FILED

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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U.S. BANKRUPTCY COURT
DIST. OF SOUTH CAROLINA

In re:	Case No. 94-75715-W
DUNES HOTEL ASSOCIATES, a South Carolina general partnership,	Chapter 11
Debtor.	**JUDGMENT**

Based upon the Findings of Fact and Conclusions of Law, the Debtor's Motion For a Stay of the Proceedings on Hyatt's Dismissal Motion is denied.

John G. Waites
United States Bankruptcy Judge

Columbia, South Carolina
August 1, 1997.

ENTERED
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J.G.S.

37

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In re:	Case No.: 94-75715 (JW)
DUNES HOTEL ASSOCIATES, a South Carolina general partnership,	Chapter 11
Debtor.	**ORDER**

THIS MATTER is before the Court on the Motion filed by Dunes Hotel Associates ("**Dunes**"), the debtor-in-possession in the above-captioned Chapter 11 case seeking, pursuant to Bankruptcy Rule 8005, a stay of a hearing by this Court of the "Motion By Hyatt Corporation and S.C. Hyatt Corporation for Dismissal of Dunes Hotel Associates' Chapter 11 Reorganization Case, and Memorandum In Support" (the "**Case Dismissal Motion**") filed on June 27, 1997 by Hyatt Corporation and S.C. Hyatt Corporation (together "**Hyatt**"). The Court, having reviewed the pleadings, having heard the representations of counsel, and having taken judicial notice of the bankruptcy case record as appropriate for purposes of this Order, makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. Dunes is a South Carolina general partnership formed in 1972. Dunes filed a Chapter 11 petition with this Court on November 18, 1994.

2. Dunes is the record title holder of real property, improvements and personal property (the "**Hotel Property**") which comprise the 505-room resort/convention hotel commonly

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AUG 04 1997
J.G.S.

JW-1 of 12-

371

known as the Hyatt Regency Hilton Head (the "**Hotel**"). The Hotel Property is on Hilton Head Island, Beaufort County, South Carolina.

3. S.C. Hyatt, a South Carolina corporation, is a wholly-owned subsidiary of the Hyatt Corp., a Delaware corporation.

4. S.C. Hyatt occupies the Hotel Property and operates the Hotel pursuant to a long term "Agreement and Lease" dated November 2, 1973, between Dunes and Hyatt Corp. (the "**Lease**").

5. Hyatt and Aetna each filed a Motion to Dismiss Dunes' Chapter 11 case on February 21, 1995 and February 13, 1995, respectively. Those Motions were denied by this Court as premature at that time. Aetna is no longer participating in these proceedings, because Aetna sold its claim to the General Electric Pension Trust ("**GEPT**"), the ultimate equity interest holder in Dunes.

6. On February 27, 1995, Dunes filed its Complaint commencing an adversary proceeding (the "**Adversary Proceeding**") against Hyatt. In its "First Claim for Relief," Dunes asked the Court to avoid Hyatt's unrecorded leasehold interest in the Hotel Property pursuant to Section 544 of the Bankruptcy Code (the "**Avoidance Claim**"). In its alternative "Second Claim for Relief", Dunes asked for a declaratory judgment that (a) the Lease is an executory management contract that Dunes could reject under Section 365 (the "**Rejection Claim**"), and (b) S.C. Hyatt had materially breached the Lease rendering it terminated or terminable (the "**Contract Claims**"). In its "Third Claim for Relief", Dunes sought, pursuant to Section 542, a turnover of the Hotel Property and accounting if the Court granted it relief under the First or Second Claims for Relief.

7. On August 25, 1995, the Court entered a Judgment and Order dismissing the Adversary Proceeding (the "**Adversary Dismissal Order**"), after consideration of Hyatt and Dunes' competing motions to dismiss or grant summary judgment.

8. In the Adversary Dismissal Order, the Court converted Hyatt's Adversary Dismissal Motion to a motion for summary judgment based upon both parties' reference to and reliance on matters outside of Dunes' Complaint in support of their positions (including the entire Chapter 11 case factual record), and held that based on existing Fourth Circuit precedent there was no basis for avoidance or rejection of the lease. The Court also dismissed Dunes' Rejection Claim and directed arbitration of Dunes' Contract Claims. The Court also dismissed Dunes' Third Claim for Section 542 turnover, which was based on relief being provided on the First or Second Claims For Relief.

9. On September 20, 1995 and January 26, 1996, the Court entered orders respectively denying confirmation of Dunes' Initial Plan of Reorganization and its Amended Plan. The Court based the Initial Plan Order on the lack of an accepting impaired class of claims for purposes of Section 1129(a)(10), and a finding that Dunes' artificial impairment and gerrymandering of a de minimis claim by GEPT's law firm solely to obtain an affirmative vote violated Sections 1129(a)(3) and 1129(a)(10). The Court based its Amended Plan Order on among other things Dunes' failure to meet the requirements of Section 1129(a)(10) of an accepting non-insider impaired class.

10. On July 30, 1996, the District Court, ruling on a Dunes appeal of the Adversary Dismissal Order, entered an "Order" and a "Judgment in a Civil Case" (the "**Remand Order**") which affirmed the dismissal of Dunes' Avoidance Claim, and the denial of reconsideration.

However, the District Court remanded the dismissal of Dunes' Rejection Claim to this Court for further findings regarding whether Dunes met the standard for rejection of an executory agreement or lease.

11. Following the Remand, Hyatt filed its Answer and Counterclaims against Dunes in the Adversary Proceeding and by its Order entered November 26, 1996, this Court bifurcated the issues on remand into first, whether the Lease is a lease of real property subject to the protections of Section 365(h) or a management agreement, and second, whether Dunes has met the standard under Section 365(a) for rejecting the Lease.

12. In its Judgment and Order of March 28, 1997 (the "**Lease Order**"), the Court held that the Lease is a real property lease subject to the protections of Section 365(h).

13. On April 10, 1997, Dunes sought reconsideration by the U.S. District Court of the Remand Order. The basis of Dunes' motion for reconsideration was a decision of another bankruptcy court. On May 1, 1997, the U.S. District Court entered an Order denying Dunes' motion for reconsideration. The District Court held that the cited decision, Glantz v. R.J.F. Int'l Corp. (In re Glantz), 205 B.R. 750 (Bankr. D. Md. 1997),was not binding upon it, and that relief was not warranted because Dunes had never raised this argument before at the trial level, even though it was available to it, and could not raise it for the first time on appeal.

14. On May 30, 1997, Dunes filed a notice of appeal to the Fourth Circuit from the District Court's denial of its Reconsideration Motion. The appeal was docketed on June 11, 1997. Hyatt has filed a Motion for Dismissal of Dunes' appeal on the asserted grounds that it is an improper interlocutory appeal.

15. On June 26, 1997, Hyatt filed the subject motion to dismiss Dunes Chapter 11 case.

16. On July 7, 1997, Dunes filed its "Motion By Dunes Hotel Associates for Stay of Proceedings on Hyatt's Motion for Dismissal of Dunes' Chapter 11 Case Pending Dunes' Appeal of the Avoidance Decision" (the "**Stay Motion**"). In the Stay Motion Dunes alleges that it will be harmed if the Chapter 11 case is dismissed and the Court of Appeals concludes such a dismissal moots the pending appeal from the District Court's Remand Order.

17. On July 9, 1997 this Court dismissed with prejudice Dunes' rejection claims and the appeal of the Lease Order, at Dunes' request and upon its representation that it no longer wished to challenge this Court's findings that the Agreement and Lease was a lease of real property under South Carolina Law.

18. At the stay hearing, Dunes offered no additional evidence of harm other than that pled in its Stay Motion.

II. CONCLUSIONS OF LAW

Rule 8005 of the Federal Rules of Bankruptcy Procedure governs a stay pending appeal. This is often referred to as the "discretionary stay" provision of the Bankruptcy Rules. The Rule provides:

> a motion for a stay of the judgment, order or decree of a bankruptcy judge . . . or other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court . . . The bankruptcy judge may suspend and order the continuation of proceedings in the case under the Code or make any other appropriate order during the pending of an appeal on such terms as will protect all parties in interest. A motion for such relief may be

> made at the district court . . . but the motion shall show why relief modification or termination was not obtained from the bankruptcy judge.

Although the issuance of a stay is left to this Court's discretion, the standard for granting a stay pending appeal under Bankruptcy Rule 8005 is the same general standard as that applied for the granting of a preliminary injunction. See, e.g., Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802, 811 (4th Cir. 1991) (reversing the grant of a preliminary injunction on the ground that improper standards were applied) (citing Instant Air Freight Co. v. C.F. Air Freight Inc., 882 F.2d 797, 800 (3d Cir. 1989)); Continental Sec. Corp. v. Shenandoah Nursing Home Pshp., 188 B.R. 205, 208 (W.D. Va. 1995) (denying stay pending appeal by creditor aggrieved by confirmed plan); In re TJN, Inc., 207 B.R. 499, 501 (Bankr. D.S.C. 1996) (Waites, J.) (denying a motion for a stay pending disposition of withdrawal of reference); In re Ward, 184 B.R. 253, 255 (Bankr. D.S.C. 1995) (Waites, J.) (denying a stay of non-dischargeability proceeding pending appeal from Bankruptcy Court's denial of jury trial); In re Brookfield Centre Ltd. Partnership, 133 B.R. 74, 75 (Bankr. E.D. Va. 1991) (denying stay of Bankruptcy Court's foreclosure order pending appeal); In re Kent, 145 B.R. 843, 843-33 (Bankr. E.D. Va. 1991) (denying a stay pending appeal of Bankruptcy Court's dismissal of case on grounds of bad faith).

"Federal decisions have uniformly characterized the grant of interim relief as an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only' in [the] limited circumstances which clearly demand it." Direx Israel, 952 F.2d at 813, 816. In Direx Israel, the Fourth Circuit articulated the proper standard for analysis of a preliminary injunction or a stay pending appeal as follows:

> 1. First, 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. Second, 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 defendant from the grant of a stay.

3. Third, if the balance of harms does not tip decidedly in favor of the movant, a stay should not be granted unless the Plaintiff can make a very strong case of probability of success on the merits.[1]

4. Fourth, if applicable, the court may evaluate whether the public interest favors granting or denying a stay.

Id. Further, the plaintiff bears the burden of establishing that each of these factors supports granting the injunction. Direx, 952 F.2d at 812 (citing to Technical Publishing Co. v. Lebhar-Friedman, Inc., 729 F.2d 1136, 1139 (7th Cir. 1984) (affirming the denial of a preliminary injunction, pending appeal, on the basis that plaintiff did not have reasonable likelihood of success on the merits)); Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970) (denying the stay of an order declaring a statute unconstitutional, pending appeal, where probability of success on appeal was not substantial, and where administrative and economic impact on authorities was of their own making); Continental Sec. Corp. v. Shenandoah Nursing Home Pshp., 188 B.R. 205, 208 (W.D. Va. 1995); In re Tolco Properties, Inc., 6 B.R. 490, 491 (Bankr. E.D. Va. 1980) (stay of order converting chapter 11 to 7 denied where harms tipped in favor of creditor).

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[1] The Fourth Circuit's formulation of the standard for the requisite showing of success on the merits for a stay pending appeal varies depending on the balance of harm evaluation, and that is why this inquiry precedes the determination by which the movant must establish the likelihood of success on the merits. The likelihood of success that must be shown will vary inversely with the degree of injury the movant will suffer absent an injunction. Direx, 952 F.2d at 813 and 817. Where the balance of harm does not tip decidedly in favor of movant, the showing of probability of success on the merits increases substantially for the movant. Id. at 817.

Likelihood of Irreparable Harm to the Movant

The first requirement of irreparable harm places the burden of proof on movant to demonstrate by a clear showing that it will sustain irreparable harm absent a stay. Moreover, the required "irreparable harm" must be neither remote nor speculative, but actual and imminent. Dan River, Inc. v. Icahn, 701 F.2d 278, 284 (4th Cir. 1983) (reversing the grant of an injunction by the district court on grounds that balancing of harms did not favor plaintiff, and plaintiff faced innumerable hurdles which made success on the merits small); accord, Direx, 952 F.2d at 812; Ecri v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987) ("Establishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a 'clear showing of immediate irreparable injury.'"); Continental Group Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 359 (3d Cir. 1980); Glasco v. Hills, 558 F.2d 179, 181 (3d Cir. 1977) (The "requisite feared injury of harm must be irreparable -- not merely serious or substantial.").

Dunes' formal assertion of irreparable harm is based on an argument that the pending Case Dismissal Motion, if granted, may moot Dunes' pending appeal regarding its Avoidance Claim. However, Dunes actual position is that mootness will not occur but that it would be a waste of resources to proceed with any dismissal hearing until the appeal of the Avoidance Claim decisions is finally decided. The Court does not believe that such speculative argument meets even a threshold showing of irreparable harm. First, Dunes' argument assumes that this Court will grant Hyatt's Dismissal Motion.[2] Second, Dunes assumes that the only possible ground for dismissal of the Chapter 11 case is futility based on the District Court's Remand Order. Third, Dunes assumes that

[2] While basing its irreparable claim on the possibility of dismissal, Dunes nonetheless also asserts in the Stay Motion that dismissal of the case is unlikely to occur, thereby undermining its own arguments of irreparable harm.

it will prevail on the Avoidance Decision appeal, and that this alone will obviate the need for a hearing on Hyatt's Dismissal Motion. This Court may or may not grant Hyatt's request for dismissal, but whatever decision this Court makes should be based on facts and law presented to it at a properly noticed hearing. In this Court's view, it would not be proper to summarily stay any hearing on a request to dismiss this Chapter 11 reorganization case which has been pending for nearly three years merely to allow the Debtor to exhaust its appeals. In this instance, it should be noted that Hyatt is seeking dismissal on several independent grounds, not merely the Avoidance Order. Thus, even if Dunes' assumptions were correct, because each of the independent dismissal grounds raised by Hyatt may support dismissal, judicial economy would not be served by a stay pending the appeal of only one ground for dismissal.

A showing of "irreparable harm," requires more than an assertion of potential mootness of an appeal or "waste" of resources. See In re Great Barrington Fair & Amusement, Inc., 53 B.R. 237, 240 (Bankr. D. Mass. 1985) (potential mootness not irreparable harm); In re Baldwin United Corp., 45 B.R. 385, 386-87 (Bankr. S.D. Ohio 1984) (If mootness of an appeal were accepted as irreparable harm, then every order should be stayed pending appeal; "We believe that something more is required to establish irreparable harm, but nothing more has been presented by the movants.") In the instant case the Court is hard pressed to find any harm; speculative or not. Depending on the facts and arguments made to this Court at the dismissal hearing, the Court can fashion appropriate relief at that time based on the record before it.

> Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Hughs Network Sys., Inc. v. Interdigital Communications Corp., 17 F.3d 691, 694 (4th Cir. 1994).

Additionally, a determination regarding imminent irreparable harm must be made on the basis of fact and cannot be based upon a theoretical possibility. The cases cited by Dunes in support of the proposition that potential mootness is harmful relate to situations in which the plaintiff would have been deprived of any remedy by the order sought to be stayed. That is clearly not the case here, where no order even exists. For example, Lutin v. United States Bankruptcy Court (In re Advanced Mining Sys., Inc.), 173 B.R. 467 (S.D.N.Y. 1994), involved the stay of an order of the bankruptcy court expunging the plaintiffs' administrative claim pending appeal because the order would have resulted in the distribution of all of the Debtor's assets to creditors without a reserve for the Plaintiffs' claim. The stay was granted there because once the funds had been distributed, it would not have been possible to provide any recovery to Plaintiffs. In the present case, Dunes will have available remedies to it in the event it can prevail on all grounds asserted by Hyatt for dismissal; the Hotel Property will still be there, and Dunes receives and will continue to receive millions of dollars in rent payments under the Lease.

Similarly, Country Squire Assocs. v. Rochester Community Sav. Bank (In re Country Squire Assocs. of Carle Place L.P.), 203 B.R. 182, 183 (2d Cir. BAP 1996) involved a stay pending an appeal of an order of foreclosure of Debtor's sole property. The foreclosure action was completed in state court and the property was scheduled to be sold at public auction. The reasoning of the court in that case is obvious. If the property were sold to a good faith purchaser, the debtor would have been unable to retrieve it, and there would have been no adequate remedy available for the loss of possession if the Debtor prevailed on appeal. Here, Dunes is not threatened by such harm.

Finally, St. Johnsbury Trucking, 185 B.R. 687 (S.D.N.Y. 1995), does not support Dunes' position. That case involved a stay of the confirmation of a plan of reorganization. If distribution had been made under the confirmed plan, there would have been insufficient funds available for CERCLA response costs. Additionally, the releases provided under the Plan would have precluded the government from seeking from responsible parties income and social security taxes withheld from employee wages. Thus, that was a case where the balance of hardships clearly tipped in favor of the government, contrary to this case.

Hence, not only is there no irreparable harm, there is not even an existing order with potential for harm. Rather, Dunes seeks to stay the mere hearing of a motion. The Hotel Property is not being sold; Dunes continues to receive rent and, since GEPT is funding its legal fees, its economy arguments are equally unpersuasive. All of its arguments can, and undoubtedly will, be made in the context of the dismissal hearing. This Court can fashion appropriate relief as part of a Dismissal Hearing on the basis of facts presented to it at that time.

Since Dunes has not met its burden of showing irreparable harm, the Court need not more specifically discuss the balancing of harms test, or the potential for success on the merits of Dunes' appeal. The Court is of the opinion, however, that such analysis would not have resulted in a different conclusion. Hyatt has been the primary focus of Dunes litigation in the bankruptcy case for nearly three years, has likewise incurred great expenses and alleges that its operation of the Hotel has been adversely effected. Dunes has had ample opportunity to confirm a plan of reorganization. The arbitration proceeding between these parties, which this Court views as the proper forum to address Dunes contractual complaints, nears determination. The balance of harm weighs in favor of Hyatt.

Dunes has not met the standards required for the issuance of a stay pending appeal as articulated in Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546 (4th Cir. 1994); Hughes Network Systems, Inc. v. Interdigital Communications Corp., 17 F.3d 691 (4th Cir. 1994); and Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802 (4th Cir. 1991).

For these reasons, Dunes' Motion For a Stay of the Proceedings on Hyatt's Dismissal Motion is denied.

AND IT IS SO ORDERED.

John E. Waites
United States Bankruptcy Judge

Columbia, South Carolina

August 1, 1997.

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JW -12