Not For Publication

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:	)	CASE NO.	01-32463 (LMW)
GARRY KLINGER,	)	CHAPTER	7
DEBTOR.	)	DOC. I.D. NO.	807

APPEARANCES

Garry Klinger 3813 East Glenn Street, #1 Tucson, AZ 85716	Chapter 7 Debtor
Judy A. Rabkin, Esq. Levett Rockwood, P.C. 33 Riverside Avenue, P. O. Box 5116 Westport, CT 06880	Attorney for Claimant Stewart Title Guaranty Company
Barbara H. Katz, Esq. Law Office of Barbara H. Katz 57 Trumbull Street New Haven, CT 06510-1004	Chapter 7 Trustee

MEMORANDUM OF DECISION AND ORDER
DENYING MOTION FOR STAY PENDING APPEAL

Lorraine Murphy Weil, United States Bankruptcy Judge

There is a surplus (the "Surplus") in this chapter 7 case after payment of timely-filed claims. Stewart Title Guaranty Company ("Stewart") filed a late proof of claim (the "POC") with respect to Claim No. 48 in the amount of $71,500.00 seeking distribution from the Surplus pursuant to 11 U.S.C. § 726(a)(3). The above-referenced debtor (the "Debtor") filed an objection (Doc. I.D.

No. 755, the "Objection")[1] to the POC. On June 21, 2007, this court issued a certain memorandum of decision and order (Doc. I.D. No. 804, the "Prior Order") overruling the Objection and allowing the POC as a late-filed claim payable from the Surplus in accordance with Bankruptcy Code § 726(a)(3). On June 26, 2007, the Debtor filed a notice of appeal (Doc. I.D. No. 806, the "Appeal Notice") with respect to the Prior Order.[2] On the same day, the Debtor filed a motion for stay pending appeal (Doc. I.D. No. 807, the "Stay Motion") which is the matter now before the court. This court has jurisdiction over this matter as a core proceeding pursuant to 28 U.S.C. §§ 157 and 1334 and that certain Order dated September 21, 1984 of the District Court (Daly, C.J.).[3]

I. PROCEDURAL BACKGROUND

The Debtor commenced this case by a chapter 11 petition filed on May 11, 2001. The case was converted to a case under chapter 7 on November 15, 2001. (*See* Doc. I.D. No. 313.) March 11, 2002 was set as the last day for filing proofs of claim in this case. (*See* Doc. I.D. No. 314.) The Debtor was denied a discharge in this case by judgment dated October 22, 2003. (*See* Doc. I.D. No. 680.) Stewart filed the POC on April 10, 2006[4] and the Debtor filed the Objection on June 26, 2006.

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1 References herein to the docket of this chapter 7 case appear in the following form: "Doc. I.D. No. ___." Stewart's response to the Objection appears in the record as Doc. I.D. No. 768.

2 On July 3, 2007, the Debtor also filed a motion to reconsider the Prior Order. (*See* Doc. I.D. No. 813.) Because of the pending appeal, on July 5, 2007 the court issued an order (Doc. I.D. No. 816) denying that motion for lack of jurisdiction.

3 That order referred to the "Bankruptcy Judges for this District" *inter alia* "all proceedings arising under Title 11, U.S.C., or arising in . . . a case under Title 11, U.S.C. . . . ." References herein to title 11 of the United States Code or to the Bankruptcy Code are references to the same as they appeared prior to the effective date of their amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

4 The POC asserts a general unsecured claim in the amount of $71,500.00 with respect to a certain note (described with more particularity below, the "Note") which Stewart claims to hold by assignment (endorsement). A copy of the endorsed Note is annexed to the POC.

The chapter 7 trustee (the "Trustee") serving in this case filed her Final Dividend Distribution Report (Doc. I.D. No. 781) on September 8, 2006; that report establishes the existence of the Surplus.[5]

The Objection first came on for a non-evidentiary hearing on August 30, 2006. The Debtor participated in that hearing telephonically.[6] This court issued an Order Requiring Further Briefing on September 6, 2006. (*See* Doc. I.D. No. 778.) Both parties submitted briefs in compliance with that order. (*See* Doc. I.D. Nos. 786 (Stewart's Initial Brief), 789 (the Debtor's Answer Brief).) The court subsequently scheduled this matter for an evidentiary hearing (the "Hearing") to be convened on March 6, 2007.[7] The Hearing was convened as scheduled. Albert Strazza, Esq. testified at the Hearing for Stewart and Stewart introduced documentary evidence into the record.[8] At the conclusion of the Hearing the court took the matter under advisement.[9] As noted above, the Prior Order was issued on June 21, 2007, and the Appeal Notice and the Stay Motion were filed on June 26, 2007. The Stay Motion originally was scheduled for a hearing on July 18, 2007. However, at

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[5] The Debtor had standing to object to claims against the Surplus. *See* 11 U.S.C. § 726(a)(6).

[6] The Debtor was incarcerated at the time but recently has been released. His conviction was for first degree larceny. *See* http://www.ctinmateinfo.state.ct.us.

[7] The court issued a *Pro Se* Writ of Habeas Corpus Ad Testificandum to enable the Debtor to appear at the Hearing in person. (*See* Doc. I.D. No. 795.)

[8] References herein to the Hearing exhibits appear in the following form: "Hearing Exh. ___." A transcript of the Hearing is in the record as Doc. I.D. No. 800 and references herein to that transcript appear in the following form: "Transcript at ___."

[9] On June 8, 2007, the Debtor filed a motion for judgment. (*See* Doc. I.D. No. 801.) On June 13, 2007, the court issued an order granting that motion to the limited extent of promising *some* decision on the Objection by June 29, 2007. (*See* Doc. I.D. No. 802, the "Timing Order.") That order made no determination on the merits and it is ludicrous for the Debtor to suggest otherwise.

the request of Stewart, that hearing was continued to August 1, 2007 (on the condition that the Prior Order be stayed through such date). Both parties appeared at the August 1, 2007 hearing.[10] Stewart objected orally to the Stay Motion. The Debtor attempted to put alleged new facts (the "Alleged New Matters") into the record (as discussed below), to which Stewart objected. The court took the matter under advisement, continuing the stay to the date of decision.

II. FACTUAL BACKGROUND[11]

Prior to the commencement of this case, the Debtor was a paralegal. Prior to the commencement of this case, the Debtor also was in the business of buying, selling and leasing real property. The Debtor purchased certain real property (the "Property") in West Haven, Connecticut known as 91 Meloy Road in March of 1998 for $95,000.00. (*See* Hearing Exh. A1.) It is undisputed that the Debtor executed the Note as maker on or about June 8, 1999. The Note was in the stated principal amount of $71,500.00 and was made payable to Chase Manhattan Mortgage Corporation ("Chase") as payee. It is undisputed that the loan evidenced by the Note was fully funded. It is undisputed that the Note was secured by a mortgage (the "Mortgage") on the Property.[12] It is uncontested that, on or about June 9, 1999, Chase obtained an ALTA Loan Policy of title insurance (the "Policy") from Stewart with respect to the Mortgage. Among other things, the Policy stated that the Mortgage had been "recorded [on] June 9, 1999 at 2:45 p.m. in the West Haven Land Records." (*See* Doc. I.D. No. 786 (copy of Policy annexed as Exhibit A to the Affidavit (the "Affidavit") of

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[10] Citations to the oral record of that hearing appear below in the following form: "Oral Record at __:__:__."

[11] The facts stated below and elsewhere in this opinion were found by the court in the Prior Order.

[12] During the period April, 1998 through January, 2000, the Debtor encumbered the Property with other mortgages. (*See* Hearing Exh. B.) The status (existence) of those other mortgages as of the commencement of this case is unclear.

Pamela Butler O'Brien, Regional Litigation Counsel for Stewart).) The Policy insured Chase against loss or damage sustained or incurred by Chase by reason of "[t]he invalidity or unenforceability of the lien of the insured mortgage upon the title . . . ." (*Id.*) The Policy also provides that "[i]n case of a claim under this policy, [Stewart may] . . . [p]urchase the . . . [Note]." (*Id.* § 6.) The Mortgage is not of record in the Town of West Haven.[13]

The Policy issuing attorney (the "Attorney") was Pacific T. Giordano, Esq. The Attorney was the limited agent of Stewart "only for the purposes of issuing title policies in the name of STEWART . . . ." (Doc. I.D. No. 786 (Exhibit B (as amended in 1997, the "Retainer Agreement") annexed to the Affidavit).) The Retainer Agreement provides in relevant part:

> DIVISION OF LOSS AND LOSS EXPENSE: The term "Loss" shall include the amount paid to or for the benefit of the insured, as well as loss adjustment expense including any cost of defending the claim resulting in the loss.
>
> (b) The relationship between ATTORNEY and STEWART under this Agreement is that of Attorney and Client, and the responsibility and liability of each party to the other shall be governed by the law relating to Attorney and Client; however, without limiting liability of the ATTORNEY, the ATTORNEY shall be liable to STEWART for any loss which STEWART may sustain or incur under any policy issued pursuant to this Agreement occasioned by any fraud[,] intentional act, or omission or negligence of ATTORNEY in performing of his undertaking hereunder, including, but without limiting the generality of the foregoing any loss resulting from any error in abstracting which was not performed by an abstractor approved by STEWART, any loss resulting from an error in the examination of the title, or any loss resulting from any error in closing of the transaction, or any loss resulting from a violation of this Agreement, or a violation of the instructions given by STEWART. ATTORNEY does not and shall not represent that ATTORNEY is closing the transaction on behalf of STEWART.
>
> (c) The liability of ATTORNEY hereunder shall survive and remain in the event of the termination of this Agreement for any cause, including the expiration thereof.

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[13] *See* Transcript at 8 (testimony of Attorney Strazza); Hearing Exh. A6 (copies of grantor and grantee indices).

(d) In all instances in which ATTORNEY is liable as defined in this paragraph, ATTORNEY shall be liable to STEWART for all reasonable costs and expenses incurred in connection therewith, and the fee of any associate counsel retained by STEWART. STEWART shall have no obligation to defend ATTORNEY.

(e) ATTORNEY is expressly not appointed as an agent of STEWART for purposes of providing abstracting and/or escrow services, and STEWART shall have no liability or responsibility for any claims or losses due to ATTORNEY acting in his own capacity as principal in providing such abstracting and/or escrow services. . . .

(Retainer Agreement ¶ 7.)[14]

By deed dated July 9, 1999, the Debtor quitclaimed the Property to Tomarra Dawn Klinger. (*See* Hearing Exh. A2.) By deed dated January 17, 2000, Ms. Klinger quitclaimed the Property back to the Debtor. (*See* Hearing Exh. A3.) As noted above, the Debtor commenced this case on May 11, 2001. Chase obtained relief from stay to foreclose the Mortgage by order dated January 23, 2002. (*See* Doc. I.D. No. 478, the "R/S Order.") The Trustee abandoned the estate's interest in the Property in April, 2002. (*See* Doc. I.D. No. 566.)[15] The Debtor sold the Property to Susan Arnold for $183,000.00 in April, 2003. (*See* Hearing Exh. A4, the "Warranty Deed.") That transfer was effectuated by the Warranty Deed dated April 22, 2003 which contained no exception for the Mortgage (or any other mortgage). (*See id.*) Substantially contemporaneously, Ms. Arnold encumbered the Property with a mortgage (the "DBNTC Mortgage") in favor of People's Choice Home Loan, Inc. (together with its assigns, "DBNTC"). (*See* Hearing Exh. A5.) Some time in

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[14] An amendment to the Retainer Agreement struck a formerly existing paragraph (a) in its entirety. The amendment claimed to modify paragraph (b) above but no changes were made to that paragraph.

[15] Accordingly, the automatic stay has not applied to the Debtor personally or property that is not property of the estate since denial of the Debtor's discharge, and has not applied to the Property specifically since its abandonment. *See* 11 U.S.C. § 362(c)(1), (2).

2004, DBNTC commenced foreclosure proceedings on the DBNTC Mortgage. (*See id.*) Title to the Property became absolute in DBNTC pursuant to those proceedings in February, 2005. (*See id.*)

Some time after entry of the R/S Order, Chase discovered that the Mortgage was not of record and made a claim (the "Policy Claim") under the Policy. (*See* Affidavit.) After investigation of the Policy Claim, Stewart purchased the Note for $71,500.00 and Chase endorsed the Note over to Stewart. (*See id.*; POC (attachments).) Chase did not file a proof of claim in this case. As noted above, Stewart filed the POC as a late claim and the Debtor filed the Objection.

III. <u>THE OBJECTION</u>

The Objection objected to the POC on the following grounds: (1) the POC was filed late; (2) the underlying claim of Chase had been paid; (3) Chase and/or Stewart was guilty of laches in failing to foreclose; (4) Stewart had improperly paid the Policy Claim; (5) Stewart could not proceed against the Surplus until it had exhausted its remedies under Retainer Agreement ¶ 7; (6) alleged failures of Chase and/or Stewart comply with various provisions of the Real Estate Settlement Procedures Act (12 U.S.C. §§ 2601 *et seq.*) barred Chase's and/or Stewart's enforcement of the Note; (7) no demand for payment has been made upon the Trustee or the Debtor by Chase or Stewart; and (8) Chase and/or Stewart was not qualified under applicable state law to engage in the subject transactions (*i.e.,* making the subject loan and/or buying the Note). The Prior Order specifically decided each of the foregoing objections against the Debtor and in favor of Stewart.

IV. THE APPEAL NOTICE AND THE STAY MOTION

The Appeal Notice lists the following "issues on appeal":

> Does the U.S. bankruptcy [sic] Court have subject matter and inpersonam [sic] jurisdiction given the absence of a determination by an action in the Superior Court of Connecticut that debtor is lible [sic] to Stewart title [sic] for any debt ? [sic]
>
> Does Stewart Title have a claim against the surplus monies absent a judgment against the debtor upon which they can demand payment.? [sic]
>
> Does the prior ruling of the Court, 13 June 2007 [*i.e.,* the Timing Order], sustaining debtor's Objection and entering judgment for the debtor contradict the present ruling and order?
>
> Such further issues as become apparent upon a review of the record on appeal.

(Doc. I.D. No. 806.)

The Stay Motion alleges the following as grounds for a stay pending appeal:

> Debtor has reason to believe that the ruling of the Court overruling his objection to the claim of Stewart Title, as more fully set forth in his notice of appeal, is erroneous.
>
> The Debtor would be dis-advantaged by distribution [to Stewart] now.

(Doc. I.D. No. 807.)

V. THE ALLEGED NEW MATTERS

At the August 1, 2007 hearing, the following colloquy between the Debtor and counsel for Stewart was placed on the record with respect to the Alleged New Matters:

The Debtor:

> "I also have to represent to the court that I have spoken to senior counsel for Stewart Title Pamela Butler and, oddly enough, this is not the property they're seeking restitution for. And they really didn't understand why it was before the bankruptcy court." (Oral Record at 2:29:13 – 2:29:27.)
>
> . . .
>
> "I do respectfully request that disbursements be withheld until . . . Stewart clarifies what it is they're looking for reimbursement for." (Oral Record at 2:29:33 – 2:29:43.)

Counsel for Stewart:

> "I spoke to Ms. Butler two days ago . . . . This is not the wrong property. And I think you heard evidence before this court that it's the correct property . . . . I don't know how he can make that representation because I'm her counsel and I talked to her. And we are in constant communication. I have not heard a word about this [being the wrong property]." (Oral Record at 2:30:02 – 2:30:40.)
>
> . . .
>
> "I think it is dreadful that he said that Ms. O'Brien[16] spoke to him and told him it was the wrong property." (Oral Record at 2:34:24 – 2:34:35.)

The Debtor:

> "The property at issue that we had discussed was 58 Randolph Avenue in Meriden. There was no discussion about 91 Meloy Road. Fifty-eight . . . Randolph Avenue in Meriden was the issue of a criminal matter and Stewart has been prolific in its demands for restitution for their payout on that property. That's where I'm getting my information. Ms. Butler is aware of it." (Oral Record at 2:34:36 – 2:35:05.)

Counsel for Stewart:

> "This claim involves . . . 91 Meloy Road and . . . [everything] in the record make it very clear, we're not talking about some property in Meriden. We're talking about a property in West Haven. And so if there's some other property and some other claim, that might be the case, but this is what we're talking about here . . . . [E]very shred of evidence that has been before this court has been about 91 Meloy Road. And this issue is not in his appeal. It's not anywhere." (Oral Record at 2:35:06 – 2:35:52.)

VI. ANALYSIS

A. Standard For Stay Pending Appeal

> Four criteria are relevant in considering whether to issue a stay . . . pending appeal: the likelihood of success on the merits, irreparable injury if a stay is denied, substantial injury to the party opposing a stay if one is issued, and the public interest.

