

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
JOHN DEAN FLANERY :
VIRGINIA K. FLANERY, : Case No. 83-228-C H
 :
 Debtors. :
----- : Adv. No. 87-0248
JOHN DEAN FLANERY :
VIRGINIA K. FLANERY, : Chapter 7
 :
 Plaintiffs, :
 :
 vs. :
 :
 GUTHRIE COUNTY STATE BANK, :
 FIRST NATIONAL BANK OF OMAHA, :
 AND THE UNITED STATES OF :
 AMERICA FOR AND ON BEHALF OF :
 THE FARMERS HOME :
 ADMINISTRATION, :
 Defendants. :

ORDER--STAY UPON APPEAL

Plaintiffs/Appellants have filed their motion for stay of the execution of the order entered on December 23, 1988. Defendants/Appellees filed their resistance thereto. The Court having considered said motion and resistance finds and rules as follows:

1. On December 23, 1988, this Court entered its order dismissing Plaintiffs/Appellants (herein "Debtors") Complaint to set aside the security interest of Guthrie County State Bank and First National Bank of Omaha (herein "Banks") in Debtors' real estate.

2. On December 28, 1988, Debtors noticed their appeal of said order and said notice of appeal was filed on December 29, 1988.

3. Debtors filed for relief under Chapter 11 of the Bankruptcy Code on February 18, 1983. This case was converted to a Chapter 7 liquidation on October 25, 1984. The case reveals substantial litigation between Debtors and Banks during the course of the case. Debtors made an attempt to avoid Banks' mortgage lien on subject real estate by means of a preference action under 11 U.S.C. §547 and several attempts were made to formulate a plan of reorganization before conversion to a Chapter 7 case.

4. The Chapter 7 trustee abandoned subject real estate on December 28, 1984, and Debtors received their discharge on March 5, 1985.

5. Debtors engaged in litigation in the United States District Court in the Southern District of Iowa upon discharge. Debtors' 48 page complaint was dismissed with prejudice for failure to state a cause of action.

6. Debtors then filed a petition in state court. This petition prayed for essentially the same relief as denied in federal court. Debtors appealed the adverse trial court ruling and this appeal was dismissed for want of prosecution.

7. The Iowa District Court granted Guthrie County State Bank relief in its replevin petition. Debtors appealed this

decision

and this appeal was also dismissed for want of prosecution.

8. Debtors filed their complaint in this adversary proceeding on November 30, 1987, almost three years after subject real estate was abandoned by the trustee and the Debtors received their discharge.

9. The Banks have not commenced a foreclosure proceeding.

DISCUSSION

Issuance of a stay pending appeal is governed by Bankruptcy Rule 8005. The standard for granting a stay pending appeal is similar to that for granting a preliminary injunction. Matter of Baldwin-United Corp., 45 B.R. 385, 386 (Bankr. Ohio 1984).

In order to obtain a stay pending appeal, the movant must clearly show the following:

(1) The movant is likely to succeed on the merits of the appeal;

(2) The movant will suffer irreparable injury unless the stay is granted;

(3) The other parties will not suffer substantial harm if the stay is granted; and

(4) The issuance of the stay will serve the public interest.

In re First South Sav. Ass'n., 820 F.2d 700, 709 (5th Cir.

1987); In re Howley, 38 B.R. 314, 315 (Bankr. Minn. 1984).

Although each condition must be satisfied, not all conditions need be given equal weight. In re Great Barrington Fair and Amusement, Inc., 53 B.R. 237, 239 (Bankr. Mass. 1985).

"These factors are not to be applied in a vacuum but instead must be viewed in light of the importance of the right of appeal and preservation of the status quo during appeal." Howley, supra, 38 B.R. at 315. The Court in deciding whether to grant or deny stay must adopt that course of action which will minimize the cost of being mistaken.

The first prong of the 4-part test is the movant's likelihood of success upon appeal. There is considerable law addressing the issue of whether a Chapter 7 debtor can use 11 U.S.C. §506(d) to avoid post-discharge a mortgage lien on the Debtor's abandoned real estate to the extent it exceeds the value of the property. There is considerable divergence of authority in the reported cases.

In the order of December 23, 1988, this Court found the contrary authority to be unpersuasive under the facts presented to the court. However, where there is divergence of authority on this issue, a stay pending appeal is appropriate because a question of whether the movant is likely to succeed upon appeal

becomes important. In re Tenfield, Inc., 12 B.R. 14, 15 (Bankr. E.D.Va. 1981). Banks could commence foreclosure proceedings. If the property were sold in these proceedings, the sale would not be

rescinded. Although Debtors would still have their redemptive rights to protect their interests, injury would still occur.

Banks have not exercised their rights under the foreclosure law of this state. Banks have not demonstrated that they will suffer irreparable harm if the stay is not granted. There is no evidence that the real estate is depreciating in value. The Court is aware that Banks are undersecured, but denying the stay will not correct this fact. There has not been a showing of substantial harm to Banks if the stay is granted.

The public interest prong has negligible impact on the Court's analysis. In a review of the cases, an analysis of this prong involves a determination of whether there is a threat to the public as a whole. Such an impact is not involved in this case.

In balancing the equities, Debtors have raised a substantial question and Banks have failed to show likely injury if a stay was granted. Accordingly, the status quo should be maintained pending a review upon the merits.

IT IS ACCORDINGLY ORDERED that Plaintiffs/Appellants' motion for stay is sustained.

FURTHER, this Order shall constitute a stay of the execution of the Order entered on December 23, 1988, and shall remain in effect pending review and the appeal is decided or dismissed, or upon further order of the Court.

Dated this 16th day of February, 1989.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE