

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

FILED  
99 JUN 29 PM 3:32  
DIST OF SOUTH CAROLINA

IN RE:

Earl Smith Cooler, Sr., and Frances  
Eugenia Cooler,

Debtors.

Note Buyers, Inc.,

Plaintiff,

v.

Frances E. Cooler and Earl S. Cooler, Sr.,

Defendants.

Case No. 98-02856-W

Adversary No. 98-80162-W

ORDER

ENTERED

JUN 30 1999

K.K.M.

Chapter 7

This matter comes before the Court on the Motion of the United States Trustee for a Stay Pending Appeal.

The debtors filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on April 2, 1998. The plaintiff, Note Buyers, Inc., filed a complaint objecting to the debtors' discharge pursuant to 11 U.S.C. § 727(a). The debtors filed an Answer to the Note Buyers complaint and the matter was set for trial. On the morning of trial, a settlement was reached. Notice of the proposed settlement was served on all parties in interest. The proposed settlement includes a provision that the debtors and two of their children will execute a non-dischargeable note in favor of Note Buyers, Inc. in the amount of \$30,000.00. Upon completion of the payments, Note Buyers will

release its judgment lien against the Debtors. The United States Trustee objected to the proposed settlement and requested that the note payments be made to the bankruptcy estate. The court entered an Order on June 2, 1999 that overruled the Trustee's objection and approved the settlement. The United States Trustee has filed a Notice of Appeal and is seeking a stay of the Order pending appeal.

The United States Trustee argues that its appeal automatically stays the court order. The United States Trustee relies on Rule 62(d) of the Federal Rules of Civil Procedure which applies in adversary proceedings pursuant to Rule 7062 of the Federal Rules of Bankruptcy Procedure. Rule 62(d) provides as follows:

STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT

*(d) stay upon appeal.* When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Under Rule 62(d), a party may obtain a stay of a money judgment pending appeal by posting a supersedeas bond. The United States Trustee argues that it is not required to post a bond under Rule 62(e) of the Federal Rules of Civil Procedure and 28 U.S.C. § 2408. However, Rule 62(d) has been limited to money judgments. See *In re Westwood Plaza Apartments Limited*, 150 B.R. 163 (Bankr. E.D.Tx 1993), *In re Capital West Investors*, 180 B.R. 240 (Bankr. N.D.Ca. 1995), and *In re Pansier*, 212 B.R. 950 (Bankr. Ct. E.D.Wis. 1997). If a money judgment or something akin to a money judgment is obtained against the United States, it is not necessary for the United States to post a supersedeas bond for

a stay pending appeal to be effective. See *Pansier, supra*. Since the United States of America is solvent, it would serve no useful purpose to require a supersedeas bond. However, in cases that do not involve money judgments, the United States must request and obtain a discretionary stay pursuant to Rule 8005. See *Capital West Investors, supra* and *In re Westwood Plaza Apartments Limited, supra*.

The only judicial authority cited by the United States Trustee which supports his position is *In re Rape*, 100 B.R. 288 (Bankr. W.D.N.C. 1989). The *Rape* case contains no analysis of the relevant rules and has been questioned in later opinions. See *In re West Investors, supra* at Note 13.

The current case does not involve a money judgment or anything akin to a money judgment. While almost all bankruptcy matters involve money to some extent, this case does not require the United States Trustee to pay any money to any of the parties. The current case involves a discharge of the debtors, a dismissal of an adversary proceeding and the approval of a settlement. Rule 62(d) does not apply to this type of order.

The United States Trustee in the current case is not the type of party which Rule 62(d) is designed to protect. The cases involving Rule 62(d) generally involve the United States Attorney representing an agency of the United States. In the current case, the United States Trustee is not representing any agency which has any interest in the matter. The United States Trustee is operating as “watchdog of the system”. Rule 62(d) is not designed to protect the United States Trustee in this type of case.

The United States Trustee also requested that this court's judgment be stayed pending appeal pursuant to the provisions of Rule 8005 of the Federal Rules of Bankruptcy Procedure, which provides as follows:

A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for 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 and the bankruptcy appellant panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of the proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. A motion for such relief, or for modification or termination of relief granted by a bankruptcy judge, may be made to the district court or the bankruptcy appellant panel, but the motion shall show why the relief, modification, or termination was not obtained from the bankruptcy judge. The district court or the bankruptcy appellant panel may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court. When an appeal is taken by a trustee, a bond or other appropriate security may be required, but when an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States a bond or other security shall not be required.

The standard for determining whether the court in its discretion should grant a stay pending appeal was stated by the Court of Appeals for the Fourth Circuit in *Long v. Robinson*, 432 F.2d 977 (4<sup>th</sup> Cir. 1970), which provides as follows:

Briefly stated, a party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay.

This court has applied the *Long v. Robinson* standard on several occasions. See *In re Ward*, 184 B.R. 253 (Bankr. D.S.C. 1995), *In re Davis*, Case No. 84-00578, A.P. No. 95-8176 (Bankr. D.S.C. April 29, 1996), *In re Dunes Hotel Associates*, Case No. 94-75715-W (Bankr. D.S.C. August 4, 1997), *In re Sedgfield Associates*, Case No. 89-1771 and 95-70386 (Bankr. D.S.C. June 1, 1995) and several others.

The United States Trustee has the burden of persuasion. *In re Dunes Hotel Associates, supra*. The standard for imposing a stay is fairly high. *In re Dunes Hotel Associates, supra*.

Under *Long v. Robinson*, the United States Trustee must first show that he is likely to prevail on the merits of the appeal. The United States Trustee can make no such showing. Rule 7041 of the Federal Rules of Bankruptcy Procedure expressly provides that the court has the discretion to approve settlements involving actions objecting to the debtors' discharge pursuant to 11 U.S.C. § 727(a). In order to prevail on appeal, the United States Trustee must show that this court abused its discretion.

The United States Trustee's argument that several courts have adopted a per se rule prohibiting settlement of § 727(a) actions does not assist him in meeting his burden. In his objection to the settlement, the United States Trustee requested that he be authorized to settle the § 727(a) action under terms similar to the agreement between Note Buyers, Inc. and the debtors. The United States Trustee's argument implicitly rejected the per se rule which prohibits all settlements. There is no precedent for the argument by the United States Trustee that he be substituted for Note Buyers and

authorized to settle the case on similar terms. The court did not abuse its discretion.

The United States Trustee is not likely to prevail on the merits of the appeal.


The second factor of *Long v. Robinson* is whether the United States Trustee will suffer “irreparable injury if the stay is denied”. The United States Trustee’s argument that mootness of the appeal constitutes irreparable injury has previously been rejected by this court. In *In re Dunes Hotel Associates, supra* this court held, “A showing of ‘irreparable harm’ requires more than an assertion of potential mootness of an appeal or ‘waste’ of resources.” (Emphasis in original). The United States Trustee will not be irreparably injured if its motion for a stay is denied.

The third factor which must be established by the United States Trustee is “that other parties will not be substantially harmed by the stay”. The United States Trustee has conceded that Note Buyers, Inc. will be harmed if a stay pending appeal prohibits it from receiving payments from the debtors during the appeal. Note Buyers, Inc. and the Debtors have worked on this case for an extended time. They have an interest in putting this matter behind them.

The final factor which must be proved by the United States Trustee is “that the public interest will be served by granting the stay”. This court has previously considered the public policy arguments presented by the United States Trustee and concluded that the public’s interests are best served in the present case by approving the settlement. Rule 7041 specifically provides for the approval of settlements.

None of the factors which the Court of Appeals considered in *Long v. Robinson* are present in the current case. The United States Trustee is not likely to prevail on appeal, he will not suffer any injury if the stay is denied, Note Buyers and the Debtors will be substantially harmed by a stay, and the public interest is served by denying the stay. The United States Trustee's Motion for a discretionary stay pending appeal pursuant to Rule 8005 of the Federal Rules of Bankruptcy Procedure should be denied.

The United States Trustee is not entitled to an automatic stay pending appeal. No grounds exist for the imposition of a discretionary appeal pursuant to Rule 8005. The United States Trustee's Motion for a stay pending appeal should be, and hereby is, denied.

  
\_\_\_\_\_  
JOHN E. WAITES  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina  
June 29, 1999