Mohammed v. Reno, 309 F.3d 95, 100 (2d Cir. 2002). "[L]ikelihood of success on the merits" is a flexible factor: "The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff[] will suffer absent the stay. Simply stated, more of one

[16] The subject individual is Pamela Butler O'Brien, Esq. and she is the litigation counsel for Stewart. (*See* Doc. I.D. No. 821, Supplemental Submittal of Stewart (including the affidavit (the "Affidavit") of Attorney O'Brien and a partial financial statement (the "Financial Statement") of Stewart).)

excuses less of the other." *Id.* at 101 (citation and internal quotation marks omitted) (alteration in original). It has been held that all four factors must be satisfied for a stay pending appeal. *See Daly v. Germain (In re Norwich Historic Preservation Trust, LLC)*, No. 3:05cv12 (MRK), 2005 WL 977067, at *3 (D. Conn. Apr. 21, 2005). It also has been held that the most "salient" factor, which is a "threshold" one, is "irreparable harm." *See In re Koper*, 286 B.R. 492, 496-97 (Bankr. D. Conn. 2002) (Dabrowski, J.). *See also In re Altman*, 230 B.R. 17, 19 (Bankr. D. Conn. 1999) (Shiff, J.) ("A showing of probable irreparable harm is the principal prerequisite for the issuance of a stay.").

B. <u>Application of Factors</u>

1. <u>Likelihood of Success on Appeal</u>

The Debtor's appeal either is frivolous or little short of frivolous.[17] The Debtor argues that Stewart should not have prevailed with respect to the Objection because neither Chase nor Stewart had reduced its/their claim to judgment.[18]

A claim in bankruptcy is defined to include:

> [a] right to payment, *whether or not such right is reduced to judgment*, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal equitable, secured or unsecured . . . .

11 U.S.C.A. § 101(5) (West 2005) (emphasis added). Thus, no state court judgment was required for Stewart to assert its claim on the Note. Moreover, as discussed in the Prior Order, the POC itself constituted *prima facie* evidence of Stewart's claim. (*See* Doc. I.D. No. 804.) The Debtor's claim with respect to the Timing Order is, as noted above, ludicrous. With respect to any other purported

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[17] The Debtor's argument in respect of the Timing Order is disposed of in note 9, *supra*.

[18] It is not clear to the court that the foregoing argument was raised in the Objection proceedings proper.

grounds for appeal, the court remains confident with respect to its conclusions set forth in the Prior Order.

The Debtor attempts to inflate the possibility of his success on the merits by now introducing the Alleged New Matters. Based on the court's experiences with the Debtor during the long course of this case, the court has developed a poor opinion of the Debtor's credibility.[19] Accordingly, the court gives the Alleged New Matters very little weight and certainly not enough weight to tip the balance in the Debtor's favor.

2. Injury

If the POC were paid now, the Debtor could recover that distribution from Stewart, an entity well able to respond to any judgment for such recovery.[20] Thus, the injury to the Debtor in the (extremely) unlikely event that he would prevail on appeal would be limited to costs of collection and delay.

3. Injury to Stewart

Stewart has been subjected to delay and litigation expense in defending against the Objection. The distribution Stewart will receive will be only about forty-five (45%) percent of its claim. To delay distribution further on a frivolous appeal only adds insult to injury.

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[19] That determination is further supported by the denial of Attorney O'Brien of *any* communication with the Debtor:

> On no occasion since the Proof of Claim was filed have I communicated directly with Mr. Klinger. I am represented by counsel, and would insist that all communications be directly through my counsel.

(Affidavit ¶ 7.)

[20] As of December 31, 2006, Stewart had net admitted assets of more than $1,000,000,000.00. (*See* Financial Statement; http://www.stewart.com.)

4. Public Interest

It is not in the public interest to delay closing of this case to facilitate a frivolous appeal.

5. Weighing the Factors

The level of injury to the Debtor does not outweigh the small likelihood of success on appeal. Neither of the two remaining factors favor the Debtor.

VII. CONCLUSION

For the reasons discussed above, the Stay Motion is denied. However, the Prior Order will be stayed through August 16, 2007 to permit the Debtor (if he so elects) to seek a stay of the Prior Order from the District Court. It is **SO ORDERED.**

Dated: August 6, 2007

BY THE COURT

Lorraine Murphy Weil
United States Bankruptcy Judge