

ENTERED ON DOCKET  
OCT 10 2008

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	)	CHAPTER 13
	)	
MARK E. PULLEN,	)	
MARY KAY PULLEN,	)	CASE NO. 07-65415-MHM
	)	
Debtors.	)	
-----		
	)	
GARY HARRIS and	)	
CAIN V. HARRIS,	)	
	)	
Movants,	)	
v.	)	CONTESTED MATTER
	)	
MARK E. PULLEN,	)	
MARY KAY PULLEN,	)	
	)	
Respondents.	)	

**ORDER DENYING STAY PENDING APPEAL**

By order entered August 7, 2008, sanctions were imposed against Cain V. Harris and Gary C. Harris ("Movants") for willful violation of the automatic stay. Movants filed a Notice of Appeal August 14, 2008, and a motion for a stay pending appeal August 22, 2008. The motion for stay pending appeal, however, failed to make any showing in support of the criteria necessary to establish entitlement to a stay pending appeal. By order entered August 26, 2008, Movants were accorded an opportunity to file a supplemental motion for stay pending appeal. Movants filed an amended motion for stay pending appeal September 15,

2008. Debtors filed a response September 19, 2008. On September 30, 2008, Movants filed a document waiving any right they might have to an oral hearing on the amended motion for stay pending appeal. Movants have made no offer to post a supersedeas bond.

Pursuant to Bankruptcy Rules 7062 and 8005,<sup>1</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;

---

<sup>1</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 II*"); *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 Movants' amended motion for stay pending appeal, Movants first assert a denial of fundamental due process because of an alleged discussion of Debtor's motion for contempt at a hearing held July 18, 2008, at which Movants' counsel was not present. The portion of the transcript of that hearing cited by Movants is as follows:

MR. GOLDBERG: . . . Now, I should add that somewhere in all of this is a hearing on my motion for contempt that was held I believe in January to which an order has not been issued, and that's one other thing --

THE COURT: Oh, really?

MR. GOLDBERG: Yes, Your Honor.

THE COURT: And which docket number is the motion for contempt?  
How did we let something like that slide? This case has been so very active.  
You filed it in January?

MR. GOLDBERG: We had the hearing in January, Your Honor.

THE COURT: So you filed the motion earlier than --

MR. GOLDBERG: Yes, Your Honor.

THE COURT: [Doc. No.] 108 I think, motion for contempt.

MR. GOLDBERG: That's correct, Your Honor. That is the motion.

THE COURT: Okay.

MR. GOLDBERG: And I think that absent the IRS and the question  
about the confirmation, that I have covered everything.

THE COURT: [Did the Chapter] 13 Trustee file anything on that  
motion?

MR. GOLDBERG: For contempt, Your Honor?

THE COURT: Yes.

MR. GOLDBERG: Your Honor, I think he just sat back and watched  
both of us go at each other. I may be incorrect, but that's my memory.

MR. GOODMAN: I have not taken an active part in the dispute  
between the two parties.

As is readily evident, the discussion outside the presence of Movants' attorney was nothing more than a reminder that the court had failed to issue an order on a pending motion.

In an attempt to establish a likelihood of success on the merits in the appeal, Movants make conclusory allegations unsupported by any legal citations except oblique references to state law. Movants assert that the actions taken threatening Debtors' rights to possession of their residential real property were completely free of the constraints of the automatic stay because of Movants' asserted ownership interest in that real property. Apparently, Movants misperceive the reach of the automatic stay.

For example, a lessor of real or personal property to a debtor cannot, simply because the lessor holds valid title under state law to property in a debtor's possession, take possession of such property or exercise any control over that property without *first* obtaining relief from the automatic stay. The automatic stay is intended to protect both debtors and creditors by maintaining the *status quo*, allowing "breathing space" for the debtor, requiring court review of disputes regarding title or rights to possession in property, and preventing creditors from engaging in self-help measures. The Bankruptcy Code, especially the automatic stay, prevents a creditors' attorney from reaching, in the attorney's office, a legal conclusion about matters of title or application of the automatic stay and taking action based upon such conclusions without obtaining the agreement of the bankruptcy court that those legal conclusions are, in fact, correct.

Movants have presented insufficient evidence or argument to show a likelihood of success on appeal. Movants attempt to establish irreparable injury by suggesting that if Movants are required to pay sanctions to Debtors and then the contempt order is reversed on appeal, Debtors would be unable to return the money. Movants, however, have not offered to post a supersedeas bond, which could, of course, offer them perfect protection for their money. Additionally, if Debtors were required to but unable to repay the sanctions, Movants could obtain a money judgment against Debtors. An injury compensable by a money judgment does not constitute an irreparable injury. *JSG Trading Corp. v. Tray-Wrap, Inc.*, 0917 F.2d 75, 79 (2d Cir.1990).

IT IS SO ORDERED, this the 9<sup>th</sup> day of October, 2008.

  
\_\_\_\_\_  
MARGARET H. MURPHY  
UNITED STATES BANKRUPTCY JUDGE