

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ALABAMA

In Re

HENRY L. BOUTWELL

Case No. 03-10144-MAM-13

Debtor.

**ORDER OVERRULING DEBTOR'S OBJECTION TO CREDITOR'S PROOF OF  
CLAIM AND FINDING THAT DEBTOR'S CHECK TO CREDITOR DID NOT  
CONSTITUTE AN ACCORD AND SATISFACTION OF HIS DEBTS**

Robert R. Blair, Selma, Alabama, Attorney for Henry L. Boutwell  
Melissa Lindquist-King, Mobile, Alabama, Attorney for AmSouth Bank

This matter is before the Court on Henry Boutwell's objection to a \$17,306.52 proof of claim filed by AmSouth Bank ("AmSouth") in his chapter 13 bankruptcy case. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2) and the Court has authority to enter a final order. For the reasons indicated below, the Court finds that Henry Boutwell's objection to AmSouth's proof of claim is overruled because he failed to prove that AmSouth's acceptance of a \$7,000 check operated as an accord and satisfaction.

FACTS

Henry Boutwell had three separate accounts with AmSouth when he filed his first chapter 13 bankruptcy case on May 30, 2000. These accounts included 1) a mortgage on his land in Plantersville, Alabama; 2) a second mortgage on his home in Selma, Alabama; and 3) a credit card account. Although all three accounts are solely in Mr. Boutwell's name, they are, for the most part, managed by his sister, Betty Boutwell.

During his first chapter 13 case, Mr. Boutwell defaulted on both his mortgage accounts and voluntarily surrendered his land in Plantersville, Alabama to AmSouth. AmSouth initiated a

foreclosure sale on the land, but the price it received was less than the amount of its mortgage on the land. This resulted in a \$8,999.25 deficiency balance on the land mortgage.

Even though the foreclosure sale resulted in a deficiency balance, the parties disputed whether Mr. Boutwell's surrender of his land was in full satisfaction of both AmSouth's land mortgage and its home mortgage. Ms. Boutwell testified that she and Mr. Boutwell intended for the surrender to be in full satisfaction of both mortgages. Alicia Neiman, vice president of consumer collections at AmSouth's Hoover office, testified that AmSouth sold the surrendered land in partial satisfaction of AmSouth's mortgage on the land only -- AmSouth's second mortgage on Mr. Boutwell's home was unaffected.

Mr. Boutwell's first chapter 13 bankruptcy case was dismissed on July 1, 2002. Representatives from AmSouth then contacted Ms. Boutwell regarding Mr. Boutwell's debts to the bank. She stated that the AmSouth representatives offered to settle all of Mr. Boutwell's debts to AmSouth for \$7,000. Ms. Boutwell informed the AmSouth representatives that she would have to talk with Mr. Boutwell and his lawyer before she could enter into a settlement; she also explained that she only wanted to deal with one representative from AmSouth in the future.

Ms. Boutwell began dealing exclusively with an "elderly man" at AmSouth. She testified that she entered into an agreement with him to settle Mr. Boutwell's debts with AmSouth for \$7,000. Ms. Boutwell obtained a \$7,000 traveler's check from her bank on September 4, 2002. She made it payable to the order of "Amsouth Bank, Consumers Coll. Rec. Dept" and underneath the bank's address she inscribed "all accts. paid in full."

Ms. Boutwell mailed the \$7,000 check to AmSouth. She testified that it was addressed to the attention of the “elderly man” with whom she had been dealing. She stated that another representative from AmSouth called her shortly thereafter to ask if she had mailed the check. Ms. Boutwell told the representative that the check was addressed to the “elderly man’s” attention and the representative then found it sitting on his desk. Ms. Neiman testified that an AmSouth employee wrote the number 9000875876 on the front of the check and applied it to Mr. Boutwell’s land mortgage account. The number refers to the account number AmSouth assigned to Mr. Boutwell’s land mortgage account.

AmSouth still considered Mr. Boutwell to be in default on his home mortgage after it received the \$7,000 check; therefore, it began foreclosure proceedings on its second mortgage lien on Mr. Boutwell’s home. The foreclosure proceedings were stopped when Mr. Boutwell filed his second chapter 13 bankruptcy case on January 8, 2003. In his schedules, Mr. Boutwell listed AmSouth as holding a \$18,566.28 secured claim against him. Mr. Boutwell did not list the claim as contingent, unliquidated, or disputed. His chapter 13 bankruptcy plan stated that Mr. Boutwell would pay AmSouth its entire claim.

AmSouth filed a \$17,306.52 proof of claim for the amount it asserts is due under its second mortgage on Mr. Boutwell’s home. Mr. Boutwell then filed an objection to AmSouth’s claim. The Court held a hearing on Mr. Boutwell’s objection to AmSouth’s claim on April 9, 2003. The parties disagree regarding the effect of the \$7,000 check Ms. Boutwell sent to AmSouth. Mr. Boutwell argued that the “all accts. paid in full” language Ms. Boutwell inscribed on the check operated as an accord and satisfaction under Ala. Code §7-3-311 when AmSouth cashed the check. AmSouth argued that the check only satisfied its mortgage on Mr. Boutwell’s

land because the amount due on AmSouth's second home mortgage was liquidated and not disputed. AmSouth also argued that Mr. Boutwell's confirmed chapter 13 bankruptcy plan precludes him from now objecting to its proof of claim.

#### LAW

Alabama Code §7-3-311 governs the "informal method of dispute resolution carried out by use of a negotiable instrument" to discharge a debt; this is commonly referred to as an accord and satisfaction. The person seeking to enforce an accord and satisfaction bears the initial burden to prove that the requirements of Ala. Code §7-3-311(a) plus either subsection (b) or (d) are met; the burden then shifts to the claimant to prove that the claim should not be discharged under Ala. Code §7-3-311(c).

In this case, Henry Boutwell asserts that all of his debts to AmSouth under three separate accounts were discharged by AmSouth's acceptance of a \$7,000 check with the words "all accts. paid in full" inscribed on its face. The Court must consider the following issues to determine if Mr. Boutwell meets his initial burden of proof under Ala. Code §7-3-311(a):

1. Was the check tendered to AmSouth in good faith?
2. Was the amount of the claim unliquidated or subject to a bona fide dispute?
3. Did AmSouth obtain payment of the check?

1.

#### Was the Check Tendered to Amsouth in Good Faith?

Under Ala. Code §7-3-311, the person seeking to enforce an accord and satisfaction by the use of an instrument carries the initial burden of proving that he or she meets three requirements under Ala. Code §7-3-311(a), which states:

(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

The Court will not discuss all three of the requirements of Ala. Code §7-3-311(a) that Mr. Boutwell must prove to show that his tender of a \$7,000 check to AmSouth acted as an accord and satisfaction of his debts to AmSouth because the second requirement is not met.

Alabama Code §7-3-311(a)(ii) requires that the person seeking to enforce an accord and satisfaction to discharge a debt must prove that “the amount of the claim was unliquidated or subject to a bona fide dispute.” Therefore, Mr. Boutwell is required to prove that when he tendered the \$7,000 check to AmSouth, its claim against him was either 1) unliquidated, or 2) subject to a bona fide dispute.

The Supreme Court of Alabama has defined unliquidated claims as “those which are ‘not yet reduced to a certainty in respect to amount, nothing more being established than the plaintiff’s right to recover; or such as cannot be fixed by a mere mathematical calculation from ascertainable data in the case.’” *Madden v. Deere Credit Services, Inc.*, 598 So.2d 860, 863 (Ala. 1992) (citing *Black’s Law Dictionary* (4th Ed. 1968)). The Supreme Court of Alabama has defined liquidated claims as amounts “susceptible of being made certain in amount by mathematical calculations from factors which are or ought to be in the possession or knowledge of the party to be charged.” *Id.* (citing to *Rifkin v. Safenovitz*, 131 Conn. 411, 414 (Conn. 1944)).

Mr. Boutwell listed AmSouth as holding a \$18,566.28 secured claim against him in the schedules he filed in this case. He did not list the debt to AmSouth as contingent, unliquidated, or disputed. However, when AmSouth filed a \$17,306.52 proof of claim for the amount it claims

is due on its second mortgage, Mr. Boutwell filed an objection to its claim. In his objection, Mr. Boutwell generally states that AmSouth's debt has already been paid outside the chapter 13 plan; alternatively, he states that AmSouth's recovery of his land paid its claim in full because the value of the land exceeded AmSouth's security interest.

