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UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:	
Elana Maria Stevens,	**Chapter 7 Case**
Debtor.	**# 98-11181**
Raymond Obuchowski, Trustee,	
Plaintiff,	**Adversary Proceeding**
vs.	**# 99-1040**
Jeffrey Poulin, Gary Phillips, David Redmond, and Lyndonville Savings Bank,	
Defendants.	

Appearances:	Lisa Chalidze, Esq. Miller, Faignant & Behrens, P.C. Rutland, VT *Attorney for Plaintiff/Trustee*	John C. Gravel, Esq. Bauer, Anderson & Gravel Burlington, VT *Attorneys for Defendants*

MEMORANDUM OF DECISION
DENYING PLAINTIFF'S MOTION TO STAY
ADVERSARY PROCEEDINGS PENDING APPEAL

The matter before the Court is the *Plaintiff's Motion to Stay Adversary Proceeding Pending Appeal Outcome* filed on October 29, 2001 [Dkt # 121-1], and the *Opposition to Plaintiff's Motion to Stay Adversary Proceeding Pending Appeal Outcome* filed by the Defendants Lyndonville Savings Bank and Trust Co., David Redmond, Gary Phillips and Jeffrey Poulin, on November 8, 2001. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334; *see also* Rule 8005 of the Federal Rules of Bankruptcy Procedure.[1] For the reasons set forth below, the motion for stay is denied.

[1] Plaintiff also filed a Motion for Leave to Appeal dated October 29, 2001in the main case, No. 98-11181, and a Motion to Withdraw the Reference of Adversary Proceeding dated October 30, 2001. Because both these motions are filed with the Bankruptcy Court but directed to the District Court, *see* 28 U.S.C. §§158(a)(3) and 157(d), these motions are not considered herein, except to the limited extent the merits of the appeal and potential harm to the petitioner and others are considered to be relevant to the instant motion.

BACKGROUND

The debtor filed a petition seeking relief under chapter 7 of title 11 U.S.C. ("the Bankruptcy Code") on August 7, 1998. On June 15, 1999, the debtor, Elana Stevens, and Pro Paving, Inc. commenced this adversary proceeding against Poulin Grain, Inc., Jeffrey Poulin, Gary Phillips, David Redmond and Lyndonville Savings Bank by filing a complaint under 28 U.S.C. § 1343, a federal civil rights statute, challenging the nature, extent and validity of a debt and related lien claimed by Lyndonville Savings Bank. The complaint presented causes of action against one or more of the defendants for lender liability, contractual bad faith, breach of contract, negligence, deprivation of civil rights under 42 U.S.C. § 1983, punitive damages, equitable subordination, and violation of the creditor's duty to act in a commercially reasonable manner. An amended complaint was subsequently filed with the trustee as the sole plaintiff. On January 18, 2000, the plaintiff filed a *Motion to Dismiss Without Prejudice and to Strike Adversary Proceeding from Docket Based on Lack of Jurisdiction or in the Alternative Based on Doctrines (sic) of Federal Abstention.* On March 14, 2000 this Court (Krechevsky, J.) denied that motion. The plaintiff has never appealed that Order, which determined the issue of bankruptcy court jurisdiction over this proceeding. On March 9, 2000, the defendants filed a motion for summary judgment which the plaintiff opposed. In support of their respective positions, the parties filed voluminous documents including multiple sets of legal memoranda, comprehensive deposition transcripts of virtually all parties and principal witnesses, numerous loan and related documents and other affidavits[2]. On October 24, 2000, this Court granted the defendants' summary judgment motion, in its entirety.

In the interim and after the summary judgment motion had been filed, the plaintiff filed *Trustee's Motion for Authority to Sell Property of the Estate Free and Clear of Liens* on May 9, 2000 (hereafter

[2] For a comprehensive discussion of the materials submitted by the parties and considered by this Court, and the factual background of this dispute, see *Memorandum of Decision Denying Plaintiff's Motion for Oral Argument and Granting Defendants' Motion for Summary Judgment* dated October 24, 2000 [Dkt. # 96-1].

"motion to sell property") in the chapter 7 case[3]. The motion to sell property requested that this Court authorize the trustee to sell to the debtor all of the estate's interest in this adversary proceeding [# 99-1040], so that the debtor could incorporate the cause of action in this adversary proceeding into the litigation pending in state court where the debtor and other third parties were suing the above-named defendants. (It should be noted that the debtor's state court action was filed to seek relief based upon alleged wrongdoing that occurred after the entry of the order for relief in this chapter 7 case.) The plaintiff/trustee proposed that in exchange for the trustee's abandonment of its interest in this lawsuit, the debtor would pay the estate one-third (1/3) of any net recovery it obtained in the pending state court litigation. On May 30, 2000, the defendants filed opposition to the trustee's motion to sell property on several grounds, including allegations that the proposed sale was neither fair nor equitable, was not being requested in good faith, and was not in the best interest of the debtor's estate. On June 20, 2000, a hearing was held on the motion to sell property and this Court reserved decision. [Dkt. #42-1]. The motion for leave to sell property was dormant while the parties pursued their claims and defenses related to the summary judgment motion and subsequent appeal - - on October 19, 2000 - - just five days prior to this Court entering its summary judgment decision - - the plaintiff filed a *Supplemental Memorandum in Support of Trustee's Motion to Sell Property of Estate Free and Clear of Liens*.

The plaintiff appealed the adverse summary judgment decision and, on September 19, 2001, the district court (Murtha, J.) affirmed this Court's decision in part, but overruled the granting of summary judgment on the claim for breach of the covenant of good faith and fair dealing and reinstated the case against certain defendants. *See* Obuchowski v. Lyndonville Savings Bank, Poulin Grain, Inc., et al., Civ. No. 01-CV-180 (D. Vt. Sept. 19, 2001)[Dkt. # 112-1]. The district court specifically remanded the adversary proceeding to this Court for a resolution of this one remaining cause of action. Following the

[3] It should also be noted that on March 17, 2000, the plaintiff also sought to amend the complaint after the summary judgment was filed in order to modify the pleading. On May 9, 2000, the requested relief was denied, except that plaintiff was permitted to drop certain parties [Dkt. 75-1]. Interestingly, it was also on May 9th that the plaintiff filed his motion to sell property, seeking to pursue this cause of action in state court.

remand, a status and scheduling hearing was held October 9, 2001. At that hearing the parties advised the Court that all discovery was completed and the Court scheduled the trial as to the alleged breach of the covenant of good faith and fair dealing claim to commence November 27, 2001. At that hearing the parties also addressed the unresolved motion to sell property; the plaintiff indicated his desire to pursue this relief and the defendants voiced their continuing opposition. The Court denied the motion to sell noting that (1) it was very familiar with the facts and law of the case, having carefully reviewed the voluminous legal memoranda and evidence filed in the summary judgment proceeding, (2) discovery was completed and (3) the remaining issue of good faith was ready for trial. The Court found that, based upon these factors, denying the motion to sell property would permit a more timely and economical resolution of this protracted dispute then would be achieved in any other forum.

The plaintiff has filed for leave to appeal the subject interlocutory order denying the motion to sell property arguing that this Court has improperly substituted its business judgment in place of the trustee's decision to sell the property, that the trustee is likely to prevail on the merits of the appeal, and that the trustee would be irreparably harmed by being forced to incur the cost of a trial concerning the remaining count in bankruptcy court and by depriving the estate of the potential to recover one-third of the net proceeds in the state court lawsuit. The trustee also asserts that no harm would be visited upon the defendants by having the single pre-petition good faith dispute joined with the debtor's post-petition multi-faceted state court lawsuit involving these and other parties and claims. The trustee also contends that a stay is needed in order to serve public policy interest of not having the trial of this sole remaining count proceed before the district court rules on trustee's claims of lack of subject matter jurisdiction, and that a stay is needed to serve the interests of judicial economy.

The defendants oppose the motion for a stay pending appeal on the grounds that the plaintiff will suffer no cognizable irreparable harm if the stay is not granted. The defendants point out that under the terms of the motion to sell and underlying representation agreement, there would be no significant costs to the estate if the trial proceeds in bankruptcy court because the plaintiff's counsel is handling this matter

on a contingency fee basis. The defendants also indicate that the plaintiff implicitly claims irreparable harm based upon a concern that the claim will not be successful at trial and argue that this is not a component of irreparable harm. The defendants also point to the harm that they will suffer in additional litigation costs and delay in the event the remaining count is sold to the debtor for joinder in pending state court litigation involving other parties and claims. Furthermore, the defendants argue that the plaintiff does not provide a legal basis sufficient to show a substantial possibility, as opposed to a mere possibility, of prevailing on appeal of this Court's order denying the motion to sell. Lastly, the defendants oppose the stay because of the public harm that would result from allowing forum shopping by the plaintiff and because of the public benefit that would flow from an orderly, efficient and timely resolution of this issue at the trial scheduled to commence on November 27, 2001.

ISSUE

The issue presented is whether the appellant has demonstrated the requisite criteria for obtaining a stay pending appeal.

DISCUSSION

The standard for obtaining a stay pending appeal is well-established in this Circuit as follows:

> The party seeking the stay must demonstrate:
>
> 1. that the movant will suffer irreparable injury if the stay is denied;
> 2. that no substantial harm will be suffered by another party if the stay is granted;
> 3. 'a substantial possibility, although less than a likelihood, of success' on the merits; and
> 4. that no harm to the public interest, if it is implicated, will be caused by granting the stay.

In re Bijan-Sara Corp., 203 B.R. 358, 360 (BAP 2nd Cir. 1996); In re Turner, 207 B.R. 373 (BAP 2nd Cir. 1997). The moving party must show "satisfactory evidence" on all four criteria, including a "strong likelihood of success on the merits." In re Bijan-Sara Corp., 203 B.R. at 360 (collected cases). Failure to satisfy one prong of the standard "dooms" the motion. Id. (collected cases).

Both In re Bijan-Sara Corp., *supra,* and In re Turner, *supra*, involve debtors who sought a stay pending appeal in order to block foreclosure proceedings. Both cases held that the stay was not warranted. Both Second Circuit Bankruptcy Appeal Panels observed that the creditor would be substantially harmed

by yet another delay in the proceedings. As noted in In re Bijan-Sara Corp, "further delay only serves to increase the already substantial burdens on the secured creditor." Id. at 360. The panel also noted that the papers filed by the appellant failed to show "any substantial possibility, although less than a likelihood, of success on the merits." Id. This test element "prescribes an intermediate level between possible and probable which is intended to eliminate frivolous appeals." In re Country Squire Associates of Carle Place, L.P., 203 B.R. 182, 184 (BAP 2nd Cir. 1996). Moreover, each case involved a debtor who was attempting to further delay the inevitable without satisfying the four requirements for a stay. While the outcome of stay motions appear to be as varied as the underlying circumstances, the cases are consistent to the extent they are governed by the adequacy of the showing made by the movant regarding each of the four elements.

In this instance, this Court finds that the plaintiff has failed to demonstrate any of the four criteria for obtaining a stay pending appeal in this Circuit. First, the trustee claims irreparable harm based upon the costs he will incur in trying this single remaining count in this adversary proceeding in this Court. The trustee commenced this litigation based upon a contingency fee arrangement with trial counsel and, thus, the trustee has not shown that any appreciable injury will flow from litigating the one remaining cause of action here. It is likewise clear that a showing of irreparable injury is not satisfied by a mere claim of financial expense. *See* JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75, 79 (2nd Cir. 1990).

In addressing the substantial harm to parties, the trustee claims that the estate will lose the potential benefit of gaining one-third of the net proceeds of the pending state court proceedings. Without the sale of the property, however, the estate will receive the benefit of a full recovery of any damages, after legal fees and costs, if this action is tried successfully in bankruptcy court, and will have the result immediately. There is no evidence to suggest that the state court litigation will be successful and if the trustee is not successful in state court, the estate gets nothing. Furthermore, the trustee's suggestion that this cause of action should be heard in state court because it is a state law question is not persuasive in light of this court's familiarity with the issue here, the fact that bankruptcy courts often adjudicate state law questions and the earlier ruling of Judge Krechevsky that this lawsuit is properly before the bankruptcy court.

The appellant has also failed to demonstrate the requisite showing that any party will be harmed by proceeding with the trial on November 27th. The trustee filed this adversary proceeding in this Court and has actively participated in protracted litigation whereby this Court has had the benefit of voluminous evidence regarding all the relevant circumstances of this dispute. Moreover, the district court has specifically remanded this remaining count to this Court for trial. The claim for breach of the covenant of good faith and fair dealing includes a broad range of conduct and transactions between the parties with which this Court is already familiar. All parties other than the plaintiff wish to proceed here and proceed on November 27, 2001.

Furthermore, this Court finds that the trustee has not shown a strong likelihood of success on the merits. The gravamen of the trustee's argument appears to be that this Court has improperly "second guessed" the trustee's judgment as to the appropriateness of the proposed sale. However, nothing in the papers filed by the trustee specifies how this Court has abused its discretion in determining to retain this dispute for timely, efficient and fair resolution, nor has the plaintiff cited any cases in support of his position on this point. While a trustee may seek to dispose of an asset in order to promote the interests of the estate, it is well-settled that the bankruptcy court judge has the independent obligation to oversee such determinations. *See* In re Great American Pyramid Joint Venture, 144 B.R. 780, 788 (Bankr. W.D. Tenn. 1992)(discussing bankruptcy judge's independent duty to assess interest of estate); In re Wells, 71 B.R. 554, 557 (Bankr. N.D. Ohio 1987)(discussing bankruptcy court's inherent duty to ensure the orderly administration of debtors' estates); In re Coram Graphic Arts, 11 B.R. 641, 644 (Bankr. E.D.N.Y. 1981)(discussing bankruptcy court's right to control its trial calendar to carry out purposes of the Code). There has been no showing that the estate has a greater likelihood of financial benefit by selling this claim to a state court litigant, nor why it is in the best interest of the estate to delay resolution of the final cause of action in this complex litigation, nor how denial of this motion constitutes an abuse of its authority to ensure the orderly administration of the debtor's estate and the management of its trial calendar.

As indicated above, this Court has previously considered and rejected the plaintiff's arguments

concerning subject matter jurisdiction, and that adverse ruling was not appealed by the plaintiff. There is no indication that the plaintiff's jurisdictional arguments in the instant motion are new or will fare any better at this late stage of the litigation.

The parties in this proceeding each deserve closure to this protracted dispute. All agree that discovery is completed. The parties have briefed their respective positions for trial. This Court is familiar with the underlying factual circumstances and legal theories presented. Therefore, the Court finds that judicial economy and fundamental fairness compel a timely resolution of the remaining claim. It is this Court's conclusion that it would not serve the interests of the public or the parties to have this one remaining issue transferred to another court for submersion into a different lawsuit involving different claims and additional parties at this late date in the proceedings.

Courts do not issue stays pending appeal automatically or capriciously, but rather require an appellant to meet the modest criteria for obtaining stay relief as outlined above. This Court notes that as a general rule it is inclined to grant stays pending appeal in the interests of justice. In this instance, however, because the trustee has failed to satisfy the criteria articulated in In re Bijan-Sara Corp., *supra,* and In re Turner, *supra*, and in light of the tortured history of this proceeding, the motion for stay pending appeal must be denied.

November 20, 2001
Rutland, VT

/s/ Colleen A. Brown
Colleen A. Brown
U.S. Bankruptcy Judge