

U.S. BANKRUPTCY COURT  
District of South Carolina

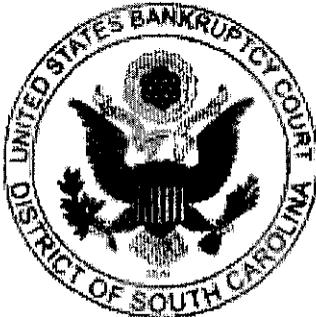
Case Number: 02-01212

Judgment and Order

The relief set forth on the following pages, for a total of 5 pages including this page,  
is hereby ORDERED.

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**FILED BY THE COURT**  
**01/22/2003**



Entered: 01/22/2003

*John E. Waites*

US Bankruptcy Court Judge  
District of South Carolina

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Michael R. Ray,

Debtor.

C/A No. 02-01212-W

**ORDER**

Chapter 7

THIS MATTER comes before the Court upon the Motion Requesting a Stay of Sale (the "Motion") filed by Michael R. Ray ("Debtor"). On January 7, 2003, the Court entered an order (the "Sales Order") authorizing the Chapter 7 trustee, W. Ryan Hovis ("Trustee"), to sell two lots located in Oakmont Subdivision in Myrtle Beach, South Carolina to Team Six, Inc. for approximately \$48,933.09. On January 9, 2003, Debtor filed a Notice of Appeal of the Sales Order as well as the Motion seeking a stay of the Sales Order. The Court originally scheduled a hearing on the Motion for January 17, 2003; however, after receiving Debtor's request for a continuance, it scheduled the hearing for January 22, 2003. Debtor failed to appear at the January 22, 2003 hearing.

Debtor's request for a stay should be considered under Federal Rule of Bankruptcy Procedure 8005.<sup>1</sup> Two Bankruptcy Rules govern the granting of a stay pending appeal, Rule 7062 and Rule 8005. Rule 7062 normally applies only to adversary proceedings or instances where a court has entered a money judgment, and a motion for the approval of the sale of property pursuant to §363 is a contested matter, not an adversary proceeding or a proceeding that creates a money judgment. See Culwell v. Texas Equip. Co., Inc. (In re Texas Equip. Co., Inc.), 283 B.R. 222, 225 (Bankr. N.D. Tex. 2002); Note Buyers, Inc.

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<sup>1</sup> Further references to the Bankruptcy Code shall be by section number only. Further references to the Federal Rules of Bankruptcy Procedure shall be by Rule number only.

v. Cooler (In re Cooler), C/A No. 98-02856-W, Adv. Pro. No. 98-80162-W, slip op. at 2 (Bankr. D. S.C. Jun. 30, 1999). Rule 8005, however, does apply to a contested matter and specifically to an order authorizing sale. See Texas Equip., 283 B.R. at 225. Under Rule 8005, the issuance of a stay is left to this Court's discretion, and the standard for granting a stay pending appeal is the same general standard as that applied for the granting of a preliminary injunction. See In re Dunes Hotel Associates, C/A No. 94-75715-W, slip op. at 6 (Bankr. D. S.C. Aug. 1, 1997) (citing Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802, 811 (4<sup>th</sup> Cir. 1991)). The proper standard for analysis of a preliminary injunction or a stay pending appeal is as follows: (1) the party requesting a stay pending appeal must make a clear showing that it will suffer irreparable harm if the court denies its request; (2) if the party establishes irreparable harm, the court must balance the likelihood of irreparable harm to the movant from the failure to grant a stay against the likelihood of harm to the opponent from the grant of a stay; (3) if the balance of the harms does not tip decidedly in favor of the movant, a stay should not be granted unless the movant can make a very strong case of probability of success on the merits; and (4) if applicable, the court may evaluate whether the public interest favors granting or denying a stay. See id. at 6-7 (citing Direx Israel, 952 F.2d at 816). The movant bears the burden of establishing that each of these factors supports granting the stay. See id. at 7 (citing Direx Israel, 952 F.2d at 812).

In this case, the Court concludes that Debtor cannot satisfy the third element of the test, which is demonstrating a probability of success on the merits, because Fourth Circuit authority is clear that Debtor has no standing to object to the sale; accordingly, his appeal will likely be quickly dismissed. In Willemain v. Kivitz, the Fourth Circuit ruled that insolvent debtors are not parties in interest to sales because they have no pecuniary interest in the distribution of assets among creditors. See 764 F.2d 1019, 1022 (4<sup>th</sup> Cir.

1985). Specifically, the Fourth Circuit upheld the lower courts' findings that a debtor lacked standing when the debtor failed to prove his solvency or that an alternative sale would return the estate to solvency. See id. at 1023. Applying this principle to this case, the Court notes that Debtor has not proved his solvency or presented any evidence indicating that an alternative sale would make his estate solvent. Indeed, Debtor's Schedules indicate that he has \$129,899 of assets and \$277,863.17 of liabilities. At the hearing held on Trustee's application to sell the properties on January 3, 2003, Debtor argued that Trustee could obtain a higher sales price for the two lots; however, Debtor did not demonstrate how any alternative sale could make up the difference between these figures and render him solvent.

Because Debtor cannot satisfy the standard to obtain a stay pending appeal pursuant to Rule 8005, the Court denies Debtor's motion.

In addition, the Court concludes by noting that, although Debtor did not request to post a supersedeas bond nor demonstrate a willingness to post such a bond pending appeal, Trustee stated at the hearing that the amount of the bond should be at least \$58,000.

**AND IT IS SO ORDERED.**

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UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,  
\_\_\_\_\_, 2003.

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Michael R. Ray,

Debtor.

C/A No. 01-01212-W

**JUDGMENT**

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Michael R. Ray's ("Debtor") Motion Requesting a Stay of Sale is denied.

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UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,  
\_\_\_\_\_, 2003.