

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Proceedings
) Under Chapter 7
LARRY MANNS,)
) No. BK 92-50463
)
Debtor(s).)

ORDER

This matter is before the Court on debtor's motion for stay pending appeal. Debtor requests that the Court stay enforcement of its order converting debtor's chapter 11 case to chapter 7, stay the appointment of a chapter 7 or chapter 11 trustee,¹ and reinstate debtor as debtor in possession pending an appeal. Debtor further requests that the Court approve a supersedeas bond "in such amount as the court determines necessary to satisfy the requirements of a supersedeas bond pending appeal." Debtor's Motion for Stay Pending Appeal, ¶ 10.

In his motion, debtor contends that Rule 62(d) of the Federal Rules of Civil Procedure (incorporated into Bankruptcy Rule 7062) allows a stay as a matter of right upon the filing of a supersedeas bond and that "[u]pon application for a stay under FRCP 62(d), the function of the court is limited to determination of the appropriate amount of the supersedeas bond." Debtor's Motion for Stay Pending Appeal, ¶ 3. However, "[t]he so-called supersedeas stay, under which a court's role is delimited to passing on the amount of the bond,

¹ At the hearing held October 26, 1994 on the United States Trustee's motion to dismiss or convert, the Court, in addition to converting the case to chapter 7, directed that should the order of conversion be stayed, a trustee would be appointed in the chapter 11 proceeding to protect the estate's assets until a determination could be made as to whether the case should be converted.

typically operates only to stay the execution of a money judgment, or a judgment determining an interest in property." In re Gleasman, 111 B.R. 595, 599 (Bankr. Ct. W.D. Tex. 1990) (citing In re Swift Aire Lines, 21 B.R. 12, 14 (Bankr. 9th Cir. 1982)). Debtor's appeal is not from a money judgment and accordingly, there is no stay as of right pursuant to Rule 62(d).

The Court's authority to grant a stay pending appeal when a money judgment is not involved is governed by Bankruptcy Rule 8005, which provides in part:

A motion for stay of the judgment, order or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court and bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.

Bankr.R. 8005. Under Bankruptcy Rule 8005, the Court may use its discretion in deciding whether to grant debtor's request for a stay pending appeal. While "[d]iscretion is not unbridled ... the scope of appellate review of stay orders issued under this rule is limited to clear abuse of discretion." In re Gleasman, 111 B.R. at 599.

In order to obtain a stay from a bankruptcy court order, the movant must make the same showing normally required for a preliminary injunction. In re Hi-Toc Development Corp., 159 B.R. 691, 692 (S.D.N.Y. 1993). The following criteria must be considered: (1) whether movant has made a strong showing on the merits (or whether movant is likely to prevail on the merits of the appeal), (2) whether

the movant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) whether the public interest will be harmed if the stay is granted. Id. (citing Hilton v. Braunskill, 481 U.S. 770, 776 (1981)).

In the present case, debtor has failed to make a strong showing on the merits for the reasons previously outlined by the Court at the hearing held October 26, 1994 and in its written order entered November 3, 1994. Specifically, although the chapter 11 case had been pending for thirty months, the Court found that there was a continuing loss to or diminution of the estate, an inability to effectuate a plan, and unreasonable delay by the debtor that was prejudicial to creditors. Under 11 U.S.C. § 1112(b), any one of these factors justifies conversion to chapter 7.

As to the second element, debtor will not be irreparably injured if a stay is not granted. The newly appointed chapter 7 trustee will ensure that the assets of the estate are preserved for the benefit of creditors, and will, among other things, oversee the operation of debtor's business. In addition, because this appears to be a surplus estate, debtor will have an opportunity to object to any action by the trustee that he believes to be improvident.

Issuance of a stay would also substantially injure the other parties interested in the proceeding, namely the creditors, as it is in their best interest that this case proceed forward. In other words, a stay would unnecessarily prolong the bankruptcy proceeding with "no foreseeable offsetting gain" and thus injure creditors. In re Hi-Toc

Development Corp., 159 B.R. at 693.

Finally, granting a stay would be contrary to public interest. As previously found by the Court, the filing of the chapter 11 proceeding was nothing more than a "tactical maneuver" by debtor to litigate his divorce case in the forum of his choice. Clearly, use of chapter 11 for this purpose is improper and granting a stay of the Court's conversion order under these circumstances is certainly not in the public interest.

Accordingly, for the reasons stated, debtor's motion for stay pending appeal is DENIED.

DATED: December 23, 1994