United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Doctors Hospital of Hyde Park, Inc.

Bankruptcy No. 00 B 11520

Adversary Caption: Doctors Hospital of Hyde Park, Inc. v. Dr. James H. Desnick, et al.

Adversary No. 02 A 00363

Date of Issuance: September 27, 2007

Judge: Jack B. Schmetterer

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE	)	
	)	
DOCTORS HOSPITAL OF HYDE PARK, INC.	)	Chapter 11
	)	Bankruptcy No. 00 B 11520
Debtor.	)	
_____	)	
DOCTORS HOSPITAL OF HYDE PARK, INC.	)	
Plaintiff,	)	
	)	Adversary No. 02 A 00363
v.	)	
	)	
DR. JAMES H. DESNICK, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION REGARDING DEFENDANT LASALLE BANK N.A.'s MOTION FOR STAY OF COUNT VIII JUDGMENT PENDING APPEAL

Following trial and entry of judgment against it, the Defendant LaSalle Bank N.A. ("Defendant") filed its Motion for Stay Pending Appeal as to the Amended Judgment on Count VIII. For reasons set forth below, Defendant's Motion for Stay Pending Appeal as to Count VIII will be denied by separate order, and any temporary order for such stay pending this ruling on the Motion will be vacated.

Background

Doctors Hospital of Hyde Park, Inc. ("Debtor") filed its Chapter 11 petition on April 17, 2000. This related Adversary Complaint was filed on April 15, 2002. Three counts of the Complaint were severed for trial. Pursuant to § 544 of Title 11 and the Illinois Uniform Fraudulent Transfer Act ("IUFTA"), Count VIII sought (a) to void the Guaranty, the Assignment, the Pledge and Security Agreement, and the Equity Pledge Agreement ("Guaranty and related lien agreements"), (b) to recover all proceeds from the sale of hospital assets that formed the collateral associated with the Guaranty and related lien agreements, and (c) pursuant to Section 550 of the Bankruptcy Code to recover an amount equal to the aggregate payments

made on the loan.[1/] In re Doctors Hosp. of Hyde Park, Inc., 360 B.R. 787, 793 (Bankr. N.D. Ill. 2007). Pursuant to §§ 544 and 550 of Title 11 and the IUFTA, Count IX sought (a) to void the Lease between an entity referred to as HPCH and the Debtor, and (b) to recover Lease payments made by Debtor to the extent that they exceeded a fair market rental. Id. Finally, pursuant to § 548 of Title 11, Count X sought (a) to avoid transfers made pursuant to the Lease, and (b) to recover those payments to the extent that they exceeded a fair market rental. Id.

The original Debtor/Plaintiff was replaced by the Chapter 11 Trustee ("Trustee" or "Plaintiff"). Following trial of the Trustee's claims against Defendant on the severed Counts VIII, IX and X, on March 2, 2007, Findings of Fact and Conclusions of Law were made and entered. It was concluded therein as to Count VIII that Defendant's purported liens on certain of Debtor's assets were based on fraudulent transfers and were therefore void. Doctors Hosp., 360 B.R. at 874. That issue was resolved by declaratory judgment contained in Paragraph 1 of the Amended Judgment, which is the judgment to which Defendant's instant stay motion pertains. A money judgment was entered against Defendant on Counts IX and X. That money judgment was stayed pending appeal when Defendant posted an adequate supersedeas bond.

Both parties filed post-trial Motions to Alter or Amend the Amended Judgment pursuant to Rule 9023 Fed. R. Bankr. P. On July 25, 2007, those motions were denied for reasons set forth in the Additional Findings of Fact and Conclusions of Law. In re Doctors Hosp. of Hyde Park, Inc., No. 02-A-00363, 2007 WL 2206887 (Bankr. N.D. Ill. July 25, 2007). Those motions sought to alter or amend the Amended Judgment only with regard to Counts IX and X, but not as to the judgment on Count VIII.

[1/] By his filing of January 18, 2007, the Trustee expressly abandoned his claim to recover loan payments under § 550.

There are three separate sources of funds currently being held in escrow by the Trustee as to which some or all of the Defendant's liens were asserted. There is no dispute between the parties that if the judgment on Count VIII were overturned and Defendant's liens reinstated, Defendant would have a viable lien claim against the Equipment Sale Proceeds totaling approximately $500,000. These funds are being held in a separate escrow account pursuant to the February 22, 2001 order by Judge Doyle. Second are the so-called Residual Funds, which according to Defendant consist of cash collateral from Medicare/Medicaid receivables, and a settlement with Dan K. Webb for $270,000. During oral argument, the Trustee asserted that all Medicare/Medicaid monies were paid to the first lienholder. In addition, the Trustee argued that the Webb settlement is a general intangible, that the applicable version of UCC Article 9 excludes commercial tort claims from general intangibles and, therefore, Defendant would not have a security interest in the Webb settlement funds. Thus, in the event of reversal of Count VIII of the Amended Judgment, there would be an issue as to both the amount and validity of Defendant's claim against the Residual Funds.

The largest fund now held by the Trustee resulted from settling claims against Debtor's sole shareholder, Dr. James Desnick, and other defendants. The settlement netted approximately $6.4 million for the estate, and the proceeds were placed in escrow pending appeal ("Desnick settlement"). The settlement was approved by the bankruptcy court over Defendant's objection. Following appeal, that decision was affirmed on January 12, 2007. See In re Doctors Hosp. of Hyde Park, 474 F.3d 421 (7th Cir. 2007). The Desnick settlement funds held by the Trustee have increased to $7.6 million, having accrued interest at U.S. Treasury rates. Following approval of the Desnick settlement, the only thing preventing the use and distribution of those funds by the Trustee was the liens claimed by Defendant.

The Desnick settlement proceeds comprised the most important fund in contention here. If the stay as to Count VIII is denied, the Trustee will be free to use those proceeds to pay dividends to claimants and administrative expenses. Defendant argues that the Trustee is protected from any loss if he prevails on appeal without need for any supersedeas bond, and that a stay pending appeal serves to maintain the status quo. The Trustee responds that because of their low risk, Treasury rates do not represent a fair rate of return on monies that could and should be distributed to creditors now, and therefore it is in the best interest of the estate and creditors to make such distribution from the Desnick settlement funds. More to the point on the stay issue, the Trustee argues that Defendant has not met its burden to entitle it to a discretionary stay order of the Amended Judgment on Count VIII pending appeal.

Jurisdiction

This issue arises under 28 U.S.C. § 157, and is referred here by District Court Operating Procedure 15(a) of the United States District Court for this District. Subject matter jurisdiction lies under 28 U.S.C. § 1334(b). Venue lies under 28 U.S.C. § 1409. This issue constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A).

Discussion

Rule 7062(d) Fed. R. Bankr. P. provides for a stay pending appeal conditioned on the posting of a supersedeas bond. Local Rule 2070-2 of the Bankruptcy Court for this District requires the supersedeas bond to be in the amount of the judgement, plus one year's interest at the statutory rate provide in 28 U.S.C. § 1961, plus $500 for costs. On May 3, 2007, Defendant, in compliance with Local Rule 2070-2, posted a supersedeas bond in the amount of $4,555,762 to stay the money judgment entered in Paragraph 2 of the Amended Judgment against them on Counts IX and X.

The separate non-monetary judgment entered on Count VIII in Paragraph 1 of the

Amended Judgment was not covered by that bond. Defendant makes a preliminary argument that upon filing of any supersedeas bond, the appealing party is entitled, as a matter of right, to a stay of a money judgment pending appeal. Fed. R. Civ. P. 62(d). Relying on the reasoning in In re Miranne, 94 B.R.413, 415 (E.D. La. 1988), Defendant tries to stretch that concept, asserting that Count VIII of the Amended Judgment can properly be viewed as a money judgment, and therefore it is entitled to a stay of Count VIII pending appeal as a matter of right. Even though its posted bond only related to Counts IX and X, Defendant argues that the amount of supersedeas bond posted is adequate to protect the status quo as to the Judgments entered on all three Counts, because that bond is supplemented by the Trustee holding larger funds from the Desnick settlement, which funds are earning a U.S. Treasury rate of interest.

Defendant's reliance on Miranne is misplaced. While that opinion recognized that "this Court's judgment is not literally a money judgment . . ." it reached the conclusory decision that "it is best understood as such for stay purposes since the ultimate issue in dispute is who between Miranne and appellees should recover a sum certain of money." Id. The Amended Judgment as to Count VIII declared void the Defendant's asserted liens, and the absence of such liens frees up monies held by the Trustee. But this is not a money judgment, and no persuasive rationale is seen for following Miranne.

Therefore, the issue as to the requested stay must be analyzed using commonly recognized standards for a discretionary stay pending appeal under Rule 8005 Fed. R. Bankr. P. Four factors are considered in deciding whether a discretionary stay pending appeal is appropriate. In re Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300 (7th Cir. 1997) (citations omitted). Those factors are: "1) whether the appellant is likely to succeed on the merits of the appeal; 2) whether the appellant will suffer irreparable injury absent a stay; 3) whether a stay would substantially harm other parties in the litigation; and 4) whether a stay is in the public

interest." Id. The moving party has the burden of establishing each of these elements. In this case, Defendant has failed to meet its burden and, therefore, its Motion for Stay Pending Appeal will be denied.

Likelihood of Success on the Merits

Likelihood of success is not certainty of success; neither is it a mere possibility. "[T]he Claimants need to demonstrate a substantial showing of likelihood of success, not merely the possibility of success, because they must convince the reviewing court that the lower court, after having the benefit of evaluating the relevant evidence, has likely committed reversible error." Forty-Eight Insulations, 115 F.3d at 1301 (citing Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991)). Defendant falls far short of meeting this standard.

In its motion, Defendant argues the likelihood of success in the most general terms. The following is Defendant's entire written argument on the subject:

> Although Defendant has not yet filed a notice of appeal from the Judgment in this case, Defendant expects to present arguments that the Judgment should be reversed based on questions of law. For example, Defendant expects to argue that under the Seventh Circuit's decision in Bonded Financial Services, Inc. v. European American Bank, 890 F.2d 838 (7th Cir. 1988), the Judgment incorrectly concluded that Defendant was an "initial transferee" under Section 550 of the Bankruptcy Code. In addition, Defendant expects to argue on appeal that the Cash Collateral Account Agreement established a "true escrow," and that the Court mistakenly decided certain legal aspects of the solvency determination. These and other legal issues presented on appeal will be reviewed *de novo*.

(Def.'s Memo. in Support of Mot. for Stay Pending Appeal at 6 (footnotes and citations omitted).) Those particular points were not expanded on in subsequent briefs or oral argument.

Defendant's argument suggests that the Conclusions of Law entered in support of Count VIII of the Amended Judgment did not properly apply Bonded Financial Services, Inc. v. European American Bank, 890 F.2d 838 (7th Cir. 1988). However, Bonded Financial was a case

interpreting the meaning of "initial transferee" under Bankruptcy Code § 550, which was a question of law applicable to Counts IX and X. Similarly, whether the Cash Collateral Account Agreement established a "true escrow" is relevant only to Defendant's status as an initial transferee as the absence of a true escrow proved Defendant's dominion and control over the transfers rather than mere agency. The judgment on those Counts has already been stayed.

The reasoning in the Conclusions of Law as to Count VIII is at issue in this discretionary stay analysis. That reasoning did not rely on any issue decided in Bonded Financial. Rather, Count VIII dealt with allegations in the Adversary Complaint that the pledge agreement was a fraudulent transfer under the IUFTA and 11 U.S.C. § 544. There was some reasoning in the Findings and Conclusions that discussed Bonded Financial, but that was discussed as to Counts IX and X in which the money judgment has been stayed by filing of the supersedeas bond. As earlier noted (see fn.1 supra), any issue as to § 550 in Count VIII as pleaded was abandoned by Plaintiff. Thus, any argument regarding Bonded Financial has no bearing whatsoever on Defendant's likelihood of success on appeal with regard to Count VIII of the Amended Judgment.

Count VIII was an action by the Debtor to void certain liens as fraudulent transfers under the IUFTA by using the strong-arm powers of § 544(a)(2) of the Code. Under Illinois law, a transfer is fraudulent as to a creditor whose claim arose before the transfer if the transfer is for less than reasonably equivalent value while the debtor was insolvent. 740 ILCS 160/5(a)(2). It was found and held that the Debtor did not receive any direct or indirect benefit from making the Guaranty and related lien agreements. Doctors Hosp., 360 B.R. at 871. There was no direct benefit because the loan proceeds were disbursed to Dr. Desnick and his spouse, and not to Doctors Hospital. Nor was there an indirect benefit. Id. While Doctors Hospital made representations in the Guaranty that it was receiving some benefit, those representations were not

conclusive, it was not an arm's length transaction, and Dr. Desnick took out as much money as he put into Doctors Hospital. Id. at 872. The full discussion of the Count VIII issue in the Conclusions of Law, which referred to the evidence and Findings (including facts to which this Defendant stipulated) is appended to the Opinion as "Exhibit to Opinion."

Defendant's sparse argument in favor of a stay does not question the legal conclusions that warranted entry on Count VIII of the Amended Judgment, but rather infers an attack on the factual Findings that were entered. Questions of fact are reviewed on appeal using a clearly erroneous standard, Klingman v. Levinson, 114 F.3d 620, 626 (7th Cir. 1997), further heightening the burden Defendant has to overcome to prove likelihood of success in contesting the Findings. According to Defendant's Memorandum in Support of Motion for Stay Pending Appeal, "the Court mistakenly decided certain *legal aspects* of the solvency determination." (Emphasis added.) The Conclusions of Law contain extensive discussion of the evidence and applicable law regarding insolvency and concluded that Plaintiff had satisfied its burden of proving Debtor's insolvency at the time the Guaranty and related lien agreements were executed. Doctors Hosp., 360 B.R. at 853-70, 874. Insolvency is a question of fact. Klein v. Tabatchnick, 610 F.2d 1043, 1048 (2d Cir. 1979); In re Join-In Int'l. (U.S.A.) Ltd., 56 B.R. 555, 560 (Bankr. S.D.N.Y. 1986). Simply labeling it a legal issue, without citing any authority for the proposition, does not make it so and does not change the standard of appellate review.

Finally, in both their motion and at hearing, Defendant argued that it is impossible to determine the likelihood of success because the precise issues on appeal are not yet known. However, Defendant's original Memorandum in Support of stay was filed on April 9, 2007, its Notice of Appeal from the Amended Judgment was filed on August 6, 2007, its supplemental brief on stay issues was filed on September 5, 2007, and oral argument on the motion for stay was held on September 10, 2007. At oral argument, Defendant argued that the issues to be

appealed were not known in April, because the Court was still considering the parties' post-trial motions to alter or amend the Amended Judgment. However, it bears repeating that Defendant did not move to alter or amend the Amended Judgment as to Count VIII. In other words, Defendant was not waiting for the Court to decide any issue relating to Count VIII, thereby waiving another opportunity to raise any factual or pertinent legal issue to be argued here or on appeal. Defendant did not provide any further explanation why it did not supplement its theories regarding likelihood of success between April and September 5, when it filed its Reply brief.

Thus, Defendant has failed to carry its burden regarding likelihood of success on the merits because a portion of its asserted appellate issues as to Count VIII of the Amended Judgment are irrelevant to Count VIII, and the relevant portion relates to questions of fact that will be reviewed on appeal using the clearly erroneous standard. Defendant has failed to demonstrate any likelihood let alone a significant likelihood of success because it did not even assert any error in the relevant Findings of Facts.

Harm to Movant

Both parties strenuously argued the second prong of the test. In doing so, the parties raised the interesting, some might say esoteric, issue of whether the voided liens, if reinstated on appeal, would be broad enough to cover the Desnick settlement funds. The Trustee argued that Defendant will not suffer any harm because even if Count VIII of the Amended Judgment is overturned on appeal and Defendant's liens are held to be valid, the Desnick settlement funds are not within the scope of the liens. However, the issue as to coverage of the asserted liens was severed from trial by agreement of the parties and therefore never tried or decided. Count VIII of the Amended Judgment held that Defendant had no lien whatsoever. Upon being asked from the bench during argument whether the parties now want the lien coverage issue set for trial, they both declined. Having agreed to sever this issue from the trial and declined to try the issue

now, the parties now argue for ruling on an issue that was not tried. From the arguments presented in writing and orally, such decision would have to be based in part on evidence presented at trial and in part on evidence not presented at trial. The present record is clearly not complete enough to decide the hypothetical question as to the scope of the liens if they are reinstated following appeal. Therefore, it would be improper to weigh the untried issue based on partial evidence and oral argument. The issue pending is whether the judgment actually entered on Count VIII should be stayed, not how the severed issue should be decided if it ever must be decided.

If Defendant's motion is denied and the Trustee disburses some or all of the Desnick settlement funds, it is argued that Defendant's appeal as to Count VIII of the Amended Judgment may be rendered moot. In response, the Trustee cites a long line of opinions, which appear to reflect the majority rule, "that an appeal being rendered moot does not itself constitute irreparable harm." In re 203 North LaSalle Street Partnership, 190 B.R. 595, 598 (N.D. Ill. 1995). A minority view argues to the contrary that mooting any appeal "is a quintessential form of prejudice." In re Adelphia Communications Corp., 361 B.R. 337, 347-48 (S.D.N.Y. 2007) (see also for a discussion and list of citations to majority and minority rule cases). The latter reasoning will sometimes be applicable, but only if the appellant can show a substantial appellate issue and likelihood of success. See Northern Border Pipeline Co. v. 64.111 Acres of Land, 125 F. Supp.2d 299, 301 (N.D. Ill. 2000) (citing Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380, 386-88 (7th Cir. 1984)) (finding that there is an "inverse relationship" between the burden of proving likelihood of success and proving irreparable harm; that is, the more likelihood of success can be found, the less irreparable harm needs to be shown). Because Defendant here is unable to carry its burden regarding likelihood of success and has not shown a substantial appellate issue, possible mootness alone is not enough to establish irreparable injury.

Thus, Defendant has failed to show that it will suffer irreparable harm under Rule 8005 Fed. R. Bankr. P. if its motion for stay is denied.

Harm to Third Parties

Defendant argues that "[a] stay will preserve the *status quo* for Defendant and will furthermore not alter the *status quo* for Plaintiff and creditors of estate [sic]." (Def.'s Memo. in Support of Mot. for Stay Pending Appeal at 6.) The underlying bankruptcy was filed in April 2000, and this Adversary Proceeding has been pending since April 2002. Defendant essentially argues that the *status quo* is prolonged litigation, but that history does not mean that creditors of the estate have not been and will not be harmed by further delay. The Desnick settlement funds are invested conservatively in Treasury paper (under standards set by the U.S. Trustee). Because those are the safest investment, they achieve the smallest rate of return. Not only might creditors invest their dividends in higher yield investments on the open market or in their businesses, but the estate continues to accrue administrative expenses that draws down the amount of money that will eventually be disbursed to creditors. One does not have to poll the creditors to discern their view as to whether five years of delay in recovering a dividend has harmed them and whether two more years of waiting out an appeal will harm them further. Thus, Defendant's argument that there is no harm to third parties is without merit.

Public Interest

The public policy behind bankruptcy is the equality of distribution to creditors within the priorities established by the Code within a reasonable time. See Bergier v. I.R.S., 496 U.S. 53, 58 (1990). In light of the discussion above regarding harm to unsecured creditors as a result of the long standing litigation, further delay is contrary to that public policy, and therefore would not be in the public interest.

Conclusion

For the foregoing reasons, Defendant's Motion for Stay Pending Appeal as to Count VIII of the Amended Judgment will be denied by separate order.

ENTER:

_____

Jack B. Schmetterer
United States Bankruptcy Judge

Dated this 27th day of September 2007.