

Dated: February 26, 2016



Daniel P. Collins

Daniel P. Collins, Chief Bankruptcy Judge

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA**

In re)	Chapter 7 Proceedings
)	
GREGORY LEVERTON,)	Case No: 2:13-bk-00908-DPC
)	
Debtor.)	Adversary No. 2:13-ap-00232-DPC
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SUSAN SMITH,)	
)	
Plaintiff,)	ORDER DENYING MOTION FOR STAY PENDING APPEAL
)	
v.)	
)	
GREGORY LEVERTON,)	[NOT FOR PUBLICATION]
)	
Defendant.)	
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Defendant, Gregory Leverton (“Debtor”), filed his Motion for Stay Pending Appeal (“Motion”) on August 21, 2015 at Adversary Docket Entry (“DE”) 141. Plaintiff, Susan Smith (“Plaintiff”) and Debtor, sought to resolve their disputes in a mediation conducted by Bankruptcy Judge Eileen Hollowell. When the parties could not reach an agreement, on January 26, 2016, Plaintiff filed her response (DE 171) in opposition to the Motion. At a hearing on February 1, 2016, the parties argued their relative positions concerning the Motion but agreed that since they wished to pursue further settlement discussions, the Court should not rule on the Motion until the Court was informed of the need to do so. On February 10, 2016, the Court was advised the parties were unable to

1 resolve their differences. The Court then took this matter under advisement. For the
2 reasons stated below, the Motion is denied.

3 **Background**

4 Following motion practice and a trial on Plaintiff's complaint seeking, among
5 other things, denial of Debtor's discharge, on July 6, 2015 the Court entered judgment
6 (the "Judgment") (DE 128) against Debtor denying his discharge pursuant to
7 § 727(a)(2)(A). Debtor appealed the Judgment on August 21, 2015 (DE 140). Debtor's
8 Motion requests that this Court issue a stay pending his appeal of the Judgment, largely
9 because he is concerned Plaintiff will succeed in having his home sold at a sheriff's
10 judgment execution sale.

11 **Applicable Law**

12 Motions for a stay pending appeal are ordinarily addressed first in the Bankruptcy
13 Court. Fed. R. Bankr. P. 8007(a). In determining whether to grant a motion for stay
14 pending appeal, bankruptcy courts are required to employ a four pronged analysis:

15 (1) whether the stay applicant has made a strong showing that he is likely to
16 succeed on the merits, (2) whether the applicant will be irreparably injured
17 absent a stay; (3) whether issuance of the stay will substantially injure the
18 other parties interested in the proceeding; and (4) where the public interest
19 lies.

19 *Nken v. Holder*, 556 U.S. 418, 434 (2009). The Ninth Circuit has noted that the Court
20 must apply a sliding scale in determining a proper balancing of interests on a motion for
21 stay pending appeal. *Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011). District Judge
22 Snow has written that, an appellant who "shows that the 'hardship balance . . . tips
23 sharply' in its favor need not show a substantial likelihood of success on the merits; in
24 that situation, 'serious questions going to the merits' will suffice." *FR 160 LLC v.*
25 *Flagstaff Ranch Golf Club*, 2013 WL4507745 citing *Alliance for the Wild Rockies v.*
26 *Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

1 1. Likelihood of Success on the Merits

2 This Court must first consider whether Debtor has made a strong showing that he
3 will likely prevail on the merits of his appeal. Debtor suggests he has a “reasonable
4 likelihood of success in this appeal” because he believes the court should have considered
5 that his Baltimore Ravens season ticket licenses transferred to his brother on the eve of
6 his bankruptcy “were of no significant value to the estate.”¹ Debtor also contends this
7 issue should be reviewed *de novo* on appeal.

8 First, Debtor failed at trial to demonstrate the value of the licenses at the date of
9 transfer or that the licenses at issue were “of no significant value” at the time of the
10 transfers. The only evidence of value was the \$1,500 license price paid by Debtor in
11 1999. Importantly, the Court found the licenses to be Debtor’s principal asset at the date
12 of the transfers and that Debtor was an avid Ravens fan who transferred the licenses to
13 his brother so he and his brother could be assured of their continued ability to enjoy the
14 Ravens football tickets.² Debtor also failed to reveal the transfers in his bankruptcy
15 filings or at his first meeting of creditors or in his responses to the trustee’s questionnaire.
16 Debtor’s amendment came only after Plaintiff advised the Court of Debtor’s non-
17 disclosure. When Debtor finally amended his statement of financial affairs on June 26,
18 2013 (Administrative Case DE 27) to disclose the transfers, he did so in a misleading and
19 factually incorrect manner calculated to mislead the Court and creditors into believing
20 the transfers were for valuable consideration. This Court’s factual findings in this regard
21 will be reviewed on appeal under a “clearly erroneous” standard, not a *de novo* standard.

