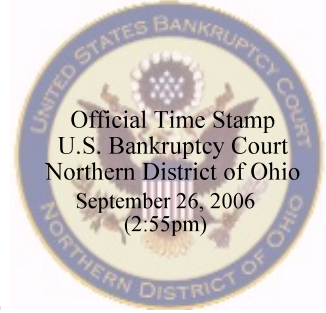


UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:)	Case No. 05-11873
)	
STEVEN H. KERR,)	Chapter 7
)	
Debtor.)	Judge Pat E. Morgenstern-Clarren
_____)	
)	
SHOWE MANAGEMENT CORPORATION,)	Adversary Proceeding No. 06-1298
dba LAKESHORE TOWERS,)	
)	
Plaintiff,)	
)	<u>MEMORANDUM OF OPINION</u>
v.)	<u>AND ORDER</u>
)	
STEVEN H. KERR,)	
)	
Defendant.)	

This court denied the defendant-debtor’s motion to dismiss the complaint in this adversary proceeding.¹ The debtor appealed from that decision and now moves for a stay pending appeal.² The plaintiff opposes the motion.³ For the reasons stated below, the motion for stay is denied.

THE JUDGMENT ON APPEAL

The plaintiff filed this adversary proceeding seeking a determination that a debt owed by the debtor was not dischargeable under 11 U.S.C. § 523. The debtor moved to dismiss the

¹ Docket 22, 23.

² Docket 36, 43.

³ Docket 42.

complaint solely on the ground of timeliness, raising the issue of whether a complaint challenging dischargeability of debt is timely filed when it is filed within 60 days of the § 341 meeting in the main bankruptcy case, rather than as a separate adversary proceeding. The court denied the motion to dismiss.

DISCUSSION

Bankruptcy rule 8005 provides that:

A motion for a stay of the judgment, order, or decree of a bankruptcy judge . . . 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 any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.

FED. R. BANKR. P. 8005.

The standards governing a motion to stay pending appeal under rule 8005 are the same as those governing an application for preliminary injunctive relief. *Sicherman v. Ohio Rehab. Servs. Comm. (In re Dial Industries, Inc.)*, 137 B.R. 247, 249 (Bankr. N.D. Ohio 1992). These four factors are to be considered and balanced:

- (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.* A movant is required to “address each factor, regardless of its relative strength, providing specific facts and affidavits supporting assertions that these factors exist.” *Id.* at 154.

Is the debtor likely to prevail on appeal?

Citing law from another circuit, the debtor states that the standard for this factor is whether he has raised a “serious legal issue.” The standard in the Sixth Circuit is stated in *Griepentrog*; that is, when the motion is for a stay pending appeal, as opposed to a motion for a preliminary injunction, the party asking for the stay “must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal.” *Griepentrog*, 945 F.2d at 153. The movant does not, however, always have to establish a high probability of success on the merits. Instead, “the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [the moving party] will suffer absent the stay.” *Id.* In any case, the movant is “always required to demonstrate more than the mere ‘possibility’ of success on the merits.” *Id.*

In support of this factor, the debtor argues that the plaintiff did not timely file its complaint as an adversary proceeding and that the filing made in the main case did not put the debtor on notice that he had been sued in an adversary proceeding. The other argument raised by the debtor is that the court does not have authority to extend the 60-day deadline absent a timely request to do so.

The debtor did not present any case law in support of his position on the main case v. adversary proceeding issue when he filed his motion to dismiss. The court considered and

rejected his position based on a Sixth Circuit case and bankruptcy court cases, none of which is addressed here by the debtor. As to the alternative ground that the court lacks authority to extend the deadline under the facts of this case, the court agrees, a point made in the opinion together with the reasons why that statement of law had nothing to do with the court's decision. While it is always possible that a higher court will reach a different conclusion than that arrived at by this court, the debtor has not made the minimum showing that his appeal raises "serious questions going to the merits." *Id.* at 154.

This factor does not favor granting a stay pending appeal.

Will the debtor suffer irreparable harm without a stay?

The debtor argues that he will suffer irreparable harm because he will have to spend money to defend an appeal that may be dismissed. The court takes this to mean that the debtor will have to spend money to defend against the complaint rather than the appeal. He also argues generally that he is old and the appeal (read, adversary proceeding) will take a toll on him. Additionally, he argues that an appeal might be made moot if the adversary proceeding is not stayed.

Injury under this factor is evaluated in terms of its substantiality, the likelihood it will occur, and the proof provided by the movant. *Griepentrog*, 945 F.2d at 154. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of stay, are not enough'." *Id.* (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). Under *Griepentrog*, therefore, the debtor's argument that he will spend time, money, and energy does not support his request for a stay. Neither does his suggestion that if he loses on the merits, the plaintiff will try to collect the judgment which will cause him trouble. In addition to being a

theoretical rather than an actual harm, that possibility is, again, a question of a monetary injury that does not support the motion under the facts of this case.

The debtor's other argument—that the Bankruptcy Appellate Panel may find his appeal moot at a later time if the case is not stayed—is best answered by the BAP. From the trial court perspective, however, this is not a persuasive argument for establishing irreparable harm. If a stay does not issue, the matter will proceed to resolution either by motion or trial. If the debtor wins on the merits, he will have no need to pursue the appeal on the procedural grounds raised here, although he may do so as a cross-appeal if the plaintiff should appeal. If the debtor loses on the merits, his appeal will include both the present issue and any issues arising out of the final judgment. In either event, therefore, his rights are preserved.

This factor does not favor granting a stay.

Will others be harmed if a stay is granted?

The debtor argues that the plaintiff will not be harmed by a stay because it simply has to wait for a ruling from the BAP before it can proceed on the merits. The plaintiff responds that it has already been harmed by the delay because it has spent time and money filing a motion for summary judgment which will be held in abeyance without response from the debtor if the stay is granted.

The court finds that this factor does not favor any particular result.

Is a stay in the public interest?

The debtor argues that “public policy weighs in favor of not spending time and energy only to learn at a later date that this adversary proceeding was not timely filed.” The same could be said of every order denying a motion to dismiss or denying a motion for summary judgment.

In each case, the parties generally are required to move the case forward knowing that there is a possibility that the original order will be reversed. The debtor has not identified anything that would make this case stand out on this point.

The court finds that this factor does not favor granting the stay.

CONCLUSION

On balance of the relevant factors, the court finds that the debtor has not shown that a stay pending appeal should be issued. The motion for a stay is, therefore, denied.

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge