

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WRITTEN DECISION - NOT FOR PUBLICATION

ENTERED 8/1/05
FILED
AUG - 1 2005
CLERK, US BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
 ENTERED
 LODGED
 RECEIVED
AUG 01 2005
CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re) CASE NO. 02-09721-H7
)
COMMERCIAL MONEY CENTER, INC.,) (Jointly Administered with
) Case No. 02-09720-H7)
Debtor.)
) ADVERSARY CASE NO. 03-90331-H7
_____)
RICHARD M. KIPPERMAN, Chapter)
7 Trustee for the Bankruptcy)
Estates of Commercial Money)
Center, Inc. and Commercial)
Servicing Corporation,) ORDER ON EMERGENCY MOTION FOR
Plaintiff,) STAY PENDING APPEAL
v.)
)
NETBANK, FSB, a federal)
savings bank,)
)
Defendant.)
_____)

On May 25, 2005, NetBank FSB ("NetBank") filed an Emergency Motion to Approve Supersedeas Bond and Stay Execution of Judgment Pending Appeal. Richard M. Kipperman, the Chapter 7 Trustee (the "Trustee") opposed.

This Court has jurisdiction to consider NetBank's motion despite the filing of the notice of appeal. Ho v. Dai Hwa Elec. (In re Ho), 265 B.R. 603 (B.A.P. 9th Cir. 2001).

///

1 FACTS

2 On January 27, 2005, this Court issued a Memorandum Decision
3 (the "Decision") in this adversary proceeding regarding the cross-
4 motions for partial summary judgment filed by NetBank and the
5 Trustee. On February 28, 2005, this Court entered an order denying
6 NetBank's motion for partial summary judgment and granting the
7 Trustee's cross-motion for partial summary judgment (the "Summary
8 Judgment Order") for the reasons stated in the Decision. The
9 Summary Judgment order provided that the Trustee was entitled to
10 judgment on the First, Second, Third, Fifth, and Sixth Claims for
11 Relief stated in the Trustee's Complaint.¹ On May 20, 2005, the
12 Court entered the Judgment in favor of Trustee against NetBank.
13 The Third Claim for Relief requested that NetBank be ordered to
14 turn over to the Trustee any of the CMC-N Purportedly Transferred
15 Assets, including without limitation, the CMC-Royal Bonds, and the
16 CMC-Collateral currently in the possession, custody, or control of
17 NetBank.

18 NetBank requests that the Court stay enforcement of the
19

20 ¹ The complaint alleged eleven claims for relief: 1) Declaratory Relief that
21 Transactions Involving CMC-N Purportedly Transferred Assets and CMC-N Collateral
22 Did Not Constitute a "True Sale" and that NetBank Did Not Perfect Any Interest
23 Therein - 11 U.S.C. § 541 and F.R.B.P. 7001(9); 2) Alternative Declaratory Relief
24 that Even if Transactions Involving CMC-N Purportedly Transferred Assets and CMC-N
25 Collateral Constitute a "True Sale," For Such Sale to Be Effective, NetBank Was
26 Required To, But Did Not, Perfect Its Interest Therein - 11 U.S.C. § 541 and
27 F.R.B.P. 7001(9); 3) Order Directing NetBank to Turn Over Estate Assets - 11 U.S.C.
28 §§ 542, 550 and 551; 4) Declaratory Relief that CMC-N Royal Bonds Were Not Assigned
to NetBank, and Order Directing NetBank to Turn Over CMC-N Royal Bonds as Estate
Assets - 11 U.S.C. §§ 542, 550, 551; 5) Judgment Voiding 90-Day Preferential
Transfer - 11 U.S.C. § 547; 6) Judgment Avoiding Unperfected Interests in CMC-N
Purportedly Transferred Assets and CMC-N Collateral - 11 U.S.C. §§ 544 and 551; 7)
Recovery of Avoidable Transfers - 11 U.S.C. § 550; 8) Declaration of Rights to CMC-N
Pool Account Funds and CMC-N Postpetition Collections - 11 U.S.C. § 541; 9)
Objection to Claims - 11 U.S.C. § 502; 10) Avoidance and Recovery of Unauthorized
Postpetition Transfers - 11 U.S.C. §§ 549 and 550; and 11) Recovery of Attorneys'
Fees and Costs - Applicable Law.

1 turnover requirements of the Judgment under Federal Rule Civil
2 Procedure ("FRCP") 62(h), or, in the alternative, under FRCP 62(d).
3 NetBank proposes posting a supersedeas bond in the amount of
4 \$50,000.

5 DISCUSSION

6 A. Federal Rule Bankruptcy Procedure 7062: Stay As A Matter of
7 Right

8 Federal Rule of Bankruptcy Procedure ("FRBP") 7062
9 incorporates the provisions of Rule 62 of the Federal Rules of
10 Civil Procedure. NetBank believes that Rule 62(d) applies and
11 contends that by filing a bond, it is entitled to a stay as a
12 matter of right. Rule 62 states:

13 (d) Stay Upon Appeal. When an appeal is taken
14 the appellant by giving a supersedeas bond may
15 obtain a stay subject to the exceptions
16 contained in subdivision (a) of this rule. The
17 bond may be given at or after the time of
18 filing the notice of appeal or the procuring
19 the order allowing the appeal, as the case may
20 be. The stay is effective when the supersedeas
21 bond is approved by the court.

22 Rule 62(d) "pertains primarily, if not exclusively, to monetary
23 judgments." Acton v. Fullmer (In re Fullmer), 323 B.R. 287, 291
24 (Bankr. D. Nev. 2005) (citations omitted). "[C]ourts have
25 restricted the application of Rule 62(d)'s automatic stay to
26 judgments for money because a bond may not adequately compensate a
27 non-appealing party for loss incurred as a result of the stay of a
28 non-money judgment." Stephenson v. Rickles Elec. & Satellites (In re
Best Reception Systems, Inc.), 219 B.R. 988, 996 (Bankr. E.D. Tenn.
1998) quoting Hebert v. Exxon Corp., 953 F.2d 936, 938 (5th
Cir.1992); see also NLRB v. Westphal, 859 F.2d 818, 819 (9th Cir.
1988) (noting that the bond "protects the prevailing plaintiff from

1 the risk of a later uncollectible judgment and compensates him for
2 delay in the entry of the final judgment.")

3 NetBank concedes that the only assets subject to turnover under
4 the Third Claim for Relief are the CMC-Royal Bonds. Nonetheless,
5 NetBank asserts that the Judgment as to the Third Claim for Relief
6 is one which affects an "interest in property," and can, therefore,
7 be analogized to a money judgment for which NetBank is entitled to a
8 stay as a matter of right, upon the posting of a bond.

9 In response, the Trustee argues that FRCP 62(d) applies
10 exclusively to money judgments and that the judgment in this case
11 requiring turnover of physical possession of the Bonds is an
12 injunction. The Trustee states that the definition of an injunction
13 is "[a] court order commanding or preventing an action." Black's
14 Law Dictionary 788 (7th ed. 1999). A mandatory injunction "orders
15 an affirmative act or mandates a specific course of action.," Id. A
16 money judgment, in contrast, is "[a] judgment for damages subject to
17 immediate execution, as distinguished from equitable or declaratory
18 relief." Id. at 848.

19 In order for this Court to issue a stay under Rule 62(d), all
20 the conditions of the Rule must be met. Rule 62 (d) provides that
21 its provisions regarding a supersedeas bond are "subject to the
22 exceptions contained in subdivision (a) of this rule." Rule 62(a)
23 provides that unless otherwise ordered, "an interlocutory or final
24 judgment in an action for an injunction or in a receivership action,
25 or a judgment or order directing an accounting in an action for
26 infringement of letters patent, shall not be stayed." Thus, the
27 rule carves out certain exceptions.

28 It is undisputed that the Third Claim for Relief is not a money

1 judgment nor can it be said that the turnover falls within an
2 exception enumerated in Rule 62(a) within the strict meaning of
3 those terms. Nonetheless, the judgment at issue can be treated like
4 the judgment to which is comparable. "When an appeal is taken from
5 a judgment that is not a money judgment or an exception of Rule
6 62(a) within the strict meaning of those terms, but is comparable to
7 one or the other of these judgments, most of the few courts that
8 have addressed the issue appear (for purposes for rule 62) to treat
9 that judgment like the judgment to which it is comparable." In re
10 Capital West Inv., 180 B.R. 240, 243 (N.D. Cal. 1995) (citation
11 omitted).

12 When drawing a comparison, it is also helpful to analyze
13 whether the bond is a sufficient substitute for the delay associated
14 with a stay of the judgment. In examining whether a party appealing
15 a government health inspection order is entitled to a stay as a
16 matter of right under Rule 62(d), one court summarized the purpose
17 of the bond as a substitute for payment of a money judgment:

18 The posting of a bond in the amount of the
19 judgment, coupled with the fact that money
20 judgments earn interest from the date they are
21 entered in the district court..., assures a
22 prevailing plaintiff that sheer passage of time
23 will not render the judgment uncollectible and
24 that he will be compensated (maybe not
25 completely) for the delay in receiving his
26 money. Thus the grant of the stay does little
27 or no harm to the plaintiff, but of course
28 denial would hurt the defendant by making him
 pay the judgment before its validity has been
 finally determined; and unless the plaintiff
 were required to give a bond, the defendant
 might find it difficult or impossible to get his
 money back if the judgment was overturned on
 appeal. Rule 62(d) strikes an appropriate
 balance by entitling the appellant to a stay but
 conditioning that right on the posting of a
 bond.

1 Donovan v. Fall River Foundry Co., 696 F.2d 524, 525 (7th Cir.
2 1982). The Seventh Circuit noted that this "solution makes little
3 sense as applied to an order to do, rather than an order to pay,
4 whether or not the order to do is a conventional injunction." Id.

5 The Court finds that the turnover portion of the judgment is
6 more analogous to a mandatory injunction than to a money judgment.
7 See Wildlife Center v. Southland Farm (In re Wildlife Center, Inc.),
8 102 B.R. 321, 322 (Bankr. E.D.N.Y. 1989) (noting that a turnover
9 order is in the nature of a mandatory injunction) (citation
10 omitted); Great Western Coal, Inc. v. Brown (In re Great Western
11 Coal, Inc., 146 B.R. 702, 704 (Bankr. S.D. Tex. 1992)
12 (characterizing debtors' request for mandatory and prospective
13 injunctive relief in the nature of a turnover order for specific
14 funds, but noting it was not a request for monetary relief.)
15 Further, the posting of a bond makes "little sense" as applied to an
16 order to do, rather than pay. Therefore, because the Court finds
17 that the turnover portion of the judgment is more akin to an
18 injunction and not a money judgment, it does not fall within the
19 scope of Rule 62(d). NetBank is therefore not entitled to a stay as
20 a matter of right and it is unnecessary for the Court to reach the
21 issue of the adequacy of the proposed supersedeas bond.

22 B. Federal Rule Bankruptcy Procedure 8005: Discretionary Stay

23 NetBank also seeks to have the Court exercise its discretion
24 and issue a stay pursuant to FRBP 8005. That rule states:

25 Notwithstanding Rule 7062 but subject to the
26 power of the district court and the bankruptcy
27 appellate panel reserved hereinafter, the
28 bankruptcy judge may suspend or order the
continuance of other proceedings in the case
under the Code or make any other appropriate
order during the pendency of an appeal on such

1 terms as will protect the rights of all parties
2 in interest.

3 "Courts in the Ninth and other circuits have construed this rule to
4 incorporate essentially the same standards as applicable under Rule
5 62(c). Fullmer, 323 B.R. at 292 (citations omitted). "There are
6 four elements to consider: 1) NetBank's likelihood of success on the
7 merits; 2) whether NetBank will be irreparably injured; 3) whether
8 issuance of the stay will substantially injure the Trustee; and 4)
9 where the public interest lies. In applying these factors, the
10 court is mindful that a discretionary stay pending appeal is viewed
11 as an extraordinary remedy." Id. (citation omitted).

12 1. NetBank's Likelihood of Success On The Merits

13 NetBank argues that the appellate court may reasonably reach a
14 different conclusion than this Court because 1) it may disagree with
15 this Court's conclusion that the Sales and Servicing Agreement
16 unambiguously constitute a "loan agreement" and 2) the issue whether
17 the payment stream under an equipment lease is considered a payment
18 intangible turns on a new statutory provision for which there has
19 been little, if any, interpretation by the courts. As pointed out
20 by the Trustee, NetBank has made "virtually no effort" to convince
21 this Court it has a reasonable likelihood of prevailing on appeal.
22 It provides no substantive arguments as to why an appellate court
23 may not agree with this Court's analysis. The Court finds that
24 NetBank has not met its burden of proving this element.

25 2. Whether NetBank Will Be Irreparably Harmed

26 NetBank also contends it will suffer irreparable harm because
27 it currently has the bonds in a secure location. The principal harm
28 to NetBank is the risk that the Trustee will transfer, destroy, or

1 lose the Bonds, which have no value to the Trustee. NetBank
2 contends that certain of its theories in the multi-district
3 litigation rely on the bonds. Damage or loss of the originals could
4 be used to prejudice NetBank in the MDL. Again, NetBank has
5 provided no substantive law or other evidence that demonstrates its
6 fears regarding the Trustee's handling of the bonds will become a
7 reality. The Trustee did agree, by way of argument, that he would
8 not transfer or destroy the bonds during the appellate process. The
9 Court finds that NetBank has not met its burden of proving this
10 element.

11 3. Whether the Trustee Will Be Harmed By An Issuance of a
12 Stay

13 NetBank contends the Trustee will not be harmed if a stay is
14 imposed. Pursuant to the June 2003 Royal Agreement, the Trustee has
15 already agreed to a rescission of the Royal Bonds. According to
16 NetBank, if the Trustee prevails on appeal, the Royal Bonds have a
17 value of zero.

18 The Trustee concedes that the stay will not directly harm him.
19 Nonetheless, the Trustee argues that Royal has paid the estate \$3
20 million dollars in return for the Trustee's agreement to pursue the
21 estates' claims against NetBank and to rescind the Bonds upon
22 recovery from NetBank. The Trustee argues it would be unfair and
23 prejudicial to Royal at this point to deny it the benefit of its
24 Court-approved bargain. The Trustee also alludes to the fact that
25 NetBank is seeking a stay in an effort to hinder Royal's efforts to
26 use the judgment in the MDL.

27 Regardless of NetBank's motives for seeking a stay, the Court
28 finds that this factor weighs slightly in favor of the Trustee. The

1 Trustee represents the estate and it is the estate that benefitted
2 from the Trustee's settlement with Royal. Therefore, the Court
3 finds that the stay will impede the Trustee's ability to fulfill the
4 terms of the settlement.

5 4. Where the Public Interest Lies

6 Finally, NetBank contends the public interest is not affected
7 whether a stay is granted or denied. The Court agrees that the
8 interest of the public in a stay pending appeal is slight, if non-
9 existent.

10 On balance, the factors weigh in favor of the Trustee. The
11 Court therefore denies NetBank's request for a discretionary stay
12 under Rule 8005.

13 CONCLUSION

14 For the reasons stated above, NetBank is not entitled to a
15 stay pursuant to Rule 62(d) nor it is entitled to a stay pursuant to
16 FRBP 8005. NetBank's Emergency Motion to Approve Supersedeas Bond
17 and Stay Execution of Judgment Pending Appeal is DENIED.

18 IT IS SO ORDERED.

21 Dated: August 1, 2005


JOHN J. HARGROVE
UNITED STATES BANKRUPTCY JUDGE