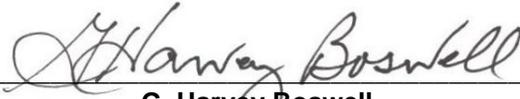


Not intended for publication



Dated: July 29, 2004
The following is SO ORDERED.


G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

Angela Burks,

Case No. 04-11796

Debtor.

Chapter 13

Angela Burks,

Plaintiff,

v.

Adv .Pro. No. 04-5134

Community Choice,

Defendants.

**MEMORANDUM OPINION AND ORDER DENYING
COMMUNITY CHOICE'S MOTION FOR STAY PENDING APPEAL**

I. FINDINGS OF FACT

On July 13, 2004, the Court issued a Memorandum Opinion and Order Granting the Debtor's Complaint for Turnover of a 1994 Toyota and a 1999 Ford Mustang from Community Choice. The Court placed the following conditions on the turnover:

1. That the debtor would pay Community Choice the repossession costs for both vehicles prior to Community Choice turning over the vehicles;

2. That the debtor's case would be placed on probation; and
3. That if the debtor's case was dismissed for any reason related to payments, said dismissal would be with prejudice under § 109(g).

Community Choice filed a Notice of Appeal and a Motion for Stay on Appeal on July 16, 2004. The Court conducted a hearing on Community Choice's motion on July 20, 2004. In their motion, Community Choice stated it was willing to post a supersedeas bond pursuant to FED. R. CIV. P. 62(d). Community Choice alleged at the hearing in this matter that its willingness to post a bond entitled it to a stay pending appeal of the turnover order as a matter of right.

II. CONCLUSIONS OF LAW

Motions for stay pending appeal are governed by FED. R. CIV. P. 62, made applicable to bankruptcy adversary proceedings by FED. R. BANKR. P. 7062, and FED. R. BANKR. P. 8005. Subsection (d) of Rule 62 provides for a stay of a judgment as a matter of right upon the posting of a supersedeas bond. FED. R. CIV. P. 62(d). Courts have consistently held, however, that this stay as a matter of right applies only in appeals of money judgments:

Courts have restricted the application of Rule 62(d)'s automatic stay to judgments for money because a bond may not adequately compensate a non-appealing party for loss incurred as a result of the stay of a non-money judgment.

Herbert v. Exxon, 953 F.2d 936, 938 (5th Cir. 1992); *Arban v. West Publishing Corp.*, 345 F.3d 390, 409 (6th Cir. 2003); *Stephenson v. Rickles Electronics and Satellites (In re Best Reception Systems, Inc.)*, 219 B.R. 988, 996 (Bankr. E.D. Tenn. 1998); *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 926 F.Supp. 888, 890 (S.D. 1996); *Dillon v. City of Chicago*, 866 F.2d 902, 904-05 (7th Cir. 1988); *NLRB v. Westphal*, 859 F.2d 818, 819 (9th Cir. 1988); *J. Perez & Cia., Inc., v. United States*, 747 F.2d 813, 814 (1st Cir. 1984); *Bellsouth Telecommunications, Inc., v. ITC Deltacom Communications, Inc.*, 190 F.R.D. 693, 695 (M.D. Ala. 1999); *Culwell v. Texas Equip. Co. (In re Texas Equip. Co.)*, 283 B.R. 222, 226 (Bankr. N.D. Tex. 2002). Parties are also not entitled to a stay as a matter of right when the matter appealed from is an injunction. Fed. R. Civ. P. 62(a) and (d). "The incorporation of this exception into Rule 62(d) is implicit recognition that the winner of injunctive relief usually cannot be protected by the posting of a sum of money. *Gov't. Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 167 F.R.D. 399, 400 (V.I. 1996).

In the case at bar, there are two reasons why Community Choice is not entitled to a stay as a matter of right. First, the order Community Choice is seeking a stay from is the July 13th order compelling them to turnover the debtor's cars. Clearly, there is no monetary aspect to this judgment. The Court has simply ordered the defendants to return the cars to the debtor. The debtor testified at the trial on her turnover complaint that she needs her car to get back and forth to work and to do outside sales

for her job. In a case where the appealing party sought to post a bond under Rule 62(d) instead of returning a fishing vessel used by the defendant in his job, the court held that no kind of fiscal guarantee would protect the defendant from the lost use of his boat and the income it would produce for him.

United States v. U.S. Fishing Vessel Maylin, 130 F.R.D. 684, 686 (S.D. Fla. 1990).

The second reason Community Choice is unable to post a bond is that a party is not entitled to post a bond when the matter appealed from is an injunction. FED. R. CIV. P. 62(a) and (d). Black's Law Dictionary defines "injunction" as "a court order commanding or preventing an action." (8th ed. 2004). Black's further states that "in its accepted legal sense, an injunction is a judicial process or mandate operating in personam by which, upon certain established principles of equity, a party is required to do or refrain from doing a particular thing." (citing 1 HOWARD C. JOYCE, A TREATISE ON THE LAW RELATING TO INJUNCTIONS § 1, at 2-3 (1909).) At least one court has recognized that "a turnover order is in the nature of a mandatory injunction." *Wildlife Center, Inc., v. Fasig Tipton Kentucky, Inc., (In re Wildlife Center, Inc.)* 102 B.R. 321, 328 (Bankr. E.D.N.Y. 1989). The Court's July 13th opinion ordered Community Choice to turn the debtor's cars over to her. Clearly, based upon Black's definition of "injunction" as well as the holding in the *In re Wildlife Center* case, the July 13, 2004, turnover order is an injunction which is not entitled to a stay as a matter of right under Rule 62.

Although Community Choice is not entitled to a stay as a matter of right by posting a bond, it may be entitled to a discretionary stay pursuant to FED. R. BANKR. P. 8005. Rule 8005 provides in part:

Notwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel 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. In deciding whether or not a discretionary stay is appropriate in a given case, a court must balance (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. *Michigan Coalition of Radioactive Material Users, Inc., v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *Bradford v. J.C. Bradford & Co. (In re Bradford)*, 192 B.R. 914, 917 (E.D. Tenn. 1996); *In re Dow Corning Corp.*, 255 B.R. 445, 542 (E.D. Mich. 2000); *In re Best Reception Systems, Inc.*, 219 B.R. at 994.

In the case at bar, Community Choice did not present arguments or allegations as to any of the four balancing factors; however, the Court finds that a discretionary stay is not appropriate in this case. The debtor needs the Toyota to get back and forth to work. She also uses her car to make outside sales

for her job. The debtor's daughter uses the Mustang to get back and forth to work and to transport herself and her brother to and from school. If the debtor is deprived of her vehicle during the pendency of the appeal, she will not be able to do her job and earn the money to make her plan payments. If she is unable to make her payments, her case will be dismissed with prejudice and she will be prohibited from seeking the protections of bankruptcy for six months. Such an inability would irreparably harm the debtor. *Raney v. Kellogg Valley Motors (In re Raney)*, 2002 WL 32114560 (Bankr. E.D. Ark. 2002). For this reason, the Court will deny Community Choice's Motion for Stay Pending Appeal.

III. ORDER

It is therefore **ORDERED** that Community Choice's Motion for Stay Pending Appeal is **DENIED**. It is **FURTHER ORDERED** that upon the debtor's payment of the repossession costs in this matter, Community Choice shall immediately turnover the 1994 and the 1999 Mustang to the debtor. The conditions placed upon the debtor in the July 13, 2004 Memorandum Opinion and Order conditionally granting the debtor's complaint for turnover remain in effect.

Mailing information

Debtors
Timothy Latimer, attorney for debtor
Stephen Hughes, attorney for Community Choice