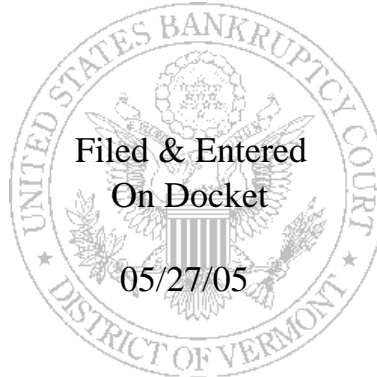


**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In re:

**VIRGINIA R. FRYE,
Debtor.**



**Chapter 13 Case
05-10004**

Appearances:

*David W. Lynch, Esq.
Burlington, VT
Attorney for the Debtor*

*Douglas J. Wolinsky, Esq.
Burlington, VT
Attorney for Union Bank*

**MEMORANDUM OF DECISION AND ORDER
DENYING DEBTOR'S MOTION FOR STAY PENDING APPEAL**

Union Bank sought relief from stay in accordance with the terms of a forbearance agreement that was entered into by the Debtor, the Debtor's husband, and Union Bank as consideration for the Debtor's voluntary dismissal of her previous chapter 13 bankruptcy case (the "Forbearance Agreement"). On February 24, 2005, this Court issued a Memorandum of Decision on Enforceability of Pre-Petition Agreement and Union Bank's Motion for Relief from Stay (doc. # 27 and accompanying order, doc. # 28) (cumulatively, the "February 24th Decision") in which the Court itemized ten factors it deemed relevant for determining whether a pre-petition waiver of the automatic stay is enforceable. The Court found that it needed further evidence to make a determination of three of these factors. After an evidentiary hearing on the three remaining issues, the Court issued an order granting Union Bank's Motion for Relief from Stay (doc. # 46) and accompanying order (doc. # 47) (cumulatively, the "April 8th Decision"). The relevant background facts and circumstances surrounding the execution of the Forbearance Agreement and the Court's findings are set forth at length in the Court's previous decisions and will not be reiterated here.

On April 15, 2005, the Debtor filed a Motion to Amend Findings and to Make Additional Findings and Amend the Judgment and Motion to Hear New Evidence (doc. # 50) (the "Motion to Amend"). The Court granted, in part, the Motion to Amend to correct the identification of the Subject Parcels and denied the remaining relief sought in the Motion to Amend (doc. # 54) (the "May 6th Order"). The Debtor has filed a notice of appeal concerning the April 8th Decision and May 6th Order (doc. # 60). The Debtor has requested that the Court grant a stay pending appeal (doc. # 59) (the "Motion for Stay"). For the reasons set forth below, the Court denies the stay.

DISCUSSION

The propriety of a stay pending appeal is informed by a multi-factored analysis distilled by the United States Supreme Court in Hilton v. Braunskill, 481 U.S. 770, 776 (1987). See Rodriguez v. DeBuono, 162 F.3d 56, 61 (2d Cir.1998); In re Cacioli, 302 B.R. 429, 431 (D. Conn. 2003). Under that analysis, the Court must determine:

- (1) whether the Debtor has made a strong showing that she is likely to succeed on the merits;
- (2) whether the Debtor will be irreparably injured absent a stay;
- (3) whether issuance of the stay will substantially injure Union Bank; and
- (4) where the public interest lies.

Hilton, 481 U.S. at 776.

As the Court in Cacioli recognized, various panels in the United States Court of Appeals for the Second Circuit, and some subordinate courts, have applied a modified, and arguably lower, standard (“the Hirschfeld Standard”) in analyzing motions for stay relief pending appeal. 302 B.R. at 431, fn 13; see, e.g., Cooper v. Town of East Hampton, 83 F.3d 31, 36 (2d Cir.1996); LaRouche v. Kezer, 20 F.3d 68, 72 (2d Cir.1994); Hirschfeld v. Board of Elections, 984 F.2d 35, 39 (2d Cir.1993); In re Country Squire Assoc. of Carle Place, L.P., 203 B.R. 182, 183 (2d Cir. BAP 1996). That standard has a slightly different four part test:

- (1) whether the movant has demonstrated ‘a substantial possibility, although less than a likelihood,’ of success on appeal;
- (2) whether the movant will suffer irreparable injury absent a stay;
- (3) whether a party will suffer substantial injury if a stay is issued; and
- (4) the public interests that may be affected.

The Court declines to apply the Hirschfeld Standard and holds that the analysis provided by the Supreme Court in Hilton v. Braunskill controls the determination of whether a stay pending appeal is appropriate.

1. Strong Showing of Likelihood of Success on Appeal

The Court recognizes the inherent conflict of a rendering court determining the probability that its own judgment will be affirmed or reversed on appeal. Nonetheless, the development of the Court’s February 24th Decision, the April 8th Decision and May 6th Order was an extremely fact-intensive, and fact-dependent exercise. As a result, this Court’s decision and supporting findings of facts are likely to be accorded deference by a reviewing court. Moreover, the Debtor has not articulated any specific error of law to support her argument on this prong of the test. For these reasons, the Court concludes that the Debtor has not made a “strong showing” or “demonstrated a substantial possibility, although less than a likelihood” that she will succeed on the merits of her pending appeal.

2. Irreparable Injury to the Debtor Absent a Stay.

In the Motion to Stay, the Debtor argues that she will suffer irreparable injury in the loss of her homestead as well as the loss of the family business if the stay is denied. Motion to Stay at p. 1. The Debtor's argument ignores the nature of the relief Union Bank sought. Union Bank's Motion for Relief was premised upon the enforceability of the terms of the Forbearance Agreement, in which the Debtor waived the application of the automatic stay in the event that she filed a subsequent bankruptcy case. There has been no evidence presented that Union Bank obtained the waiver by coercion, fraud or mutual mistake of material facts. See February 24th Decision p. 7. While the Debtor may now, with 20/20 hindsight, view the Forbearance Agreement as improvident, no legal basis exists for the Court not to recognize the enforceability of that agreement. All evidence presented to the Court demonstrates that the Debtor knowingly and voluntarily entered into the Forbearance Agreement, even with the potential waiver of the automatic stay provision, and filed a subsequent bankruptcy case, even though this would trigger the waiver. The Court finds that the irreparable harm the Debtor cites is the result of the agreement she made. She has offered no credible argument that the denial of the stay would proximately cause her to lose the homestead and business properties.

3. Injury to Union Bank

The Debtor argues that Union Bank will suffer no injury in the event the Motion to Stay is granted because Union Bank, contrary to the Court's findings, is adequately protected. The Court finds this argument unpersuasive. The lending relationship between the Debtor and Union Bank dates back many years and the troubled nature of that relationship is quite clear from the record in this case. Union Bank gave the Debtor and Mr. Frye an extended opportunity to sell or refinance the collateral via the Forbearance Agreement. The waiver provision of the Forbearance Agreement provided Union Bank assurance that in the event the Debtor filed another bankruptcy case Union Bank would not be subject to the delay and costs of protracted litigation. Moreover, notwithstanding the Debtor's assertions to the contrary, she has not established that Union Bank is adequately protected and would not suffer financial harm if forced to await the outcome of an appeal. The Court finds that Union Bank is likely to suffer financial injury if the stay is granted.

4. Where the Public Interest Lies

Consideration of the public's interest in this case evokes an analysis of the impact of a stay upon the enforcement of a consensual out of court debt restructurings and settlements. It is this Court's observation that settlements of disputed debts and forbearance agreements generally result in less litigation, lower costs for all parties, more rapid resolution of disputes, and a greater opportunity for the

debtor to retain his or her property and the lender to get paid. There will be no incentive for parties to enter such agreements if the courts decline to enforce them. Based upon the facts presented, there is an important public policy goal to be accomplished by enforcing the Forbearance Agreement here, as articulated in the underlying decisions. The Court finds that granting the stay where forbearance agreements are at issue, and an extensive factual determination has been made in support of the decision, would chill the encouragement of out of court restructurings and settlements. In those situations, the stay should only be granted in extraordinary circumstances (e.g., where all three other prongs of the test are met).


CONCLUSION

The determination of the propriety of issuing a stay pending an appeal rests within the sound discretion of the court. In re Blackwell, 162 B.R. 117, 119 (E.D. PA 1993). Based upon the record before it, the Court finds that each of the Hilton factors weighs against granting the Motion for Stay. Therefore, in light of the foregoing,

IT IS HEREBY ORDERED that the Debtor's Motion for Stay Pending Appeal is DENIED.

SO ORDERED.

May 27, 2005
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge