IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
HENRY LUCKY BOUTWELL,	)	
	)	
Debtor,	)	**CIVIL ACTION 03-0355-WS-C**
	)	
HENRY BOUTWELL,	)	**(Bankr. Case No. 03-010144-MAM-13)**
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	
	)	
AMSOUTH BANK,	)	
	)	
Defendant/Appellee.	)	

ORDER

This bankruptcy appeal is before the Court on defendant/appellee AmSouth Bank's Motion to Dismiss Appeal (doc. 23) and plaintiff/appellant Henry Boutwell's Motion for Extension of Time to file Objection (doc. 25). Because the Court finds that AmSouth's Motion to Dismiss is properly **granted in part** and **denied in part**, the merits of the appeal are also considered at this time. After careful consideration of the arguments and authorities presented by the parties, as well as the record on appeal and all other relevant portions of the court file, the Court **affirms** the Bankruptcy Court's Order dated April 16, 2003.

I. Background.

A. Procedural History in Bankruptcy Court.

On January 8, 2003, Boutwell filed a voluntary Chapter 13 petition in the U.S. Bankruptcy Court for the Southern District of Alabama. Among other obligations, he listed on Schedule D a claim by AmSouth in the amount of $18,566.28, secured by a second mortgage on Boutwell's residence, located at 2121 Lauderdale Street, Selma, Alabama (the "Real Property"). (Bankr. doc. 10, at Schedule D.) Boutwell left unchecked the boxes for "contingent," "unliquidated," or "disputed" as to AmSouth's claim. (*Id.*) According to Boutwell's Chapter 13 Plan filed concurrently with his petition, he intended to make direct monthly post-petition

payments to AmSouth in the amount of $230.00, with the pre-petition arrearage being paid 100% through the Plan. (*Id.*, at Chapter 13 Plan.)[1]

On January 27, 2003, AmSouth filed a Proof of Claim in the amount of $17,306.52, including an arrearage in the amount of $7,758.79 at the time of filing the Chapter 13 petition. (Proof of Claim.) That same day, Boutwell filed an Objection to Claim No. 1 (the "Objection"), in which he contended, *inter alia*, "[t]hat this estate is not justly and truly indebted to [AmSouth] in the amount claimed" and that Boutwell had previously paid the true amount of the claim to AmSouth outside the Plan. (Bankr. doc. 6, at 1.) The crux of Boutwell's objection was that he had settled his debt to AmSouth through presentation of a $7,000 check that he contended operated as an accord and satisfaction to release him from his indebtedness to AmSouth in full. On April 9, 2003, the Bankruptcy Court conducted an evidentiary hearing regarding the objection, allowing the parties to submit argument and authority in support of their respective positions. One week later, U.S. Bankruptcy Judge Margaret Mahoney entered an Order (Bankr. doc. 16) overruling Boutwell's objection and specifically concluding that "his tender of a $7,000 check to AmSouth did not constitute an accord and satisfaction" under Alabama law. (*Id.*, at 8.) On April 24, 2003, Boutwell filed a Notice of Appeal (the "First Appeal") appealing Judge Mahoney's April 16 Order to this Court.

As the First Appeal commenced in this District Court, the bankruptcy proceedings continued. In that regard, on May 16, 2003, AmSouth filed a Motion for Relief from Stay in Bankruptcy Court. In support of its Motion, AmSouth asserted that it held a valid mortgage interest in the Real Property; that as of May 9, 2003, Boutwell owed AmSouth the principal sum of $18,975.56, including a post-petition arrearage of $1,106.79; and that Boutwell had failed to make any post-petition payments to AmSouth, despite being directed to do so in the Bankruptcy Court's order confirming the Plan. (Bankr. doc. 26, at 1.) AmSouth sought modification of the automatic stay codified at 11 U.S.C. § 362 "to permit AmSouth to enforce all of its right, title

[1] On April 21, 2003, the Bankruptcy Court entered an Order Confirming Plan and Payment Order (Bankr. doc. 18), ordering Boutwell to pay $230.00 per month to AmSouth, with the pre-petition arrearage to be paid 100% through the Plan.

and interest in and to the Real Property." (*Id.*, at 2.)[2]

On June 4, 2003, Judge Mahoney held a hearing on AmSouth's Motion. At that time, Boutwell's counsel asserted that the Motion for Relief from Stay reduced to "exactly the same issue" as that previously presented by Boutwell's Objection to AmSouth's Proof of Claim. (Bankr. doc. 41, at 3.) After hearing counsel's argument, Judge Mahoney indicated that her ruling "wasn't going to be any different" than it had been as to Boutwell's Objection, and that she intended to grant relief from the automatic stay to AmSouth under the same rationale. (*Id.*, at 5.) This oral ruling of June 4 was confirmed by an Order (Bankr. doc. 30) dated July 1, 2003, in which the Bankruptcy Court formally granted AmSouth's request for relief from stay and authorized it "to exercise all its rights as to the Real Property in accordance with the loan documentation between the parties and applicable law." (*Id.*) On July 10, 2003, Boutwell filed a Notice of Appeal (the "Second Appeal") appealing the July 1 Order to this Court.

B. Procedural History in Federal Court.

Shortly after his appeals were filed in this District Court, Boutwell filed a Motion to Stay Execution of the Bankruptcy Court's July 1 Order (doc. 13), as well as a Motion to Consolidate the two appeals (doc. 14). After briefing by the parties, on September 4, 2003, this Court entered an Order (doc. 17) denying the Motion to Stay Execution based on Boutwell's failure to meet his burden of proof, the Court's determination that he was unlikely to succeed on the merits of his Second Appeal, and the Motion's noncompliance with Bankruptcy Rule 8005. That Order also granted the Motion to Consolidate the two appeals, and ordered supplemental briefing as to the consolidated appeals.

On October 17, 2003, after the close of the supplemental briefing, AmSouth filed a Motion to Dismiss Appeal (doc. 23), asserting that Boutwell's appeals had been rendered moot by AmSouth's foreclosure on the Real Property on October 10, 2003 for the sum of $20,681.33. In an untimely opposition brief (doc. 26) accompanied by a Motion for Extension of Time (doc. 25), Boutwell objected to the Motion to Dismiss on the grounds that he does not seek to set aside the foreclosure sale, but is instead appealing the Bankruptcy Court's determination as to the

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[2] Such enforcement efforts would presumably include the initiation of foreclosure proceedings with respect to the Real Property.

validity of AmSouth's Proof of Claim.[3]

II. Motion to Dismiss Appeal.

As a preliminary matter, the Court is confronted with the question of whether Boutwell's twin appeals survive the October 10, 2003 foreclosure sale of the Real Property. In its Motion to Dismiss, AmSouth argues that the appeals are barred by *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1998), in which the Eleventh Circuit stated that:

> "It is well settled law in this circuit that when the debtor fails to obtain a stay pending appeal of the bankruptcy court's order ... setting aside an automatic stay and allowing a creditor to foreclose on the property, the subsequent foreclosure and sale of the property renders moot any appeal."

Id. at 1553 (quoting *In re Matos*, 790 F.2d 864, 865-66 (11th Cir. 1986)). AmSouth maintains that because Boutwell failed to secure a stay of the July 1 Order setting aside the automatic stay and allowing foreclosure, the subsequent foreclosure sale moots Boutwell's appeal under a plain reading of *Miami Center*. In a tardy opposition filed after the deadline announced by the Court, Boutwell asserts that *Miami Center* is distinguishable and that the foreclosure sale did not destroy the appeal's viability.[4]

The Court agrees, in part, with AmSouth's reasoning. After all, Boutwell's Second Appeal seeks reversal of the Bankruptcy Court's July 1 Order granting AmSouth relief from the automatic stay and effectively removing all impediments to the foreclosure sale. Moreover, Boutwell plainly failed to secure a stay of that July 1 Order prior to the foreclosure sale. The

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[3] Despite being afforded an opportunity to do so, AmSouth did not submit a reply brief in response to Boutwell's submission on the Motion to Dismiss.

[4] The Court's Order (doc. 24) dated October 23, 2003 provided that any opposition to the Motion to Dismiss from Boutwell must be filed by November 5, 2003. Boutwell's opposition was filed on November 13, 2003. Concurrently therewith, Boutwell's counsel filed a Motion for Extension of Time (doc. 25) in which he indicated that his spouse had undergone emergency medical treatment in late October 2003 and early November 2003, as a result of which counsel was unable to work on a full-time basis until November 11, 2003. Despite the emergent pattern by Boutwell's counsel of failing to adhere to deadlines set in this action, the Court finds that the circumstances set forth in the Motion for Extension as to this latest episode are clearly sufficient to satisfy the "excusable neglect" standard set forth in Rule 6(b), Fed.R.Civ.P. For that reason, the Motion for Extension of Time is **granted** and the Court **accepts** Boutwell's out-of-time response (doc. 26) to the Motion to Dismiss.

clear objectives of the Second Appeal are to restore the Real Property to the protection of the automatic stay and to prevent AmSouth from foreclosing on same. Given these facts, a straightforward reading of the above-quoted language from *Miami Center* necessarily yields a conclusion that Boutwell's Second Appeal is moot. The foreclosure sale having occurred, this Court cannot now strike down the Bankruptcy Court's Order allowing that foreclosure sale without compromising the integrity of the sale and subverting the finality of the Order. *See, e.g.*, *Matos*, 790 F.2d at 865-66 (noting that equitable mootness rule is premised on considerations of finality of orders, protection of the integrity of the foreclosure sale process, and the court's inability to rescind the sale and grant effective relief on appeal); *Markstein v. Massey Assocs., Ltd.*, 763 F.2d 1325, 1327 (11th Cir. 1985) (noting that "[t]his rule of law is intended to provide finality to orders of bankruptcy courts and to protect the integrity of the judicial sale process").

Simply put, the foreclosure sale frustrates the Court's ability to provide effective relief in the Second Appeal. If the Court were to agree with Boutwell's position in the Second Appeal, it would reverse the Bankruptcy Court's July 1 Order providing relief from the automatic stay. However, the consequences of that July 1 Order – namely, the foreclosure sale of the Real Property – cannot be undone. The Court cannot rescind the sale. *See Markstein*, 763 F.2d at 1327 ("When the bankruptcy court sets aside an automatic stay ... and the debtor fails to obtain a stay pending appeal with the result that the property is sold to a creditor at foreclosure, a court is powerless to rescind the sale on appeal."); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294, 1295 (11th Cir. 1984) (similar). Nor can the Court otherwise place the Real Property back under the aegis of the automatic stay. Accordingly, even if this Court concluded that the Bankruptcy Court erred in setting aside the automatic stay on July 1, the Court would be powerless to grant relief to Boutwell arising from the July 1 Order. On this rationale, and based on a straightforward application of the principles enunciated by the Eleventh Circuit in *Miami Center* and *Matos*, the Court concludes that Boutwell's Second Appeal has been rendered **moot** by the October 10 foreclosure sale.[5]

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[5] This determination is unaffected by Boutwell's argument that the Court can, in fact, provide relief on the Second Appeal. Boutwell asserts that "if the Bankruptcy Court erred in granting relief from stay ..., [AmSouth's] subsequent actions were wrongful and must be addressed by future action by Boutwell." (Objection to Motion to Dismiss Appeal, at 2.) Thus,

However, to the extent that AmSouth claims Boutwell's First Appeal is likewise barred by the logic of *Miami Center*, its argument sweeps too broadly. The Eleventh Circuit has taken pains to clarify that failure to obtain a stay pending appeal does not automatically sound the death knell for all bankruptcy appeals and that "the absence of a stay does not compel a finding of mootness in all cases." *In re Club Associates*, 956 F.2d 1065, 1070 n.13 (11th Cir. 1992); *see also In re AOV Industries, Inc.*, 792 F.2d 1140, 1146 (D.C. Cir. 1986) ("[F]ailure to secure a stay is not *per se* dispositive of *all* the issues before [the appellate court]."); *Matos*, 790 F.2d at 865 n.3 (explaining that, even if a debtor fails to obtain a stay pending appeal of order quieting title in property that is subsequently sold, an appeal is not mooted if the debtor seeks not to undo the sale but to recover share of proceeds derived from the sale); *Miami Center Ltd. Partnership v. Bank of New York*, 820 F.2d 376, 279 (11th Cir. 1987) ("*Miami Center I*") (recognizing that despite substantial consummation of reorganization plan, "an appeal is not moot if the court can still order some effective relief").

Particularly illuminating on this point is *Markstein*, in which a creditor was authorized by the bankruptcy court to foreclose on property, and proceeded to do so when the debtor failed to

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Boutwell maintains that this Court should rule on the Second Appeal because if the July 1 Order were incorrect, then AmSouth's actions taken in reliance on that Order could trigger future legal action by Boutwell against AmSouth. However, the type of claim contemplated by Boutwell is barred by the same policy considerations discussed above relating to the finality of bankruptcy orders which are not stayed pending appeal. In the Eleventh Circuit, the law is settled that where a debtor fails to obtain a stay from an order granting relief from the automatic stay, a creditor is "entitled to treat the judgment of the bankruptcy court relieving it from the automatic stay as a final order, and it [is] entitled to take action in reliance upon that order." *In re Kahihikolo*, 807 F.2d 1540, 1543 (11th Cir. 1987); *Sewanee*, 735 F.2d at 1295 (similar); *see also American Grain Ass'n v. Lee-Vac, Ltd.*, 630 F.2d 245, 247 (5th Cir. 1980) (noting that the consequence of failing to obtain a stay is that the prevailing party may treat the lower court's judgment as final). The Bankruptcy Court's July 1 Order authorized AmSouth to foreclose on the Real Property. A plain reading of *Kahihikolo* reflects that, even if the July 1 Order was erroneous, AmSouth was entitled to rely on and act in accordance with that Order when Boutwell failed to obtain a stay. That being the case, any argument by Boutwell that AmSouth engaged in "wrongful" conduct by doing that which a final order of the Bankruptcy Court expressly authorized it to do – even if that order were subsequently reversed – cannot prevail. Boutwell cannot punish AmSouth for relying on the July 1 Order, and the relief he identifies would necessarily do just that. Hence, the consequences of the foreclosure sale cannot be undone, and Boutwell can obtain no relief even if the order authorizing the foreclosure sale were deemed erroneous.

obtain a stay. 763 F.2d at 1326. The creditor itself purchased the property in the foreclosure sale. *Id.* The Eleventh Circuit declared that it was powerless to rescind the foreclosure, and that many aspects of the debtor's appeal were therefore moot. *Id.* at 1327. Nonetheless, the appeal was not mooted in its entirety because *Markstein* panel concluded that it "can still grant some equitable relief in the present case." *Id.* In particular, because the record lacked specific findings as to the amount of mortgage debt, the debtor might be entitled to recover the difference between the amount for which the property sold and the amount of the mortgage debt, to the extent that the former exceeded the latter. *Id.* On that basis, the *Markstein* court remanded the case for findings as to that aspect of the bankruptcy appeal.

Boutwell's First Appeal is analogous to the portion of the *Markstein* appeal allowed to survive the foreclosure sale. In particular, Boutwell contends in his First Appeal that the amount of his indebtedness to AmSouth is zero. If he is correct, then the logic of *Markstein* would allow him to recover the difference between the amount of the foreclosure sale and the amount of his indebtedness, notwithstanding the occurrence of the foreclosure sale. Stated differently, Boutwell's First Appeal is not directly aimed at the Bankruptcy Court's July 1 Order authorizing AmSouth to foreclose on the Real Property. Rather, the First Appeal relates solely to the antecedent question of whether Boutwell owes money to AmSouth. The Court remains able to rule on that question, notwithstanding the foreclosure sale, and if Boutwell succeeds on the First Appeal, the Court could order effective relief as described above. Moreover, such a ruling will not undermine the policy goals of providing finality to bankruptcy orders and preserving the integrity of the judicial sale process, because even if the Bankruptcy Court's April 16 Order is invalidated and AmSouth is ordered to remit all or part of the sale proceeds to Boutwell, AmSouth will not thereby be punished for relying on the April 16 Order.

In light of the foregoing, the Court hereby **grants** AmSouth's Motion to Dismiss as to the Second Appeal, and declares the Second Appeal **moot** because Boutwell failed to obtain a stay, the Real Property has been sold in a foreclosure sale, and the Court is powerless to provide Boutwell with relief on that Second Appeal. As to the First Appeal, however, AmSouth's Motion to Dismiss is **denied** because the Court remains capable of ordering some effective relief on that claim notwithstanding the foreclosure sale.

III. Analysis of Merits of First Appeal.

A. Standard of Review.

In an appeal of a bankruptcy court decision, the district court sits as an appellate court. In that capacity, the district court cannot make independent factual findings, and must affirm the bankruptcy court's findings of fact unless they are clearly erroneous. *Alabama Dept. of Human Resources v. Lewis*, 279 B.R. 308, 313-14 (S.D. Ala. 2002) (citing *In re Club Associates*, 956 F.2d 1065, 1069 (11th Cir. 1992)); *see also In re Spiwak*, 285 B.R. 744, 747 (S.D. Fla. 2002) ("A district court reviewing a bankruptcy appeal is not authorized to make independent factual findings; that is the function of the bankruptcy court."); Fed.R.Bankr.Proc. 8013 (on appeal, bankruptcy court's findings of fact "shall not be set aside unless clearly erroneous"). A finding of fact is clearly erroneous when, even if there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *In re Hatem*, 273 B.R. 900, 903 (S.D. Ala. 2001).

By contrast, a bankruptcy court's conclusions of law are subject to *de novo* review by a district court. *In re Brown*, 303 F.3d 1261, 1265 (11th Cir. 2002); *Club*, 956 F.2d at 1069; *In re Calvert*, 907 F.2d 1069, 1070 (11th Cir. 1990). Finally, a bankruptcy court's equitable determinations are reviewed for abuse of discretion. *Spiwak*, 285 B.R. at 748 (citing *In re Red Carpet Corp. of Panama City Beach*, 902 F.2d 883 (11th Cir.1990)).

B. Facts.

Neither party has directly articulated disagreement with the factual findings set forth by the Bankruptcy Court in its April 16, 2003 Order. As such, the relevant facts to this appeal (all of which are drawn from the Bankruptcy Court's Order) are as follows:[6]

On May 30, 2000, Boutwell filed his first Chapter 13 bankruptcy case. At that time, he had three accounts with AmSouth, including a mortgage on land in Plantersville, Alabama; a

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[6] In their briefs, both parties present various facts that were not expressly found by the Bankruptcy Court. As stated above, this Court lacks the power to make independent findings of fact in a bankruptcy appeal context. No party having maintained that Judge Mahoney's findings of fact were clearly erroneous for having omitted certain additional facts identified by the parties, this Court is constrained to the factual determinations set forth in the Bankruptcy Court's April 16 Order.

second mortgage on the Real Property in Selma, Alabama; and a credit card account. These accounts were solely in Boutwell's name, but were managed largely by his sister, Betty Boutwell ("Ms. Boutwell"). Both mortgages were in default when Boutwell filed his first petition.

During the first bankruptcy proceeding, Boutwell surrendered the Plantersville land to AmSouth, after which AmSouth conducted a foreclosure sale. Because the price received was less than the amount of the mortgage, the foreclosure sale resulted in a deficiency balance of $8,999.25 on the Plantersville mortgage. The parties disagreed as to the intent of Boutwell's surrender of the Plantersville land, with Boutwell asserting that it was intended to be in full satisfaction of both the Plantersville and Selma mortgages, while AmSouth maintained that the surrender served as a partial satisfaction of the Plantersville mortgage only.

After Boutwell's first Chapter 13 case was dismissed on July 1, 2002, negotiations continued between AmSouth and Ms. Boutwell regarding Boutwell's debts to the bank. Ms. Boutwell contends that during those negotiations, AmSouth offered to settle all of Boutwell's debts to the bank for $7,000. She testified that, after further discussion, she entered into an agreement with an unidentified "elderly man" at AmSouth to settle all of Boutwell's debts with AmSouth for $7,000. Ms. Boutwell proceeded to obtain a $7,000 check from her bank on September 4, 2002, payable to "AmSouth Bank, Consumer Coll. Rec. Dept." At the bottom of the check, Ms. Boutwell wrote the notation "all accts. paid in full." She then mailed the check to the "elderly man" at AmSouth with whom she had struck the agreement.

Alicia Neiman, vice president of consumer collections at AmSouth's Hoover office, testified that a bank employee wrote the account number of Boutwell's Plantersville mortgage account on the front of the check and applied the proceeds exclusively to the Plantersville account, without altering the balance on Boutwell's mortgage for the Real Property. Because AmSouth treated the $7,000 check as relating only to the Plantersville account, it considered Boutwell to be in default on the mortgage for the Real Property in Selma. Shortly thereafter, AmSouth commenced foreclosure proceedings on that property. Rather than contesting AmSouth's right to foreclose on the grounds that the $7,000 check had released the debt, on January 8, 2003, Boutwell filed a second Chapter 13 bankruptcy case, listing AmSouth as

holding a secured claim against him in the amount of $18,566.28.[7] Significantly, Boutwell's bankruptcy filings did not characterize AmSouth's claim as contingent, unliquidated, or disputed; to the contrary, his Plan stated that he would pay AmSouth its entire claim, including both the arrearage and the $230 monthly mortgage payments.

When AmSouth filed a $17,306.52 Proof of Claim for the amount it claimed it was owed on the Real Property mortgage, Boutwell objected that the $7,000 check tendered in September 2002 constituted an accord and satisfaction, effectively negating his debts and freeing him from further obligation to AmSouth.

C. Accord and Satisfaction Issue.

After an evidentiary hearing, the Bankruptcy Court overruled Boutwell's objection, finding that his tender of a $7,000 check to AmSouth did not constitute an accord and satisfaction under Alabama law. In reaching this conclusion, the Bankruptcy Court found that Boutwell did not meet his initial burden of proof under Alabama Code § 7-3-311(a) to enforce an accord and satisfaction, inasmuch as he failed to establish that AmSouth's claim was either unliquidated or subject to a bona fide dispute. With respect to whether the dispute was bona fide, the Bankruptcy Court found "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." (April 16 Order, at 6.)[8] This Court now reviews the Bankruptcy Court's ruling on the

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[7] The foreclosure proceedings on the Real Property were stayed upon the filing of Boutwell's second Chapter 13 petition.

[8] In particular, the Bankruptcy Court observed that after AmSouth initiated foreclosure proceedings on the Real Property, Boutwell did not argue that the $7,000 payment completely satisfied the mortgage on the Real Property, but instead filed for Chapter 13 protection. This omission is inconsistent with Boutwell's present position that the $7,000 check disposed of the balance on the Real Property mortgage. Similarly, Boutwell's January 2003 bankruptcy schedules list AmSouth as a secured creditor holding an $18,566.28 secured claim, with no suggestion that the claim was contingent, unliquidated or disputed. Finally, his Chapter 13 Plan stated that Boutwell would pay AmSouth for the entire amount of its claim. The Bankruptcy Court deemed these actions fundamentally inconsistent with Boutwell's objection to AmSouth's Proof of Claim on accord and satisfaction grounds, and noted that Boutwell had failed to reconcile these discrepancies. (*Id.*, at 7.)

accord and satisfaction issue.

1. Definition of Accord and Satisfaction.

Alabama law defines an accord and satisfaction as "an agreement reached between competent parties regarding payment of a debt the amount of which is in dispute." *Newson v. Protective Ind. Ins. Co. of Alabama*, --- So.2d ----, 2003 WL 22463336, *5 (Ala. Oct. 31, 2003) (citation omitted). An accord and satisfaction requires a meeting of the minds regarding its subject matter. *Id.* Whether an accord and satisfaction exists is "almost always a question for the trier of fact." *Elan Pharma, Inc. v. Brinson*, 689 So.2d 202, 205 (Ala.Civ.App. 1997).

In assessing whether an accord and satisfaction exists in this case, the Court applies the framework set forth in Alabama Code § 7-3-311(a), which provides that a person may enforce an accord and satisfaction against a claim if he establishes each of the following items:

> "(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."

Id. The third element is plainly satisfied here; therefore, the Court's analysis will focus on the first and second requirements.

2. The Claim was Neither Unliquidated Nor Subject to Bona Fide Dispute.

The Bankruptcy Court determined that the amount of AmSouth's claim was neither unliquidated nor subject to a bona fide dispute between the parties. This Court agrees. Without question, AmSouth's claim was not "unliquidated." After all, Alabama law counsels that a claim is unliquidated only where the damages "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) (citations omitted). Certainly, the mortgages on both the Real Property and the Plantersville land were for specific amounts. The sale of the Plantersville land resulted in a deficiency balance in the fixed amount of $8,999.25. Moreover, in schedules accompanying his Chapter 13 petition filed on January 8, 2003, Boutwell quantified the amount of AmSouth's secured claim against him at $18,566.28. Those schedules did not reflect that AmSouth's claim was unliquidated or otherwise not amenable to being reduced to a specific amount with certainty. In light of the foregoing, any suggestion (which Boutwell has

not made, in any event) that his debts to AmSouth were unliquidated is at odds with the facts.

Therefore, § 7-3-311(a)(ii) can be satisfied only if the amount of AmSouth's claim was subject to a "bona fide dispute" when the accord and satisfaction was reached. The Bankruptcy Court determined, and this Court concurs, that the "bona fide dispute" requirement is properly construed as obliging Boutwell to 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." (April 16 Order, at 6.)

On appeal, Boutwell maintains that the record reflects a dispute between the parties regarding the value of the Plantersville land, inasmuch as Boutwell and AmSouth disagreed as to whether that land had sufficient equity to satisfy the entire Plantersville mortgage as well as some or all of the Real Property mortgage. (Appellant Brief, at 10.) However, not all disagreements are bona fide, and Boutwell proffers no argument or evidence on appeal as to the bona fide nature of the dispute over the value of AmSouth's claim. The Bankruptcy Court found no bona fide dispute, entering a specific finding that "Mr. Boutwell did not in good faith sincerely and genuinely dispute the amount of AmSouth's claim." (April 16 Order, at 6.) This determination was a finding of fact, and therefore is reviewed on a "clearly erroneous" basis.[9]

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[9] Courts in bankruptcy appeals have characterized similar determinations as findings of fact, not conclusions of law. *See, e.g., In re Caldwell*, 895 F.2d 1123, 1127 (6th Cir. 1990) ("Like the district court, we review the bankruptcy court's determination of good faith for clear error," in context of whether debtor proposed plan in good faith); *Matter of Metz*, 820 F.2d 1495, 1497 (9th Cir. 1987) ("A bankruptcy judge's finding that a debtor's plan is proposed in good faith is a finding of fact reviewed under the clearly erroneous standard."); *In re Hatem*, 273 B.R. 900, 904 (S.D. Ala. 2001) (whether a Chapter 13 plan is proposed in good faith is a question of fact reviewed on "clearly erroneous" basis); *Toles v. Powers*, 1999 WL 1261453, *3 (N.D.Tex. Dec. 28, 1999) ("[C]ourts have found that determining whether a debtor acted in good faith is a question of fact and therefore should be overturned only if clearly erroneous."); *In re Mannor*, 175 B.R. 639, 642 n.3 (Bkrtcy. E.D.Mich. 1994) (opining that good faith, for purposes of ascertaining eligibility for Chapter 13 relief, is a question of fact). More generally, outside the bankruptcy appeal context, both Alabama and federal courts routinely frame "good faith" issues as questions of fact. *See generally Galbreath v. Scott*, 433 So.2d 454, 457 (Ala. 1983) (whether officer's expenditures were made in good faith to further corporate interests was a question of fact); *Simmons Machinery Co. v. M&M Brokerage, Inc.*, 409 So.2d 743, 757 (Ala. 1981) (contention by defendant accused of fraud that inaccurate loan payoff amount was provided in good faith was a question of fact); *Equitable Credit Co. v. State ex rel. Perry*, 106 So. 399 (Ala. 1925) (holder of lease sale contract's good faith in investigating buyer's use of automobile to run

The Bankruptcy Court concluded that there was no bona fide dispute as to the value of AmSouth's claim based on the following facts: (1) despite contending he had surrendered the Plantersville land to AmSouth in full satisfaction of both mortgages, Boutwell subsequently tendered an additional $7,000 to AmSouth; (2) despite his claim that the $7,000 check was intended to satisfy the Real Property mortgage in full, when AmSouth initiated foreclosure proceedings, Boutwell did not challenge AmSouth's right to do so but instead filed for Chapter 13 protection; (3) despite presently contending that he owes AmSouth nothing, in the schedules accompanying his January 8, 2003 petition, Boutwell acknowledged that AmSouth held a secured claim for $18,566.28, which was not contingent, unliquidated or disputed; and (4) despite his current position that his debts to AmSouth have been paid in full, in his Chapter 13 Plan, Boutwell expressed an intent to pay a monthly direct payment and 100% of the arrearage to AmSouth through the Plan.[10]

Boutwell has made no attempt on appeal to square his current position that he owes AmSouth nothing with the conduct identified above, including particularly his filings in the Bankruptcy Court reflecting that he owed AmSouth more than $18,000, and that he intended to pay that debt in its entirety through the Plan. He cites no record evidence tending to explain his inconsistencies or otherwise to establish the existence of a bona fide dispute as to the amount of his indebtedness to AmSouth. On this record, the Court cannot find that the Bankruptcy Court's determination that Boutwell "did not in good faith sincerely and genuinely dispute the amount of AmSouth's claim" is clearly erroneous. As such, the Bankruptcy Court's conclusion that the amount of AmSouth's claim was neither unliquidated nor subject to a bona fide dispute will not be disturbed on appeal. Based on that determination, Alabama Code § 7-3-311(a)(ii) was not satisfied and Boutwell was not entitled to enforce the accord and satisfaction against AmSouth

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whisky was a question of fact); *Longpre v. Diaz*, 237 U.S. 512, 520, 35 S.Ct. 731, 59 L.Ed. 1080 (1915) (existence of good faith was a question of fact with respect to possession of real property in good faith); *Bryan v. Jones*, 530 F.2d 1210, 1216 (5th Cir. 1976) (Brown, J., concurring) ("Inescapably what is good faith is a question of fact for each case.").

[10] The Court is at a loss to see how a bona fide dispute can exist where Boutwell argues that he owes the bank nothing, while in the same breath acknowledging that he owes AmSouth more than $18,000 and volunteering to pay off same through the Plan.

under the applicable Alabama provisions.

3. Boutwell Did Not Tender the $7,000 Check in Good Faith.

Even if § 7-3-311(a)(ii) required something less than a showing that Boutwell harbored a good faith, sincere and genuine dispute as to the amount of AmSouth's claim, his invocation of accord and satisfaction would be defeated under § 7-3-311(a)(i), which requires him to prove that he "in good faith tendered an instrument to the claimant as full satisfaction of the claim." *Id.* Under Alabama law, "good faith" occurs when a party "offers a check with the intent to honestly enter into an accord and satisfaction while observing reasonable commercial standards of fair dealing." *Ex parte Meztista*, 845 So.2d 795, 799 (Ala. 2001) (quoting *Webb Business Promotions, Inc. v. American Electronics & Entertainment Corp.*, 617 N.W.2d 67, 73 (Minn. 2000)).

As explained above, the Bankruptcy Court made a specific factual finding that Boutwell lacked a good faith dispute with AmSouth as to the amount of its claim. The determination that Boutwell did not in good faith sincerely and genuinely dispute the amount of AmSouth's claim is fatal to his ability to establish that he in good faith tendered the $7,000 payment to AmSouth in full satisfaction of said claim.[11] For the reasons stated *supra*, the Bankruptcy Court's finding that Boutwell did not act in good faith was not clearly erroneous. That finding remaining intact, Boutwell has not satisfied § 7-3-311(a)(i), and therefore cannot succeed on his accord and

[11] This conclusion is not undermined by the pronouncement in *Meztista* that "[t]he focus of the good faith inquiry is on the offer of accord, and not on the actions of the parties in performing the underlying contract." 845 So.2d at 799 (citation omitted). The *Meztista* proposition that "good faith" is not determined by the parties' underlying conduct would apply if the evidence of lack of good faith in this case concerned aspects of the parties' relationship other than this dispute (*i.e.*, if Boutwell had engaged in previous unfair or improper business dealings with AmSouth, those acts would not bear on the "good faith" inquiry). By contrast, here the Bankruptcy Court found a lack of good faith by Boutwell as to the very existence of a dispute between the parties. If, as the Bankruptcy Court found, Boutwell did not have a good faith dispute with AmSouth, then his act of tendering a smaller check for "all accts. paid in full" simply could not have constituted a good faith attempt to enter into an accord and satisfaction to resolve that dispute.

satisfaction defense to AmSouth's Proof of Claim.[12]

4. Meztista *Does Not Require a Contrary Result.*

Boutwell attempts to bypass all of the foregoing issues on appeal by emphasizing the "all accts. paid in full" legend on the $7,000 check which AmSouth cashed. Relying on *Ex parte Meztista*, 845 So.2d 795 (Ala. 2001), Boutwell argues that by accepting Boutwell's tender and cashing the check, AmSouth necessarily agreed to the condition placed on the check.

The *Meztista* decision lends superficial support to Boutwell's position. That case concerned a dispute between two partners over unliquidated partnership profits. The defendant partner had given the plaintiff partner a check for $17,617.84, bearing the legend "final payment/ payment in full." 845 So.2d at 796. The plaintiff cashed the check, but wrote on it that she was doing so "under protest," and proceeded to sue the defendant for additional profits. *Id.* The *Meztista* court explained that, when the check was tendered with a condition that it was in full satisfaction, the plaintiff did not have the option of writing a restrictive endorsement, cashing the check, and filing suit for additional funds; rather, the plaintiff's only options were "(1) reject the offer of the check as full satisfaction of the disputed claim; or (2) accept the offer of the check as a full satisfaction by cashing or depositing the check." *Id.* at 797 (quoting *Hylton v. Meztista*, 845 So.2d 792, 795 (Ala.Civ.App. 2000) (Crawley, J., dissenting)). By endorsing and depositing the check, the plaintiff "agreed to the condition upon which it was offered, and she is estopped to deny that agreement." *Id.* at 798.

Boutwell argues that the *Meztista* is controlling here. Like the defendant in *Meztista*, Boutwell tendered a check to a creditor bearing a legend that the check was payment in full between the parties. Like the plaintiff in *Meztista*, AmSouth cashed or deposited that check.

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[12] In his brief, Boutwell fails to tailor his arguments to the appropriate standard of review, much less to address any specific flaws that he believes inhere in the Bankruptcy Court's April 16 Order. Indeed, his filing presupposes that this Court could make new factual findings, or overturn those of the Bankruptcy Court, willy-nilly. Boutwell presents no argument that the Bankruptcy Court's findings regarding the absence of good faith should be reviewed on anything other than a clearly erroneous standard, nor does he offer authorities or evidence for the proposition that such findings were erroneous. In fact, Boutwell does not discuss or challenge the Bankruptcy Court's conclusions, reasoning or factual findings at all, instead opting to reiterate what the Court presumes were the same arguments he previously presented to the Bankruptcy Court.

Therefore, Boutwell contends, *Meztista* compels a conclusion that AmSouth's act of depositing the check constituted acceptance of the condition on which Boutwell offered the check, such that AmSouth is estopped to deny the existence of an accord and satisfaction.

However, *Meztista* neither abrogates nor otherwise alters the requirements of the Alabama Code; on the contrary, that court specifically recognized that § 7-3-311(a) "prescribes the rules that apply when an accord and satisfaction is asserted on the basis of a written notation on a negotiable instrument." 845 So.2d at 798 (citation omitted).[13] As such, under a plain reading of *Meztista*, AmSouth's act of cashing or depositing Boutwell's "all accts. paid in full" check binds it to the condition stated on that check only if all threshold requirements of Ala. Code § 7-3-311(a) have been met. The Bankruptcy Court held, and this Court agrees, that they were not. In light of that conclusion, the Court does not and, indeed, cannot reach the question of whether *Meztista* requires AmSouth to abide by the condition inscribed on the front of the Boutwell check it deposited, because the underpinning foundational basis for an accord and satisfaction defense to AmSouth's claim does not exist.

IV. Conclusion.

For the reasons set forth above, AmSouth's Motion to Dismiss Appeal is **granted** as to Boutwell's appeal of the Bankruptcy Court's Order dated July 1, 2003, but **denied** as to his appeal of the Bankruptcy Court's Order dated April 16, 2003. Boutwell's appeal of the July 1, 2003 Order is **dismissed** as **moot**. Boutwell's Motion for Extension of Time to File Objection and to Accept Out of Time Filing is **granted** pursuant to Rule 6(b), Fed.R.Civ.P.

After careful review of the record and the parties' filings on appeal, the Court is persuaded that the Bankruptcy Court's determination that Boutwell did not in good faith sincerely and genuinely dispute the amount of AmSouth's claim was not clearly erroneous. That finding precludes Boutwell from making the requisite showing under Alabama Code § 7-3-311(a) for an accord and satisfaction, as a matter of law. For that reason, it is hereby **ordered** that the Bankruptcy Court's Order of April 16, 2003, overruling Boutwell's objection to

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[13] Indeed, *Meztista* recognized that even where a creditor accepts an accord and performs a satisfaction, the creditor may challenge its validity if the legal elements of accord and satisfaction have not been satisfied. *Id.*

AmSouth's Proof of Claim, is due to be, and the same hereby is, **affirmed**.

DONE and ORDERED this 15th day of December, 2003.

s/ WILLIAM H. STEELE
UNITED STATES DISTRICT JUDGE