

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

In re

Case No. 03-33186

FULTON BELLOWS & COMPONENTS, INC.
f/k/a JRGACQ CORPORATION

Debtor

MEMORANDUM ON MOTION FOR STAY PENDING APPEAL

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Presently before the court is the Motion for Stay Pending Appeal (Motion for Stay) filed by the Debtor on April 28, 2004, seeking a stay of the Order entered by the court on April 21, 2004 (April 21, 2004 Decision), granting the Motion for Payment of Expenses Due Pursuant to the Provisions of a Collective Bargaining Agreement filed by the United Steelworkers of America, AFL-CIO-CLC, and the Joinder in Motion for Payment of Expenses Due Pursuant to the Provisions of Collective Bargaining Agreement filed by the International Association of Machinists and Aerospace Workers Union. In its April 21, 2004 Decision, the court directed the Debtor to pay all pre- and post-petition vacation pay due under the terms of a Collective Bargaining Agreement dated October 16, 1999, between the Debtor and the Steelworkers' Local 5431 and a Collective Bargaining Agreement dated October 26, 1999, between the Debtor and the Machinists' Local 555 (collectively Agreements).¹ On May 6, 2004, both Unions filed objections to the Debtor's Motion for Stay (collectively Objections).

I

The Debtor and the Unions have a much-documented conflict concerning the terms of employment governed by their Agreements, which address all aspects of the employer-employee relationship, including wages, medical pay, vacation pay, and other areas of contention between these parties. The Agreements, which expire in October 2004, provide for the payment of lump sum vacation payments to the Union workers on the first paycheck of July each year. The aggregate sum of the vacation pay for 2003 was \$628,000.00.

¹ The April 21, 2004 Decision also overruled the Objection of Debtor, Fulton Bellows & Components, Inc., to Motions of Unions for Payment of "Expenses" filed by the Debtor on March 19, 2004.

The Debtor filed the Voluntary Petition commencing its Chapter 11 bankruptcy case on June 10, 2003. On June 16, 2003, it filed a motion seeking interim modification and relief from the Agreements concerning the lump sum payments of vacation pay due on July 3, 2003. The court granted this motion, allowing the Debtor to pay only \$157,000.00, representing 25% of the entire amount due. The interim relief order expired on August 8, 2003.

After negotiations, the Debtor made a modification proposal to the Unions, who did not accept the offer. Thereafter, the Debtor filed a motion to reject the Agreements on August 6, 2003, which was denied by the court's Order entered on August 29, 2003, based upon the court's questions about the Debtor's good faith, findings that the proposed modifications imposed a disproportionate burden on the Unions, and determinations that a balance of the equities weighed heavily in favor of denying the motion. This Order was not appealed by any party, and the parties continued negotiations.

The Debtor made a second proposal to the Unions in September 2003, which they once again rejected, and on September 29, 2003, the Debtor filed another motion to reject the Agreements, based upon the September 2003 proposal. On October 29, 2003, the court denied the Debtor's second motion on the basis of the res judicata effect of the August 29, 2003 Order (October 29, 2003 Decision). The Debtor appealed the October 29, 2003 Decision to the United States District Court (District Court) on November 5, 2003. It did not file a motion for stay pending appeal.

The Unions filed their motion for vacation pay in March 2004, seeking the \$471,000.00 balance due for the July 2003 vacation pay. The court, in its April 21, 2004 Decision, granted the motion, ruling that the interim modification order expired on August 8, 2003, and because the Agreements were not rejected, they remain in effect. Accordingly, the Debtor was required to pay the remaining balance of the July 2003 vacation pay, along with any other vacation pay that accrued since that time. On April 28, 2004, the Debtor appealed the April 21, 2004 Decision to the District Court, and in accordance therewith, filed the Motion for Stay, requesting relief from the payment of the vacation pay pending its appeal.

II

The Motion for Stay is governed by Federal Rule of Bankruptcy Procedure 8005, which states, in material part:

A motion for 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 . . . 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.

FED. R. BANKR. P. 8005. Whether to grant a motion for a stay pending appeal is within the court's discretion. *In re Level Propane Gases, Inc.*, 304 B.R. 775, 777 (Bankr. N.D. Ohio 2004).

In making its determination, the bankruptcy court must look to the following factors:

[W]e 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.

Stephenson v. Rickles Elecs. & Satellites (In re Best Reception Sys., Inc.), 219 B.R. 988, 992 (Bankr. E.D. Tenn. 1998) (quoting *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). “These factors are to be balanced.” *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002); see also *Best Reception Systems*, 219 B.R. at 993. The Debtor, as movant, bears the burden of proving each factor by a preponderance of the evidence. *Level Propane Gases*, 304 B.R. at 777.

The Sixth Circuit set forth the following standard for the balancing test in *Griepentrog*:

[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.”

....

Of course, in order for a reviewing court to adequately consider these four factors, the movant must address each factor, regardless of its relative strength, providing specific facts and affidavits supporting assertions that these factors exist. This, in turn, develops an adequate record from which we can determine the merits of the motion.

Griepentrog, 945 F.2d at 153-54 (internal citations omitted). In summary,

[t]he strength of the likelihood of success on the merits that needs to be demonstrated is inversely proportional to the amount of irreparable harm that will be suffered if a stay does not issue. However, in order to justify a stay of the district court's ruling, the defendant must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted.

Baker, 310 F.3d at 928.

A

Griepentrog does not require the court to balance each of the four factors equally; however, the Debtor must prove, at a minimum, that it stands more than a mere possibility of success in its appeal. The Debtor argues that a stay should be granted because its appeal presents material issues of law, questioning the court's interpretation and application of 11 U.S.C.A. § 1113. The Debtor avers that the court's October 29, 2003 Decision finding the Debtor was bound by the res judicata effect of the court's decision rendered on August 29, 2003, which was reflected in the April 21, 2004 Decision, is contrary to and inconsistent with the Bankruptcy Code, bankruptcy policy, and the National Labor Relations Act. In essence, that appeal centers around whether the court improperly interpreted § 1113(b) and (c) and

the factors associated with rejection of the Agreements when it denied the Debtor's September 2003 motion to reject.

The issue of whether the court erred in its October 29, 2003 Decision is presently pending before the District Court. The Debtor did not request a stay pending appeal of that decision, and thus, none was granted. The only order from which the Debtor has requested a stay pending appeal is the April 21, 2004 Decision, granting the Unions' motion for vacation pay. On the other hand, the April 21, 2004 Decision addressed a different Bankruptcy Code section, § 1113(f), concerning unilateral actions by a debtor in violation of a collective bargaining agreement. The April 21, 2004 Decision also stated that the bankruptcy court retained jurisdiction over the enforcement of its August 29, 2003 Order, despite the pending appeal of the October 29, 2003 Decision. Moreover, the April 21, 2004 Decision was based upon the Sixth Circuit's interpretation of § 1113(f), set forth in *United Steelworkers of Am. v. Unimet Corp. (In re Unimet Corp.)*, 842 F.2d 879 (6th Cir. 1988).

The court agrees that it faces an "inherent conflict of a rendering court determining the probability that its own judgment will or will not be reversed on appeal." *In re Cacioli*, 302 B.R. 429, 431 (Bankr. D. Conn. 2003). Nevertheless, the court finds that the Debtor has not offered sufficient evidence that it will succeed on the merits of its appeal of the April 21, 2004 Decision in order to justify granting the Motion for Stay. The Sixth Circuit's precedent of *Unimet* has been followed by other courts in their interpretation of § 1113(f), and there is no indication that the bankruptcy court erred in following this binding authority. *See, e.g., Int'l*

Union, UAW, Local 2194 v. Alcorn Bldg. Components, Inc. (In re Alcorn Bldg. Components, Inc.), 170 B.R. 317 (E.D. Mich. 1994); *In re Bunting Bearings*, 302 B.R. 210 (Bankr. N.D. Ohio 2003); *In re Typograph Co.*, 229 B.R. 685 (Bankr. E.D. Mich. 1999).

Additionally, while the issues to be addressed by the District Court in the appeal of the October 29, 2003 Decision may present “serious questions going to the merits,” the same does not hold true for the April 21, 2004 Decision, which clearly follows the Sixth Circuit’s precedent regarding the interpretation of § 1113(f) as it relates to collective bargaining agreements in effect. Furthermore, a reversal of the court’s October 29, 2003 Decision would not invalidate the April 21, 2004 Decision, but instead, would result in the court being required to ascertain the Debtor’s second proposed rejection on its merits. There is still no guarantee that the court would grant the second motion to reject, especially in light of its finding that the Debtor failed to proceed in good faith with the Unions pre-petition and prior to the first motion to reject, which weighed heavily against rejection. The Debtor does not explain why this finding will not be binding on it in any future § 1113 rejection litigation, regardless of the Debtor’s actions thereafter.

B

In addition to finding that the Debtor has not produced evidence that it has more than a possibility of success on the merits, the court also finds that the Debtor has failed to satisfactorily prove that it will be irreparably harmed absent a stay of the April 21, 2004 Decision. As set forth in *Griepentrog*,

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

the 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.

Griepentrog, 945 F.2d at 154 (quoting *Sampson v. Murray*, 94 S. Ct. 937, 953 (1974)).

In support of its Motion for Stay, the Debtor argues that it will suffer irreparable harm because the Debtor has insufficient funds to pay the balance of the vacation pay and forcing payment would result in the “administrative insolvency” of the Debtor and “would imperil trade creditors and customers as well as employees, including [the Unions].” The Debtor also argues that its cash is subject to the properly perfected security interest of its secured lender, pursuant to a cash collateral order entered on July 3, 2003, *nunc pro tunc* to July 1, 2003, which included a carve-out for payment of actual and necessary estate expenses.

In the April 21, 2004 Decision, the court acknowledged the Debtor’s continued argument throughout the pendency of this bankruptcy case that it would be forced to close its doors if its various requests for relief were not granted. The court initially granted the Debtor’s request for interim relief regarding the vacation pay on July 2, 2003, based upon

evidence supplied by the Debtor that proved its cash deficiency. Since that time, however, there has been very little actual evidence to prove the likelihood of this occurrence, other than the Debtor's continued assertions that it would be forced to shut down and liquidate if the court did not allow rejection of the Agreements and now, if the court does not grant the Motion for Stay. However, as pointed out by the court in the April 21, 2004 Decision, the Debtor has not closed its doors and has continued operations for more than eight months since the court first denied the Debtor's request to reject the Agreements, and the court puts little credence in these averments, without substantial proof to back them up. Instead, these allegations are "speculative and theoretical." *Griepentrog*, 945 F.2d at 154.

An order consistent with this Memorandum will be entered.

FILED: May 13, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-33186

FULTON BELLOWS & COMPONENTS, INC.
f/k/a JRGACQ CORPORATION

Debtor

ORDER

For the reasons stated in the Memorandum on Motion for Stay Pending Appeal filed this date, the court directs that the Motion for Stay Pending Appeal filed by the Debtor on April 28, 2004, seeking a stay of the court's April 21, 2004 Order granting the Motion for Payment of Expenses Due Pursuant to the Provisions of a Collective Bargaining Agreement filed by the United Steelworkers of America, AFL-CIO-CLC, on March 10, 2004, and the Joinder in Motion for Payment of Expenses Due Pursuant to the Provisions of Collective Bargaining Agreement filed by the International Association of Machinists and Aerospace Workers on March 11, 2004, is DENIED.

SO ORDERED.

ENTER: May 13, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE