Order Entered.

Patrick M. Flatley
United States Bankruptcy Judge
Dated: Friday, September 29, 2006 4:29:42 PM

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE:	)	
	)	
EUGENE E. BROWN and	)	CASE NO. 02-53538
DEBRA A. BROWN	)	
	)	
Debtors.	)	

MEMORANDUM OPINION

Ameriquest Mortgage Company ("Ameriquest") requests that this court stay the effect of its September 1, 2006 Memorandum Opinion and Order pending its appeal of the court's decision. The court's ruling permitted Eugene and Debra Brown (the "Debtors") to pay their Chapter 7 trustee, Martin P. Sheehan (the "Trustee"), enough money to satisfy all claims against their bankruptcy estate in full, along with all costs and expenses of administration, in return for transferring the estate's interest in the Debtors' own lawsuit against Ameriquest back to the Debtors themselves.

The court held a hearing on Ameriquest's Motion to Stay Pending Appeal in Wheeling, West Virginia, on September 20, 2006, at which time the court allowed the parties until September 26, 2006, to submit supplemental briefing. That briefing is now complete and Ameriquest's Motion is ripe for review. For the reasons stated herein, the court will deny the Motion.

I. BACKGROUND

The facts of this case are fully set forth in the court's Memorandum Opinion of September 1, 2006, and will not be repeated here. In short, the Debtors have a claim against Ameriquest arising out of Ameriquest's pre-petition and post-petition conduct that was not disclosed on their bankruptcy petition. When the Trustee learned about the asset, the Trustee reopend the Debtors' case, and then proposed to

transfer the estate's interest in the Debtors' lawsuit to the Debtors themselves in exchange for enough money to pay all allowed claims and costs of administration in their bankruptcy case. The court approved the Trustee's proposed course of action on September 1, 2006, over Ameriquest's objection.

On September 11, 2006, Ameriquest filed a notice of appeal of the court's September 1, 2006 ruling, and filed its motion for a stay of that decision pending appeal. On September 14, 2006, the court granted Ameriquest a temporary stay of its order pending an evidentiary court hearing, which the court held on September 20, 2006. All parties were afforded the opportunity to present evidence, testimony, and argument at the hearing.

II. DISCUSSION

To be entitled to a stay pending an appeal,[1] Ameriquest must meet the four-part test set forth by the Fourth Circuit: "a party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay." *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). *See also In re Convenience USA, Inc.*, 290 B.R. 558, 562 (Bankr. M.D.N.C. 2003) (same); *In re Symington*, 211 B.R. 520, 522 (Bankr. D. Md. 1997) (same). These factors are not to be rigidly applied, and require a determination based on the individual circumstances of a particular case. *E.g.*, *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987) ("Since the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules."). For example, if the irreparable harm in not granting a stay pending an appeal is great, then less weight is to be afforded to the movant's likelihood of success on the merits of an appeal.

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[1] Ordinarily, a stay of an action pending an appeal is governed by Fed. R. Civ. P. 62; however, the order that Ameriquest is appealing originated from a contested matter in the Debtors' bankruptcy case under Fed. R. Bankr. P. 9014, which makes Rule 62 inapplicable to the proceeding unless ordered otherwise by the court. Despite the fact that Rule 62 is not directly applicable to contested matters, bankruptcy courts have used the Rule 62 standards in determining whether a stay of an action should be granted while a matter is on appeal. 12 *Moore's Federal Practice – Civil*, § 62.32 (2006) ("Although it is not specifically stated, Rule 62 has been applied in bankruptcy cases as well."); *see also* Fed. R. Bankr.P. 8005 ("A motion for a stay of the judgment, order, or decree of a bankruptcy judge . . . must ordinarily be presented to the bankruptcy judge in the first instance.").

E.g., *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002) ("The strength of the likelihood of success on the merits that needs to be demonstrated is inversely proportional to the amount of irreparable harm that will be suffered if a stay does not issue. However, in order to justify a stay of the district court's ruling, the defendant must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted. In assigning weight to each factor, a court will seek to balance the harm to the movant against the harm to other parties."); *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991) ("As the balance tips away from the [movant on its showing of irreparable harm], a stronger showing on the merits is required."); *In re Shenandoah Realty Partners, L.P.*, 248 B.R. 505, 510 (W.D. Va. 2000); ("If the balance tips towards the movant, he need show only substantial and serious questions as to merits of the case. Where the harms are more evenly balanced, however, the movant must make a strong showing that success on the merits is likely.").

A. The Merits of the Appeal

Ameriquest asserts that this court's approval of Trustee's transfer of the estate's interest in the Debtors' litigation claim against Ameriquest, to the Debtors themselves, in exchange for enough money to satisfy all claims against the estate and costs of administration in full, is contrary to applicable law for the reasons it articulated in the underlying litigation.

"[O]n an application for a stay or injunction pending appeal, one of the considerations should be whether the petitioner has made a strong showing that he is likely to prevail on the merits of his appeal." *Miltenberger v. Chesapeake & O. R. Co.*, 450 F.2d 971, 974 (4th Cir. 1971). In making this determination, a court is in no way "decid[ing] any of the substantive issues which will be reached on appeal or express[ing] any view on the ultimate merits of the appeal." *Long v. Robinson*, 432 F.2d 977, 980 (4th Cir. 1970). In looking at the substantive merits of an appeal, a court " 'may properly stay [its] own orders when [it has] ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.' " *Peck v. Upshur County Bd. of Educ.*, 941 F. Supp. 1478, 1481 (N.D.W. Va. 1996) (citation omitted), *aff'd in part and rev'd in part*, 155 F.3d 274 (4th Cir. 1998).

In this case, the reasons for the court's decision to allow the Trustee to transfer the bankruptcy

estate's interest in the Debtors' lawsuit against Ameriquest to the Debtors themselves is set forth in its Memorandum Opinion of September 1, 2006, and will not be reiterated here. The court does not believe that Ameriquest is likely to prevail on the merits of its appeal, especially considering the serious questions regarding its standing to object to the Trustee's contemplated course of action, and the fact that its allowed claim in the Debtors' bankruptcy proceeding is to be fully satisfied.[2] Accordingly, this factor does not weigh in favor of Ameriquest.

B. Irreparable Injury to Movant and Other Parties

Ameriquest argues that it will suffer an irreparable harm unless the court grants its motion for a stay pending its appeal on the grounds that – once the Trustee collects the money from the Debtors in exchange for releasing the estate's interest in their lawsuit – the Trustee will then disburse that money to pay the allowed claims against the Debtors' bankruptcy estate. Likewise, Ameriquest asserts that statutory or equitable mootness may effectively deny it a right of appeal.

The Fourth Circuit has stated that a showing of irreparable harm resulting from the absence or imposition of a stay pending appeal is the most important factor in a court's analysis. *Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir. 1997) ("Under this hardship balancing test, the first two factors regarding the likelihood of irreparable harm to the plaintiff if denied and of harm to the defendant if granted are the most important."). Before balancing the harms between the movant and the non-movant, however, the movant must make a " 'clear showing' of irreparable injury absent preliminary injunctive relief" and only then is the court " 'to balance the 'likelihood' of harm to the' [non-movant] from the grant of such relief." *Direx Israel, Ltd. v. Breakthrough Medical Corp*., 952 F.2d 802, 812 (4th Cir. 1992) (citation omitted).

In this case, Ameriquest has not shown any injury to itself as a result of the implementation of the court's September 1, 2006 Order. Indeed, under the court's order, Ameriquest will be the recipient of

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[2] Ameriquest cites *Licensing by Paolo v. Sinatra (In re Gucci)*, 126 F.3d 380 (2nd Cir. 1997) for the proposition that a creditor to a bankruptcy proceeding has standing to appeal a sale order. *Gucci*, however, is not a case where the creditors of the estate were receiving 100% of their claims as a result of the sale. In fact, there are $202,987,606.74 in unsecured claims against the Paolo Gucci estate alone, Case No. 94-40614 (Bankr. S.D.N.Y.), and the sale in controversy was only for $3,300,000. Therefore, *Gucci* is inapposite.

approximately $12,718 should its motion be denied – if the stay is granted, then it will receive nothing until there is a final adjudication of this case. The only harm in this case asserted by Ameriquest as a result of the court's September 1, 2006 order is the harm resulting to the Debtors should the court's ruling be in error.[3] The Debtors, however, are not complaining of any injury. Indeed, Ameriquest's request for a stay may put the bankruptcy estate's interest in the Debtors' claim against Ameriquest in jeopardy.[4]

Apart from the merits of the court's September 1, 2006 order, Ameriquest argues that it will suffer an irreparable harm should the court not grant it a stay pending an appeal on the grounds of statutory or equitable mootness. *See, e.g.*, 11 U.S.C. § 363(m) ("The reversal or modification on appeal of an authoriz[ed sale] . . . does not affect the validity of a sale . . . to an entity that purchased the . . . such property in good faith . . . ."); *Pittsburgh Food & Bev. v. Ranallo*, 112 F.3d 645, 650 (3rd Cir. 1997) (" 'In the case of a bankruptcy sale, the failure to obtain a stay of the sale, pending appeal, allows the sale to be completed, thus preventing an appellate court from granting relief and thereby rendering the appeal moot.' ") (citation omitted); *In re Continental Airlines*, 91 F.3d 553, 558-59 (3rd Cir. 1996) (" '[A]n appeal should . . . be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable.' ") (citation omitted).

