

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

In re:
RON WILSON AND LARHONDA WILSON,
Debtors

CIVIL ACTION

NO. 09-3281 c/w
NO. 09-3283
(Order Ref: All Cases)

SECTION "F"

ORDER AND REASONS

Before the Court are Fidelity and Option One's motions for stay pending appeal. For the reasons that follow, the motions are DENIED.

Background

Ron Wilson, Sr. and LaRhonda Wilson (Debtors) filed a voluntary petition under Chapter 13 of the Bankruptcy Act on September 29, 2007. Option One Mortgage Corporation¹ holds a mortgage secured by debtors' residence. Option One filed a Motion for Relief from Stay on January 7, 2008; the Debtors objected, asserting they were current on their payments. The motion was denied because Option One failed to provide evidence of default.

¹ Option One is the former name of Sand Canyon Corporation. Because all the parties refer to Sand Canyon as Option One, the Court will use that name.

Option One filed a second Motion for Relief from Stay on March 10, 2008. Attached to that motion was an affidavit by Dory Goebel,² assistant secretary at Option One, attesting to the nonpayment of four installments. Debtors again objected, asserting all payments had been made and filed proof of payment into the record.

Because of the conflicting evidence, the bankruptcy court issued Orders to Show Cause against Option One, Dory Goebel, and counsel for Option One. The court held a hearing on the second motion to lift the stay and the show cause orders on June 26, 2008. At the hearing, counsel for Option One, Clay Wirtz, admitted that Option One had received five payments post-petition, but had failed to amend or correct the information in the lift-stay motion or Goebel's affidavit. The court found that Wirtz had violated his ethical duty of candor to the court and sanctioned him \$1,000. It also sanctioned Option One and Goebel \$5,000 for failing to appear and \$5,000 for filing a false affidavit. The court continued the hearing on the orders to show cause, set for August 21, 2008. Fidelity moved to appear as an interested entity, which the bankruptcy court granted, and the court issued an order to show cause as to Fidelity, also set for hearing on August 21, 2008. The

² Dory Goebel is both an employee of Fidelity and an officer of Option One. Goebel signed this affidavit solely in her capacity as an officer of Option One. Fidelity has a contractual relationship with Option One to provide administrative support services to Option One regarding mortgage loans to borrowers such as the debtors. Fidelity asserts its only connection to the debtors' bankruptcy case was that Goebel was a Fidelity employee.

United States Trustee entered an appearance in the case on June 30, 2008.

At the August 21st hearing, the Trustee requested the opportunity to conduct additional discovery. After hearing testimony, the court granted the request and directed the Trustee to propound discovery "on the court's behalf" on Option One and Fidelity to obtain documentation relating to the case. The Trustee issued discovery requests to Fidelity, Option One, and The Boles Law Firm in fall 2008. All three filed motions to quash the discovery requests, which were denied by the bankruptcy court on February 6, 2009. Fidelity filed a Motion for Clarification and Option One filed a Motion for Reconsideration, in which Fidelity joined.³ The bankruptcy court denied all three motions on March 27, 2009. Fidelity and Option One filed motions with this Court for leave to appeal the bankruptcy court's orders denying the motions to quash, motion for reconsideration, and motion for clarification.

Fidelity and Option One now move to stay the bankruptcy proceedings pending the outcome of the appeal.

³ The bankruptcy court also ruled on a motion to stay, allegedly filed by Option One. Option One asserts it filed the motion to stay to be heard by the district court, and therefore there was no motion to stay before the bankruptcy court. The parties have not appealed the bankruptcy court's ruling on the issue of stay, and the Federal Rules of Bankruptcy Procedure Rule 8005 permits the parties to seek a stay directly from the district court.

Fidelity argues that it fulfills the four-part test for granting a stay. First, it contends that it has made a substantial case and shown a likelihood of success on the merits of the appeal because it claims the bankruptcy court exceeded its authority under section 105(a) of the Bankruptcy Code in allowing the Trustee, a non-party, to conduct discovery against Fidelity, a non-creditor, non-party entity. Fidelity argues that the appeal is not a "discovery dispute," but rather it is about the proper scope or relevance of discovery under the Federal Rules of Civil Procedure, the authority of the bankruptcy court to authorize the discovery, and the standing of the Trustee to conduct the discovery. Fidelity insists that the Trustee is not a party and does not have the right to request and conduct a Rule 2004 examination. It notes that even if it did have the right, the Trustee never filed a Rule 2004 motion to conduct the discovery. Next, Fidelity urges that it will suffer irreparable injury if the stay is not granted because it will be forced to respond to unduly burdensome discovery requests and will be forced to reveal sensitive, proprietary, and confidential information, which cannot be "undone" if reversed on appeal. Fidelity then argues that a stay will not result in substantial harm to other participants in the appeal because there is no underlying controversy remaining. Finally, Fidelity submits that a stay would serve the public interest because it would protect non-party, non-creditor entities from discovery propounded

without procedural or jurisdictional bases.

Option One essentially echoes Fidelity.

I.

A stay pending appeal is an "extraordinary remedy." Belcher v. Birmingham Trust Nat'l Bank, 395 F.2d 685, 686 (5th Cir. 1968). A party seeking a stay pending appeal generally must establish four factors: (1) likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) absence of substantial harm to the other parties from granting the stay; and (4) service to the public interest from granting the stay. Hunt v. Bankers Trust Co., 799 F.2d 1060, 1067 (5th Cir. 1986). Each part of the test must be met; however if the appeal involves a "serious legal question" and "the balance of the equities weighs heavily in favor of granting the stay," then the appellant need only present a substantial case on the merits rather than show a probability of success on the merits. Arnold v. Garlock, 278 F.3d 426, 438-39 (5th Cir. 2001). Notably, "[l]ikelihood of success remains a prerequisite in the usual case even if it is not an invariable requirement." Ruiz v. Estelle, 666 F.2d 854, 857 (5th Cir. 1982).

II.

Without expressing any view on the ultimate merits of the motions for leave to appeal or the appeals themselves, this Court finds that the movants have failed to establish the factors necessary to warrant a stay.

A. Likelihood of Success/Substantial Case on the Merits

Because this is an interlocutory appeal, the movants must first establish a likelihood that their appeal will even be permitted, and then must establish the likelihood of success on the underlying merits of the appeal. In re Mounce, No. 03-55022, 2008 WL 2714423, *2 (Bankr. W.D. Tex. July 10, 2008). The movants urge this Court to apply the "substantial case on the merits" standard, arguing that these appeals involves a serious legal question and the other three factors weigh heavily in favor of a stay.⁴ Regardless of which applies, the Court finds that the movants have failed to establish the first factor under either standard.

Movants both argue that this is not a discovery dispute. Appeals of discovery orders are rarely granted. See Piratello v. Philips Electronics N. Am. Corp., 360 F.3d 506, 508 (5th Cir. 2004) ("[D]iscovery orders do not constitute final decisions under [28 U.S.C.] § 1291, and therefore, are not immediately appealable."); A-Mark Auction Galleries, Inc. v. Am. Numismatic Ass'n, 233 F.3d 895, 898-99 (5th Cir. 2000) (noting "the well-settled rule in this circuit that discovery orders may not be appealed under the Cohen exception"). The United States Supreme Court has held that a party seeking to appeal a discovery order "must refuse compliance be held in contempt, and then appeal the contempt order." Church of

⁴ The Court notes that the three other factors do not weigh heavily in favor of stay.

Scientology of CA v. U.S., 506 U.S. 9, 18 n.11 (1992).⁵

Understandably, then, the movants attempt to recharacterize the bankruptcy court's denial of their motions to quash the Trustee's discovery requests as something other than a discovery order. However, this appeal, at its heart, is a discovery dispute and to conclude otherwise would be a journey into alchemy. Fidelity and Option One challenge the bankruptcy court's decision to allow the Trustee to issue discovery requests. In fact, Fidelity's entire argument as to the irreparable harm it would suffer focuses on it being forced to comply with "unduly burdensome discovery" that would result in disclosure of "commercially sensitive, proprietary and confidential information."⁶

B. Irreparable Injury

Movants have also failed to establish irreparable injury if the Court fails to issue a stay. Complying with a discovery order does not, on its own, constitute irreparable injury. See Capdeboscq v. Francis, 98 F. App'x 988, 991 (5th Cir. 2004);

⁵ The Court distinguishes between parties and non-parties, noting that "a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." Id. Fidelity argues, in an unrelated context, that it is not a party to the proceeding. However, the Court finds that as an "interested entity," Fidelity has a "sufficient stake in the proceeding" that it should be treated like a party for the purposes of determining the finality of the bankruptcy court's order.

⁶ Counsel are advised to become better aware of 28 U.S.C. § 1927.

Coastal States Gas Corp. v. Dep't of Energy, 609 F.2d 736, 738 (5th Cir. 1979). Fidelity argues that it would be forced to disclose sensitive, proprietary, and commercial information and asserts that the bankruptcy court failed to issue a protective order to lessen the impact of this disclosure. However, Fidelity only requested a blanket protective order during a hearing; the court responded that it would entertain a request for specific requests relating to specific documents. When and if Fidelity makes a good faith argument as to specific documents, protections are available to Fidelity to assure the confidentiality of its produced documents. Option One's basis for claiming irreparable injury is that it would be forced to litigate a second show cause proceeding that is akin to a criminal contempt hearing, but fails to persuade the Court of its irreparable injury.

C. Harm to Other Parties

The movants argue that this factor only applies to other parties to the proceeding; because the Trustee is not a party, they claim, any harm to the Trustee would be irrelevant. The bankruptcy court noted that the Trustee would not incur substantial harm by delaying discovery, but that allowing the movants to continue with their improper servicing practices will harm other debtors in this district through the filing of unwarranted motions for relief supported by false affidavits. The Court agrees.

D. Public Interest

Finally, the Court finds that granting the stay would not serve the public interest. Option One argues that the public interest is always served when the plain language of the Federal Rules of Procedure are enforced and that, absent a stay, Option One will have no effective means of review because the bankruptcy court issued a final order sanctioning Option One. Fidelity asserts that allowing the Trustee to seek discovery from another nonparty would open the door to discovery without reasonable bounds in future bankruptcy cases. These arguments focus on the merits of the appeal rather than on granting the stay. The Court finds that the public interest would more effectively be served by allowing the bankruptcy proceedings to continue unhindered by a stay.

Accordingly, the motions to stay are DENIED.

New Orleans, Louisiana, June 3, 2009.


MARTIN D. C. FELDMAN
UNITED STATES DISTRICT JUDGE