

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 09-13675
)
TAMMY S. MARTIN,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION AND**
) **ORDER**

Former creditor John Hayes moves for a stay pending his appeal of this court's order of March 16, 2011. For the reasons discussed below, the motion is denied.¹

DISCUSSION

The Order

After conducting an evidentiary hearing, this court determined that John Hayes violated the discharge injunction entered in this chapter 7 case and awarded damages to the debtor Tammy Martin as a sanction for that contempt. In the court's March 16, 2011 memorandum of opinion and order to that effect, the court set a schedule for determining the amount to be awarded: the debtor had until March 31, 2011 to file an affidavit as to her lost wages; her counsel had until the same date to file a detailed fee statement; and Mr. Hayes had until April 14, 2011 to object. The debtor and her counsel timely filed their affidavits; the court awaits a response from Mr. Hayes. After those filings are complete, the court intends to award damages based on the documents.

¹ Docket 47.

On March 29, 2011, Mr. Hayes filed a notice of appeal of the order and a motion for stay pending that appeal. The appeal has been referred to the Bankruptcy Appellate Panel.

Stay Pending Appeal

Mr. Hayes moves this court for a stay under Bankruptcy Rule 8005. That rule states in relevant 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. 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 Motion

Mr. Hayes asserts that he is entitled to a stay by giving a supersedeas bond as a matter of right under Bankruptcy Rule 8005; that rule does not, however, provide for such relief. Rather, it states the procedure to be followed when a party seeks approval for a supersedeas bond to which it is otherwise entitled. The rule providing for a stay by supersedeas bond is Bankruptcy Rule 7062, as it incorporates Federal Rule of Civil Procedure 62(d). *See* FED. R. BANKR. P. 7062. Rule 7062 applies in adversary proceedings, which are proceedings listed in Bankruptcy Rule 7001. FED. R. BANKR. P. 7001. The debtor brought this contempt proceeding before the court by a motion and it is a contested matter under Bankruptcy Rule 9014, rather than an adversary proceeding. FED. R. BANKR. P. 9020. While certain of the adversary proceeding rules apply in

contested matters, Bankruptcy Rule 7062 is not one of them. *See* FED. R. BANKR. P. 9014 (c). Consequently, Mr. Hayes is not entitled to a stay as a matter of right upon the posting of a bond. *In re Anderson*, 390 B.R. 812, 814 (Bankr. D. S.C. 2007); *Adell v. John Richards Homes Bldg. Co. (In re John Richards Homes Bldg. Co.)*, 320 B.R. 139, 141-42 (E.D. Mich. 2005).

Mr. Hayes's request for a stay under Bankruptcy Rule 8005 must be determined by considering and balancing these factors:

- (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal;
- (2) the likelihood that 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); *In re Best Reception Sys., Inc.*, 219 B.R. 988, 992-94 (Bankr. E.D. Tenn. 1998).

"These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Griepentrog*, 945 F.2d at 153. A stay is an exercise of judicial discretion and the propriety of issuing a stay depends on the circumstances of a particular case. *Nken v. Holder*, 129 S. Ct. 1749, 1760 (2009). The "party requesting a stay bears the burden of showing circumstances which justify an exercise of that discretion." *Id.* at 1761.

Mr. Hayes's motion fails to address any of the four relevant factors. As a result, he has failed to meet his burden of showing that a stay is appropriate and his motion is denied on that basis. Moreover, it is apparent that a stay pending appeal is not appropriate under the

circumstances as the appeal he filed appears to have little chance of succeeding. The court's order is interlocutory and it is unlikely that the Bankruptcy Appellate Panel will choose to hear an appeal before this court determines the sanction amount. Additionally, even if the appellate panel were inclined to hear the appeal, it is unlikely that it would find that this court erred in its determination that Mr. Hayes violated the discharge injunction and should be sanctioned. The other factors do not weigh in favor of a stay as it does not appear that Mr. Hayes will be irreparably harmed absent a stay; the debtor will clearly be harmed if a stay is imposed and Mr. Hayes is permitted to continue his state court lawsuit against her despite the fact that the underlying debt is discharged; and the public interest weighs in favor of enforcing the discharge injunction and a prompt resolution of this matter.

CONCLUSION

Mr. Hayes has not established that a stay pending appeal is appropriate in this case. His motion is, therefore, denied.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Pat E. Morgenstern-Clarren". The signature is written in a cursive, flowing style.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge