

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

In the Matter of:

Diwan, L.L.C.

Case No. **12-00424-als11**

Debtor

**Order on Motion for Stay Pending Appeal (#377)
(date entered on docket: February 23, 2016)**

Before the Court is the Debtor's Motion for Stay Pending Appeal and an objection thereto filed on behalf of Mahu-Vishnu Corporation. Jurisdiction for this matter arises pursuant to 11 U.S.C. §§ 157(b)(1) and 1334. Based upon the docket and filed documents the following findings and conclusions of law are entered by the Court pursuant to Federal Rules of Bankruptcy Procedure 7052 and 9014. For the reasons stated the objection is sustained and the Motion is denied.

BACKGROUND

Diwan filed its chapter 11 petition on February 22, 2012. By way of its Chapter 11 plan filed on September 6, 2012 at docket number 75, Diwan sought to have the claim held by Mahu-Vishnu Corporation, its largest creditor, subordinated based upon 11 U.S.C. § 510(c). Objections to this creditor's proofs of claims were also filed under the theories of inequitable conduct and impairment of collateral. On July 16, 2013 the Court issued its ruling that partially subordinated Mahu-Vishnu's claim.¹ Diwan was directed to file an amended disclosure statement and modified plan that conformed to the outcome on the objection to claim. Diwan

¹ The appeal of this order, filed by Mahu-Vishnu, was dismissed by the Bankruptcy Appellate Panel as interlocutory.

subsequently filed an objection to the amended Proof of Claim filed by Mahu-Vishnu Corporation. After a simultaneous hearing on these matters on February 26, 2015 the Court did not approve the debtor's Third Amended Disclosure Statement, denied confirmation of the debtor's Third Amended Plan and overruled the debtor's Objection to Proof of Claim 6-2 filed by Mahu-Vishnu Corporation. An order dismissing the case was entered at docket number 337.² Diwan appealed the order dismissing its case to the District Court. On December 23, 2015 the District Court affirmed the "Bankruptcy Court's determination that the impairment of collateral defense was inapplicable, as well as its decision to deny plan confirmation and dismiss the case." Diwan appealed the District Court's Order and Judgment to the Eighth Circuit Court of Appeals. On January 28, 2016 Diwan requested a stay pending appeal from this Court.

DISCUSSION

In this Circuit a court evaluates the following factors to determine whether to grant or deny a stay pending appeal:

- (1) the threat of irreparable harm to the movant;
- (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant;
- (3) the probability that movant will succeed on the merits; and
- (4) the public interest.

Walker v. Lockhart, 678 F.2d 68, 70 (8th Cir. 1982) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)(en banc)). The movant is entitled to an injunction pending appeal only if "the Dataphase factors, on balance," weigh in his favor. *Home Instead, Inc. v. Florance*, 721 F.3d 494, 499 (8th Cir. 2013).

In balancing the equities no single factor is determinative. The likelihood that plaintiff ultimately will prevail is meaningless in

² Diwan was given until March 12, 2015 to consider whether to voluntarily convert its case to a chapter 7 proceeding. Because no motion to convert was filed the dismissal order became effective on March 13, 2015.

isolation. In every case, it must be examined in the context of the relative injuries to the parties and the public. If the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits. Conversely, where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less.

Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d at 113.

In its Motion Diwan simply cites to Federal Rule of Appellate Procedure 8(a)(1)(C)³ in its bare request for a stay pending appeal. Federal Rule of Civil Procedure 8(a)(2) requires a claim for relief to contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” “[T]he movant must address each factor, regardless of its relative strength, providing specific facts and affidavits supporting assertions that these factors exist.” *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) (citations omitted). Diwan has provided no supporting facts, legal analysis or explanation to justify a stay pending appeal.

The Order appealed from was docketed over eleven months ago. The dismissal of the chapter 11 proceeding became effective on March 13, 2015 and the automatic stay was terminated. *See* 11 U.S.C. § 362(c)(2)(B) (2015). The District Court appeal is now concluded. During this entire time no motion for a stay pending appeal was requested. Diwan has elected to appeal to the Circuit Court and for the first time seeks a stay of the dismissal order in order to enjoy the continued benefit of the automatic stay. “Implicit in Fed. R. Bankr. P. 8005 is the

³ This Rule permits a court to enter an order “suspending, modifying, restoring or granting an injunction while the appeal is pending.” The pleading filed by Diwan does not include a specific request for one of these actions. The Motion does indicate that the automatic stay should remain in place but it is not at all clear that such a reference is an appropriate request under Federal Rule of Appellate Procedure 8(a)(1)(C). Therefore, the Court construes the request as one that actually arises under Federal Rule of Appellate Procedure 8(a)(1)(A) or Federal Rule of Bankruptcy Procedure 8007(a) for a stay of the dismissal which would allow the automatic stay to remain in place.

requirement that a motion for stay pending appeal be timely filed. Failure to timely file the motion can result in denial.” *Lafayette v. Kaplan (In re Kaplan)*, 373 B.R. 213, 215 (B.A.P. 1st Cir. 2007) (citations omitted).

It is within the Court’s discretion to determine whether a stay pending appeal is warranted. *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 10-11 (1942). Diwan’s untimely Motion fails to meet even the most minimum burden to establish the basis and justification for its stay request. The Court also concludes based upon the record and the District Court’s Order that Diwan is not likely to succeed on the merits of its appeal.

IT IS THEREFORE ORDERED that the Motion for Stay Pending Appeal is denied.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

Parties receiving this Order from the Clerk of Court:
Electronic Filers in this Chapter Case