

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

ENTERED ON DOCKET

6/24/05

IN RE:	:	
	:	
TERRY M. GAY and YVONNE W. GAY,	:	CASE NO. G04-30523-REB
	:	
Debtors.	:	CHAPTER 7
_____	:	
	:	
YVONNE W. GAY,	:	
	:	
Plaintiff,	:	
	:	ADVERSARY PROCEEDING
v.	:	
	:	NO. 05-2005
	:	
RABUN COUNTY BANK,	:	
AMERIQUEST MORTGAGE COMPANY,	:	
MARA SACKS, and	:	
ALBERT O. ENGLISH,	:	
	:	JUDGE BRIZENDINE
Defendants.	:	

ORDER DENYING MOTION FOR STAY PENDING APPEAL

Before the Court is Plaintiff's motion for stay pending appeal filed pursuant to Federal Rule of Bankruptcy Procedure 8005, which matter came on for hearing on June 23, 2005 regarding entry of a stay of this Court's Order entered on May 19, 2005 granting a motion to dismiss on grounds of lack of subject matter jurisdiction. In determining whether a discretionary stay should be granted, courts have applied a four factor test that considers the following:

- 1) the likelihood the movant will prevail on the merits on appeal; 2) whether, absent a stay, the movant will suffer irreparable damage; 3) whether the adverse party will suffer no substantial harm from the issuance of the stay; and 4) whether the public interest will be served, rather than disserved, by issuing the stay.

See In re Arnal, 2003 WL 22709326 (Bankr. S.D.Ga. July 30, 2003), citing *Garcia-Mir v. Meese*,

781 F.2d 1450, 1453 (11th Cir.1986).

With respect to the first factor, which is ordinarily the most critical, the Court concludes that it is unlikely that Plaintiff will prevail on her appeal of this Court's dismissal order as Plaintiff's claims herein would exist outside bankruptcy and were not created upon or by the filing of the Chapter 7 bankruptcy petition. Thus, there is no "arising under title 11" jurisdiction pursuant to 28 U.S.C. § 1334(b). Similarly, the Chapter 7 Trustee having abandoned the bankruptcy estate's interest in all of the causes of action asserted by Plaintiff in this matter, resolution of Plaintiff's claims will have no 'conceivable effect on the bankruptcy estate,' and thus do not fall within this Court's "related to" jurisdiction under Section 1334(b). *See Franklin Life Ins. Co. v. Rousselle (In re Rousselle)*, 259 B.R. 409, 412 (Bankr. M.D.Fla. 2001), citing *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 788 (11th Cir. 1990), quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984).

The remaining jurisdictional basis for consideration would be under this Court's "arising in a case under title 11" jurisdiction, which generally includes administrative matters such as allowance of claims, reaffirmation of debts, dischargeability of debts, lien avoidance for purposes of a debtor's exemptions, and orders for turn over of estate property. Under appropriate circumstances, such matters may even include a determination of the validity, extent, and priority of liens. By characterizing the relief sought by Plaintiff in this manner, however, it appears that Plaintiff is attempting to bring a state law action to quiet title or to require specific performance by Rabun County Bank by having said Defendant mark its security deed satisfied based on the receipt of certain funds in connection with the closing of a refinanced loan. Further, in this same complaint and as alternative relief, Plaintiff brings two separate claims for legal malpractice.

Such claims extend beyond the scope of this Court's jurisdiction over administrative matters. The Court further concludes that the matters at issue herein as arising under state law are more properly heard and decided by the state superior courts who are experienced in conducting trials on such claims.

With regard to irreparable harm to Plaintiff, given the existence and scope of the current mortgagor's interest in the property, there is little possibility of irreparable damage as said mortgagor will most likely intervene in any foreclosure by Rabun County Bank to protect its interest. Finally, given the weight of the above conclusions on the first two factors, the remaining factors would not be determinative herein.

In sum, the Court having reviewed the case authority cited in the brief and having heard the argument of Plaintiff's counsel, based on the above reasoning, as supplemented by the reasons and conclusions stated on the record on June 23, 2005, which are incorporated herein in accordance with Federal Rule of Bankruptcy Procedure 7052, the Court concludes that the Plaintiff has failed to establish sufficient grounds for the issuance of a stay pending appeal of this Court's dismissal order. Accordingly, it is

ORDERED that the Plaintiff's motion for stay pending appeal be, and hereby is, **denied**.

The Clerk is directed to serve a copy of this Order upon Plaintiff's counsel, counsel for each Co-Defendant, the Chapter 7 Trustee, and the U.S. Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia, this 24th day of June, 2005.



ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE