



**IT IS ORDERED as set forth below:**

**Date: October 30, 2009**

**Paul W. Bonapfel  
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

IN THE MATTER OF:	:	CASE NUMBER: A09-78963-PWB
	:	
LARUE PAUL MCKENZIE,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE

**ORDER**

On September 18, 2009, the Debtor filed appeals of the following Orders: Order Modifying the Automatic Stay with respect to HSBC Bank USA, National Association (Doc. 23); Order Denying Motion to Extend Automatic Stay Beyond 30 Days (Doc. 24); and Order Denying Emergency Motion to Extend the Automatic Stay (Doc. 26).<sup>1</sup> In connection with the appeals, the Debtor has filed a Motion for Extension of Time (Doc. 37); Motion for Stay Pending Appeal (Doc. 38) and Amended Motion for Stay Pending Appeal (Doc. 42) (the amended motion attaches a

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<sup>1</sup>The Debtor has filed one Notice of Appeal (Doc. 37) in which he appeals three Orders.

memorandum omitted from the original motion); Motion for Fee Waiver (Doc. 39); and Motion for Leave to Appeal (Doc. 40). The Court will examine each one in turn.

Motion for Extension of Time

The Debtor's Notice of Appeal contains a request for extension of time "[i]n the event that this form was not received in the Clerk's office within the required time." The record reflects that the Debtor's Appeal filed September 18, 2009, of Orders entered September 10 and September 11 is timely. Accordingly, the request for extension of time is moot.

Motion for Stay Pending Appeal

The Debtor seeks a stay pending the appeal of the Court's Order Modifying the Automatic Stay with respect to HSBC Bank USA, National Association (Doc. 23). This Order permits HSBC to commence foreclosure proceedings "to the extent of advertising said foreclosure and providing required notices of sale" on property located at 1747 Buckhead Valley Lane, Atlanta, Georgia 30324.

Bankruptcy Rule 8005 which governs a stay pending appeal provides as follows:

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.

In order to obtain a stay pending appeal, the appellant must show (1) there is a likelihood of success on the merits; (2) there will be irreparable harm to the debtor if no stay is granted; (3) there is a lack of substantial harm to the creditor if there is a stay; and (4) the relief requested is not contrary to the public interest. *Piedmont Associates v. Cigna Property & Casualty Insurance Co.*, 132 B.R. 75, 76 (N.D.Ga. 1991).

The Court concludes that staying this Order is inappropriate because the Debtor is unlikely to succeed on the merits of the appeal. Because the Court's Order is not final, an appeal may not be taken as of right. 28 U.S.C. § 158(a)(1); FED. R. BANKR. P. 8001(a). Thus, the Debtor must obtain leave from the District Court to appeal this interlocutory Order. 28 U.S.C. § 158(a); FED R. BANKR. P. 8003.

Courts have adopted the standard of 28 U.S.C. § 1292(b), which governs the appeal of an interlocutory order from a district court to a court of appeals, when reviewing requests for leave to appeal an interlocutory order issued by a bankruptcy court. *See* 10 COLLIER ON BANKRUPTCY ¶ 8003.03 (Alan N. Resnick & Henry J. Sommer, eds., 15<sup>th</sup> ed. rev.). “Under § 1292, an interlocutory appeal is appropriate when the appealed order involves a controlling question of law for which there is substantial ground for difference of opinion, and the immediate resolution of the issue will materially advance the ultimate termination of the litigation.” *In re Fox*, 241 B.R. 224, 232 (10<sup>th</sup> Cir. B.A.P. 1999). Although it is not the bankruptcy court's decision to grant leave to

appeal,<sup>2</sup> the Court deems it unlikely that the District Court will grant leave to appeal the Order because the appealed order does not satisfy the unique standard of 28 U.S.C. § 1292(b). Accordingly, the Court denies the Debtor’s motion to stay the Order Modifying the Automatic Stay with respect to HSBC Bank USA, National Association (Doc. 23).

Motion for Fee Waiver/Request to Proceed In Forma Pauperis

Section 1915 of Title 28 permits application for waiver of a fee for an appeal by affidavit of the applicant. Although section 1915 of Title 28 permits a person who is unable to pay the fees for an appeal to have such fees waived, a defendant may not proceed *in forma pauperis* in an appeal “if the trial court certifies in writing that it is not taken in good faith.” 28 U.S.C. § 1915(a)(3). To make such a certification, a court must determine “not merely that the appeal lacks merit, but that the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant” and that there is “no arguable basis in law or fact to support [the appellant’s] claims.” *In re Fromal*, 151 B.R. 733, 735 (E.D. Va. 1993) (citations omitted).

With respect to the Order Modifying the Automatic Stay with respect to HSBC Bank USA, National Association (Doc. 23), the Court concludes that the Debtor’s appeal is frivolous for the same reasons set forth for denying the motion for stay pending appeal. The Order is not a final order appealable of right and it does not satisfy the standard for leave to appeal an interlocutory order.

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<sup>2</sup>Section 158(a) of Title 28 gives a district court the jurisdiction to hear appeals from final orders and judgment “and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of [Title 28].” The Advisory Committee Note to Bankruptcy Rule 8003 provides that “[t]he motion for leave to appeal is addressed to the district court or the bankruptcy appellate panel, although filed with the clerk of the bankruptcy court.” Therefore, this motion requires no action by the bankruptcy court.

The Court concludes that the appeals of the Order Denying Motion to Extend Automatic Stay Beyond 30 Days (Doc. 24) and Order Denying Emergency Motion to Extend the Automatic Stay (Doc. 26) are equally frivolous. Section 362(c)(3)(B) provides that if an individual chapter 7, 11, or 13 debtor has had a prior case pending and dismissed within the preceding 1 year period, the automatic stay shall terminate on the 30<sup>th</sup> day after the filing of the case unless the on motion of a party in interest and after notice and hearing completed before the expiration of the 30 day period, the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed. Though the Debtor filed his motion to extend the automatic stay 21 days after filing the case, he did not set the matter for hearing using the Court's self-calendaring procedures, nor did he contact Chambers to request an expedited hearing. As a result, no hearing was held within 30 days of the filing of the bankruptcy petition. Because the stay expired statutorily, there is no legal basis for the Court to extend the stay pursuant to § 362(c)(3). As a result, the appeal of this order denying the motion is not taken in good faith because the appeal is without merit.

The appeal of the Order denying the emergency motion is also without merit. This "emergency motion" is merely a reiteration of the other motion with the word "emergency" added to the title. No legal basis is asserted for the extension of the stay after the expiration of the 30 day period and, thus, the Court had no ability to extend a stay that expired as a matter of law. As a result, this appeal is not taken in good faith because the appeal is without merit.

Based on the foregoing, it is

ORDERED that the Debtor's motion for extension of time (Doc. 37) is denied as moot; and it is

FURTHER ORDERED that the Debtor's motion and amended motion for stay pending appeal are denied (Doc. 38, 42); and it is

FURTHER ORDERED that the Debtor's motion for fee waiver (Doc. 39) is denied. The Court hereby certifies that the appeals taken in this case are not taken in good faith.

End of Order

Distribution List

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