

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT HAMMOND

IN RE:)
SHERRY G. CHILDRESS)
) BANKRUPTCY NO. 09-23367
)
Debtor)

ORDER

This Chapter 13 case came before the Court for a Hearing on February 10, 2010 on a Motion “To Stay Pending Appeal” filed by the Debtor, Sherry G. Childress, Pro Se, (“Debtor”) on January 20, 2010, relating to the Order entered on January 11, 2010, granting the Motion by U. S. bank, N.A. (“U.S.”) to Dismiss this Case and Enjoin the Debtor from filing another case for 180 days, and the Motion by U. S. for an Order Terminating and Annuling the Automatic Stay, and the Response and Objection to said Motion by U. S. filed on January 27, 2010.

U. S. appears by Attorney Taylor.

Debtor appears Pro se.

Trustee appears by Attorney Godshalk.

Submitted. Arguments heard.

U. S. in its response and Objection asserts that the Motion of the Debtor be denied as she did not file a supersedeas bond, as required by Fed. R. Civ. P. 62(d).¹

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Fed. R. Civ. P. 62(d), Stay with Bond on Appeal, as made applicable by Fed. R. bk. P. 7052, only applies to Adversary Proceedings, and does not apply to contested matters such as the Motions filed by U. S. in this case, unless the Court otherwise directs. See Fed. R. Bk. P. 9014 (c), Application of Part VII Rules. The Court has not directed that Fed. R. Bk, P. 7062 applies in this case. The Orders entered versus the Debtor in favor of U. S. are not for the payment of monies by the Debtor to U. S. wherein the posting of a supesedeas bond by the Debtor is appropriate.

It is also noted that Fed. R. Bk. P. 4001(a)(3) provides that an order granting a motion for relief from the automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 14 days after entry of the Order, unless the Court orders otherwise. The Court has not ordered otherwise.

The Court is free to fashion a remedy other than requiring the positing of a supersedeas bond where Appellant’s financial condition prevents it from obtaining such a bond In re Byrd , 172 B.R. at 970, 974 Bankr. W. D. Wash. 1994) (collecting cases).

Federal Rule of Bankruptcy Procedure 8005, Stay Pending Appeal, provides, in part, 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.

The factors to be considered by the Bankruptcy Court in determining whether a Motion for Stay Pending Appeal should be granted was summarized by the Court in In re Beswick, 98 B.R. 904 (N. D. Ill. 1989), where the Court stated as follows:

Pursuant to Bankruptcy Rule 8005 and Rule 62(c) of the Federal Rules of Civil Procedure, this Court has been granted the express authority to grant a stay of the dismissal of the Chapter 12 proceedings by the bankruptcy court while an appeal of that order is pending before the district court. See Sandra Cotton, Inc., v. Bank of New York, 64 B.R. 262 (W.D.N.Y. 1986) (applying Bankruptcy Rule 8005); In re X-Cel Constructors of Delaware, Inc., 76 B.R. 969 (D.N.J. 1987) (applying both Fed. R. Civ. P. 62(c) and Bankruptcy Rule 8005).

The factors which are to be considered by the district court in making the determination whether or not to grant the stay are as follows: (1) the movant's likelihood of success on the merits of the appeal; (2) whether the movant will suffer irreparable injury if a stay pending the appeal is not granted; (3) whether other parties will suffer substantial harm if the stay is issued; and (4) whether there will be harm to the public interest if the Stay is issued. In re Arthur & Janet Hamilton, 95 B.R. 564 (N.D. Ill. 1989); X-Cel Constructors, *supra*; Sandra Cotton, *supra*. Courts applying this four-part test impose upon the movant the burden of showing that these enumerated factors balance in the favor of the movant and warrant the issuance of the stay while appeal of the order of the bankruptcy court is pending. X-Cel Constructors, 76 B. R. at 970; Sandra Cotton, 64 B.R. at 263; In re Crettella, 47 B.R. 382 (E.D.N.Y. 1984).

Id. 98 B.R. at 905. Accord. In re Herrera, 2010 WL 148182 (Bankr. W. D. Texas 2010); In re Ward, 184 B.R. 253, 255 (Bankr. D.S.C. 1995); In re Byrd, 172 B.R. at 974; In re Cockings, 172 B.R. 257, 259 (E. D. Ark. 1994); In re Blackwell, 162 B.R. 117, 119 (E. D. Pa 1993); In re Dial Industries, Inc., 137 B.R. 247, 249 (Bankr. N. D. Ohio 1992).

The burden of proof is upon the party seeking the stay. In re Dial Industries Inc., 137 B.R. at 249 (citing In re Hamilton, 95 B.R. 564, 565 (N. D. Ill. 1989)). The determination by this Court as to the Debtor's likelihood of success on the merits of the Appeal places the Court in the somewhat unusual position of reviewing the legal merits of its own Order. Judge O'Brien in In re Howley, 38 B.R. 314 (Bankr. D. Minn. 1984), incitefully wrote: "Although this Court obviously views the likelihood of the Debtor's success on appeal to be small, the Court does regard the right to appeal as a valuable interest worth protecting and ensuring." Id. 38 B.R. at 315. This Court adopts that reasoning. It also is noted that not all of the four factors need be given equal weight. In re Barrington Fair and Amusement, Inc., 53 B.R. 237, 239 (Bankr. D. Mass. 1985). See also, In re Queen, 121 B.R. 1, 2 (D.N.H. 1990) (Bankruptcy Court concluded that the merits factor supporting a stay on appeal was established, even though if the Court were to apply likelihood of success on the merits in a strict literal sense, the Court would come down the other way, citing, In re PSNH, 116 B.R. 347, 349 (Bankr. D.N.H. 1990), where the Court observed that this factor in actual practice does not mean a literal "likelihood" of success on the merits, but that the Movant has a "substantial case", or a "strong case on appeal". While each part of the four-part test must be met, the appellant need not always show a "probability" of success on the merits; instead, the Movant need only show a substantial case on the merits when a serious legal question is involved and shows that the balance of equities weights heavily in favor of granting the stay. Arnold v. Garlock, 278 F.3d 426, 438-39 (5th Cir. 2001).

The Debtor's Chapter 13 case was dismissed pursuant to §1307(c) "for cause" as not having been filed in good faith based on the "totality of circumstances" test, relying on Matter of Love, 957 F.2d at 1350 (7th Cir. 1992), as well as this Court's Decision in In re Earl, 140 B.R. 728 (Bankr. N. D. Ind 1990). This is a fact intensive inquiry. Matter of Love, 957 F.2d at 1335. Thus, the Appellate Court should apply the clearly erroneous standard on appeal. Id. 957 F.2d at 1354. The clearly erroneous standard requires the Appellate Court to give great deference to the trier of fact. Id. Under this

standard, if the trial court's account of the evidence is plausible in light of the record viewed in its entirety, a reviewing court may not reverse even if convinced that it would have weighed the evidence differently than the trier of fact. Id.

The Court decided that the Debtor's Petition was filed in bad faith in that this appeared to be the sixth Chapter 13 Petition filed either by the Debtor Sherry, her spouse George Childress, or by them jointly, in a period of approximate three years and one month or between July 7, 2006 (case No. 06-61318) and the present case No. 09-213367, which was filed on August 12, 2009.

While the Debtor asserted generally at the hearing that one or more of the previous cases were not actually filed by her, or her spouse, George Childress, the Court could not during the hearing locate in the record of the prior cases such a finding. However, attached to the Debtor's Motion to Stay Pending Appeal is an Order entered by the Honorable Judge Klingeberger in case No. 07-21879, dated July 24, 2007 "preliminarily" deciding that cases numbered 06-61318, 06-62584, and 07-20999 were in fact not filed either by the Debtor or her spouse, George Childress.

Nevertheless, there is no question that case No. 07-21879 was in fact filed by the Debtor on July 19, 2007, and dismissed on April 23, 2009 for a default in Plan payments; that Case No. 09-21610 was filed by the Debtor's spouse, George Childress, on April 28, 2009 and dismissed On November 12, 2009 for a default in Plan payments; and, that the present case No. 09-23367, was filed by the Debtor on August 12, 2009. A Motion to Dismiss this case for a default in Plan Payments has been filed by the Trustee in this case.

It is also undisputed that case No. 07-21879 was filed on July 19, 2007 by George Childress, which stayed a Sheriff's sale scheduled for July 25, 2007, based on a foreclosure decree obtained by U.S.; and that the present case No. 09-213367 was filed by the Debtor on August 12, 2009, which again stayed a Sheriff's sale scheduled for that very same day. U. S. obtained a Decree of Foreclosure versus the Debtors in the State Court on April 12, 2006 or almost four years ago.

The Debtor had made no Plan payments in this case at the time U. S. filed its Motions, and George Childress made no Plan payments in case No. 09-21610. The Secured Claim filed by U. S. in this case states that the Debtor and George Childress owe U. S. \$125,083.86, and that they owe U. S. a prepetition arrear of \$35,811.24, including therein 32 months of payments at \$758.90 a month. The Debtor has not disputed the accuracy of the Claim. However, in case No. 07-21879, the Chapter 13 case filed by George Childress, his Plan was Confirmed on February 14, 2008, and the Trustee distributed \$13,053.50 in Plan payments to U. S. before that case was dismissed based on a material default in Plan payments.

The issues presented in the Appeal by the Debtor concerns primarily issues of fact as to whether the Chapter 13 Petition was filed in good faith, as opposed to serious legal issues. Nevertheless, if the Debtor persuades the District Court on Appeal that cases numbered 06-61318, -6-62584, and 07-20999 were not filed by here or her spouse George Childress, together with the fact that in case No. 07-21870 filed by George Childress, his Plan was Confirmed, and U. S. was paid \$13,053.50, the Debtor may be able to present a substantial or strong case on the merits on Appeal. Thus, the Debtor has met her burden on this point.

As to whether the Debtor will suffer irreparable injury if her Motion is not granted, and whether U. S. shall suffer substantial harm if the Stay is issued, it is clear that if the Motion is not granted, the Debtor will suffer irreparable injury, as the Decree of Foreclosure has been entered in favor of U. S. There is no right under Indiana Law to redeem after a foreclosure decree has been entered. If no Stay Order is entered, U. S. is in a position to have the Sheriff execute a Writ of Assistance and remove the Debtor from the mortgaged premises, even if the Debtor should prevail on Appeal. On the other hand, if the Motion is granted, U. S. will still be in a position to obtain an affirmance of the Orders of this Court in its favor, while still retaining its Mortgage Lien on the Debtor's residence. Thus, the Debtor has met her burden on this point. Finally, there will be no harm to the public interest if the Stay is

issued, as the very purpose of Chapter 13 is for the Debtor to reorganize, save her residence from foreclosure, and at the same time pay U. S.'s Secured Claim in full. Accordingly, the Motion is hereby

GRANTED.

However, this Motion cannot be granted without conditions to protect U. S. These conditions are as follows:

1. That the Debtor shall pay the Trustee the sum of \$758.90 each month beginning on February 22, 2010 and on the 22nd day of each month thereafter until further order of the Court, this being the amount of the monthly Mortgage payment. The Trustee shall forthwith remit said preconfirmation payments to U. S.

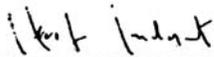
2. That on or before February 22, 2010, the Debtor shall serve on U. S. and the Trustee, evidence of a comprehensive and broad form homeowner's insurance policy from a reputable insurance carrier authorized to do business in the State of Indiana in an amount of \$125,000.00 with a deductible not in excess of \$500.00, a policy period of six months, and proof that said policy has been prepaid for six months showing U. S. as loss payee.

3. The Debtor shall pay the next installment of Real Estate Taxes due on the Mortgaged Real Estate for the year 2009 payable in 2010, and each installment thereafter until further order of the Court, and serve proof of Payment on U. S. and the Trustee no later than 10 days prior to when any such installment is due.

4. That in the event that the Debtor fails or refuses to perform as set out above, after a five (5) day grace period, the Court may vacate this Order without further notice and hearing upon Affidavit of Default by U. S.

SO ORDERED.

February 11, 2010



JUDGE, U. S. BANKRUPTCY COURT

Distribution:
Debtor
Attorney Taylor
Trustee