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IT IS SO ORDERED.



Beth A. Buchanan
Beth A. Buchanan
United States Bankruptcy Judge

Dated: May 15, 2012

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re)
)
CARL PERTUSET) Case No. 11-15607
VERA PERTUSET) Chapter 12
) Judge Buchanan
Debtors)

ORDER DENYING MOTION FOR STAY PENDING APPEAL

This matter is before this Court on the *Motion to Request Continue Stay* [Docket Number 127] and *Appellant’s Response to All Creditors* [Docket Number 138] (together, the “Motion for Stay Pending Appeal”) filed by the Debtors, *pro se*. On April 2, 2012, the Debtors filed a notice of appeal [Docket Number 125] of this Court’s (1) *Order: (I) Denying Debtors’ Oral Motion to Continue Confirmation Hearing; (II) Denying Confirmation of Proposed Plan; (III) Granting Motions to Dismiss Case; (IV) Applying Two Year Bar to Refiling; (V) Denying Motion for Relief from Stay and Motion for Adequate Protection as Moot; and, (VI) Granting Motion to Withdraw as Counsel* [Docket Number 117] (the “Dismissal Order”) and (2) *Order Denying Motion to Reconsider* [Docket Number 123] (the “Reconsideration Order”). Pursuant to the

Motion for Stay Pending Appeal, the Debtors request a “stay of all proceedings” and to preclude “all actions from alleged creditors.”

American Savings Bank, FSB and ASB Community Development Corp. [Docket Number 134], Farm Credit Services of Mid-America [Docket Number 135], Ohio Valley Resource Conservation and Development [Docket Number 140], and Quality Car & Truck Leasing [Docket Number 141] (collectively, the “Responding Creditors”) oppose the Debtors’ request for a stay pending appeal.

A motion for stay of a judgment “must ordinarily be presented to the bankruptcy judge in the first instance.” Fed. R. Bankr. P. 8005. While Federal Rule of Bankruptcy Procedure 8005 (“Rule 8005”) contemplates that a party may request a stay pending appeal directly from the appellate court, “the motion [must] show why the relief, modification, or termination was not obtained from the bankruptcy judge.” Although the Motion for Stay Pending Appeal is captioned for the appellate court, there is no explanation for requesting the relief directly from the appellate court. Furthermore, the Debtors clearly indicate that they wish for this Court to consider their request for a stay pending appeal. Docket Number 138. Accordingly, this Court will address the Motion for Stay Pending Appeal.

I. Standards for Relief

A. Standard Governing Requests For A Stay Pending Appeal

In determining whether to grant a stay of an order pending appeal under Rule 8005, courts customarily consider the same four factors used to evaluate a request for a preliminary injunction, those factors being:

- (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal;
- (2) the likelihood that the moving party will be irreparably harmed absent a stay;
- (3) the prospect that others

will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

In re Gress, 435 B.R. 520, 523 (Bankr. S.D. Ohio 2010)(quoting *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrop*, 945 F.2d 150, 153 (6th Cir. 1991)). These specified factors are not conditions that must be met but rather are interrelated considerations that are to be balanced together. *Griepentrop*, 945 F.2d at 153. In balancing these factors, “[t]he strength of the likelihood of success on the merits that needs to be demonstrated is inversely proportional to the amount of irreparable harm that will be suffered if a stay does not issue.” *Baker v Adams County/Ohio Valley School Board*, 310 F.3d 927, 928 (6th Cir. 2002). “However, in order to justify a stay of the . . . court’s ruling, the [movant] must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted.” *Id.*

A request for a stay pending appeal under Rule 8005 is an extraordinary remedy. *In re Black Diamond Mining Co., LLC v. Sergent*, 2011 Bankr. LEXIS 3645 at *14-15, 2011 WL 4433624 at *4 (Bankr. E.D. Ky. Sept. 21, 2011)(citing *In re F.G. Metals, Inc.*, 390 B.R. 467, 471 (Bankr. M.D. Fla. 2008)(further citations omitted)). The party seeking the stay bears the burden of proving by a preponderance of the evidence that it is entitled to the stay. *Sicherman v. Ohio Rehab. Servs. Comm’n (In re Dial Indus., Inc.)*, 137 B.R. 247, 249 (Bankr.N.D.Ohio 1992).

B. Standards Regarding Pro Se Litigants

Pleadings filed by *pro se* litigants must be liberally construed and are held to less stringent standards than formal pleadings drafted by lawyers. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)(citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). *Pro se* status, however, does not exempt a litigant from complying with the relevant rules of procedural and substantive law. *Hulsey v. State of Texas*, 929 F.2d 168, 171 (5th Cir. 1991)(citations omitted); *see also Jourdan*

v. Jabe, 951 F.2d 108,110 (6th Cir. 1991)(affirming dismissal of action for failure to prosecute where *pro se* litigant failed to comply with discovery deadlines despite numerous previous extensions by the court).

II. Legal Analysis

A. Likelihood Of Success On Appeal

The first factor that this Court must consider in addressing the Motion for Stay Pending Appeal is the likelihood that the Debtors will prevail on the merits on appeal. Even though the Debtors have designated twenty-six issues on appeal stemming from the Dismissal Order and the Reconsideration Order [Docket Number 136], the only arguments that the Debtors advance in support of the likelihood of their success on the merits on appeal are the arguments advanced by the Debtors in their Motion to Reconsider [Docket Number 119]. These arguments included the alleged (1) bias of the judge, (2) lack of standing by certain creditors to assert claims in the Debtors' bankruptcy case and exclusion of witnesses and evidence offered by the Debtors in support of their standing argument, (3) dismissal of the Debtors' case based on ineligibility to be debtors under Chapter 12 of the Bankruptcy Code, and (4) failure to consider allegations of "Servicing Misconduct," "Unfair, Deceptive, and Unlawful Loan Loss Mitigation Processes," "Wrongful Conduct Related to Foreclosure," "Bankruptcy-Related Misconduct," and "Violations of the False Claims Act."

While this Court recognizes that there is an "inherent conflict of a rendering court determining the probability that its own judgment will or will not be reversed on appeal," *In re Webb MTN, LLC v. Exec. Realty P'ship, L.P. (In re Webb MTN, LLC)*, 2009 Bankr. LEXIS 4090 at *4-5, 2009 WL 4931305 at *2 (Bankr. E.D. Tenn. Dec. 11, 2009)(quoting *In re Cacioli*, 302 B.R. 429, 431 (Bankr. D. Conn. 2003)), the Debtors have not offered any argument in their

Motion for Stay Pending Appeal that persuades this Court that its prior determinations on the matters raised by the Debtors in the Motion to Reconsider were erroneous. Rather, the Debtors merely incorporate by reference the legal arguments already addressed by this Court in the Reconsideration Order as support for the Motion for Stay Pending Appeal. The Responding Creditors assert that this factor weighs against the Debtors in that the Bankruptcy Appellate Panel affirmed the bankruptcy court's dismissal of the Debtors' previous Chapter 12 case for reasons similar to those given by this Court in dismissing the Debtors' second Chapter 12 case. The Responding Creditors note that there has been no change in the Debtors' circumstances, financial or otherwise, that would warrant a different outcome on the merits of the current appeal.

Even though the Debtors "need not always establish a high probability of success on the merits, . . . [they are] still required to show, at a minimum, serious questions going to the merits." *Griepentrop*, 945 F.2d at 153-54 (internal citations and quotations marks omitted). To do so, the Debtors "must offer something more than an assertion or expectation of success on the merits in order to prove the existence of questions as to the merits of the case and a reasonable possibility that [they] will, in fact, succeed on the merits of [their] appeal." *In re Webb MTN, LLC*, 2009 Bankr. LEXIS 4090 at *4-5, 2009 WL 4931305 at *2. Given that this Court already addressed each of the arguments contained in the Motion to Reconsider in the Reconsideration Order and that the Debtors have not offered anything further in support of such arguments for purposes of the Motion for Stay Pending Appeal, this Court finds that the Debtors have not sustained their burden with respect to likelihood of success on the merits of the appeal.

B. Irreparable Harm

The second factor that this Court must consider in addressing the Motion for Stay Pending Appeal is the likelihood that the Debtors will be irreparably harmed absent the issuance of a stay. The Debtors assert that they will suffer irreparable harm if the stay is not granted because they will lose their family farm, which may cause them to go out of business and result in the loss of jobs for the people they employ.¹ Consequently, the Debtors contend that their appeal of the Dismissal Order and Reconsideration Order would be an “empty gesture” if a stay is not imposed and creditors are permitted to resume collection efforts.

