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FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED

97 MAY -5 PM 3:19

NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re: ) Case No. 95-14778  
)  
MELVIN FINCH and ) Adversary Proceeding No. 96-1165  
BARBARA FINCH, )  
) Chapter 11  
Debtors. )  
)  
) Judge Pat E. Morgenstern-Clarren  
COMMERCE EXCHANGE BANK, )  
)  
Plaintiff, )  
)  
v. ) **ORDER**  
)  
ROBERT FINCH, et al., )  
)  
Defendants. )

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In re: ) Case No. 95-14779  
)  
JOSEPH WILLIAMS and ) Adversary Proceeding No. 96-1162  
ELSIE WILLIAMS, )  
) Chapter 11  
Debtors. )  
)  
) Judge Pat E. Morgenstern-Clarren  
COMMERCE EXCHANGE BANK, )  
)  
Plaintiff, )  
)  
v. ) **ORDER**  
)  
ROBERT FINCH, et al., )  
)  
Defendants. )

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This matter is before the Court on a Motion for Stay of Proceedings filed by the Defendant-Debtors in both of these Adversary Proceedings (“Motions”), which Motions are opposed by Commerce Exchange Bank and the United States Trustee.<sup>1</sup> (Adv. Pro. #96-1165 Docket 62, 68; and Adv. Pro. #96-1162 Docket 59, 65). Defendant-Debtors filed responses to the Commerce opposition (Adv. Pro. No. 96-1162 Docket 67; Adv. Pro. 96-1165 Docket 70). Defendant-Debtors also filed notices indicating their intention to have the Bankruptcy Appellate Panel first consider their requests for stay; however, there is no record that this relief has in fact been requested. (Adv. Pro. #96-1165 Docket 69; and Adv. Pro. #96-1162 Docket 66). Therefore, in order to clarify the record in these cases, this Court is addressing the Motions currently before it. For the reasons set forth below, the Motions for Stay are denied.

Debtors filed the captioned Chapter 11 cases on October 27, 1995. Debtors in each of these cases, and in the related Robert Finch case, own an undivided one-third interest in real estate located at Leuer Avenue, Cleveland, Ohio (the “Property”) which they were authorized to sell to E.Z. Building Components Corp. by Orders entered on April 29, 1996. (Case No. 95-14478 Docket 25, Case No. 95-14779 Docket 25, Case No. 95-14780 Docket 28). That sale still has not closed. On May 8, 1996, Commerce Exchange Bank (“Commerce”) filed these Adversary Proceedings requesting a determination of the validity, priority and extent of liens and

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<sup>1</sup> In a related case, Defendant- Debtor Robert Finch has requested identical relief from this Court and from the Bankruptcy Appellate Panel. (Case No. 95-14780, Adv Pro. No. 96-1164 Docket 62, 63). This Court’s Order in that case asked for clarification regarding those requests. Debtor’s Notice filed in response indicates his intention to have the Bankruptcy Appellate Panel first consider his request for stay. (Case No. 95-14780, Adv. Pro. No. 96-1164 Docket 71). The Court has, therefore, filed a separate Order in the *Finch* case denying the Motion filed in this Court as moot.

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interests in the Property. Defendant-Debtors filed Second Amended Answers and Counterclaims. The Counterclaims requested: (1) the invocation of marshaling to compel Commerce to satisfy its claims from property other than the Property and an order requiring Commerce to exhaust its claims against M & R Mechanical Contractors, Inc. ("M & R"), a closely held corporation owned by Debtors Robert Finch, Joseph Williams and Melvin Finch; and (2) the credit of certain payments made by M & R during its Chapter 11 case. The parties agreed to a schedule for the filing of motions for summary judgment and agreed that hearing on confirmation of Debtors' Plans should not go forward pending determination on summary judgment because the marshaling issue with respect to Commerce was the same in both contexts.

Commerce filed Motions requesting Summary Judgment on its Complaints and on Debtors' Counterclaims. (Adv. Pro. #96-1165 Docket 36; Adv. Pro. # 96-1162 Docket 33). Additionally, Debtors filed Partial Motions for Summary Judgment requesting judgment on the issues of marshaling and the propriety of an award of costs and fees to Commerce under 11 U.S.C. § 506(b). (Adv. Pro. #96-1165 Docket 37; Adv. Pro. # 96-1162 Docket 34). The Judgments of March 20, 1997 granted Commerce summary judgment on the First and Second Counterclaims and denied judgment on the Complaints. On the First Counterclaim, it was determined that marshaling as proposed by the Debtors is not available and that there is no basis for requiring Commerce to exhaust its remedies against M & R. On the Second Counterclaim, it was determined that there was no legal or factual basis for Debtors' request regarding the M & R payments. Judgment on the Complaints was denied based on the fact that the sale of the Property has not closed. Debtors' Motions were also denied. Debtors have appealed the

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judgments. (Adv. Pro. #96-1165 Docket 54; Adv. Pro. # 96-1162 Docket 51). Debtors now request that this Court issue a stay of proceedings.

**DISCUSSION**

The Motions request a stay of the Adversary Proceedings and, more extraordinarily, a stay of the Chapter 11 cases pending determination on the appeals. Commerce opposes the entire stay request. The United States Trustee opposes a stay in the Chapter 11 cases, but takes no position with respect to a stay in the Adversary Proceedings.

Bankruptcy Rule 8005<sup>2</sup> provides:

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 the 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 other appropriate order during the pendency of the appeal on such terms as will protect the rights of all parties in interest . . . .

The standards applicable to preliminary injunctive relief are appropriately considered in determining this request. *In re Dial Industries, Inc.*, 137 B.R. 247 (Bankr. N.D. Ohio 1992).

The factors to be balanced in this determination are:

- (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal;
- (2) the likelihood the party seeking the stay will be irreparably harmed absent a stay;

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<sup>2</sup> The Motions reference Bankruptcy Rule 8005 and 7062(d). Bankruptcy Rule 7062 provides for a stay on appeal by giving a supersedeas bond. Despite the reference to Rule 7062, Debtors have not provided or offered a bond.

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- (3) the prospect that others will be harmed if the court grants the stay; and
- (4) the public interest in granting the stay.

*Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Movants have the burden of establishing that they are entitled to the requested relief. *Griepentrog*. Debtors' Motions fail to address the relevant considerations, although they do make some reference to the legal standards in their Replies. Considering all arguments made by Debtors, they have failed to carry their burden of establishing a basis for the requested relief.

**Likelihood of Prevailing on the Appeal**

Debtors fail to address their likelihood of success on appeal and have failed to meet this substantive requirement for the imposition of a stay. Their request is based entirely on their disagreement with the Court's ruling regarding marshaling and a reference to the appeals having been filed. No factual or legal support is offered to establish that they are likely to prevail on those appeals.

**Irreparable Injury**

Debtors contend that they will be harmed and prejudiced because they will be required to pursue their appeals and to continue dealing with issues in their Chapter 11 cases. Specifically, they refer to pending motions for dismissal and conversion filed by Commerce and the United States Trustee in the Chapter 11 cases. Additionally, they request maintenance of the status quo in the Adversary Proceedings to protect their right of appeal. Injury under this factor must be evaluated in terms of its substantiality, the likelihood of its occurrence, and the proof provided by the movant. *Griepentrog*. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of stay, are not enough." *Griepentrog* at 154.

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Debtors essentially argue that they will be inconvenienced by maintaining the appeal and their positions in the Adversary Proceedings and Chapter 11 cases. Mere inconvenience is an insufficient basis for imposition of a stay. Moreover, there is no basis for concluding that Debtors' right of appeal will be impinged by further proceedings in the Adversary Proceedings. The only issue remaining in the Adversary Proceedings is whether Commerce's Motion to Dismiss its Complaint should be granted. Regardless of how that Motion is decided, the resolution will not cause irreparable harm to Debtors. Debtors have, therefore, cited nothing to sustain their burden of establishing irreparable harm in the absence of a stay.

**Harm to Others**

Debtors do not address the issue of harm to others insofar as they are requesting a stay of their Chapter 11 cases. They maintain, however that Commerce will not be prejudiced by a stay of the adversary proceedings. Debtor has not substantiated a lack of harm to others in either context. Moreover, it is clear that the requested stay encompassing both the Adversary Proceedings and the Bankruptcy Cases would entail substantial harm to others. Debtors filed their Chapter 11 cases on October 27, 1995. Creditors in these cases have been waiting over a year and a half for the confirmation of a plan and to receive a distribution on their claims. If a stay is granted in the Chapter 11 cases, this wait will be extended indefinitely. Moreover, the request for a stay is erroneously based on the premise that the success or failure of Debtors' reorganizations is entirely bound to the issue of marshaling. It is not. Motions have been filed in these cases requesting dismissal or conversion which raise issues regarding the viability of the sale of the Property and the ability of the Debtors to fund plans of reorganization, regardless of whether the liens on the Property are marshaled. While Debtors' failure to prevail on the issue of

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marshaling may be referred to and considered in determining these motions, with full cognizance of the pending appeals, there is no basis to stay that consideration and doing so would be detrimental to parties in interest.

**Public Interest**

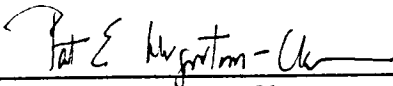
Debtors addressed this factor only in their Reply Brief. They state that a party who files bankruptcy to reorganize and pay his debts should be protected. This general statement is insufficient to meet Debtors' burden of proving that the public interest favors a stay. Further, it would appear that to delay these cases in the absence of a legitimate or compelling reason would not be in the public interest.

**CONCLUSION**

Taking into consideration all of the relevant factors, the Defendant-Debtors' Motions for Stay of Proceedings are denied.

IT IS SO ORDERED.

Date: 5 May 1997

  
\_\_\_\_\_  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by telecopy on: Ronald Henderson, Esq.  
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By: Joyce L. Gordon, Secretary

Date: 5/5/97

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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

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NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re: ) Case No. 95-14780  
)  
ROBERT FINCH, ) Chapter 11  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
) **JUDGMENT**

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED that the Motion of the United States Trustee for Conversion or Dismissal and the Motion of Commerce Exchange Bank for Conversion are granted and the Debtor's Opposition to them is overruled. This case is, therefore, converted to a case under Chapter 7 of the United States Bankruptcy Code.

Date: 19 May 1997

Pat E. Morgenstern-Clarren  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Ronald E. Henderson, Esq.  
Steve Hobt, Esq.  
Amy Leizman, Esq.

By: Joyce L. Gordon, Secretary  
Date: 5/19/97



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UNITED STATES BANKRUPTCY COURT  
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NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re: ) Case No. 95-14778  
)  
MELVIN FINCH, ) Chapter 11  
BARBARA FINCH, )  
) Judge Pat E. Morgenstern-Clarren  
Debtors. )  
) **JUDGMENT**

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED that the Motion of the United States Trustee for Conversion or Dismissal and the Motion of Commerce Exchange Bank for Conversion are granted and the Debtors' Opposition to them is overruled. This case is, therefore, converted to a case under Chapter 7 of the United States Bankruptcy Code.

Date: 19 May 1997

Pat E. Morgenstern-Clarren  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Ronald E. Henderson, Esq.  
Steve Hobt, Esq.  
Amy Leizman, Esq.

By: Joyce L. Gordon, Secretary

Date: 5/19/97