UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
RALPH LEO BRUTSCHE,
Debtor. No. 11-13326-s7

MEMORANDUM OPINION ON EMERGENCY
MOTION FOR STAY PENDING APPEAL

This matter is before the Court on the Emergency Motion for Stay Pending Appeal ("Motion") filed on July 30, 2012 (doc 294). Debtor, who is represented by counsel, filed the Motion without assistance of his counsel. Debtor's Motion seeks to stay all acts by the Chapter 7 trustee Yvette Gonzales and her attorney the Law Office of George "Dave" Giddens, PC, pending the outcome of his appeal of the Court's Order Granting Motion to Convert Case from Chapter 11 to 7 (doc 265) filed on June 8, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). For the reasons set forth below, the Court finds that it must deny the Motion.

STAYS PENDING APPEAL

Federal Rule of Bankruptcy Procedure 8005 deals with stays pending appeals from judgments or orders of bankruptcy judges. The Rule provides:

> 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. A motion for such relief, or for modification or termination of relief granted by a bankruptcy judge, may be made to the district court or the bankruptcy appellate panel, but the motion shall show why the relief, modification, or termination was not obtained from the bankruptcy judge. The district court or the bankruptcy appellate panel may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court. When an appeal is taken by a trustee, a bond or other appropriate security may be required, but when an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States a bond or other security shall not be required.

The rule discusses the procedural aspects of obtaining a stay, but is silent on the elements a movant must establish to obtain a stay.

In 2009, the United States Supreme Court was faced with the issue of what elements should be considered in granting a stay pending an appeal. Nken v. Holder, 556 U.S. 418, 434 (2009). The Court found four relevant considerations:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Hilton [v. Braunskill, 481 U.S. 770] at 776, 107 S.Ct. 2113 [(1987)].

The Court also commented on the relative importance of the four factors.

> The first two factors of the traditional standard are the most critical. It is not enough that the chance of success on the merits be "better than

> negligible." Sofinet v. INS, 188 F.3d 703, 707 (C.A.7 1999) (internal quotation marks omitted). Even petitioner acknowledges that "[m]ore than a mere 'possibility' of relief is required." .... By the same token, simply showing some "possibility of irreparable injury," Abbassi v. INS, 143 F.3d 513, 514 (C.A.9 1998), fails to satisfy the second factor.

Id. at 434-35. "Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." Id. at 435.

As discussed below, the Court finds that Debtor does not meet either the first or second element for obtaining a stay pending appeal. Therefore, the Court need not address the third or fourth elements.

LIKELIHOOD OF SUCCESS ON THE MERITS

Debtor is appealing the Order that converted his case from Chapter 11 to Chapter 7. The Bankruptcy Code section governing conversions from Chapter 11 to Chapter 7 is 11 U.S.C. § 1112(b), which provides in relevant part:

> (b)(1) Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.
> (2) The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of

creditors and the estate, and the debtor or any other party in interest establishes that--

(A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and

(B) the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A)--

(i) for which there exists a reasonable justification for the act or omission; and

(ii) that will be cured within a reasonable period of time fixed by the court.

(3) ...

(4) For purposes of this subsection, the term 'cause' includes--

(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation[.]

The order converting this case was based on a Memorandum Opinion ("Memo") entered June 8, 2012 (doc 267). The Memo quotes Bankruptcy Code section 1112(b) and then discusses the concept of "rehabilitation" referenced in section 1112(b)(4)(A). The Court found that Debtor's business had been developing and selling upscale real estate in Santa Fe, New Mexico. However, relief from the automatic stay was granted as to substantially all of Debtor's developable real estate by orders entered on February 16, 2012 (docs 208 and 209)[1]. Debtor's authority to use cash collateral was also terminated on that date (doc 210). The Court therefore found that Debtor's business had ceased and he was left

[1]Debtor, acting without counsel, filed an appeal of the stay orders. That appeal was dismissed on July 6, 2012 for failure to prosecute. Doc 284 (copy of BAP appeal 12-16, doc 44). Those orders are now law of the case.

with, at best, the possibility of a reorganization plan that sold assets and pursued highly contested litigation. This scenario did not fit into the concept of "rehabilitation."

The Court also found "ample evidence" of substantial and continuing losses to or diminution of the estate. First, the Court referenced its Memorandum Opinion on the Motions for Relief from Stay filed by Los Alamos National Bank and Grevey-Liberman (doc 211), in which the Court listed a $657,000 decline in the value of the real estate collateral, no business revenue, and post-petition cash expenditures of $145,000 for personal items (including a home mortgage) and professional fees, and $215,000 of post-petition accounts payable. At the hearing on conversion or dismissal, the Court further found that an updated appraisal of the real estate collateral indicated that its value had declined by an additional $4 million; that professional fees were continuing for: bankruptcy administration, defending the Rodriguez litigation, pursuing counterclaims against Los Alamos National Bank, pursuing claims against the City of Santa Fe and pursuing claims against the Nature Conservancy. Overall, the Court found that the estate was in the position of continuing substantial losses.

Debtor's Motion for Stay states that this Court made errors in valuing the property in relation to the stay motion. Those arguments are now foreclosed by the dismissal of his appeal.

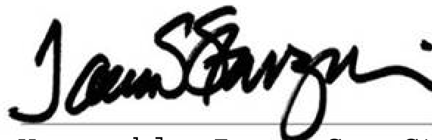
Debtor's only other argument about his potential success on appeal is that this Court did not have proper grounds for converting the case. As discussed above, the Court found "cause" under section 1112(b)(4)(A). Therefore, the Court finds that Debtor has not demonstrated that he will likely prevail on the merits of his appeal[2].

IRREPARABLE INJURY

Debtor has not demonstrated that a stay is necessary to prevent irreparable injury. If or when the Trustee proposes to settle litigation with the bank, Debtor can file his objections to the adequacy of the settlement. However, if Debtor lacks standing to pursue that objection, by definition he could not be injured by the settlement because he will not receive anything from the estate after payments to creditors regardless of whether the settlement is approved or not.

CONCLUSION

For the reasons set forth above, the Court finds that the Motion for Stay pending appeal is not well taken and is hereby denied.



Honorable James S. Starzynski
United States Bankruptcy Judge

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[2]The Court also finds that the Bankruptcy Appellate Panel reached the same conclusion on August 3, 2012 and entered its Order Denying Emergency Motion for Stay. BAP 12-48, doc 32.

Date Entered on Docket: August 6, 2012

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