UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re:	)	
	)	**JUDGE RICHARD L. SPEER**
Kenneth and Andrea Harchar	)	
	)	Case No. 07-3184
Debtor(s)	)	
	)	(Related Case: 98-13277)
Kenneth and Andrea Harchar	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	
United States of America	)	
	)	
Defendant(s)	)	

DECISION AND ORDER

On February 2, 2009, this Court entered an order finding that, based upon the procedural posture of this adversary proceeding, there did not appear to be any "forthcoming matters necessary for adjudication in this Court." (Doc. No. 213). On November 9, 2009, the Plaintiff, Andrea Peticca (a.k.a. Andrea Harchar), filed a Notice Of Appeal of this Order. (Doc. No. 215). Thereafter, on February 11, 2009, the Defendant, the United States of America, filed a Motion entitled:

> Motion for Final Judgment Implementing the Stipulation with Andrea Harchar Or, If the 2/2/2009 Order Was Intended to Be a Final Appealable Judgment, Then to Alter or Amend It (or, Alternatively, Request for Telephonic Status Conference)

(Doc. No. 218).

In its Motion, the Defendant asks "that the Court enter a judgment to the effect indicated in paragraph 16 [of the Motion], and that it grant such other relief as appears appropriate, or that it schedule a telephonic status conference." Paragraph 16 of the Defendant's Motion provides:

> FINAL ORDER AND JUDGMENT
> Upon the stipulation of plaintiff Andrea Harchar, now known as Andrea Lynn Peticca, and the defendant, United States of America (Doc. No. 205), and upon the prior dismissal of Kenneth Harchar, with prejudice, for failure to prosecute (Doc. No. 211), it is hereby
>
> ORDERED, ADJUDGED, AND DECREED that the claims of Andrea Lynn Peticca concerning her 2000-year income tax overpayment are dismissed with prejudice (subject to the right of appeal preserved in the stipulation) and the judgment denying her claims concerning the plaintiffs' 1999-year joint income tax overpayment is hereby made final, and the United States is entitled to recover costs in the sum of $5,623.00 against Kenneth Harchar and Andrea Harchar now known as Andrea Lynn Peticca (jointly and severally). The judgment against Andrea Lynn Peticca is stayed until any appeals she may prosecute are concluded or the time to file an appeal or further appeal expires without appeal.

The Defendant in its Motion also set for that the "Court should implement the stipulation between the United States and Andrea Peticca, but should also include a costs judgment against Kenneth Harchar in the same amount to which Andrea has stipulated . . . ."(Doc. No. 218, ¶ 13).

For the reasons now explained, the Court declines to Grant the relief request by the Defendant.

DISCUSSION

The stipulation filed by the Parties, and for which the Defendant now seeks the Court's approval, is simply an agreement between the Parties in the nature of a contract. *In re Martinez,* 393 B.R. 27, 32 (Bankr. D.Nev. 2008). Therefore, while the stipulation is binding upon the Parties, the Court is not under any duty to approve the stipulation. *In re Cuascut,* 91 B.R. 13, 16 (Bankr. E.D.Pa.1988). Instead, since a stipulation approved by a court effectively operates as a court order,

a court may, in its discretion, decline to approve a stipulation in any situation where it would not otherwise enter an order in the form submitted by the parties. *In re Peck*, 155 B.R. 301, 308 (Bankr. D.Conn.1993).

In this matter, the Court, having thoroughly reviewed the terms of the Parties' stipulation, has not and continues not to be inclined to approve the agreement, particularly those terms of the stipulation regarding 'finality' which is an issue plainly within the purview of an appellate court. 28 U.S.C. § 158.

Even this issue aside, the Plaintiff has filed a timely notice of appeal regarding this Court's Order wherein it was held that there did not remain any further matters for adjudication. This Order expressly took into account that the Parties had entered into a stipulation regarding the Defendant's costs and the Plaintiffs' 2000 year tax refund, and that this Court had entered a decision and order regarding the Plaintiffs' 1999 year tax refund.

When a notice of appeal is filed, this Court loses jurisdiction over any matters involved in the appeal on the basis that a bankruptcy court and an appellate court cannot have concurrent jurisdiction over the subject matter of the appeal. *See*, *e.g.*, *In re Overmeyer*, 53 B.R. 952, 955 (Bankr. S.D.N.Y. 1985). A limited exception is provided where a motion is filed under Bankruptcy 9023 to alter or amend the judgment. FED.R.BANKR.P. 8002(b). No such motion, however, exists with respect to the Parties' stipulation regarding the Plaintiffs' 2000 year tax refund, and this Court's decision and order regarding the Plaintiffs' 1999 tax refund. Accordingly, this Court is without jurisdiction to enter any relief sought by the Defendant regarding these matters.

As to the assessment of costs, the Defendant does set forth in its Motion that it "hereby moves, pursuant to Fed.R.Bankr.P. 9023, to alter or amend it to include a judgment for costs as set forth . . . . in accordance with the stipulation." To the extent that jurisdiction does exist to entertain this motion, the Court declines to grant relief. The Court's power to assess costs is discretionary. *See* FED.R.CIV.P. 54(d)(1) (the rule uses the word "should" not "shall"); *Clark v. Universal Builders*,

Inc., 501 F.2d 324 (7th Cir. 1974), *certiorari denied* 95 S.Ct. 657, 419 U.S. 1070, 42 L.Ed.2d 666. (court has discretionary power to assess costs). And given the procedural posturing of the Parties throughout the course of this proceeding, an award of costs in the Defendant's favor would not be equitable. *See, e.g., Friedman v. Ganassi*, 853 F.2d 207, 211 (3rd Cir.1988) (a prevailing party generally is entitled to an award of costs unless the award would be inequitable.)

A final note. Whether, as the Defendant contends, the Plaintiff's appeal is premature is not a question for this Court to decide, but rather should be decided by an appellate court. The decisions cited by the Defendant, *Riggs v. Scrivner*, 927 F.2d 1146, 1148 (10th Cir. 1991) *and United States v. Dennis*, 902 F.2d 591 (7th Cir. 1990), do nothing to advance the Defendant's theory that the Plaintiff's appeal is premature. Rather, these decisions simply reiterate the rule that, if an appeal is later found by the appellate court to indeed be premature, any order issued by the trial court after the notice of appeal was filed may stand.

In sum, the Court declines the Defendant's invitation to approve the Parties' stipulation. The Court also declines to alter its decision denying the Defendant an award of costs. Therefore, unless a court orders otherwise, this Court finds that, pursuant to the Notice of Appeal filed by the Plaintiff on November 9, 2009, this Court has been divested of all jurisdiction in this adversary proceeding. As such, the Court does not find that a telephonic status conference, as requested by the Defendant, would be helpful.

Accordingly, it is

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ORDERED that Motion filed by the Defendant, the United States of America, entitled "Motion for Final Judgment Implementing the Stipulation with Andrea Harchar Or, If the 2/2/2009 Order Was Intended to Be a Final Appealable Judgment, Then to Alter or Amend It (or, Alternatively, Request for Telephonic Status Conference)," be, and is hereby, DENIED.

Dated: February 13, 2009

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Richard L. Speer
United States
Bankruptcy Judge