The harm alleged by the party seeking a stay pending appeal should be considered in terms of the likelihood of its occurrence, its substantiality and the adequacy of the proof provided by the movant. *Griepentrop*, 945 F.2d at 155. As relates to the likelihood of occurrence, “the harm alleged must be both certain and immediate, rather than speculative or theoretical.” *Id.* at 154 (citations omitted). Generally, the resumption of collection activities during the pendency of an appeal in and of itself does not constitute irreparable harm. *LaRocco v. Smithers (In re Smithers)*, 2005 Bankr. LEXIS 2899 at *11, 2005 WL 4030095 at *4 (Bankr. S.D. Ohio July 13, 2005); *see also, Jonas v. W.P. Hickman Systems Inc. (In re Jonas)*, 2009 Bankr. LEXIS 2215 at *8, 2009 WL 2382969 at *3 (Bankr. N.D. Ohio July 30, 2009)(“Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of stay, are not enough.” (quoting *Griepentrop*, 945 F.2d at 154)(further citations and internal quotation marks omitted). Given the status of state court actions by the Debtors’ creditors to enforce their lien rights, the risk of foreclosure and repossession of the Debtors’ farm and farming equipment is more likely than not both certain and immediate. Several creditors have judgments against the

¹ Debtor Carl Pertuset testified at the November 29, 2011 hearing on American Savings Bank’s motion for relief from stay and motion to dismiss that the Debtors currently employ certain unnamed family members in their farming operations.

Debtors. *See* Farm Credit Services January 25, 2012 Hearing Exhibit J (certified Judgment Entry from Court of Common Pleas, Scioto County, Ohio dated August 9, 2011 finding that American Savings Bank and Farm Credit Services have valid mortgages on certain property of the Debtors) and Quality Car January 25, 2012 Hearing Exhibit C (certified Order Sustaining Plaintiff's Motion for Judgment on the Pleadings dated July 11, 2011 entering judgment in favor of Quality Car against the Debtors). While the Debtors have pending state court appeals relating to one or more of these judgments, there is a substantial chance that creditors may execute on their judgments before final disposition of either the state court or bankruptcy appeals. *See In re Taub*, 2010 Bankr. LEXIS 3458 at *7-8, 2010 WL 3911360 at *3 (Bankr. E.D.N.Y. Oct. 1, 2010)(noting that an imminent foreclosure sale or other action that may render an appeal meaningless may constitute irreparable harm).

The Responding Creditors counter that any loss incurred by the Debtors as a result of collection efforts by creditors during the pendency of the appeal could be compensated by monetary damages if the Debtors prevailed on appeal. "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Griepentrop*, 945 F.2d at 154)(citations and internal quotation marks omitted). The Responding Creditors correctly state that courts have found that the risk of foreclosure during the pendency of an appeal does not constitute irreparable harm because a debtor could be adequately compensated by damages if the debtor lost its interest in property through a wrongful foreclosure. *See Hamilton v. Lomas Mortgage U.S.A. (In re Hamilton)*, 95 B.R. 564, 565 (N.D. Ill. 1989)(citing *Sandra Cotton, Inc. v. Bank of New York*, 64 B.R. 262 (W.D.N.Y. 1986))(holding that possible foreclosure of debtors' residence pending appeal was not irreparable harm because debtors could be

compensated by damages for wrongful foreclosure). Perhaps due to the special nature of the “family farm” and Chapter 12’s general objective of aiding farmers in retaining their lands², other courts have held that the foreclosure or replevin of farmland and farming machinery may constitute irreparable injury. *In re Mader*, 100 B.R. 989, 991 (N.D. Ill. 1989); *In re Beswick*, 98 B.R. 904, 906 (N.D. Ill. 1989); *but see In re Rafter Seven Ranches, LP*, 2008 Bankr. LEXIS 4540 at *21-22 n.24, 2008 WL 4330009 at *6 (Bankr. D. Kan. Sept. 19, 2008)(noting that if the debtor was successful on appeal of its claimed stay violation, the debtor could use the stay violation damages award to purchase substitute land to continue its farming operations). This Court agrees with those courts in concluding that, while not entirely convinced that monetary damages may not adequately address any harm resulting from a wrongful foreclosure or replevin of family farm property, the asserted harm may in fact be irreparable from the Debtors’ perspective and therefore this factor weighs in favor of the Debtors. *Id.*

C. Harm To Others

The second factor that this Court must consider in addressing the Motion for Stay Pending Appeal is the harm to other parties if this Court grants the stay. “This factor is the other side of the coin to irreparable harm. The court must measure the harm to the non-movant, here the [creditors], and balance the harm inuring to all parties.” *Henkel v. Lickman (In re Lickman)*, 301 B.R. 739, 748 (Bankr. M.D. Fla. 2003).

The Debtors contend that their creditors will not be harmed if this Court grants a stay because the creditors “are not the real parties in interest,” because the principals of the creditors may not be operating the entities in the near future, and because the creditors “have securitized

² See *In re Rafter Seven Ranches, LP*, 2008 Bankr. LEXIS 4540 at *21-22 n.24, 2008 WL 4330009 at *6 (finding no irreparable harm in enforcing settlement agreement requiring sale of farmland but noting that “[t]he unstated irreparable harm is that Tract 3 has been in the family of [the debtor’s] principal for many years, and that its principal has an understandable emotional attachment to the land”).

the loans and sold as unregistered and un-regulated securities to the investors, who are the real creditors and other parties in interest.” Docket Number 138 at pp. 5-6. The Responding Creditors assert that they will be substantially injured by a stay pending appeal. Significantly, the Responding Creditors note that a stay precludes the Responding Creditors from pursuing their state law rights to collect against their collateral. The Responding Creditors argue that not only have they not received payments from the Debtors on the loan obligations for an extended period of time but certain Responding Creditors have had to advance funds for insurance and taxes to ensure that their interests in the collateral are protected. The Responding Creditors maintain their collateral continues to diminish in value and that certain collateral may be damaged or removed by the Debtors if a stay of collection efforts is imposed.

This Court finds that the Responding Creditors (and creditors in general) will be harmed by granting a stay pending appeal. This Court further finds that the harm to creditors by granting a stay outweighs the harm to the Debtors in denying the request for a stay pending appeal. The Debtors have been afforded two chances to reorganize their debts and save their farm over a collective period of greater than two years. The Debtors’ creditors, on the other hand, have not been paid for an extended period of time and have expended significant time and resources in seeking to enforce their asserted contractual and state law rights. *See Vincent Andrews Management Corp. v. McCarron (In re Vincent Andrews Management Corp.)*, 414 B.R. 1, 7 (D. Conn. 2009)(finding that substantial delay in collection of judgment weighs in favor of denying stay); *In re Lickman*, 301 B.R. at 748 (finding stay pending appeal would harm judgment creditor by halting collection efforts). The Debtors failed to adequately protect the Responding Creditors’ interests in their collateral during the pendency of the Chapter 12 case and do not propose to post a bond to do so during the pendency of this appeal. *See In re Beswick*, 98 B.R. at

907 (finding substantial harm to creditors where “no agreement had been entered into securing any of the creditors’ interest from further depreciation, no monies had been paid to [specific bank creditor] by debtors for rent or otherwise, and no arrangements had been made securing any creditors’ position with respect to the [current year] crop”). Accordingly, the Debtors have failed to carry their burden with respect to this factor.

D. The Public Interest

The final factor that this Court must consider in addressing the Motion for Stay Pending Appeal is whether the public interest will be served by granting the stay. The Debtors contend that “there is a clear public policy against putting someone on the dole when such an event can be avoided.” Docket Number 138 at p. 6. The Responding Creditors reply that the public interest is not served where debtors (such as the Debtors in this case), with no probability of confirming a plan of reorganization and who have not dealt with their creditors in good faith, are permitted to employ delay tactics to frustrate the legitimate rights of creditors to collect on the obligations rightfully due to creditors.

Chapter 12 of the Bankruptcy Code signifies an important public interest in giving “family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land.” *Justice v. Valley National Bank*, 849 F.2d 1078, 1090 (8th Cir. 1988)(quoting H.R. Rep. 554, 99th Cong. 2d Sess., 48, reprinted 1986 U.S. Code Cong. & Admin. News 5249). This objective, however, is carefully balanced against the equally important public interest of “preventing abuse of the [bankruptcy] system and ensuring that farm lenders receive a fair repayment.” *Id.* Under the facts and circumstances of this case, as more fully described in the Dismissal Order, the Debtors’ actions demonstrate an abuse of the bankruptcy system as evidenced by a lack of fundamental fairness in the Debtors’ dealings with their creditors. *Cf. In*

re Vincent Andrews Management Corp., 414 B.R. at 8 (finding merit in argument that “the public interest in ensuring that the bankruptcy process is not improperly utilized to delay creditors from collection would be undermined by a stay in this case”). The Debtors were given a “fighting chance” in bankruptcy on two occasions and have failed to propose and confirm a plan that provides for the repayment of the Debtors’ obligations to their creditors. Accordingly, this Court finds that the Debtors have failed to meet their burden to show that the public interest is served by granting the stay.

III. Conclusion

In balancing the four factors customarily considered in evaluating whether to grant a stay of an order pending appeal under Rule 8005, this Court finds that the factors clearly weigh in favor of denial of the requested stay in this case. Although there may be an irreparable harm to the Debtors by not granting the stay, the Debtors have not shown that there are serious questions going to the merits on appeal. Furthermore, the harm to the Debtors does not decidedly outweigh the harm imposed on their creditors if a stay is issued. Finally, the public interest is not served by granting the stay. Accordingly, the Debtors’ Motion for Stay Pending Appeal is hereby DENIED.

SO ORDERED.

Distribution list:
All creditors and parties in interest.

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