

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
2 APR 19 2002
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:) Case No. 00-10145
)
THE V COMPANIES and) Chapter 7
V-S ARCHITECTS, INC.,) Jointly Administered
)
Debtors.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

On March 29, 2002, the Debtors filed a Motion for Stay pending appeal of the judgment converting these cases from Chapter 11 reorganizations to Chapter 7 liquidations. (Docket 444). The Motion is opposed by the United States Trustee, the interim Chapter 7 Trustee, and creditor the Board of County Commissioners of Jefferson County, Ohio (sometimes collectively "Opponents"). (Docket 449, 450, 451). A hearing was held on April 11, 2002, at which time the parties provided additional arguments in support of their positions. The Court has considered all arguments made in the briefs and at the hearing, as supplemented by the Debtors on April 16, 2002. (Docket 462).

FACTS

These cases began as reorganization cases under Chapter 11 of the Bankruptcy Code. About one and a half years postpetition, the United States Trustee and the Board of County Commissioners of Jefferson County, Ohio (the "Board") moved to convert the cases to Chapter 7 liquidation cases. The Debtors contested the motion. Based on the evidence presented during five days of trial, the Court concluded that the cases should be converted to Chapter 7 for multiple reasons, standing alone and collectively, including:

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

unreasonable delay based on the Debtors' failure to provide meaningful financial information two years post-filing, the filing of materially inaccurate operating reports, and the Debtors' failure to meet their fiduciary obligations

In re The V Companies and V-S Architects, Inc., 274 B.R. 721, 740 (Bankr. N.D. Ohio 2002).

The Court entered a Judgment converting the cases on March 8, 2002 (the "Judgment").

(Docket 429). The Debtors filed a timely appeal. On March 29, 2002, the Debtors filed a

Motion for Stay of Judgment pending appeal. (Docket 444).

DISCUSSION

Federal Rule of Bankruptcy Procedure 8005 provides in relevant part:

A motion for a stay of the judgment . . . of a bankruptcy judge . . . pending appeal must ordinarily be presented to the bankruptcy judge in the first instance . . . [T]he 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

The factors to be considered in evaluating a motion to stay a judgment pending appeal 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;
- (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). "These factors are not prerequisites that must be met, but are interrelated

considerations that must be balanced together." *Id.*

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

Likelihood of Prevailing on the Merits on Appeal

The Movants did not address this factor in their Motion. They did, however, argue at the hearing that they are likely to prevail on the merits on appeal because of erroneous evidentiary rulings which resulted in Paul V. Voinovich¹ being questioned regarding two exhibits that he should not have had to answer questions about and the Court's findings about the credibility of the witnesses. Although the Debtors did not identify the exhibits by title or exhibit number at the hearing, they described one as being a set of Vocon documents and the other as documents from the Florida Secretary of State.² The Debtors contend that permitting Paul V. Voinovich to be questioned about these documents when he was not familiar with them made him look foolish and wrongly impacted on his credibility.

The combined response of the Opponents was that: (1) these documents related to relevant issues, given Paul V. Voinovich's relationship to the Debtors; (2) the Judgment is based on several independent grounds that go beyond this issue; (3) to the extent that the challenge is to findings of fact, the Judgment includes detailed findings based on five days of testimony which are reviewed under the limited standard set out in Federal Rule of Civil Procedure 52(a) (made applicable here by Bankruptcy Rule 7052); and (4) to the extent that the challenge is to credibility findings, it is the province of the trial court to determine credibility. The Opponents

¹ Paul V. Voinovich is the president, sole shareholder, and a director of Debtor The V Companies. He is also the vice president, secretary, and treasurer of Debtor V-S Architects, Inc. ("VS"). All shares of VS stock are held in trust for Paul V. Voinovich.

² The Debtors' post-hearing Supplement identifies the documents as the Board's Exhibits 16 and 22. Exhibit 16 is election results from the November 5, 1996 general election in Jefferson County. The Board argued at trial that the election results showed motivation for the Debtors to take certain actions, but ultimately the Court did not make any findings with respect to this argument. Exhibit 22 is a series of documents, including agreements between the Debtors and Vocon, invoices between the Debtors and Vocon, and checks payable to the Debtors.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

acknowledge that there are some cases that are “close calls,” but contend that this is not one of them.

A party requesting a stay must “demonstrate more than the mere ‘possibility’ of success on the merits.” *Griepentrog*, 995 F.2d at 153. At a minimum, “serious questions going to the merits” must be shown. *Id.* at 154. Having considered all arguments, the Court finds that the alleged errors identified by the Debtors do not raise a serious question going to the merits of the decision for the reasons stated by the Opponents.³ This factor does not support granting a stay.

Irreparable Injury

The Debtors assert that they will be irreparably harmed if the case is converted to a Chapter 7 pending appeal because the Chapter 7 Trustee:

. . . has indicated that he does not intend to operate and will not perform the various contracts entered into by the Debtors as Debtors in Possession. The result of such decisions will be the loss of a valuable asset, and the generation of substantial and presently unquantifiable damage claims by the parties who contracted with the Debtors in Possession.

(Motion ¶ 2). The Debtors argue that their operating reports show that they are making a profit and could continue to do so if permitted to perform the existing contracts. Although the Debtors described the contracts at the hearing as being “worth \$3 million,” they did not identify the contracts, the nature of the performance that they would render or the anticipated amount of

³ At the hearing, the Debtors also referred to their contested Motion in Limine. The Court is not clear whether the Debtors were suggesting that it was reversible error not to have ruled on the motion before trial. To the extent that this is part of the Debtors’ argument, the Court will evaluate it. It is an accepted practice in a bench trial to reserve ruling on disputed documents until they are actually offered into evidence at trial so that the court can consider a party’s arguments in context, particularly when a challenge is to relevance. The Debtors here had the opportunity to raise their evidentiary objections during the trial and they did so. The Court finds that this issue does not support the Debtors’ argument that they are likely to prevail on the merits of the appeal.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

profit that performance would generate. The Debtors argue further that their appeal may become moot without a stay. They suggested at the hearing on the motion to stay pending appeal that they might also pursue an orderly liquidation if allowed to remain in operation pending appeal.

The Opponents collectively respond that:

- (1) The Debtors are not really making an argument that *they* will suffer irreparable harm. They will not be liable for any damage claims generated by the contract situation; instead, any damage claim is made against the Chapter 7 estate, a separate legal entity. In a Chapter 7 case, the Chapter 7 Trustee is responsible for acting in the best interests of the estate. The interim Chapter 7 Trustee in this case is in active discussions with Paul V. Voinovich concerning his interest in buying the contracts from the Chapter 7 estate, which sale would bring funds into the estate. Far from being indifferent to this asset, the Trustee is focusing on it.
- (2) The potential harm identified is that there may be claims brought against the Chapter 7 estate if the contracts are not assumed and assigned and/or performed. This is not likely to happen, in part because the Trustee has sixty days from the date of the conversion in which to assume or reject executory contracts, and that date is in the future. Also, monetary harm such as these theoretical claims generally does not rise to the level of irreparable harm.
- (3) Performing the contracts will not necessarily benefit the estate even if they result in a profit because Independence Bank claims a security interest in any proceeds that may be generated by such performance. The only benefit from performing the contracts is to Independence Bank and Paul V. Voinovich as the individual who guaranteed the Debtors' obligations to that bank. Additionally, performance by the Debtors may actually harm the estate if, as in the past, performance leads to claims that the contracts were not properly carried out.

Injury under this factor must be evaluated in terms of its substantiality, the likelihood of its occurrence, and the adequacy of proof provided by the movant. *Griepentrog*, 954 F.2d at 154. In this case, the Debtors have not shown that they will suffer harm under the scenario they paint. The potential damage claim arising out of a potential breach of contract is a claim that would be brought against the Chapter 7 estate, not against the Debtors. It is not unusual for a Chapter 11

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

case to be converted to a Chapter 7. When that happens, there are often contract issues that must be addressed. The Chapter 7 Trustee is responsible for evaluating these assets and determining how best to deal with them. In this case, the interim Chapter 7 Trustee is timely moving forward with that responsibility and the Debtors did not show that the Trustee's approach to these assets is improper or questionable.

Additionally, the Debtors argue that they will be irreparably harmed if contracts are not performed because they will be deprived of the profits that performance will generate. They did not, however, show that performing these contracts would generate a profit. The Debtors point to their operating reports which on their face show a profit. That is not proof that carrying out additional contracts will generate a profit. Further, this Court has already found that the books and records underlying the operating reports are not an accurate statement of the Debtors' finances. The Debtors also contend that permitting them to operate will leave open the possibility that they will themselves conduct an orderly liquidation. If the Debtors wished to treat their Chapter 11's as liquidating 11's rather than reorganizing 11's, they had ample opportunity to do so before the cases were converted on motion of the United States Trustee and the Board. They did not. Finally, the Debtors did not show that any harm is irreparable, as the potential harm is monetary.

On balance, consideration of this factor does not support granting a stay.

Harm to Others and the Public Interest

The Debtors' Motion does not address these two factors. During the hearing, the Debtors argued that it did not harm anyone for the Debtors to operate these businesses in the months leading up to the conversion Judgment. Consequently, the Debtors believe it will not harm anyone for them to be put back in control.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

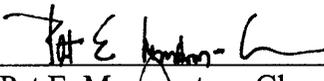
The Opponents disagree, pointing to the findings, among others, that the Debtors breached their fiduciary duties and filed materially inaccurate operating reports. In other words, they argue that the Debtors *did* cause harm before the Judgment was issued and it would be contrary to the public interest to give them the opportunity to do so again.⁴ Having observed the trial witnesses and considered the extensive documentation both in the context of the trial testimony and on this post-trial review, the Court finds that it would clearly be contrary to the public interest to, in effect, undo the conversion and permit the Debtors to operate these businesses while the appeal is pending.

On balance of all of the arguments, this factor does not support granting a stay.

CONCLUSION

After considering and balancing all of the relevant factors, the Court finds that the Motion for Stay does not state good cause and is denied. A separate Order will be entered reflecting this decision.

Date: 19 April 2002



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Lenore Kleinman, Esq.
Marvin Sicherman, Esq.
Harry Wright, IV, Esq.
Alan Lepene, Esq.

By: Joyce L. Gordon Secretary

Date: 4/19/02

⁴ The Board also presented an affidavit from the interim Chapter 7 Trustee stating that when he went to the Debtors' business premises to take possession of the books and records, he found several bags of shredded documents. The Board argues that this shows wrongdoing on the part of management. The Court finds this allegation to be irrelevant, as people shred documents for a number of reasons and there was no proof that this activity was improper.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
02 JUL 25 PM 3:40

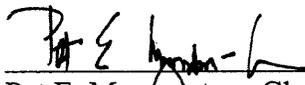
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 00-10145
)
THE V COMPANIES and) Chapter 7
V-S ARCHITECTS, INC.,) Jointly Administered
)
Debtors.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

For the reasons stated in the Memorandum of Opinion filed this same date, the motion of Virgil E. Brown, Jr., Chapter 7 Trustee, to assume and assign executory contracts to Mayfield Engineering and Construction Management, Inc., sell assets to Mayfield free and clear of liens and encumbrances, and enter into a compromise with Independence Bank is granted. (Docket 485, 492). The objection of MWH Americas, Inc. is overruled. (Docket 493).

IT IS SO ORDERED.

Date: 25 July 2002


Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Alan Lepene, Esq.
Alexander Jurczenko, Esq.
Harry Wright, IV, Esq.
Harry Greenfield, Esq.
Bruce Rinker, Esq.
Lenore Kleinman, Esq.

By: Joyce L. Gordon, Secretary
Date: 7/25/02