22 This Court finds Debtor has not made a strong showing that he is likely to prevail
23 on the merits of his appeal. Rather, this Court finds that the District Court hearing the
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25 ¹ The Court found, among other things, that Debtor’s transfers demonstrated his intent to hinder, delay or defraud
his creditors, in violation of § 727(a)(2)(A).

26 ² The Ravens won the Super Bowl on February 3, 2013, less than three months after the transfers and less than
two weeks after Debtor’s bankruptcy petition.

1 appeal will likely find this Court's factual findings were not clearly erroneous and,
2 therefore, will affirm this Court's factual findings against Debtor.

3 2. Irreparable Harm

4 Debtor contends the only two present sources from which Plaintiff could recover
5 on its Judgment are the non-exempt equity in his home and his job which produces some
6 non-exempt wages. By way of a quasi-supersedeas bond, Debtor has offered to sequester
7 15% of his net wages. Under Arizona law, 25% of his net wages would be non-exempt.
8 In other words, Debtor wants to have the ability to spend 85% of his net wages even
9 though 10% of the wages spent would not be exempt from Plaintiff's post-judgment
10 collection remedies. This Court finds Debtor has not proposed an appropriate bonding
11 strategy relative to his wages nor has he cited any irreparable harm that would befall him
12 if 25% of his net wages are executed upon by Plaintiff pending the outcome of this appeal.

13 Debtor's principal "irreparable harm" argument focuses on the potential loss of
14 his home. Debtor is concerned that "Plaintiff has already recorded a lien against Debtor's
15 home and presumably intends to foreclose upon that lien." Bankruptcy Judge Haines
16 held that a judgment recorded in the county of the debtor's Arizona homestead does not
17 create a lien against the homesteaded property. *In re Rand*, 400 B.R. 749, 754 (Bankr.
18 D. Ariz. 2008). If Judge Haines is correct, Plaintiff could not "foreclose upon that lien."

19 Although neither party has supplied evidence of the present value of the home or
20 the amount of the liens against the home, at oral argument on the Motion, Debtor's
21 counsel suggested a value of \$320,000 and a lien totaling \$130,000 but also noted that,
22 after paying the lien and homestead exemption and costs of sale, there is no significant
23 equity, if any, for Plaintiff to realize upon. Like Debtor, this Court has significant doubt
24 that a sheriff's execution sale would realize any value over the amount of the lien plus
25 the Debtor's homestead exemption plus the costs of sale. Any harm Debtor might suffer
26 is very speculative if a stay is not granted. More importantly, at most, Debtor could lose

1 his home to Plaintiff's post-judgment execution sale but be left with \$150,000
2 representing the value of his homestead exemption under A.R.S. § 33-1101. It is that
3 \$150,000 value, not the home itself, which is exempt under Arizona law. Debtor's
4 homestead exemption would not be impaired or "irreparably harmed" if a stay is not
5 issued pending Debtor's appeal.

6 This Court finds Debtor has failed to persuade this Court that he will suffer
7 irreparable harm if his Motion is denied.

8 3. Harm to Plaintiff

9 Debtor contends Plaintiff is "not at risk with regard to" Debtor's home because
10 there is no evidence that property is declining in value. Debtor also offers to sequester
11 15% of his net wages (i.e. 60% of his non-exempt wages) pending the appeal. Debtor
12 has failed to supply any evidence concerning the value of his home or the stability of the
13 value of that home. Debtor has also failed to propose a means of preserving the status
14 quo regarding 40% of his non-exempt wages. The Court finds Debtor fails to persuade
15 the Court that he has satisfied the third prong of the *Nken* stay analysis.

16 4. Public Interest

17 Debtor contends public policy is served if Debtor is permitted to stay in his home
18 pending his appeal. Arizona's homestead exemption is the applicable expression of
19 public policy relative to a debtor's homestead. As noted above, the Arizona homestead
20 exemption, at best, protects \$150,000 of value in a home, not the home itself or a debtor's
21 ability to reside in his home. Debtor fails to persuade the Court that he has satisfied the
22 fourth prong of the stay test.

23 Conclusion

24 Even if this Court were to place little or no emphasis on the "merits" element of
25 the *Nken* analysis, this Court finds that the *Leiva-Perez* sliding scale has not been satisfied
26 by Debtor because he failed to persuade this Court that he will suffer any harm let alone

1 significant irreparable injury. For the reasons stated above, the Court hereby denies the
2 Debtor's Motion.

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4 **DATED AND SIGNED ABOVE.**

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