

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

In re

JOSEPH F. FERRELL and
LISA C. FERRELL

Joint Case No. 93-33162-K
Chapter 13

Debtors.

JOSEPH F. FERRELL and
LISA C. FERRELL,

Plaintiffs,

vs.

Adv. Proc. No. 94-0154

SOUTHERN FINANCIAL, INC.,

Defendant.

**SUPPLEMENTAL MEMORANDUM RE PLAINTIFFS' COMPLAINT TO SET ASIDE HOME
FORECLOSURE SALE COMBINED WITH NOTICE OF THE ENTRY THEREOF**

On March 24, 1994 the Court signed a "Memorandum Re Plaintiff's Complaint To Set Aside Home Foreclosure Sale Combined With Notice Of The Entry Thereof" which was entered by the Bankruptcy Clerk on March 25, 1994.¹ The following citations shall supplement the Court's prior March 24, 1994 Memorandum.

IN RE BRADLEY

In In re Bradley, 75 B.R. 198 (Bankr. W.D. Va. 1987), the court held, inter alia, that the debtors' principal residence was property of the broad section 541(a) estate, even though a foreclosure proceeding had been instituted against the debtors' home pursuant to a Virginia deed of trust by the mortgagee, FmHA, and the indenture trustee, who actually conducted a sale of the home prior to the debtors'

¹ The adversary proceeding file does not yet contain the "bare Order" referred to at page 11 of the Court's March 24, 1994 Memorandum.

commencement of a chapter 13 case. FmHA was the successful bidder at the January 26, 1987 foreclosure sale; however, a memorandum of sale was not prepared by the indenture trustee and no deed was delivered or executed when the debtors filed their section 302 chapter 13 petition on January 29, 1987.

Specifically, the Bradley court stated in relevant part at p. 199 as follows:

"The question simply put is whether the foregoing facts sufficiently removes this property from the Debtors' estate. Under the law of Virginia, FmHA, as a matter of state law, did not finalize the foreclosure sale prior to the date the bankruptcy petition was filed. *In re Rolan*, 39 B.R. 260, 264 (Bankr. W.D. Va. 1983); *See In re Chitwood*, 54 B.R. 396 (Bankr. W.D. Va. 1985); *Feldman v. Rucker*, 201 Va. 11, 109 S.E.2d 379 (1959); *Powell v Adams*, 179 Va. 170, 18 S.E.2d 261 (1942). The Memorandum of Sale was not prepared and signed by the trustee prior to the filing of the petition. *Id.* More importantly, the trustee did not make and record a deed evidencing the sale prior to the filing of the petition by the Debtors. *In re Rolan* at 264. Therefore, even under the laws of Virginia the sale was not finalized and the Debtors retained an interest in the property when they filed their Chapter 13 petition on January 29, 1987. This interest is protected by the stay of 11 U.S.C. §362 that became operative at the time the petition was filed.

"Under federal law, which must be considered, the legal or equitable interest the Debtors had in the property on the day the petition was filed became property of the estate. 11 U.S.C. §541(a). Subsection 541(a) provides:

"(a) The commencement of a case under Sections 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

"(1) Except as provided in subsections (b) and (c)(2) of this section, *all legal or equitable interests* of the debtor in property as of the commencement of the case. (emphasis added)

"Because the Debtors were not divested of their interest in the real estate at the time the petition was filed, the property became property of the estate. Under 11 U.S.C. §1322(b)(3), the Chapter 13 plan may provide for preserving this property and curing the default in payments to FmHA on this property of the estate.

"In the consideration of chapter 13 cases, it must be remembered that this is a rehabilitative statute, which must be liberally construed in debtors' favor, to carry out the intent of Congress that these financially distressed debtors shall have an opportunity to restructure their financial problems. Therefore, the federal law should apply where that aim will be promoted. *See In re Taddeo*, 685 F.2d 24, 6 C.B.C.2d 1201, 9 B.C.D. 556 (2d Cir. 1982); *In re Thompson*, 17 B.R. 748 (Bankr. W.D. Mich. 1982); *In re Davis*, 15 B.R. 22 (Bankr. D. Kas. 1981), *aff'd*, 16 B.R. 473 (D. Kan. 1981); *In re Thacker*, 6 B.R. 861 (Bankr. W.D. Va. 1980).

"In summary, the foreclosure sale was not finalized even under the law of Virginia which does not necessarily govern decisions in these cases and the interest the Debtors retained at the time the petition was filed was property of the estate protected by federal law. An appropriate Order shall be entered permitting the Debtors to provide for payments to the FmHA under their Chapter 13 plan."

IN RE RELATED PARTNERS PROPERTIES, INC.

In *In re Related Partners Properties, Inc.*, 163 B.R. 213 (D.C. S.D. Fla. 1993), the court held, inter alia, that the expiration of the Florida redemption period is accomplished only when the Clerk of Court files a certificate of title and serves a copy of it.

IN RE VALENTE

In *In re Valente*, 34 B.R. 362 (D.C. Conn. 1983), the District Court, on appeal, held that the Bankruptcy Court erred in denying the debtors the opportunity to cure a mortgage default after entry of a state court judgment of foreclosure since the Bankruptcy Code authorizes plans filed by chapter 11 debtors to provide for curing or waiving any default.²

DEFINITION OF WORD "SALE"

Black's Law Dictionary, Revised Fourth Edition, at pp. 1503-1504 defines, in relevant part

² See Epstein and Fuller, "Chapters 11 and 13 of the Bankruptcy Code - Observations on Using Case Authority from One of the Chapters in Proceedings Under the Other," 38 Van. L. Rev. 901 (May 1985).

the word "sale" as follows:

"A contract between two parties, called, respectively, the `seller' (or vendor) and the `buyer' (or purchaser,) by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and the possession of property. *Pard. Droit Commer. §6; 2 Kent, Comm. 363; Poth. Cont. Sale, §1; Butler v. Thomson, 92 U.S. 414, 23 L.Ed. 684. In re Frank's Estate, 277 N.Y.S. 573, 154 Misc. 472.*

"A contract whereby property is transferred from one person to another for a consideration of value, implying the passing of the general and absolute title, as distinguished from a special interest falling short of complete ownership. *Arnold v. North American Chemical Co., 232 Mass. 196, 122 N.E. 23, 284; Faulker v. Town of South Boston, 141 Va. 517, 127 S.E. 380, 381.*

"An agreement by which one gives a thing for a price in current money, and the other give the price in order to have the thing itself. Three circumstances concur to the perfection of the contract, to-wit, the thing sold, the price, and the consent. *Civ.Code La. art. 2439.*

"To constitute a `sale,' there must be parties standing to each other in the relation of buyer and seller, their minds must assent to the same proposition, and a consideration must pass. *Commissioner of Internal Revenue v. Freihofer, C.C.A.3, 102, F.2d 787, 789, 790, 125 A.L.R. 761.*

"`Sale' consists of two separate and distinct elements: First, contract of sale which is completed when offer is made and accepted and, second, delivery of property which may precede, be accompanied by, or follow, payment of price as may have been agreed on between parties. *Inland Refining Co. v. Langworthy, 112 Okl. 280, 240 P. 627, 629.*"

BY THE COURT

**DAVID S. KENNEDY
CHIEF UNITED STATES BANKRUPTCY JUDGE**

DATE: April 5, 1994

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