

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN  
DISTRICT OF IOWA

IN RE: )

) Chapter 12

VINCENT W. MICHELS )

) Bankruptcy No. 03-00316

Debtor. )

**ORDER RE MOTION FOR STAY PENDING APPEAL**

The above-captioned matter came on for hearing on Debtor's Motion for Stay Pending Appeal on October 16, 2003. Debtor appeared in person with Attorney Thomas Fiegen. Carol Dunbar appeared as Chapter 12 Trustee. Also present was Maynard Savings Bank represented by Attorney John Hofmeyer III. The matter was argued after which the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L).

**BACKGROUND**

On September 19, 2003, the Court entered an order denying confirmation of Debtor's Chapter 12 Plan and dismissing the case. Debtor filed a Notice of Appeal on September 29, 2003. On that date he also filed a Motion for Stay Pending Appeal of Order. The Motion states: "To preserve his farming operation and assets, Michels requests a stay pending the outcome of his appeal of the dismissal of his Chapter 12 case." Debtor further states that under Rule 9014, he is not required to file a supersedeas bond.

**CONCLUSIONS OF LAW**

A stay pending appeal of this matter is governed by Bankruptcy Rule 8005. Rule 7062 states that Fed. R. Civ. P. 62 applies in adversary proceedings. Rule 62 authorizes a stay pending appeal as a matter of right if the appellant posts a bond. In re Texas Equipment Co., 283 B.R. 222, 225 (Bankr. N.D. Texas 2002). Unless a court orders otherwise, Rule 7062 does not apply to contested matters under Rule 9014. Instead, Rule 8005 is applicable. This Rule provides for a discretionary stay pending appeal in contested matters. Id. Imposition of a bond is discretionary under Rule 8005. Id. at 229 n.5.

**DISCRETIONARY STAY**

In determining whether to grant a stay pending appeal under Rule 8005, the Court applies a four-part analysis which is similar to the standard applicable to a request for a preliminary injunction. In re Hegg, No. 95-20920KD, slip op. at 3 (Bankr. N.D. Iowa Nov. 2, 1995); In re Smoldt, 68 B.R. 533, 535 (Bankr. N.D. Iowa 1986). Specifically, appellants must demonstrate: (1) they are likely to prevail on the merits of the appeal;

(2) they will suffer irreparable injury if the stay is denied; (3) the opposing party will not be substantially harmed by the stay; and (4) the public interest will be served by the granting of the stay. Hegg, slip op. at

3. The decision is discretionary with the court. In re Sphere Holding Co., 162 B.R. 639, 642 (E.D.N.Y. 1994). "The bankruptcy judge may design stays to avoid unjust results, by taking into consideration all the exigencies of the entire bankruptcy case." In re Wiston XXIV Ltd. Pship., 161 B.R. 70, 72 (D. Kan. 1993).

## 1. Likelihood of Success

The appellants have the burden to establish they are likely to prevail in their appeal. In re Sunflower Racing, Inc., 225 B.R. 225, 227 (D. Kan. 1998). They need a substantial case on the merits which raises serious legal questions. Texas Equipment, 283 B.R. at 227. If the underlying matter arose from a factual question, it is not likely the decision will be overturned. Id. Nor will appellants be likely to succeed on appeal if there is strong legal precedent contrary to their position. In re Easton, No. 87-00345S, slip op. at 3 (Bankr. N.D. Iowa May 16, 1988).

In Sphere Holding Co., the Court found the underlying dismissal of a Chapter 11 case unwarranted after a mere three-month delay, giving the appellant debtor a good chance of success on the merits of the appeal. 162 B.R. at 644. In Hegg, this Court noted the multiple grounds upon which it based its decision to support a conclusion that the debtors were not likely to prevail on the merits of their appeal. Slip op. at 3. In In re Kerzman, 63 B.R. 393, 394 (Bankr. D.N.D. 1986), the debtors filed a new Chapter 11 petition while their original Chapter 11 case was still open although the debtors had defaulted on the plan. The new Chapter 11 petition was filed on the eve of a foreclosure sale. The court noted that "the process cannot go on indefinitely." Id. at 395. It denied a stay pending appeal, finding that the debtors had failed to establish that circumstances had substantially changed so that they now had a realistic prospect for a successful reorganization. Id.

## 2. Irreparable Injury to Appellant if Stay Denied

A serious issue arises if a pending appeal becomes moot due to activity occurring in the absence of a stay. The sale of property which is subject to a pending appeal could render the appeal moot, irreparably injuring the appellant. See Easton, slip op. at 7 (noting substantial completion of a Chapter 11 plan would moot the creditor's appeal of the

confirmation order); Texas Equipment, 283 B.R. at 228 (finding that if the property was sold, the Debtor's appeal of the order authorizing the sale of the property would be moot).

One court noted that the mootness problem is not definitive but is one important factor to evaluate along with all the relevant circumstances. Sunflower Racing, 225 B.R. at 228. In Hegg, this Court denied a stay pending appeal of its order denying confirmation of a Chapter 13 plan. Hegg, slip op. at 1-2. The Court noted there was little chance of the debtors proposing a feasible Chapter 13 plan, when considering whether denial of the stay would cause them injury. Id. at 3. In In re Connelly, 195 B.R. 230, 231 (Bankr. W.D.N.Y. 1993), a debtor appealed denial of confirmation and dismissal of his Chapter 13 case. He sought to stay a foreclosure sale pending appeal. Id. The court noted denial of the stay would not harm the debtor as there was no evidence there was value in the property beyond taxes and liens. Id. at 235.

### **3. Harm to Appellee if Stay Granted**

In Hegg, this Court noted that granting a stay would put creditors on hold, having the effect of granting the relief denied by the Court's denial of confirmation. Id. The Court found this constituted substantial harm to creditors.

Id.; see also Sunflower Racing, 225 B.R. at 228 (finding harm to creditors from further delay after Chapter 11 confirmation denied). In Easton, this Court noted that the costs accruing to appellees such as attorney fees, accruing interest on the debt and other expenses associated with the delay pending appeal would mitigate against a discretionary stay. Easton, slip op. at 7. It noted, however, that these types of costs can be covered by a supersedeas bond. Id. In Connelly, the court found a stay pending appeal would cause harm to a

secured creditor as secured debt would increase with interest, the creditor would incur attorney fees, tax liens were priming the creditor's lien and the debtor had no equity in the collateral. 195 B.R. at 235.

### **4. Serving the Public Interest**

There is no harm to the public interest where granting a stay pending appeal would affect merely private rights of two claimants to property. Texas Equipment, 283 B.R. at 228. The public interest is harmed where a stay would allow the appellant to continue to manipulate and abuse the bankruptcy system. Connelly, 195 B.R. at 236; see also Hegg, slip op. at

3 (stating public interest would not be served by allowing debtors to stay appeal where their Chapter 13 plan failed because payment was based on contingent litigation pending in another court).

### SUPERSEDEAS BOND

Imposition of a bond upon the grant of a discretionary stay pending appeal under Rule 8005 is discretionary with the court. Sphere Holding, 162 B.R. at 644. The purposes of a bond are to secure the prevailing party against any loss arising from an ineffectual appeal and to preserve the status quo. Id.; Texas Equipment, 283 B.R. at 229; Smoldt, 68 B.R. at 535. The court may condition a stay pending appeal as necessary in the circumstances as well as impose a bond. Wiston XXIV, 161 B.R. at 71. In Wiston, the court conditioned the stay on a \$50,000 bond as well as requiring that cash rent and control of the collateral property go to the secured creditor. Id.

No bond is necessary where no damages will be incurred during a stay and no collateral is at stake. Sphere Holding, 162 B.R. at 644. A bond can be waived if the appellant is clearly able to satisfy the judgment if the appeal fails and the appellee's rights will not be compromised. In re Carlson, 224 F.3d 716, 719 (7th Cir. 2000). Items considered in calculating the amount of a bond include the rental value of the collateral property, depreciation, insurance, appeal costs, attorney fees, property taxes and other damages arising from delays. See Smoldt, 68 B.R. at 536; Easton, slip op. at 7-8; Wiston XXIV, 161 B.R. at 71; Texas Equipment, 283 B.R. at 230-31.

### ANALYSIS

As previously indicated, courts apply a four part analysis in determining whether to grant a stay pending appeal. The Court will briefly examine the first and fourth of these criteria. Maynard Savings Bank asserts that Debtor has little chance of prevailing on appeal. This Court found multiple grounds for both denial of confirmation and dismissal. Many of the underlying questions were factual in nature. Debtors must raise serious legal questions and have a substantial case on the merits before it would be considered inappropriate to deny a stay on this ground. It is the firmly held conviction of this Court that grounds for appeal are not evident in the record. If the Court were to solely consider this issue, the Court would deny any stay on appeal.

The fourth criteria is whether the public interest is involved. In this case, there are creditors other than Maynard Savings Bank, though the Bank is by far the largest creditor and a secured creditor who has most loudly voiced its objections. Though other creditors have also been denied payment over an extended period of time, the public interest is not really implicated in this case.

Ultimately, the decision to grant or deny a stay in this matter involves the second and third criteria. In other words, the test, as far as this Court is concerned, is irreparable injury to Debtor by denying the stay as opposed to injury caused to the Bank and other creditors by

granting the stay pending appeal. Debtor asserts that a stay is necessary to preserve his farm operations and assets. In the absence of a stay, the Bank could arguably foreclose on the farm and/or commercial real estate and execute on collateral farm equipment. Debtor's plan contemplated turning over the commercial real estate to the Bank and selling the farm equipment. Therefore, execution against these pieces of collateral would not necessarily cause Debtor a significant amount of harm. However, if the Bank foreclosed its second lien on the farm, Debtor's ability to continue in Chapter 12, if successful in this appeal, would be severely compromised.

On the opposite side of the ledger, the Bank argues that further delay will prejudice its rights. As set forth more fully in the order denying confirmation, Debtor has failed to make any substantial payment to the Bank for more than four years. The Bank feels strongly that Debtor has no grounds to argue this appeal and asserts that this is merely another delaying tactic in an attempt to deny the Bank payment on its rightful claims. While the Bank admits that it remains oversecured, it contends that the appeal is meritless and it should be allowed to proceed with its appropriate legal remedies.

The Court has evaluated these two positions. It is the conclusion of this Court that it has the discretion to require Debtor to post a bond. However, it may be more appropriate to require Debtor to make payments to the Bank in the form of "adequate protection" pending this appeal. The Court discussed this with counsel for the Bank at the time of hearing. Counsel indicated that the Bank would need in excess of \$2,000 per month in order to cover accruing costs. The Court recognizes that if this property is foreclosed, Debtor's remedies are nonexistent. At the time, the Court feels that, if Debtor demonstrates good faith by making monthly payments, any damages to the Bank because of the appeal would be covered by that payment. Therefore, while the Court feels that this appeal is meritless, this Court feels that the payment of \$2,500 per month by Debtor directly to the Bank can effectively defray any damages to the Bank during the relatively brief appeal period.

**WHEREFORE**, Debtor's Motion for Stay Pending Appeal is GRANTED subject to conditions.

**FURTHER**, Debtor shall pay directly to the Bank through its counsel John Hofmeyer III the sum of \$2,500 each month until appeal in this matter is resolved.

**FURTHER**, the first payment shall be made effective October 15, 2003 and the 15th day of each month thereafter until this appeal is final. For the purposes of the first payment, Debtor shall have until October 30, 2003 to make this payment to Mr. Hofmeyer's office.

**FURTHER**, payments thereafter shall be due on the 15th of the month or before at the office of Mr. Hofmeyer. If payments are not received by

the 15th of each month or earlier, Mr. Hofmeyer may submit an affidavit to this Court setting forth that the payment has not been timely received.

**FURTHER**, upon receipt of this affidavit, the Court, without further notice or hearing, will lift the stay pending appeal ordered on this date.

**FURTHER**, pending appeal, Debtor shall provide to the Bank a showing of adequate insurance on all the property secured by the Bank.

**SO ORDERED** this 23rd day of October, 2003.

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KILBURG  
CHIEF BANKRUPTCY JUDGE

PAUL J.