Without passing on the merits of statutory or equitable mootness argument, and without a finding that the transfer proposed by the Trustee falls under the moniker of a "sale" as opposed to some other type of transaction, the court notes that a possibility exists that Ameriquest's appeal could become moot. Before the appeal can become moot under § 363(b) and (m) of the Bankruptcy Code, however, the court must first determine that the the Trustee's transaction with the Debtors is a bankruptcy "sale" and that the Debtors are good faith purchasers. This court has not made either determination. In fact, the Trustee's

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[3] Ameriquest argues that the Debtors will suffer a harm because the Debtors will have borrowed money to pay the Trustee for what it alleges to be an illegal transaction. Once the Trustee receives the money, Ameriquest argues, he will disburse those funds to the Debtors' creditors.

[4] The Debtors' State court counsel represented that Ameriquest is seeking dismissal of the Debtors' State court counterclaim against it on the basis that the claim belongs to the bankruptcy estate – not the Debtors – and that the Debtors lack standing. The Debtors counsel further represented that should the State case be dismissed, then it is possible that the bankruptcy estate could lose its property interest in the counterclaim.

motion was entitled "Motion to Release Asset to Debtors In Consideration of Payment" and it nowhere references § 363 of the Bankruptcy Code.

Furthermore, for equitable mootness to apply, the transactions undertaken must be of sufficient complexity such that they cannot be unwound. *E.g., Lowenschuss v. Selnick (In re Lowenschuss)*, 171 F.3d 673, 678 (9th Cir. 1999) ("We disagree [that the appeal is equitably moot] because this case does not present transactions that are so complex or difficult to unwind that the doctrine of equitable mootness would apply."). Here, there are only eight allowed claims against the estate, totaling $25,398, to be paid by the Trustee. Ameriquest holds the largest claim ($12,718). Based on these facts, the possibility exists that either the statutory or equitable mootness doctrines articulated by Ameriquest will apply. Thus, the only harm to Ameriquest by a failure to stay the court's September 1, 2006 Order pending an appeal is that Ameriquest's appeal may be subject to a future claim of mootness. " '[A]n appeal being rendered moot does not itself constitute irreparable harm.' " *In re TWA*, No. 01-56, 2001 Bankr. LEXIS 723 at *28-29 (Bankr. D. Del. Mar. 27, 2001) (citation omitted). *See also In re Kmart Corp.*, No. 02-C-9257, 2002 U.S. Dist. LEXIS 24851 at *3-4 (N.D. Ill. Dec. 30, 2002) (same); *Virginia Dep't of Med. Assistance Servs. v. Shenandoah Realty Partners (In re Shenandoah Realty Partners)*, 248 B.R. 505, 510 (W.D. Va. 2000) (same); *In re Bd. of Dirs. of Multicanal S.A.*, No. 04-10280, 2005 Bankr. LEXIS 1865 at *6 (Bankr. S.D.N.Y. Jan. 6, 2005) (same). Therefore, the court's consideration of the injury to the moving and non-moving parties should the court not grant or deny a stay pending appeal does not weigh in favor of Ameriquest.

C. Public Interest

Finally, Ameriquest asserts that the public interest will be served if the court's decision is stayed pending Ameriquest's appeal on the basis that the public is best served by ensuring that a legally appropriate and final decision is reached before parties are permitted to engage in transactions that cannot be undone, and/or costs are incurred that cannot be recouped.

The appellate process is in place to ensure that a legally appropriate and final decision is reached. Moreover, the possible risk of disgorging payments made on allowed claims against the estate (including Ameriquest's claim) is not one that is borne by Ameriquest; it is borne by the Debtors, and they urge the court to deny Ameriquest's motion. The public interest favors a party paying his or her just debts, and the

expeditious administration of bankruptcy estates; the creditors in this case have already waited approximately four years for payment. *See* 11 U.S.C. § 704(a)(1) ("The trustee shall collect and reduce to money the property of the estate . . . and close such estate as expeditiously as is compatible with the best interests of the parties in interest. . . ."). Therefore, the public interest does not weigh in favor of granting Ameriquest's motion for a stay pending appeal.

III. CONCLUSION

Weighing all of the above factors, the court concludes that Ameriquest is not entitled to a stay pending its appeal. Therefore the court will deny the Motion.

A separate order will be entered pursuant to Fed. R. Bankr. P. 9021.