

ENTERED ON  
AUG 23 2006  
DOCKET

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE: ) CHAPTER 7  
)  
LORA LYNN ALEXANDER ) CASE NO. 06-67957-MHM  
)  
Debtor )  
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WELLS FARGO BANK, N.A., )  
its successors or assigns )  
)  
Movant )  
v. ) **CONTESTED MATTER**  
)  
LORA LYNN ALEXANDER )  
)  
Respondent )

**ORDER REGARDING DEBTOR'S  
MOTION FOR STAY PENDING APPEAL**

Hearing was held August 15, 2006, on Movant's motion for relief from the automatic stay and for *in rem* relief . The motion was granted orally at the hearing. A written order was entered August 22, 2006. On August 17, 2006,<sup>1</sup> Debtor, who is proceeding *pro se*, filed a notice of appeal and a motion for a stay pending appeal.<sup>2</sup> Debtor

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<sup>1</sup> Bankruptcy Rule 8001 provides, in part:

...A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof....

<sup>2</sup> In the text of the motion, Debtor erroneously directs her request for relief to the U.S. District Court. Under Bankruptcy Rule 8005, a motion for stay pending appeal is first directed to the bankruptcy court.

has not offered to post a supersedeas bond. Under 11 U.S.C. §102, no hearing on this motion is necessary.

Debtor's bankruptcy Schedule A does not list as an asset of the estate the real property that was the subject of the order granting Movant relief from the stay. Movant's motion shows that the relevant real property was sold at foreclosure sale April 5, 2005. The motion also showed, and the records of the Clerk confirm, that this case is Debtor's sixth bankruptcy case since October 2003.

Pursuant to Bankruptcy Rules 7062 and 8005,<sup>3</sup> where the appellant fails to offer to post a supersedeas bond, the granting of a stay pending appeal is discretionary with the court. That discretion is by design a flexible tool which permits the bankruptcy court to tailor relief to the circumstances of the particular case. *Gleasant v. Jones, Day, Reavis & Pogue*, 111 B.R. 595 (Bankr. W.D. Tex. 1990).

The four criteria for a stay pending appeal are:

- (1) Whether the movant has made a showing of likelihood of success on the merits;

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<sup>3</sup> Bankruptcy Rule 7062, based on FRCP 62, (d) states:

**Stay Upon Appeal.** When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Bankruptcy Rule 8005 states (in part):

**Stay Pending Appeal.** A motion for a stay of the judgment, order, or decrees 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 ..., 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.

- (2) Whether the movant has made a showing of irreparable injury if the stay is not granted;
- (3) Whether the granting of the stay would substantially harm the other parties; and
- (4) Whether the granting of the stay would serve the public interest.

*In re First South Savings Association*, 820 F.2d 700 (5th Cir. 1987) ("*First South*"); *In re Grand Jury Proceedings*, 689 F.2d 1351 (11th Cir. 1982); *Ruiz v. Estelle*, 666 F.2d 854 (5th Cir. 1982) ("*Ruiz I*"); *Pitcher v. Laird*, 415 F.2d 743 (5th Cir. 1969).

The most significant of the four criteria is the likelihood of success on appeal. *In re Bilzerian*, 264 B.R. 726 (Bankr. M.D. Fla. 2001). In *Ruiz v. Estelle*, 650 F.2d 555 (5th Cir. 1981) ("*Ruiz I*"), on the subject of likelihood of success on the merits, the court stated:

[O]n motions for stay pending appeal, the movant need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay.

605 F.2d at 565. In *Ruiz II*, however, the court explained:

Likelihood of success remains a prerequisite in the usual case even if it is not an invariable requirement. Only 'if the balance of equities (i.e, consideration of the other factors) is ...**heavily tilted** in the movant's favor' will we issue a stay in its absence, and, even then, the issue must be one with patent substantial merit.

666 F.2d at 857 (emphasis in the original).

In the instant case, Debtor has presented no facts to suggest a likelihood of success on appeal. Additionally, because the property was sold by foreclosure 16 months ago, Debtor is not threatened with mootness of the appeal if no stay is granted. Debtor suggests

that she wishes to proceed with a civil action “to establish ownership of said property” that is pending in Henry County.<sup>4</sup> It does not appear that a stay pending appeal will hinder or assist in the prosecution of that state law action. Finally, Debtor has failed to establish that the balance of the equities is heavily tilted in her favor. Accordingly, it is hereby

**ORDERED** that Debtor’s motion for stay pending appeal is *denied*.

The Clerk is directed to serve this Order upon Debtor, counsel for Movant, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 23<sup>rd</sup> day of August, 2006.

  
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MARGARET H. MURPHY  
UNITED STATES BANKRUPTCY JUDGE

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<sup>4</sup> At the hearing, Debtor maintained that the pendency of her wrongful foreclosure suit pending in Henry Superior Court precluded this court from lifting the automatic stay of 11 U.S.C. § 362 to allow Wells Fargo Bank to continue its pursuit of a writ dispossessing Debtor from the property, but offered no support for that position. It appears that Debtor’s objective is lodged within the jurisdiction of Henry County.