

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

JAMES EDWARD FOBBER
SS# 415-70-5324 and
CORETTA MAY FOBBER
SS# 315-36-1589,

No. 97-21408
Chapter 13
[affirmed E.D. Tenn., 3-3-1999]
[affirmed 6th Cir., 1999 WL 1336121]

Debtors.

M E M O R A N D U M A N D O R D E R

This case is before the court on the *pro se* debtors' motion for stay pending appeal filed on February 1, 1999, wherein the debtors "make motion for stay of Courts order of 1-13-1999, pending decision of Appeals Court on whether debtors should be allowed to dismiss their voluntary bankruptcy or remain in a chapter 13." The only ground recited in the motion is that "Debtors feel they and others will suffer irreparable damage if stay is not granted." No certificate of service was attached evidencing service upon the chapter 7 and 13 trustees or the U.S. trustee.

A motion for stay of judgment or other order pending appeal under Fed. R. Bankr. P. 8005 is discretionary. See *First Nat'l Bank of Boston v. Overmyer (In re Overmyer)*, 53 B.R. 952, 955 (Bankr. S.D.N.Y. 1985). The criteria to be evaluated under Rule 8005 are as follows: (1) the likelihood that the party seeking stay will prevail on the merits of the appeal; (2) the likelihood that the movant will suffer irreparable injury unless the stay is granted; (3) whether other

parties will suffer no substantial harm if the stay is granted; and (4) whether the public interest will be served by granting the stay. See *Stephenson v. Rickles Electronics & Satellites (In re Best Reception Systems, Inc.)*, 219 B.R. 988, 992 (Bankr. E.D. Tenn. 1998)(discussing *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) and *Bradford v. J.C. Bradford & Co. (In re Bradford)*, 192 B.R. 914, 917 (E.D. Tenn. 1996)). Although the four factors are "integrated considerations that must be balanced together," the "movant is always required to demonstrate more than the mere 'possibility' of success on the merits" and "is still required to show, at a minimum, 'serious questions going to the merits.'" *Griepentrog*, 945 F.2d at 153-54.

The decision of this court that is being appealed by the debtors is an order entered January 13, 1999, granting the chapter 13 trustee's motion to reconvert the case back to chapter 7. The motion for stay does not set forth any basis which would indicate that this court's ruling will be reversed on appeal, although the debtors do state in their statement of issues on appeal that "debtors feel they submitted a confirmable plan, not based on 100%, but on what they could afford, paying the secured outside the plan, and the unsecured better than 15%." The debtors' assertion, however, is not supported by the record. At the hearing on the motion to reconvert, the debtors and their counsel represented to the court that the plan which was before the court at that time was not feasible because the debtors could not

afford the proposed plan payment. As set forth in the court's memorandum filed on January 15, 1999, the court granted the motion to reconvert because of this admission, along with the following undisputed facts: that the debtors had been in chapter 13 for over ten months and had failed to submit a confirmable plan, that during the pendency of the chapter 13, the debtors had surrendered or conveyed to a creditor certain property of the estate without the court's knowledge or approval, and that it had been six months since the debtors made a plan payment to the chapter 13 trustee and the debtors represented that it would be 30 days before they would be able to recommence plan payments. Without a doubt, there was more than cause for the reconversion and the court's conclusion that such action was in the best interests of creditors and the estate. Because the debtors have failed to show "serious questions going to the merits" of this court's ruling, it is highly unlikely that the debtors will prevail on the merits of their appeal.

Furthermore, while the debtors claim that they and others will suffer irreparable damage if a stay is not granted, the court finds to the contrary. The debtors will not be prejudiced by liquidation of the assets of the estate since a chapter 7 liquidation was exactly what the debtors requested when they filed their petition initiating this case. Issuing a stay, on the other hand, will prejudice the chapter 7 trustee in his efforts to promptly administer the estate and the debtors' creditors in timely receiving their collateral and any dividends from the estate.

As an aside, the court notes that the debtors appear to be under the misconception that they are appealing a refusal by this court to dismiss their bankruptcy case for improper venue, notwithstanding the specific recitation in the notice of appeal that the debtors "hereby make appeal from court order reconverting case to Chapter 7." This court's observation is based on the statement of issues on appeal filed by the debtors on February 1, 1999, wherein the debtors state that they "feel that their voluntary bankruptcy case should be dismissed in light of their domicile being Stigler, Oklahoma from 1994 to present." No such ruling, however, has been made by this court. The only request for dismissal on this basis was made in the debtors' notice of appeal wherein they request dismissal of their bankruptcy case pursuant to 28 U.S.C. § 1408 based on the assertion that "Oklahoma is and has been debtors [sic] place of residence." This court took no action on the motion to dismiss since it had no authority to do so in light of the appeal. See *Hardin v. Caldwell*, 1990 WL 20457 at *5 n.19 (6th Cir. March 6, 1990)(bankruptcy court lacks authority to render an adjudication on dismissal motion during the pendency of appeal); *Barr v. Overmyer (In re Overmyer)*, 136 B.R. 374, 375 (Bankr. S.D.N.Y. 1992) (the filing of a notice of appeal divests the bankruptcy court of jurisdiction to proceed with respect to the matters raised by such appeal). See also *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 402 (1982)("filing of a notice of appeal ... confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the

appeal").

To the extent the debtors contend that they should be granted a stay pending appeal because the district court will dismiss the case based on lack of proper venue, again this court concludes that the debtors have failed to raise serious questions going to the merits of their case, both on a factual basis and a legal one. The debtors' assertion that they have been domiciled in Stigler, Oklahoma from 1994 to present conflicts with their previous statements made under the penalty of perjury. When the debtors voluntarily commenced a chapter 7 case in this court on June 4, 1997, they stated in their joint petition that they "have had a residence in this District for 180 days immediately preceding the date of this petition." On December 19, 1997, the debtors filed an amended petition listing their address as being "Route 1, Bulls Gap, Tennessee" and stating that "Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days preceeding [sic] the date of this petition." Nonetheless, regardless of whether venue was proper in this district, lack of venue over a proceeding may be waived either by consent or conduct of a party. By filing their bankruptcy case in this district, the debtors waived any right to assert the impropriety of venue. See *In re Fishman*, 205 B.R. 147, 149 (Bankr. E.D. Ark. 1997).

For all these reasons, the debtors' motion for stay pending appeal is denied.

SO ORDERED.

ENTER: February 3, 1999

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE