

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 98-15286
Chapter 11

N. KENNETH FREEMAN

Debtor

MEMORANDUM AND ORDER

On October 28, 1998, the court entered an order dismissing this Chapter 11 case. The debtor filed a notice of appeal and a motion for a stay pending appeal. *Fed. R. Bankr. P.* 8005.

In deciding whether to grant a stay, the court considers the same criteria that a district court would consider under *Fed. R. App. P.* 8. *Stephenson v. Rickles Electronics & Satellites (In re Best Reception Systems, Inc.)*, 219 B.R. 988 (Bankr. E. D. Tenn. 1998).¹ Those criteria are (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits, (2) whether the applicant will be irreparably injured without a stay, (3) whether issuance of the stay will substantially injure other parties interested in the proceeding, and (4) where the public interest lies. *Hilton v. Braunskil*, 481 U.S. 770, 776, 107 S.Ct. 2113, 2119, 95 L.Ed.2d 724 (1987).

The Sixth Circuit balances the first and second criteria. The more serious the harm that will result to the moving party if the court denies the stay, the lower the standard for showing a likelihood of success on the merits. *Michigan Coalition of Radioactive*

¹ For unknown reasons, this case does not appear in bound volume 219.

Material Users, Inc. v. Griepentrog, 945 F.2d 150 (6th Cir. 1991) *rev'd on other grounds* 954 F.2d 1174 (6th Cir. 1992). In this case, however, the debtor can not prevail even under this balancing approach. For the reasons stated below, it is extremely unlikely the debtor will prevail on question of whether this case should have been dismissed.

The debtor filed this Chapter 11 case *pro se* on September 28, 1998. On October 13, 1998, the debtor filed a motion under 11 U.S.C. § 366 to set a utility deposit for the Electric Power Board (“EPB”). 3 Lawrence P. King, et al., *Collier on Bankruptcy* ¶ 366.03 at 366-3 – 366-4 (15th ed. 1998). On October 16, 1998, the EPB filed a response combined with a motion to dismiss.

The motion to dismiss alleged that the debtor filed the case merely to frustrate creditors’ attempts to pursue their remedies and not with any reasonable hope of reorganizing a business. The motion listed six prior cases filed by the debtor individually or jointly with his wife. Four of those cases were filed in this court from 1992 through 1995. The other two cases were filed in 1997 and 1998 in the Northern District of Georgia.

The motion also listed two other possible cases filed in the Northern District of Georgia in 1994 and another in 1998.

The court heard the motions on October 28, 1998. The debtor raised no objection to hearing the motion to dismiss at that time. At the hearing, the EPB submitted a copy of an order entered by Judge Robinson of the Northern District of Georgia on

August 25, 1998, slightly more than a month before the debtor filed this Chapter 11 case. The order lists nine prior bankruptcy cases filed by the debtor from 1988 to the time of the order.

Judge Robinson held:

Based on the foregoing, the Court concludes that this case was not filed in good faith. This case filing and the previous case filings and the debtor's failure to prosecute these cases evidences an intent to improperly hinder and delay creditors. The court concludes that this case was not filed for legitimate rehabilitative purposes. As a result, the court concludes that the instant case was an abusive filing and the case will be dismissed. Accordingly, and for good cause shown, it is

ORDERED that Confirmation in this case is DENIED and this Chapter 12 case is DISMISSED WITH PREJUDICE pursuant to 11 U.S.C. § 109(g) and § 105(a) as an abusive filing due to debtor's failure to properly prosecute the case, and debtor shall be ineligible for bankruptcy relief under Chapter 11, Chapter 12, and Chapter 13 of Title 11 . . . for a period of eighteen (18) months from the date of entry of this Order in the Northern District of Georgia.

The order went on to say that the debtor could not file a Chapter 7 case in the Northern District of Georgia without proof of legal residence or domicile in the Northern District of Georgia.

Judge Robinson's order does not specifically bar future bankruptcy filings by the debtor in other districts. Nevertheless, the order estops the debtor from denying the pattern of abusive filings as set out in the order — a pattern that continued until a few

weeks before the debtor filed this Chapter 11 case. *In re Mandalay Shores Cooperative Housing Association, Inc.*, 112 B.R. 440 (Bankr. M. D. Fla. 1990).

The court allowed the debtor an opportunity to show a change of circumstances that might show good faith in the filing of this case. The debtor stated that he had suffered serious medical problems which were controlled by medication. These medical problems predated Judge Robinson's order and did not constitute a change in circumstances relative to debtor's lack of good faith. See *Gateway North Estates, Inc. v. United States Trustee (In re Gateway North Estates, Inc.)*, 165 B.R. 427 (E. D. Mich 1994); *In re Miracle Church of God in Christ*, 119 B.R. 308 (Bankr. M. D. Fla. 1990) (implied requirement of good faith as to filing of petition).

Furthermore, Judge Robinson's order dismissed the case under 11 U.S.C. § 109(g)(1). Dismissal under that subsection makes the debtor ineligible for bankruptcy relief in any court for 180 days after the dismissal. Thus, the debtor was not eligible for an individual Chapter 11 when he filed the petition commencing this case.

Giving effect to the dismissal under § 109(g) does not contradict Judge Robinson's limit on his order to the Northern District of Georgia. The order created two barriers to bankruptcy filing by the debtor. One barrier is imposed by § 109(g) as a result of the order and applies to all courts. The order created an additional barrier only for the Northern District of Georgia. By explicitly barring the debtor from re-filing in the Northern District of Georgia for a period of eighteen months, the order saves creditors from having to file a motion to dismiss under § 109(g).

As to the second and third criterion, the law and the facts do not favor a stay pending appeal. The debtor has repeatedly filed bankruptcy and obtained the benefit of the automatic stay without any real effort at reorganizing. Dismissal of the case removed the debtor's property from the bankruptcy estate and revested it in him free of the automatic stay. 11 U.S.C. § 349(b)(3) & § 362(c). A stay pending appeal would amount to aiding the debtor in the continued misuse of the bankruptcy system. The debtor's creditors should have the opportunity to take action rather than being delayed even longer by a stay of the dismissal while it is on appeal.

In this regard, the debtor failed to show a change of circumstances that suggests the economic ability to reorganize. *Compare Society National Bank v. Barrett (In re Barrett)*, 964 F.2d 588 (6th Cir. 1992) and *In re Herrera*, 194 B.R. 178 (Bankr. N. D. Ill. 1996).²

Finally, the public interest does not justify a stay pending appeal. When the other factors do not favor a stay pending appeal, the public interest is reflected by § 109(g). It was intended to prevent repeated filings when they amount to an abuse of the bankruptcy system. A stay pending appeal in this situation would amount to a continuation of the abuse, contrary to the public interest reflected by § 109(g). Accordingly,

² The court notes that the debtor has not paid the filing fee for the Chapter 11 case or the appeal.

It is ORDERED that the debtor's Motion for Stay Pending Appeal is DENIED.

ENTER:

BY THE COURT

entered November 3, 1998

R. THOMAS STINNETT
U.S. BANKRUPTCY JUDGE