UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	:	**Case No. 11-58110**
George L. Brooks and	:	
Sharon D. Brooks,	:	Chapter 13
Debtors.	:	Judge Caldwell

ORDER DENYING MOTION FOR STAY OF PROCEEDINGS PENDING APPEAL (DOC. NO. 52)

On February 13, 2012, Creditor Telhio Credit Union ("Creditor") filed a Notice of Appeal (Doc. No. 46). Creditor is appealing this Court's Order Overruling Objection of Telhio Credit Union to Confirmation of Debtors' Chapter 13 Plan (Doc. No. 37) and Order Confirming Chapter 13 Plan (Doc. No. 44). Pursuant to Rule 8005 of the Federal Rules of Bankruptcy Procedure, Creditor now seeks a stay of the instant proceedings pending its appeal. Responses in opposition to the motion have been filed by both the Chapter 13 Trustee (Doc. No. 58) and Debtors (Doc. No. 63). On April 10, 2012, the Court held a hearing on the motion. For the following reasons, Creditor's motion will be denied.

In deciding a motion for stay pending appeal, the Court must consider the following factors traditionally evaluated in the context of a request for preliminary injunction:

(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 Seidel, 443 B.R. 411, 413 (Bankr. S.D. Ohio 2011) (citing *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). These factors are not requirements, but considerations to be weighed by the court. *Seidel*, 443 B.R. at 413.

First, the Court must consider the likelihood of success on the merits of the appeal. Because this is one of but several weighted factors, a movant is not required to demonstrate a "high probability of success." *Mich. Coalition*, 945 F.2d at 153. However, the movant is required to show more than the mere "possibility" of success on the merits. *Id*.

Creditor proposes three arguments as to why the Court erred in adopting a valuation of $86,000.00: (1) Debtors' appraiser failed to recount on the stand adjustments made in his use of the comparative sales approach, (2) Debtors' appraiser relied on distressed sales in determining his valuation, and (3) Debtors' appraiser improperly valued the damaged portion of the real estate at zero. Having considered these arguments, the Court finds it unlikely that Creditor will prevail on the merits.

In its first and third arguments, Creditor contests the reliability of Debtors' appraiser due to an inability to recount certain details on the stand, and asserts that the appraiser valued a portion of the property at zero. Though Creditor argued in closing that the Court should accept Creditor's appraisal, it made no objection to either the qualification of Debtors' appraiser or to the admission of his appraisal into evidence. The Court exercised its discretion as fact finder to determine the reliability and credibility of the evidence. The motion fails to identify an abuse of that discretion such that Creditor might prevail on appeal. The Court is not convinced that Creditor has sustained its burden with respect to these arguments.

In its second argument, Creditor argues that 11 U.S.C. § 506(a)(1) bars an appraiser from considering distressed sales when utilizing a sales comparison approach. In support, Creditor cites *Taffi v. United States (In re Taffi)*, 68 F.3d 306 (9th Cir. 1995). In *Taffi*, the Court was tasked with choosing the proper value to place on a debtor's residence for the purposes of determining the amount of the creditor's secured claim under section 506(a). *Taffi*, 68 F.3d at 308. The parties stipulated to two values: (1) a "fair market" value – the value a fully-informed buyer would pay for the property under fair market conditions, and (2) a "forced sale" value – the value the residence would sell for under forced sale conditions. *Id.* Each valuation was based upon a hypothetical sale that had not actually occurred. *Id.* In *Taffi*, the Court determined that a secured creditor's claim should be valued based upon the fair market value of its collateral, and not upon what the creditor would have gotten if forced to immediately liquidate that collateral. However, *Taffi* does not, as Creditor suggests, bar an appraiser from using distressed sales in determining the fair market value of a debtor's residence. Indeed, fair market conditions logically must take into account distressed comparable sales, as the existence of less expensive alternative properties in an area would almost certainly affect how much the fully-informed buyer would be willing to pay.

In the instant case, Debtors' appraiser offered an opinion of fair market value based upon comparable sales in the area, some of which were "distressed" sales. The appraiser did not state, nor did the Court conclude, that the valuation placed upon the property by Debtors' appraiser represented what Creditor would receive if forced to immediately liquidate, or that a "forced sale" valuation was more appropriate than a "fair market" valuation under section 506(a). As noted in the Court's order, surrounding distressed sales can influence a property's fair market value. The opinion of Debtors' appraiser was determined to be a more accurate expression of that "fair market" value, and was not a "forced sale" value.

The Court is not convinced that Creditor has sustained its burden with respect to this argument. Creditor cites no other facts or case law which would indicate the Court abused its discretion when it adopted a valuation of $68,000.00. Accordingly, the Court finds the likelihood of success on the merits to be low.

Second, the Court must address the likelihood of irreparable harm to the movant absent a stay. In support of this factor, Creditor alleges that Debtors' Chapter 13 Plan may be substantially consummated prior to a ruling on appeal. In response to this claim, Debtors contend that the appeal would likely conclude prior to the end of the 60 month applicable commitment period, unless 100% of claims are paid in full, which would render Creditor's appeal moot. The Trustee notes in his response that, even if Creditor prevails on appeal, distributions to secured, administrative, and priority claimholders would still have to be made.

Though not clearly stated in its motion, Creditor appears to seek a stay of any distribution under the plan pending the resolution of the appeal. The Court agrees with the Trustee and Debtors that it is unlikely the plan will be substantially consummated, or that Debtors will receive a discharge, prior to the conclusion of the appeal. Creditor acknowledged at hearing it would be unlikely for this event to occur. The initial distributions required to be made under the plan to secured, administrative, and priority claimholders will not harm Creditor. Any potential harm to creditor will take years to occur. Accordingly, the Court concludes that the likelihood of irreparable harm to Creditor absent a stay is low.

Third, Creditor alleges that no harm will come to Debtors or other parties if a stay is granted. To the contrary, the Trustee and Debtors note that non-payment of certain claims will necessarily result in the accrual of interest on those claims. Such would reduce the amount of money available to unsecured creditors. Debtors further note that all creditors would be harmed by virtue of delay if distributions under the plan are stayed. The parties have suggested a stay of distributions on only unsecured claims. However, no form of bond has been posted to protect those claimholders. Based upon these considerations, the Court concludes that the institution of a stay will necessarily harm other parties in the proceeding.

Last, the Court must consider whether the public interest would be best served by issuing a stay. This has not been addressed by the parties. However, the Court recognizes that the public has an interest in the federal court system promptly handling Chapter 13 cases. Granting one creditor leave to stay distributions to the detriment of others, after already having had the opportunity to litigate, is in contravention of this interest. Therefore, the Court concludes that the public interest would be best served by not issuing a stay.

At hearing on the motion, the parties reported to the Court that an agreement had been reached. The parties proposed to halt distributions to unsecured creditors, while permitting distributions to secured, priority, and administrative claimholders. The Court expressed to the parties its concerns regarding the halting of distributions to unsecured creditors, and the lack of a bond to protect the parties' interests. Counsel for Creditor indicated that Creditor would be willing to post a bond as a term of any agreement, which would remove the potential prejudice to other parties, but did not know how much of a bond Creditor would authorize. After consideration of the arguments of the parties, the Court granted Creditor 20 days with which to submit a revised proposed order that would include the posting of a bond. Creditor has not timely submitted a revised order.

Based upon the above determinations, the Court concludes that the relevant factors weigh against issuing a stay pending appeal. Creditor has not raised an issue that shows a likelihood of success on the merits. Further, Creditor has failed to demonstrate that it would be irreparably harmed absent a stay. However, the institution of a stay in the absence of a bond would necessarily prejudice creditors. These factors, when weighted against each other, do not warrant the relief requested. Accordingly, Creditor's motion is hereby **DENIED**.

IT IS SO ORDERED.

Copies to:

Default List
Scott W. Paris, Esq. (electronic service)