UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
STEVEN LODEN DYE	)	CASE NO. 06-71024-MHM
	)	
Debtor.	)	

ORDER DENYING STAY PENDING APPEAL

On June 15, 2007, FXM, P.C. d/b/a Frank X. Moore & Associates ("FXM") filed a notice of appeal of the Order Granting Trustee's Motion for Turnover of Property of the Estate, entered June 5, 2007 (the "Turnover Order"); and on June 25, 2007, filed a notice of appeal of the Order Granting Trustee's Motion to Approve Compromise and the Amended Order Granting Trustee's Motion to Approve Compromise, both entered June 15, 2007 (collectively, the "Compromise Orders"). On July 9, 2007, FXM and Riverwood Partners[1] ("Riverwood") filed a notice of appeal that included the Turnover Order and the Compromise Orders, and added to those orders being appealed the Order Denying Debtor's Motion to Reconsider Order Concluding that Debtor's Residence Should be Vacated Pursuant to Terms Specified in the Order (the "Reconsideration Order"), and the Order Denying Motion of FXM and Riverwood to Vacate Pursuant to The Terms Specified in the Order (the "Order Denying Motion to Vacate"), both entered June 27, 2007; the oral orders denying FXM Firm's Motion to Recuse, set forth on the record at the hearings held

[1] Riverwood Partners is owned or controlled by Debtor's father-in-law and has made no appearance except through FXM.

June 27, 2007, July 5, 2007, and July 6, 2007 (the "Recusal Order"); the Order Approving Abandonment, entered July 12, 2007 (the "Abandonment Order"); the Order Granting Motion to Annul Stay and Validate Post-Petition Consent Judgment, entered July 12, 2007 (the "Order Annulling Stay"); and "all other judgments, rulings, orders, or decrees by the court which are or may be appealable" (collectively, all the orders from which Movants appeal, the "Appealed Orders").

On July 10, 2007, Movants filed a motion to stay all matters in this case in furtherance or relating to the Appealed Orders, including:

1. staying disbursement under the terms of the compromise approved by the Compromise Orders of any proceeds from the sale of the Edgewater Property;[2]
2. staying any proceedings in the Interpleader Actions, including enforcement of any proceedings related to the Consent Judgment in the Cravenridge Interpleader Action and any disbursement of Excess Funds;
3. staying Trustee's abandonment of the Interpleader Actions; and
4. staying the effect of stipulations or releases contained in the settlement that is the subject of the Compromise Orders.

BEP Creditor's Trust ("BEP") filed a response opposing Movant's motion for stay pending appeal. Pursuant to 11 U.S.C. §102, and in light of the hours already expended in the proceedings leading up to the Appealed Orders, no further notice or hearing on Movant's motion is necessary.

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[2] The capitalized terms not otherwise defined have the meaning ascribed to them in the parties' pleadings filed in connection with the Appealed Orders.

Pursuant to Bankruptcy Rules 7062 and 8005,[3] 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. *Gleasman 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;

(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 II"*); *Pitcher v. Laird,* 415 F.2d 743 (5th Cir. 1969).

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[3] 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.

The most significant of the four criteria appears to be the likelihood of success on appeal. In *First South*, the court's decision to issue a writ of mandamus to require the district court to issue a stay pending appeal of the bankruptcy court's order granting a motion for superpriority loan pursuant to 11 U.S.C. §364(d) was based upon a finding that the movant would probably succeed on the merits. In *First South,* the Circuit Court found the bankruptcy court's finding of adequate protection to be clearly erroneous and, thus, that the movant was likely to succeed on the merits in its appeal. The court cited *Ruiz II* for the four criteria for stay pending appeal.

Ruiz II was preceded by *Ruiz v. Estelle,* 650 F.2d 555 (5th Cir. 1981) ("*Ruiz I*"). On the subject of likelihood of success on the merits, the *Ruiz I* 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).

Pitcher v. Laird, 415 F.2d 743, involved the appeal of a habeas corpus action filed by an enlisted member of the Army who was seeking an administrative discharge as a conscientious objector. Following the district court's denial of the habeas corpus writ, the

movant was ordered to report for transfer to Viet Nam. In that case the court denied the stay pending appeal based on a finding that the movant was unlikely to succeed on the merits and that being shipped to Viet Nam was not an "irreparable injury" to someone lawfully in military service.

