumed to be the reasonably equivalent value of the property. See e.g., Madrid v. Lawyers Title Insurance Corp., 725 F.2d 1197 (9th Cir. 1984). The Littleton court noted that "a determination of reasonable equivalence must be based upon all the facts and circumstances of each case." (citation omitted) Littleton, supra.

This court finds no basis for a determination that the foreclosure sale now before the court brought the debtor the reasonably equivalent value of the property. Unlike Littleton,

there are no subsequent dispositions of the property to "provide to the parties involved only the value to which they are clearly entitled." Littleton, supra at 94, N.7. The debtors had a

³The Eleventh Circuit has adopted all decisions rendered by the Fifth Circuit on or before September 30, 1981 as binding precedent in this circuit. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1988).

substantial amount of equity in the home from which their unsecured creditors are entitled to benefit. The fair market value of the property in question is Twenty-Six Thousand and No/100 (\$26,000.00) Dollars. The property was sold at the foreclosure sale for only Fourteen Thousand Fifty-Nine and No/100 (\$14,059.00) Dollars, which represents only fifty-four (54%) percent of the fair market value of the home. Eleven Thousand Nine Hundred Forty-One and No/100 (\$11,941.00) Dollars in equity was lost in the sale. The transfer, therefore, may be avoided pursuant to 11 U.S.C. §548(a)(2)(A).

When a transfer is avoided under §548, two forms of recovery are authorized by 11 U.S.C. §550.⁴ The plaintiffs, for

⁴11 U.S.C. §550 provides as follows:

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from -

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or (2) any immediate or mediate good faith transferee of such transferee.

(c) The trustee is entitled to only a

the benefit of the bankruptcy estate may recover the transferred property, or if the court so orders, the value of the property. The plaintiffs in this action have prayed to have the property returned and for defendant C & S to retain a security interest in the property, i.e. place the parties in the same position they were in before the foreclosure sale. However, as this court previously found, the foreclosure sale occurred and terminated the debtor's right to redeem the property. The mortgage held by C & S was satisfied also by the sale. The court can find no provision and the plaintiffs have cited none, which gives this court the authority to reinstate the mortgage, or force an entity (C & S or Johnson) to extend financing where no debtor-creditor relationship existed at the time of filing.

The only appropriate remedy under the facts now before the court would be to allow the plaintiffs to recover the value of the property less the amount previously paid at the foreclosure sale. 11 U.S.C. §548(c)⁵ See In re: Hulm, 45 B.R. 523. 529 (Bankr.

D. N . D. 1984). The property has a value of Twenty-Six Thousand and No/100 (\$26,000.00) Dollars. The defendants, Birnet and

single satisfaction under subsection
(a) of this section.

⁵11 U.S.C. §548(c) provides:

Except to the extent that a transfer or obligation voidable under this section [§548] is voidable under section 544, 545 or 547 of this title, a transferee or obligation of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

Leslie Johnson, paid to C & S Fourteen Thousand Fifty-Nine and No/100 (\$14,059.00) Dollars for the property at the time of the sale, and C & S satisfied its note from plaintiffs and security interest in the property in exchange for this payment. Therefore, plaintiffs, for the bankruptcy estate, are entitled to recover the sum of Eleven Thousand Nine Hundred Forty-One and No/100 (\$11,941.00) Dollars. The Chapter 13 trustee is entitled to this recovery for the benefit of the plaintiff's bankruptcy estate. 4 Collier on Bankruptcy ¶550.02 (L. King 15th ed. 1989).

Pursuant to §550, the plaintiffs may recover from the initial transferee (the Johnsons) or the entity for whose benefit such transfer was made (C & S). 11 U.S.C. §550(a)(1). The exception from any recovery available for immediate or mediate transferees of the initial transferee under §550(a)(1) that take for value, in good faith, and without knowledge that the transfer may be avoided under §550(b)(1) applies only under the circumstances set forth in §550(a)(2), not under this set of circumstances. In this case the transfer sought to be avoided as fraudulent was the

transfer from the plaintiffs, by C & S acting as their attorney in fact under power of attorney contained in the deed to secure debt

held by it, to the Johnsons at the foreclosure sale on April 4, 1989. The initial transferee in the transfer complained of was the Johnsons, and C & S who received the money from the Johnsons was the entity for whose benefit the transfer occurred. The complained of transfer was not the execution by the plaintiffs of the deed to secure debt granting the security interest in the property and extending the power of attorney to C & S. Neither the Johnsons, nor C & S, were immediate or mediate transferees of the initial transferee described in §550(a)(2).

ORDER

It is therefore ORDERED that judgment be entered in this proceeding for plaintiffs Johnny Grissom and Jeanette Holland Grissom against defendants C & S National Bank, Birnet L. Johnson, and Leslie R. Johnson jointly and severally in the sum of Eleven Thousand Nine Hundred Forty One and No/100 (\$11,941.00) Dollars plus interest at the legal rate until the judgment is satisfied;

Further ORDERED that all recovery under this judgment shall be for the benefit of the estate and shall be paid over to the Chapter 13 trustee subject to the plaintiffs valid claim of exemption;

Further ORDERED that upon satisfaction of the judgment in this case defendants Birnet L. Johnson and Leslie R. Johnson, in

accordance with 11 U.S.C. §502(d), are allowed to file a claim in the underlying Chapter 13 proceeding for the fair market rental

value of the property at 2415 Lisbon Road, Augusta, Georgia, from the date of sale to them until they obtain possession of the premises from plaintiffs; and

Further ORDERED that upon satisfaction of the judgment in this case defendants Birnet L. Johnson and Leslie R. Johnson are granted relief from the automatic stay of 11 U.S.C. §362 for the purpose of gaining possession of the property located at 2415 Lisbon Road, Augusta, Georgia.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 20th day of December, 1989.