

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

Case No. 08-43175

MICHAEL JAMES BAKER, and
SUZIE CARMEN BAKER,

Chapter 7

Debtors.

Judge Thomas J. Tucker

**OPINION AND ORDER DENYING DEBTORS' MOTION
FOR STAY PENDING APPEAL,
EXCEPT FOR A LIMITED TEMPORARY STAY**

I. Introduction

On March 11, 2014, the Court entered an order entitled “Order Approving Revised Settlement and Requiring Turnover of Property” (Docket # 116, the “Revised Settlement Order”), which, among other things, (1) granted, with modifications, the motion of Douglas S. Ellmann, Trustee (Docket # 79, the “Motion”), for an order approving a proposed settlement and requiring the turnover by the Debtors of certain real property known as 5142 N. Territorial Road, Dexter, Michigan (the “Property”) and the settlement and resolution of certain litigation claims asserted by the Debtors in connection with *Michael Baker and Suzie C. Baker v. Residential Funding Company, LLC and Orleans Associates PC*, Washtenaw Circuit Court Case No. 11-1260-CH and *Residential Funding Company, LLC v. Michael J. Baker and Suzie Baker*, Michigan District Court 14-A-1, Case No. 08-3-C-235 LT (collectively, the “Litigation Claims”); and (2) approved the settlement described in the Motion, with the revisions stated in the Revised Settlement Order.

On March 14, 2014, the Trustee filed a motion to modify the Revised Settlement Order (Docket # 118), which was later withdrawn, as indicated in the Court’s Order filed on March 25,

2014 (Docket # 136, the “March 25, 2014 Order”).

On March 27, 2014, Debtors filed a notice of appeal (Docket # 137), purporting to appeal to the United States District Court the following orders: (1) an order entered by the Court on March 5, 2011 entitled “Order Regarding Trustee’s Motion for Approval of Settlement, and Regarding Further Proceedings on Other Motions” (Docket # 111); (2) the Revised Settlement Order (Docket # 116); and (3) the March 25, 2014 Order (Docket # 136).

On April 2, 2014, Debtors filed an ex parte motion seeking a stay of the effect of the Revised Settlement Order (Docket # 116) pending appeal of that order (Docket # 147, the “Stay Motion”).¹

The Court has reviewed the Stay Motion, and concludes that a hearing is not necessary, and that except for the temporary stay granted by the order below, the Stay Motion should be denied, for the reasons stated in this opinion.

II. Discussion

A. The relevant factors

Debtors’ Stay Motion is based on Fed.R.Bankr.P. 8005, which states, in pertinent part:

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 appellate panel reserved hereinafter, **the bankruptcy judge may suspend or order the continuation of other 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

¹ The Stay Motion erroneously states that the Revised Settlement Order is at Docket # 118.

granted by a bankruptcy judge, may be made to the district court or the bankruptcy appellate 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 appellate panel may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court
.....

(emphasis added). The factors that courts must apply in determining whether to grant a motion for a stay pending appeal were discussed at length in *Michigan Coalition of RadioActive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153-54 (6th Cir. 1991). In *Griepentrog*, the Sixth Circuit stated, in relevant part:

In determining whether a stay should be granted under Fed.R.Civ.P. 8(a), we consider the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction. These well-known factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together.

Although the factors to be considered are the same for both a preliminary injunction and a stay pending appeal, the balancing process is not identical due to the different procedural posture in which each judicial determination arises. Upon a motion for a preliminary injunction, the court must make a decision based upon “incomplete factual findings and legal research.” Even so, that decision is generally accorded a great deal of deference on appellate review and will only be disturbed if the court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.

Conversely, a motion for a stay pending appeal is generally made after the district court has considered fully the merits of the underlying action and issued judgment, usually following completion of discovery. As a result, a movant seeking a stay pending review on the merits of a district court's judgment will

have greater difficulty in demonstrating a likelihood of success on the merits. In essence, a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal. Presumably, there is a reduced probability of error, at least with respect to a court's findings of fact, because the district court had the benefit of a complete record that can be reviewed by this court when considering the motion for a stay.

To justify the granting of a stay, however, a movant need not always establish a high probability of success on the merits. The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other. This relationship, however, is not without its limits; the movant is always required to demonstrate more than the mere “possibility” of success on the merits. For example, even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the defendant if a stay is granted, he is still required to show, at a minimum, “serious questions going to the merits.”

In evaluating the harm that will occur depending upon whether or not the stay is granted, we generally look to three factors: (1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided. In evaluating the degree of injury, it is important to remember that

[t]he key word in this consideration is *irreparable*. 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.

In addition, the harm alleged must be both certain and immediate, rather than speculative or theoretical. In order to substantiate a claim that irreparable injury is likely to occur, a movant must provide some evidence that the harm has occurred in the past and is likely to occur again.

Id. (citations omitted); *see also Serv. Emps. Int’l Union Local 1 v. Husted*, 698 F.3d 341, 343

(6th Cir. 2012)(*per curiam*); *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002).

Debtors, as the moving parties, bear the burden of establishing by a preponderance of the evidence that they are entitled to the stay. *See Husted*, 698 F.3d at 343; *In re Holstine*, 458 B.R. 392, 394 (Bankr. E.D. Mich. 2011).

“[A] court’s decision to [grant or] deny a Rule 8005 stay is highly discretionary.” *Id.* (quoting *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1301 (7th Cir. 1997)).

B. Consideration of the relevant factors

The Court concludes that Debtors have not satisfied their burden, and that a stay pending appeal should not be granted, except for the temporary stay described below.

1. Factor No. 1 — Debtors’ likelihood of success on appeal

The Court concludes that it is very unlikely that the district court will reverse, modify, or vacate the this Court’s Revised Settlement Order, or either of the other two orders that Debtors are appealing. This Court certainly is not infallible. But the Court strongly believes that it correctly applied well-established law to the facts of this case in entering its orders, for the reasons stated on the record in the Court’s bench opinion given on March 5, 2014.²

The Court’s conclusion about this first stay factor is alone fatal to Debtors’ Stay Motion, under the Sixth Circuit’s decision in *Griepentrog*, quoted above. There, the Sixth Circuit held, among other things, that “even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the [opposing parties] if a stay is granted, he is still required to show, at a minimum, ‘serious questions going to the merits.’” *Griepentrog*, 945 F.2d at 154

² A transcript of that bench opinion is on file in this case, at Docket # 119.

(citations omitted). Debtors have not made such a showing, so the Stay Motion must be denied for this reason alone, except for the temporary stay described below.

2. Factor No. 2 — irreparable harm to Debtors

The Court will assume, for purposes of ruling on the Stay Motion, that the second stay factor, “the likelihood that the moving party will be irreparably harmed absent a stay,” favors a stay pending appeal.

3. Factor Nos. 3 and 4 — harm to others and the public interest

The third and fourth stay factors, namely, “the prospect that others will be harmed if the court grants the stay;” and “the public interest in granting the stay,” both weigh against granting a stay pending appeal, other than the temporary stay described below. The Court finds that the Trustee and creditors will be harmed if the Court grants a stay that lasts for the entire time the Debtors’ appeal to the district court remains pending. Such a stay would unduly delay the Trustee in administering the estate for the benefit of the creditors, and will unduly delay payments to creditors. “Such delay can only harm such creditors; it cannot benefit them.” *See In re McInerney*, 490 B.R. 540, 548 (Bankr. E.D. Mich. 2013). On the other hand, Debtors have already had an opportunity in this court to litigate their rights in response to the Trustee’s settlement motion that led to the Revised Settlement Order.

Finally, there is a public interest in preventing debtors from using the bankruptcy process to unduly delay payments to creditors.

And the public interest, as expressed by Congress in several ways in the Bankruptcy Code, favors the prompt administration of bankruptcy cases. *See, e.g.*, 11 U.S.C. § 704(a)(1) (requiring Chapter 7 trustees to “collect and reduce to money the property of the estate for which such trustee serves, and close such estate as

expeditiously as is compatible with the best interests of parties in interest”); 11 U.S.C. § 707(a)(1)(which provides as a ground for dismissal of a Chapter 7 bankruptcy case “unreasonable delay by the debtor that is prejudicial to creditors”).

Id.

Overall, the relevant factors weigh strongly against granting a stay pending appeal, other than the temporary stay described below. With that exception, and in the exercise of its discretion under Fed.R.Bankr.P. 8005, the Court will deny Debtors’ Stay Motion.

III. A temporary stay is warranted.

Considering Factors 1-4 above, and under all the circumstances, the Court concludes that a limited, temporary stay is warranted, so that the Debtors need not surrender the home in which they and their children live to the Trustee until April 16, 2014. This limited, temporary stay will give the Debtors a reasonable time to seek a stay pending appeal in the district court, before they otherwise would have to vacate their home. The Court has discretion under the circumstances to order this limited, temporary stay under Fed.R.Bankr.P. 8005, as an “appropriate order during the pendency of an appeal . . . as will protect the rights of all parties in interest.”

IV. Conclusion and Order

For the reasons stated in the opinion above,

IT IS ORDERED that the Stay Motion (Docket # 147) is granted to the extent of the limited, temporary stay described below, and otherwise is denied.

IT IS FURTHER ORDERED that the provisions in the Revised Settlement Order (Docket # 116) that requires the Debtors to surrender the “Property” and related provisions (Paragraph nos. 5 and 6-7 of the Revised Settlement Order) are stayed until April 16, 2014. On April 16,

2014, this stay will automatically terminate.

Signed on April 2, 2014

/s/ Thomas J. Tucker
Thomas J. Tucker
United States Bankruptcy Judge