The Court finds that AmSouth held a liquidated claim against Mr. Boutwell when he tendered a \$7,000 check to AmSouth because its claim was "susceptible of being made certain in amount by mathematical calculations from factors which [were] or [should have been] in the possession or knowledge of" Mr. Boutwell or his sister. *Madden* at 863. Mr. Boutwell had two mortgages with AmSouth. He defaulted on both of them. Both mortgages were for specific amounts. AmSouth held a foreclosure sale on Mr. Boutwell's land and subsequently received an additional \$7,000 check from Mr. Boutwell. Neither Mr. Boutwell nor his sister could recall if the foreclosure sale resulted in a deficiency balance; Ms. Neiman, however, testified that the sale resulted in a \$8,999.25 deficiency balance. It was Mr. Boutwell's burden to show that AmSouth's claim was unliquidated. He failed to meet his burden; therefore, he may not discharge AmSouth's claim unless he can show that it was subject to a bona fide dispute.

The Court could not find a precise definition of the phrase "subject to a bona fide dispute" as it is used in Ala. Code §7-3-311(a). However, *Black's Law Dictionary* 88 (7th ed. 1999) defines "bona fide" as "made in good faith; without fraud or deceit" and as "sincere; genuine." Therefore, Mr. Boutwell must prove that in good faith, he sincerely and genuinely disputed the amount of AmSouth's claim when he tendered a \$7,000 check to AmSouth.

The Court finds that Mr. Boutwell did not in good faith sincerely and genuinely dispute the amount of AmSouth's claim because his actions before and after he tendered the "all accts.

paid in full” check to AmSouth were contrary to the position he now takes. Mr. Boutwell and his sister both testified that they believed Mr. Boutwell surrendered his land to AmSouth in full satisfaction of both AmSouth’s mortgage on his land and on his home. Nonetheless, Mr. Boutwell subsequently tendered an additional \$7,000 to AmSouth. The \$7,000 check stated that it was paying all of Mr. Boutwell’s accounts in full. However, when AmSouth began foreclosure proceedings on Mr. Boutwell’s home after receiving the check, he filed a second chapter 13 bankruptcy case instead of asserting that the \$7,000 payment to AmSouth completely satisfied its mortgage on his home.

In the schedules Mr. Boutwell filed in his second chapter 13 bankruptcy case, he listed AmSouth as a secured creditor holding an \$18,566.28 secured claim that was not contingent, unliquidated, or disputed. His chapter 13 plan stated that he would pay AmSouth its entire claim. Mr. Boutwell did not explain the apparent discrepancy between his schedules and plan, which listed AmSouth’s claim as a secured (but not contingent, unliquidated, or disputed) claim that would be paid in full and his objection to AmSouth’s claim, which stated that he had already paid AmSouth’s claim in full.

The Court cannot reconcile Mr. Boutwell’s inconsistent actions with his multiple assertions that he has fully satisfied his debts to AmSouth. Although neither Mr. Boutwell nor Ms. Boutwell are sophisticated borrowers, their general lack of understanding of Mr. Boutwell’s financial dealings with AmSouth cannot act as a substitute for a bona fide dispute. Therefore, the Court must find that Mr. Boutwell did not meet his burden to show that the amount of AmSouth’s claim was subject to a bona fide dispute.

The Court has found that Mr. Boutwell did not meet his initial burden of proof under Ala. Code §7-3-311(a); therefore, it will not address the defenses that may be available to AmSouth under Ala. Code §7-3-311(c). For the same reason, the Court will not address AmSouth's argument that Mr. Boutwell's confirmed chapter 13 bankruptcy plan precludes him from now objecting to its proof of claim.

It is ORDERED that Henry Boutwell's objection to AmSouth's \$17,306.52 proof of claim is overruled because his tender of a \$7,000 check to AmSouth did not constitute an accord and satisfaction.

Dated: April 16, 2003

  
MARGARET A. MAHONEY  
U.S. BANKRUPTCY JUDGE