

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

In Re:

JIM LEE WIERSMA and
PATRICIA DARLENE
WIERSMA,

Debtors.

Bankruptcy Case
No. 01-41874

MEMORANDUM OF DECISION

Appearances:

Brent T. Robinson, LING & ROBINSON, Rupert, Idaho, Attorney
for Debtors.

Kelly McConnell, GIVENS, PURSLEY. Boise, Idaho, Attorney for
Bank of the West.

Bank of the West, a creditor, has asked the Court to amend the terms
of the summary order for stay pending appeal previously entered in this case. The
Wiersmas, Chapter 11 Debtors whose bankruptcy case was dismissed, object to the

Bank's motion arguing the stay order need not be amended. After oral argument, the matter was taken under advisement.

Facts

Debtors appealed several of this Court's rulings, including its order that their Chapter 11 case would be dismissed, to the Ninth Circuit Bankruptcy Appellate Panel ("BAP"). The BAP affirmed this Court's orders. Debtors then appealed to the Ninth Circuit Court of Appeals.

Shortly after the initial appeal to the BAP, the Court entered an order implementing a stay regarding \$1.5 million in funds at issue in the appeal. That money is currently on deposit in a joint account in the names of Debtors and the Bank.

Among the issues on appeal is whether the Bank holds an enforceable security interest in the funds. To protect the money during the appeal, the Court prohibited the parties from accessing the funds. When the BAP affirmed this Court, and the Debtors appealed to the Court of Appeals, yet another stay order was entered by this Court to prevent the parties from disturbing the disputed funds. In that order, the Court extended the scope of the stay until all appeals are concluded. The stay order provides:

None of the parties may take any action against the settlement proceeds from the Wiersmas' lawsuit

against Gietzen Electric pending: (1) final disposition by the Ninth Circuit concerning the Wiersmas' appeal from the B.A.P.'s decision in *Wiersma v. O.H. Kruse Grain & Milling (In re Wiersma)*, ___ B.R. ___, No. ID-02-1523, 2005 WL 464889 (B.A.P. 9th Cir. Feb. 1, 2005) and final disposition in any appeal taken by any of the parties from the Ninth Circuit's decision, or the expiration of time to file any such appeal; and (2) further order of this Court.

Summ. Order at 8, Docket No. 457 (May 3, 2005).

While the stay order has been in effect several months, the Bank recently filed this motion asking the Court to amend its terms. It contends the language of the stay order fails to prevent "third parties" (presumably referring to parties other than the Bank, the Wiersmas, or other parties to their bankruptcy case) from reaching the \$1.5 million fund, such as through an execution or attachment. The Bank also requests specific language be included in the stay order acknowledging that the Bank may execute against Debtors' other property to satisfy the debt they owe it.

Debtors argue no amendment to the stay order is necessary because no party has attempted to execute against the settlement funds, and if they did, Bank's security interest protects its rights. Debtors point out that due process requirements prevent the Court from entering a stay against third parties who are not also parties to the bankruptcy case. Debtors see no reason to amend the stay to

include specific language permitting Bank to collect from their other assets because the Bank can and has been proceeding against Debtors in state court.

Disposition

Federal Rule of Bankruptcy Procedure 8005 allows the Bankruptcy Court discretion to stay a judgment, order or decree pending the outcome of an appeal. Additionally, the Court may “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. “Bankruptcy Rule 8005 is by its design a flexible tool which permits a bankruptcy court to uniquely tailor relief to the circumstances of the case, so that the appellate process will neither undo nor overwhelm the administration of the bankruptcy case.” *In re Gleasman*, 111 B.R. 595, 599 (Bankr. W.D. Tex. 1990).

A. The Court Will Not Stay Unidentified Creditors Not Before It.

The Bank requests the Court fashion a stay that prevents any post-petition creditor of the Debtors from attempting to execute on the funds to collect a debt. The Bank concedes it is unaware that any such creditors exist, yet argues the stay must protect it from this possibility.

The Court fashioned the stay order to preserve the \$1.5 million pending the outcome of the appeals. The Bank has not shown that its interest in

these funds is at risk, and the Court declines to craft a stay to accommodate hypothetical situations. If the Bank can show any particular party intends to attempt to execute against the trust account, then after appropriate motion, notice and opportunity for that party to be heard, the Court will consider extending the stay.

B. The Stay Prevents the Bank From Executing Only on the Settlement Funds.

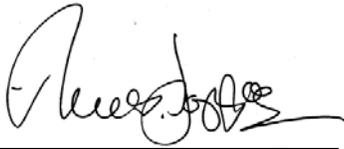
The Bank requests the Court modify the stay order to specifically allow the Bank to execute against Debtors' other property. This is not necessary. The current stay order is clear. It applies only to "the settlement proceeds from the Wiersmas' lawsuit with Gietzen Electric." Summ. Order at 8, Docket No. 457 (May 3, 2005). Clearly, the scope of the stay under the Court's order is limited. No other assets or funds are included within the scope of the stay. The Bank's concern that it is stayed by the order from executing against other property is unfounded.

Conclusion

The Bank's Motion to Amend Stay Pending Appeal will be denied by separate order. The Court is not inclined to enter a stay order purporting to impact the rights of unknown entities or individuals, especially when no real controversy is known to exist. If an actual dispute over rights in the \$1.5 million

arises, the Bank may return with an appropriate motion. Moreover, the current stay order prevents the Bank from execution against the settlement funds, nothing else.

Dated: September 28, 2005



Honorable Jim D. Pappas
United States Bankruptcy Judge