

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:) CHAPTER 13
)
BARBARA JEAN MCNAIR,) CASE NO. 12-64142 - MHM
)
Debtor.)

ORDER REGARDING STAY
PENDING APPEAL

This case commenced June 4, 2012, when Debtor filed her Chapter 13 bankruptcy petition *pro se*. By order entered July 11, 2012, the automatic stay was modified to permit the Georgia Housing and Finance Authority ("GHFA") to proceed with dispossession proceedings, GHFA having purchased the real property in which Debtor resides, 3785 Buffington Place, Union City, Fulton County, Georgia (the "Property"), at a foreclosure sale (conducted by GHFA prepetition, February 7, 2012) (Doc. No. 20) (the "Order"). Debtor filed a Notice of Appeal of the Order July 27, 2012 (Doc. No. 22).¹

On August 2, 2012, Debtor filed *pro se* a *Motion for Temporary Restraining Order*, which the undersigned construes as a motion for stay pending appeal (Doc. No. 30)(the "Motion"). Hearing on the Motion was held August 8, 2012, at which attorney for GHFA and Debtor, appearing *pro se*, were present.

In the Motion, Debtor relies upon a federal statute, "Protecting Tenants at Foreclosure Act," Sec. 701, *et seq.*, PL 111-22, May 20, 2009, 123 Stat. 1632 (the "Statute"). The Statute provides, in part:

¹ That appeal appears not to have been timely filed, i.e. filed within 14 days of the date of entry of the order appealed from. Bankruptcy Rule 8002(a).

SEC. 702. Effect of Foreclosure on Preexisting Tenancy.

- (a) **In General.**--In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to--
- (1) the provision, by such successor in interest, of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice; and
 - (2) the rights of any bona fide tenant, as of the date of such notice of foreclosure--
 - (A) under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1); or
 - (B) without a lease or with a lease terminable at will under state law, subject to the receipt by the tenant of the 90 day notice under subsection (1),

except that nothing under this section shall affect the requirements for termination of any federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.

- (b) **Bona Fide Lease or Tenancy.**--For purposes of this section, a lease or tenancy shall be considered bona fide only if--
- (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;

- (2) the lease or tenancy was the result of an arms-length transaction;
and
- (3) the lease or tenancy requires the receipt of rent that is not
substantially less than fair market rent for the property or the unit's
rent is reduced or subsidized due to a Federal, State, or local
subsidy.

At the hearing, Debtor presented a copy of the lease of the Property from Anita King to Debtor dated November 1, 2011 (the "Lease"). The Property, however, was conveyed by Anita King to Carlos Encarnacion by Warranty Deed filed and recorded April 5, 2011. By letter dated February 27, 2012, GHFA notified Debtor to vacate the Property within 90 days. That letter also requested that Debtor send GHFA a copy of her Lease of the Property, which she did. The Lease shows that the monthly rental payment is \$600.00. GHFA presented evidence that the fair market value of the Property is approximately \$48,000, with a tax-assessment value of \$43,000; that the monthly mortgage payment was \$857.47; and that the fair market monthly rent of the Property would be approximately \$936.00. GHFA obtained a dispossessory judgment against Debtor May 22, 2012, which was not appealed by Debtor before Debtor filed this bankruptcy case. Debtor has neither made nor offered any payments to GHFA and Debtor admitted she had paid no rent to Ms. King or any other party since April, 2012.

Based upon the parties' presentations, Debtor does not appear to be a *bona fide* tenant under the Statute because:

- Anita King, the apparent former owner of the Property "sold" the Property to Carlos Encarnacion *before* she entered into the lease with Debtor;

- The rent Debtor was required to pay under the Lease is substantially less than the fair market rent for the Property.

Additionally, the May 22, 2012 dispossessory judgment was not appealed and arguably precludes further litigation of issues that were or could have been decided in that proceeding.

Pursuant to Bankruptcy Rules 7062 and 8005,² 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;
- (2) Whether the movant has made a showing of irreparable injury if the stay is not granted;

² 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.

(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). The evidence and argument presented by the parties show Debtor has so little likelihood of success on appeal that her appeal could be characterized as frivolous and filed only for the purpose of delay. Accordingly, it is hereby

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

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtor, the Chapter 13 Trustee, attorney for Georgia Housing and Finance Authority and the U.S. Trustee.

IT IS SO ORDERED, this the 10th day of August 2012.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE