

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:) Case No. 04-21670
)
MARJORIE J. JUSCZAK,) Chapter 13
)
Debtor.) Judge Arthur I. Harris

ORDER DENYING MOTION FOR STAY PENDING APPEAL (DOCKET #58)

On September 13, 2004, the debtor, Marjorie J. Juszczak, filed a petition under Chapter 13 of the Bankruptcy Code. On November 5, 2004, Juszczak filed a motion for voluntary dismissal of her Chapter 13 case pursuant to 11 U.S.C. § 1307(b) (Docket #44). On November 9, 2004, this Court granted Juszczak's motion for voluntary dismissal, which resulted in the imposition of a 180-day filing bar pursuant to 11 U.S.C. § 109(g)(2) (Docket #47). The Court also retained jurisdiction "to consider sanctions that have been or may be requested by a party in interest or that the Court may seek to impose on its own initiative." *Id.* On November 19, 2004, the debtor filed a notice of appeal of the order dismissing her case and retaining jurisdiction for possible sanctions (Docket #55), and on November 22, 2004, the debtor filed a motion for a stay pending appeal (Docket #58).¹ For the reasons that follow, the debtor's motion is denied.

¹ On November 22, 2004, the debtor also filed a motion for disqualification and recusal of the undersigned judge (Docket #57). The Court's denial of that motion is the subject of a separate order.

DISCUSSION

Motion for Stay Pending Appeal Should Be Presented First to Bankruptcy Judge

Bankruptcy Rule 8005 provides in pertinent part:

A motion for a 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.

Although the debtor seeks to present her motion for a stay pending appeal directly to the district court, such action is inconsistent with Rule 8005. As a leading commentator has stated in reference to Rule 8 of the Federal Rules of Appellate Procedure, the Rule from which Bankruptcy Rule 8005 was adapted:

The cardinal principle with respect to stay applications under Rule 8 is that the relief must first be sought in the lower court. . . . If the district court denies a stay, the proper procedure is to apply to the court of appeals for a stay rather than appeal the district court order.

16A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE:

JURISDICTION 3D § 3954 at 295 (1999). Thus, it is appropriate for this Court to address, in the first instance, the motion for a stay pending appeal. Should the Court deny or refuse to rule on the motion, the debtor remains free to seek a stay from the district court.

Standard for Determining Whether to Issue a Stay Pending Appeal

Under Bankruptcy Rule 8005, the factors to be considered by a court in

determining whether a stay or injunction pending appeal should issue are:

- (1) whether the applicant has demonstrated a likelihood of success on the merits;
- (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other interested parties; and
- (4) where the public interest lies. *See Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *In re Dow Corning, Corp.*, 255 B.R. 445, 542 (E.D. Mich. 2000); *In re Best Reception Systems, Inc.*, 219 B.R. 988, 992-93 (Bankr. E.D. Tenn. 1998) (applying Rule 8005 and *Griepentrog* standard); *In re Abbo*, 191 B.R. 680, 682 (Bankr. N.D. Ohio 1996) (Krasniewski, J.) (same).

Application of Standard to Debtor's Motion

In weighing these factors against the circumstances of this case, the Court first concludes that the debtor's appeal has little likelihood of success on the merits. For example, the debtor's appeal may well constitute an interlocutory appeal for which leave to appeal must be obtained from the district court under Bankruptcy Rule 8003. In addition, the debtor's suggestion that this Court somehow lacks jurisdiction to consider sanctions against her and her former counsel following the voluntary dismissal of her case under 11 U.S.C. § 1307(b) is inconsistent with established case law. *See, e.g., Javens v. City of Hazel Park (In re Javens)*, 107

F.3d 359, 364 n.2 (6th Cir. 1997) (“Since dismissal of an underlying bankruptcy case does not automatically strip a federal court of residual jurisdiction to dispose of matters after the underlying bankruptcy case has been dismissed, exercise of such jurisdiction is left to the sound discretion of the trial court.”), quoting *In re Lawson*, 156 B.R. 43, 45 (B.A.P. 9th Cir. 1993). See also *In re Donohoo*, 243 B.R. 536 (Bankr. M.D. Fla. 1999); *Skaggs v. Fifth Third Bank of N. Ky. (In re Skaggs)*, 183 B.R. 129, 130-31 (Bankr. E.D. Ky. 1995) (“[I]ntentional wrongful conduct should not be excused merely because the underlying bankruptcy case has been dismissed.”).

While the Court is aware of a split among the circuit courts as to whether bankruptcy courts, as “unit[s] of the district court” under 28 U.S.C. § 151, constitute “a court of the United States” within the meaning of that 28 U.S.C. § 1927, compare *In re Cohoes Indus. Terminal, Inc.*, 931 F.2d 222, 230 (2d Cir. 1991) (“bankruptcy court may impose sanctions pursuant to 28 U.S.C. § 1927”), with *In re Courtesy Inns, Ltd.*, 40 F.3d 1084, 1086 (bankruptcy court may not impose sanctions under § 1927), the possible use of § 1927 as one of several bases for imposing sanctions hardly constitutes a valid reason for denying the Court’s jurisdiction to consider sanctions, especially given the absence of controlling precedent in this circuit. Indeed, one of the cases cited by the debtor for the

proposition that § 1927 is not available to bankruptcy courts, *In re DeVille*, 361 F.3d 539 (9th Cir. 2004), expressly affirmed the imposition of sanctions under the bankruptcy court's inherent powers. "[G]iven the inadequacy of rules and statutes to sanction [the Chapter 13 debtor's and his counsel's] misconduct, the bankruptcy court correctly relied upon its inherent power as a sanctioning tool." 361 F.3d at 551. Thus, the debtor is unlikely to prevail on appeal.

Furthermore, the debtor has not presented any evidence that she will be irreparably harmed absent the granting of a stay. The debtor and debtor's counsel will simply be obligated to defend the pending motions for sanctions and any Court-initiated consideration of sanctions. Having availed herself of the Court's jurisdiction to obtain the protections and benefits of the Bankruptcy Code, there should be minimal harm in being required to defend such actions and to participate in the court's determination of whether sanctions are warranted.

Nor do the other factors to be considered under Bankruptcy Rule 8005 – potential harm to other parties and the public interest – favor the granting of a stay of this Court's Order pending the debtor's appeal. If Charter One is again unable to complete a foreclosure sale within the current 180-day filing bar imposed under 11 U.S.C. § 109(g), there is the possibility of yet another bankruptcy filing by the debtor, absent the in rem relief that is the subject of a pending motion for sanctions.

To the extent that the Court finds that imposition of in rem relief is warranted, a stay pending appeal could harm both Charter One and the second mortgage holder.

In addition, should the court stay any hearing on sanctions pending an interlocutory appeal, the reviewing court would be faced with the distinct possibility of piecemeal appeals. For example, if this Court, after awaiting resolution of the first appeal, were ultimately permitted to address possible sanctions, and if any party were to appeal the Court's decision to impose or not impose sanctions, the district court would be faced with hearing this matter twice.

Finally, to the extent that this motion for a stay pending appeal is intended as a delay of the Court's inherent authority and its authority under Section 105 to take any action necessary "to enforce or implement court orders or rules, or to prevent an abuse of process," such a stay would go against the public interest.

CONCLUSION

For the foregoing reasons, the debtor's motion for a stay pending appeal (Docket #58) is denied.

IT IS SO ORDERED.

/s/ Arthur I. Harris 11/24/2004
Arthur I. Harris
United States Bankruptcy Judge