In the motion for stay pending appeal, Movants failed to present any argument regarding the likelihood of success on appeal and, in fact, Movants appear to suggest that the likelihood of success is not relevant to the court's exercise of discretion in imposing a stay pending appeal. A review of the Appealed Orders, however, shows that Movants' likelihood of success is low.

The Turnover Order directed Debtor to vacate his residence, the Edgewater Property, to allow Trustee to market it for sale.[4] The Turnover Order was based upon Debtor's stated intention to surrender the Edgewater Property, his failure to maintain payments to the mortgagees, and his failure to cooperate with Trustee and Trustee's realtor is marketing the Edgewater Property. Finally, Trustee has filed a status report showing that Debtor has vacated the property. The likelihood of success in an appeal of the Turnover Order appears to be minuscule.

The Compromise Orders resulted from five days of hearings on Trustee's motion to approve a compromise regarding the disbursement of the proceeds from the prospective sale of Debtor's residence, the Edgewater Property. Trustee had negotiated with the parties

[4] Movants expressly do not oppose the sale of the Edgewater Property, only the disbursement of the sale proceeds in accordance with the court-approved compromise agreement.

holding security interests in the Edgewater Property a carve-out for the benefit of the estate. The thrust of FXM's opposition to the compromise embodies FXM's attempt to relitigate the claim held by BEP, which arises from a default judgment entered in the U.S. District Court as a result of FXM's failure to file an answer on behalf of Debtor. The bankruptcy court cannot, however, overturn a judgment issued by the U.S. District Court, no matter how much or how convincingly a party argues such judgment should be overturned. FXM's amorphous claims of set-off and conspiracy[5] are claims that appear to have been foreclosed by the U.S. District Court's judgment and, in any event, could only be pursued in that forum. *Stoll v. Gottlieb*, 305 U.S. 165 (1938). FXM's alternative argument is that the Consent Order entered in CCR's bankruptcy case on BEP's claim constituted a release or payment of the claim and also released Debtor-guarantor from liability on the claim. The Consent Order was essentially a ruling on an objection to BEP's claim, reclassifying it as an unsecured claim.[6] That reclassification did not constitute payment or satisfaction of the debt and did not affect Debtor's liability as guarantor. 11 U.S.C. §524. All the grounds for FXM's opposition to the proposed compromise were thoroughly explored and found to be without merit at the conclusion of the hearings on Trustee's compromise motion. The appeal of the Compromise Orders has little likelihood of success.

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[5] The set-off claims were found to be without merit in the bankruptcy proceeding involving Debtor's corporation, Coastal Care Resources, LLC ("CCR"). BEP's claim against Debtor arises from Debtor's guarantee of CCR's liability to BEP.

[6] This reclassification was based upon a determination that the value of the relevant property of CCR, after deduction for the claims of other secured creditors with priority over BEP's claim, was insufficient to provide any security for BEP's claim. *See* 11 U.S.C. §506(a) and (d).

The Reconsideration Order relates to the requests of Debtor to reconsider the Turnover Order. Debtor's motion for reconsideration was denied because he offered no factual or legal arguments that he had not already presented. The likelihood of success on appeal of that order is no greater than the likelihood of success on appeal of the Turnover Order.

In the motion to vacate the Compromise Orders, FXM and Riverwood presented an offer from Riverwood to pay the estate $85,000 in return for (1) Trustee's abandonment of the settlement approved in the Compromise Orders and (2) permission for FXM to proceed on a contingency fee basis with litigation to invalidate the claim(s) of BEP. Trustee had rejected Riverwood's offer and **the Order Denying the Motion to Vacate** was premised upon the court's recognition that Riverwood's offer was based upon and intended to force the estate to pursue the same meritless arguments FXM had presented at the hearings on Trustee's motion to approve the compromise. Those arguments have not improved or become more convincing with the passage of time. The likelihood that the Trustee's evaluation of all the facts and circumstances, leading to his conclusion that Riverwood's offer was not in the best interests of the estate, would be overturned based upon FXM's chimerical assertions of an ability to invalidate BEP's claim is very low.[7]

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[7] In fact, even assuming that BEP's claim could be invalidated and discounting the legal expenses necessary to accomplish such a feat, Trustee's compromise will yield a greater return for the estate because Trustee was able to negotiate a carve-out, basically a gift from the secured creditors to the estate, to be used to pay administrative expenses and unsecured creditors. Unfortunately, as administrative expenses continue to climb as a result of the apparently meritless opposition to Trustee's every action by FXM and/or Debtor, the probability that unsecured creditors will receive any distribution from the carve-out is growing smaller.

The Recusal Order resulted from FXM's motions to recuse made orally during the course of the hearings conducted in this case and denied orally by the undersigned at the time they were made. Bankruptcy Rule 5004(a) provides that disqualification of a bankruptcy judge is governed by 28 U.S.C. §455, which provides:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
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> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding...[.]

Section 455 includes no provision for referral of the question of recusal to another judge; if the judge sitting on a case is aware of grounds for recusal under this section, the judge has a duty to recuse himself or herself. *U. S. v. Sibla,* 624 F.2d 864 (9th Cir. 1980); *In re Corrugated Container Antitrust Litigation,* 614 F.2d 958 (5th Cir.), *cert. denied* 449 U.S. 888 (1980); *U.S. v. Battle,* 235 F.Supp.2d 1301 (N.D.Ga. 2001)(J. Evans). Alleged bias must be personal and it must stem from an **extra-judicial** source. *Loranger v. Stierheim,* 10 F.3d 776 (11th Cir. 1994); *U.S. v. Merkt,* 794 F.2d 950 (5th Cir. 1986); *U.S. v. Phillips,* 664 F.2d 971 (5th Cir. Unit B 1981).[8] As stated on the record at the time the motions to recuse were denied, the undersigned has no personal bias for or against FXM or any other party in this proceeding and has rendered judgment based only upon the facts and

[8] *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981), renders decisions of the Fifth Circuit issued prior to September 30, 1981, binding precedent for the Eleventh Circuit.

arguments presented orally and in writing in this case. Adverse rulings made on meritless arguments do not provide a basis for recusal.

The Abandonment Order relates to Trustee's abandonment of the Cravenridge Interpleader Action, the Cravenridge Excess Proceeds, the Danielle Interpleader Action, the Danielle Excess Proceeds and all scheduled household goods, furnishings and jewelry of Debtor. The abandonment of the Cravenridge Interpleader Action, the Cravenridge Excess Proceeds, the Danielle Interpleader Action, and the Danielle Excess Proceeds was based upon the estate's lack of interest therein, as Debtor had transferred his interest in both the Cravenridge and Danielle properties prior to the respective foreclosure sales, and no interest for the estate exists unless those transfers are first avoided. Additionally, even if Debtor's transfers were avoidable, both properties were fully encumbered and would provide no equity for the estate. The household goods, furnishings and jewelry of Debtor, which would likely qualify as exempt property but which Debtor has declined to claim as exempt property, were shown to be of inconsequential value to the estate, as the burden and expense of liquidation would exceed their value. Movants have offered no cognizable legal or factual argument that could support a denial of Trustee's abandonment of these properties. Therefore, the likelihood of success on appeal of the Abandonment Order is small.

Except for FXM's overarching assertions that BEP's claim should be invalidated, FXM has presented no reasonable opposition to **the Order Annulling Stay.** The factual

and legal basis set forth in the order itself need not be repeated here. Movants' appeal of the Order Annulling Stay is unlikely to be successful.

Movants have also failed to show that consideration of the other factors is so heavily tilted in Movants' favor that a stay pending appeal should be granted without a showing of likelihood of success on the merits. Movants have failed to show they will be irreparably harmed if no stay is granted. The turnover of the residence to Trustee will cause no irreparable harm: Debtor has vacated and Trustee has secured the Edgewater Property. As discussed above, the estate has little or no interest in the property Trustee has abandoned, so Movants can show no irreparable harm by the abandonment. As discussed in the oral ruling approving Trustee's compromise motion, even if the BEP claim were invalidated, the estate would likely realize substantially less than it will realize under the carve-out negotiated by Trustee.

Finally, public policy seeks to prevent endless, pointless litigation that appears to be designed to deplete the estate's assets to a point where the Trustee for the estate would surrender because it lacks resources to continue litigation of issues which, if not wholly frivolous, are worthy of little consideration from a practical legal perspective.

Nevertheless, if Movants are convinced of the merits of the appeals, they may post a supersedeas bond and thus obtain a stay pending appeal. Considering all the facts and circumstances and the risk of harm to the estate and creditors that would result from further

delay, the undersigned would approve a supersedeas bond in an amount not less than $1 million. Accordingly, it is hereby

ORDERED that Movants' motion for stay pending appeal is denied.

IT IS SO ORDERED, this the 24th day of July, 2007.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE