

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

| | | |
|--------------------------|---|-------------------------|
| ----- | | |
| In re: |) | |
| |) | |
| MICHAEL M. McCORMACK and |) | CASE NO. 99-33702 (ASD) |
| ROSEMARIE M. McCORMACK, |) | |
| |) | CHAPTER 7 |
| Debtors. |) | |
| ----- | | |
| D.A.N. JOINT VENTURE, |) | |
| A Limited Partnership, |) | |
| |) | |
| Plaintiff |) | |
| vs. |) | ADV. PRO. NO. 00-3054 |
| |) | |
| MICHAEL M. McCORMACK and |) | |
| ROSEMARIE M. McCORMACK, |) | |
| |) | |
| Defendants. |) | Re: DOC. I.D. NO. 43 |
| ----- | | |

**MEMORANDUM ORDER ON
REQUEST FOR RELIEF PENDING APPEAL**

The present contested matter was initiated by the Plaintiff-Appellant's filing of the above-captioned *Motion for Order Pursuant to Bankruptcy Rule 8005* (hereafter, the "Appellate Motion"). The Appellate Motion seeks relief from the Clerk's entry of a *Discharge of Debtors* on September 17, 2003. The undisputed and indisputable facts relevant to this matter are as follows:

1. On August 19, 2003, this court entered Judgment (hereafter, the "Judgment") in favor of the Debtor-Defendants in the above-captioned adversary proceeding in which the Plaintiff had sought a denial of the general discharge of the Debtors.

2. On August 29, 2003, the Plaintiff filed a Notice of Appeal with respect to the Judgment.

3. Pending appeal, the Plaintiff (hereafter, "Appellant") did not seek a stay of any action.

4. On September 17, 2003 the Clerk entered a *Discharge of Debtors* (hereafter, the "Discharge Order").

5. In refraining from seeking a stay of the entry of the Discharge Order, Appellant's counsel allegedly relied on the practice and procedure of the Clerk in prior, similar proceedings in which he was involved.

6. The practice of the Clerk, at this seat of court, in entering discharge orders pending an appeal of the Court's overruling of a discharge objection has varied during the period of Appellant's counsel's practice before this Court. The current procedure is to enter the discharge order in due course, without respect to the pendency of an appeal, *unless* an appellant seeks and obtains a stay of the entry of that order pending appeal. However, the practice of the Clerk in certain times past has been to the contrary, *i.e.* the Clerk would refrain from entering a discharge until the subject appellate proceedings were resolved in favor of the debtor-appellees (hereafter, the "Prior Practice").

The Appellees argue that the Appellant has missed its opportunity to obtain relief pending appeal due to its failure to timely request a stay of the Discharge Order. Counsel for the Appellant admits that he did not seek a stay within the temporal guidelines of the applicable rules, but asserts that such inaction was conscious and deliberate, in reliance upon the Prior Practice.¹

¹ For the reasons which follow, it is unnecessary for the Court to opine on the merits of the Appellant's "reliance" argument.

This Court has recently ruled under similar, although materially different, circumstances, that the entry of a discharge order should be stayed pending appeal. In re Cacioli, 302 B.R. 429 (Bankr. D. Conn. 2003). In Cacioli, the appellant's request for a stay was lodged with the Court prior to any issuance by the Clerk of a discharge order. Under those circumstances this Court determined that a stay was appropriate, due primarily to the potential harm that could befall entities who might extend post-petition credit to debtors on the strength of a discharge which is, in fact, only provisional in nature.

The analysis of the present Appellate Motion, however, is different; owing largely to the fact that the Discharge Order here has already entered. The specific relief prayed for by the Appellant is *declaratory*, *i.e.* for an order from this Court declaring that the Discharge Order "is subject to all orders, including reversal, revocation, or modification entered in subsequent proceedings as a result of the Appeal." This request is presumably intended to blunt an argument by the Appellees that the entry of the Discharge Order has mooted the pending appeal.²

The specific declaratory relief requested by the Appellant here is superfluous since it simply articulates the inherent power of an appellate court. Nothing can be added to (or subtracted from) the power of an appellate court by a declaratory order of this Court. This Court can deny the requested relief on this basis alone. However, it is also important to note that had the Appellant also requested affirmative relief, *e.g.*, a revocation or vacation of the Discharge Order pending appeal, that request would also have been denied.

² This Court takes an extremely dim view of the Appellees' mootness argument since (i) they have made no showing of prejudicial reliance on the Discharge Order; and (ii) an appellate court plainly has the power to vacate the Discharge Order, and/or accord other necessary relief, in the event it determines to reverse the Judgment.

Although in Cacioli the Court emphasized the harm that could occur to the public interest by the entry of a discharge order pending a plaintiff's appeal of a Section 727(a) case, the fact that in the instant case a discharge order has already entered materially alters that analysis. If this Court were to vacate or revoke the discharge order, notice of that action would need to be provided to all creditors. Then, in the likely event that the Judgment is affirmed on appeal, those same creditors would need to receive an additional notice of the final entry of a discharge order. This Court is concerned that creditors' receipt of three separate announcements of action regarding the Debtors' discharges will do harm, through confusion, outweighing any unavoidable harm to the general public interest attributable to the existence of a provisional discharge order.

Therefore, the Court declines to revoke or vacate the Discharge Order pending appeal. Nonetheless, in order to protect the public interest to the extent possible, this Court will limit the Debtors' affirmative use of the discharge pending final appellate resolution of this adversary proceeding. Accordingly,

IT IS HEREBY ORDERED that the Appellate Motion is **DENIED**; and

IT IS FURTHER ORDERED that the Debtors are **ENJOINED** from publishing the Discharge Order to any entity for the purpose of obtaining credit, unless and until the pending appeal in the instant adversary proceeding is fully and finally resolved in their favor;

IT IS FURTHER ORDERED that the Debtors shall forthwith serve a copy of this Memorandum Order upon all entities to which they have published the Discharge Order for the purpose of obtaining credit, and were not denied any of such credit request, and

shall certify service thereof to this Court.

BY THE COURT

DATED: April 19, 2004


Albert S. Dabrowski
Chief United States Bankruptcy Judge

4/19/04

OPINION SERVICE LIST

In re

Chapter 7

MICHAEL M. McCORMACK and
ROSEMARIE M. McCORMACK,

Case No. 99-33702
Adv. Pro. No. 00-3054
Doc. I.D. No. 43

Debtors

Parties:

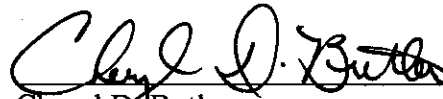
Patrick W. Boatman, Esq. : Attorney for Plaintiff
Boatman, Boscarino, Grasso & Twachtman:
628 Hebron Avenue, Bldg. 3 :
Glastonbury, CT 06033 :

Edward P. Jurkiewicz, Esq. :
Edward P. Jurkiewicz, L.L.C. :
P. O. Box 222 :
New Hartford, CT 06057 :

Martha C. Rainey, Esq. :
DeBeau, Ryan & Boyan, P.C. :
38 Park Street :
P. O. Box 568 :
Rockville, CT 06066 :

Judges/Clerk of Court/Others :
Hon. Robert L. Krechevsky :
Hon. Alan H. W. Shiff :
Hon. Lorraine Murphy Weil :
Regina Miltenberger, Divisional Manager :
Patricia N. Beary, Assistant U.S. Trustee :
U. S. District Court Library :
Elizabeth A. Austin, Esq. :
Laura Gold Becker, Esq. :

Dated: April 19, 2004


Cheryl D. Butler