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Honorable Christopher M. Alston
Chapter 11
Hearing Location: Seattle, Rm. 7206
Hearing Date: Friday, September 16, 2016
Hearing Time: 9:30 a.m.
Response Date: September 9, 2016

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re: NORTHWEST TERRITORIAL MINT, LLC, Debtor.	Case No. 16-11767-CMA **MOTION FOR STAY PENDING APPEAL REGARDING BANKRUPTCY COURT'S MEMORANDUM OPINION AND FURTHER ORDER ON MOTION FOR AUTHORITY TO WITHDRAW AS ATTORNEY FOR DEBTOR**

I. INTRODUCTION

On August 4, 2016, the Court entered its Memorandum Opinion and Further Order on Motion for Authority to Withdraw as Attorney for Debtor (the "Order") pursuant to which it held that funds remaining from an advance fee deposit (the "Deposit Funds") paid to the Tracy Law Group ("TTLG") are owned by Diane Erdmann. Mark Calvert, as Chapter 11 Trustee (the "Trustee") of Northwest Territorial Mint, LLC ("NWTM") has appealed the Order.

The Trustee's appeal of the Order relates to the standard of proof applied by the Court, the Court's factual determinations, and the Court's failure to consider evidence regarding the source of the Deposit Funds. Although the Court correctly held that the initial burden of proof was on Ms. Erdmann to establish an interest in the Deposit Funds, is the Trustee's position that the Court erred in the applicable standard of proof. The Court never stated the standard of proof which it employed; however, its ruling demonstrated that it did not employ the applicable preponderance of the evidence

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standard in both determining that Ms. Erdmann had met her initial burden, and that the Trustee failed to meet his burden. Additionally, in determining that the Trustee had failed to meet his burden, the Court failed to consider substantial evidence set forth at trial by the Trustee that demonstrated the source of the Deposit Funds was property of the Debtor.

II. ARGUMENT

As discussed more fully herein, the Trustee believes that this motion is governed by both Rule of Bankruptcy Procedure 7062 and Rule of Bankruptcy Procedure 8007. Under Rule 7062, which is applicable to adversary proceedings, the Trustee is entitled to a stay as a matter of right upon posting of a bond. Under Rule 8007, the Court may stay an order as a matter of discretion. Because of the procedural ambiguity of the matter on appeal, the Trustee requests that the Court grant a discretionary stay, and if the Court fails to do so, that it fix the amount of bond required for the purposes of Rule 7062.

A. Applicable Standard for Discretionary Stay

Motions for discretionary stay pending appeal respecting bankruptcy court orders are governed by Fed. R. Bankr. P. 8007. When deciding whether to issue a discretionary stay pending a bankruptcy appeal, courts use the following four factors: (1) movant's likelihood of success on the merits of the appeal; (2) significant and/or irreparable harm that will come to movant absent a stay; (3) harm to the adverse party if a stay is granted; and (4) where the public interest lies. *In re Wymer*, 5 B.R. 802, 806 (9th Cir. B.A.P. 1980); *In re North Plaza, LLC*, 395 B.R. 113, 119 (Bankr. S.D. Cal. 2008) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L.Ed.2d 724 (1987)). The Ninth Circuit has recognized that the "likelihood of success" and "irreparable harm" factors are two points on a sliding scale, so that if the degree of irreparable harm is great, less of a showing of likelihood of success is needed to obtain a stay. *See Humane Society of U.S. v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008).

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B. The Stay Factors Favor the Trustee

1. The Trustee is likely to prevail on the merits.

In the Order, the Court correctly held that Diane Erdmann held the initial burden of proof to prove an interest in the Deposit Funds, and that if she satisfied her burden, it was then the Trustee's burden to show that the source of the Deposit Funds was property stolen from NWTM. Order at 12-13. The Court, however, failed to articulate the standard of proof that it was required to employ in making a determination as to whether either party satisfied its burden. The applicable burden that the Court was required to employ was "preponderance of the evidence"[1], a standard that requires the Court to conclude that it is "more likely than not" that a fact is true. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996). A party may meet its burden through the use of either direct or circumstantial evidence. *Desert Palace Inc. v. Costa*, 539 U.S. 90, 99, 123 S. Ct. 2148, 156 L.Ed.2d 84 (2003).

It is clear from the Order that the Court did not apply the preponderance of the evidence standard to either Ms. Erdmann's or the Trustee's burden. With respect to Ms. Erdmann, the Court concluded she had satisfied her burden of establishing an interest in the Deposit Funds because "she wired funds from her own bank account and . . . she endorsed over to TTLG a cashier's check that was payable to her." Order at 12. The Court's finding ignores the necessary inquiry of the source of the cash deposited into Ms. Erdmann's bank account[2] or the source of the gold sold in exchange for the cashier's check. In fact, Ms. Erdmann presented no evidence, other than self-serving testimony, that she had an interest in the cash wired to TTLG or the gold sold to Seattle Coin Shop. The only evidence Ms. Erdmann presented in support of her position that she owned sufficient cash to make a $50,000 deposit or a cache of gold coins sufficient to sell for $100,000 was her own testimony.

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[1] *See. e.g., In re Bailey*, 300 B.R. 486, 490) (6th Cir. B.A.P. 2008); *In re Millette*, 539 B.R. 396, 400 (Bankr. D.N.H. 2015); *In re Paige*, 433 B.R. 878, 896 (Bankr. D. Utah 2011), affirmed in part, reversed in part 685 F.3d 1160; *In re Taylor, In re Santella*, 298 B.R. 793, 798 (Bankr. S.D. Fla. 2002).

[2] The evidence was uncontroverted that Ms. Erdmann deposited $50,000 in cash into her bank account immediately before sending the wire to TTLG.

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Despite finding her testimony at trial self-serving and not credible (Order at 9), the Court erroneously found she had satisfied her burden of establishing an interest in the Deposit Funds. The Court's determination was based solely on the fact that she deposited the cash into a bank account in her name, and converted the gold into a check made out to her. The Court did not require her to provide evidence of an interest in the cash and gold which were the source of the balance in her bank account and the cashier's check.

With respect to the Trustee's burden, the Court erroneously states that "there is no evidence that the $50,000 wired by Ms. Erdmann was taken from the Vault . . .[and]. . . no evidence that any the items [sic] removed by Ms. Erdmann and Ms. [sic] Hansen from the Mint in late March ended up in the Black Bag." Order at 7. In fact, the Trustee presented substantial circumstantial evidence of both facts. With respect to the cash, for example, there was testimony and evidence that significant amounts of cash that should have been in NWTM's vault were unaccounted for, that Ms. Erdmann had sole control of the cash, and that she deposited $50,000 in cash into her bank account the same day she sent the wire to TTLG. With respect to the gold, Ms. Erdmann and Mr. Hansen admitted under oath that they loaded a large box with NWTM-owned gold bullion on the night of March 26th and took it home. Ms. Erdmann also testified that any bullion she personally owned (to the extent it existed) had been moved to her safe deposit boxes on March 8th, which, given the safe deposit box records, precludes the possibility that the Black Bag was loaded with her personally-owned gold on the morning of March 31.

The Court's statement that there was "no evidence" suggests both that the Court did not consider circumstantial evidence in its determination of whether the Trustee had satisfied his burden and that the standard to which the Trustee was held was far higher than "more likely than not." At trial, the Trustee offered uncontroverted evidence of the following facts:(1) Ms. Erdmann controlled NWTM's cash; (b) substantial amounts of cash could not be accounted for; (c) a large box of gold bullion was removed from the vault by Ms. Erdmann and Mr. Hansen mere days before the Deposit Funds were paid; (d) between March 8 and early April, Ms. Erdmann's alleged personal gold was in

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her safe deposit boxes because of her fear of a seizure of assets at her home—a fact established by her own testimony; (e) although Ms. Erdmann accessed her safe deposit boxes on March 31, she did not do so until 1:30 p.m., hours after the Black Bag was given to David Huffman. Together with the utter lack of credible evidence that Ms. Erdmann ever owned a cache of cash and gold,[3] it is "more likely than not" that NWTM was the source of the cash deposited into Ms. Erdmann's bank account on March 31 and the source of the gold sold to Seattle Coin Shop.

Simply put, in reviewing the direct *and circumstantial* evidence under the proper standard of proof there is a substantial likelihood that the Trustee will prevail on his appeal.

2. The Estate will be irreparably harmed absent a stay.

There can be no doubt that the Estate will be irreparably harmed if a stay pending appeal is not granted. Cash is an asset that is easily consumed or secreted. Absent a stay, the Deposit Funds will be returned to Ms. Erdmann, and there is every reason to believe that over the course of the appeal, they will be expended or otherwise disposed of and the Estate will be left with no source of recovery if it prevails on appeal. Moreover, it can be anticipated that in the absence of as stay, Ms. Erdmann will argue that the appeal is moot once the Deposit Funds have been returned to her possession and consumed. In sum, without a stay the harm to the Estate will be great, as it will likely be left entirely without remedy. The undeniable harm to the Estate strongly supports the imposition of a stay pending appeal.

3. Ms. Erdmann will not be harmed if a stay is granted.

Ms. Erdmann will not be harmed by the imposition of a stay. At issue in this contested matter is the ownership of monies which have been, and will continue to be, held in trust for the party that prevails on appeal. As opposed to the risk to the Estate if a stay is not imposed, there is literally no risk to Ms. Erdmann that the Deposit Funds will diminish in any way over the course of

[3] In fact, the lack of any sort of paper-trail whatsoever constitutes evidence that such assets never existed.

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the appeal. The status of the Deposit Funds will be exactly the same at the conclusion of the appeal as it is at the present time.

4. There is a public interest in maximization of return to creditors.

One of the most fundamental purposes of a corporate bankruptcy is to maximize return to creditors. *See, e.g., In re Moody Nat. SHS Houston H, LLC,* 426 B.R. 667, 657 (Bankr. S.D. Tex. 2010) citing *Fla. Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 128 S. Ct. 2326, 2339, 171 L.Ed.2d 203 (2008) ("Maximizing creditor recoveries may be done with a reorganization of the business or with its liquidation, but it is a fundamental requirement"). Moreover, there is a "great public policy in ensuring that [bankruptcy cases] continue to an orderly, efficient resolution to maximize and preserve the estate's assets." *In re Bankruptcy Appeal of Allegheny Health, Education and Research Foundation*, 252 B.R. 309, 331 (W.D.Pa. 1999).

Here, the Deposit Funds are a potential asset of the estate, which the Trustee is obligated to pursue in the interest not only of the fundamental purpose of the Bankruptcy Code of maximizing recovery, but also in the interest of the thousands of creditors which have an economic stake in this proceeding. Accordingly, the public interest lies in favor of the Trustee.

C. No Bond Should be Required as a Condition of the Stay.

"The reason for requiring a bond is to secure the prevailing party against any loss that might be sustained as a result of an ineffectual appeal." *Quarles v. Miller*, 193 B.R. 779, 782 (W.D. Va. 1996) (internal quotes omitted). "The posting of a supersedeas bond is not a prerequisite to obtaining a stay pending appeal; rather, [it] is discretionary." *Id*. at 782; see also *In re United Merchants & Mfrs., Inc.*, 138 B.R. 426, 430 (D. Del. 1992) (stay pending appeal granted without requiring a bond); *In re Byrd*, 172 B.R. 970, 974 (Bankr. W.D. Wash. 1994) ("[T]he court has discretion to grant a stay pending appeal under Rules 8005 and 7062(c) and it need not require the posting of a supersedeas bond.").

The purpose of a supersedeas bond is to secure the appellees from a loss resulting from the stay of execution. *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1505 n.1 (9th Cir. 1987). Here,

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there is no need for a supersedeas bond, in that there is no risk of loss to Ms. Erdmann in the event the Trustee is not successful on appeal. As noted above, the Deposit Funds are currently held in trust by TTLG, and therefore there is no possibility that at the end of the appeal they will be unavailable for the prevailing party. Under such circumstances, a bond as a condition to the stay would serve no purpose.

D. Alternatively, the Court Should Clarify that Rule 7062 is Applicable to this Matter.

In the event the Court does not grant a stay under Rule 8007, the Court should fix the amount of a supersedeas bond for the purposes of Rule 7062 so that the Trustee may exercise his right to a stay. Federal Rule of Bankruptcy Procedure 7062 applies in adversary proceedings, which include a proceeding to determine an interest in property. Fed. R. Bankr. P. 7001. Accordingly, although the matter was not commenced by the filing of a complaint, Rule 7062 applies.[4]

Rule 7026 makes Federal Rule of Civil Procedure 62 applicable to adversary proceedings. Federal Rule of Civil Procedure 62 provides, in relevant part, "(d) Stay with Bond on Appeal. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond." Fed. R. Civ. P. 62.

The posting of a supersedeas bond under Rule 7062(d) in an amount approved by the court gives the judgment debtor an absolute right to a stay pending appeal. *Byrd* 172 B.R. at 974. For the reasons set-forth in Section C above, there is no reason for the Court to require a supersedeas bond in more than a nominal amount. The Trustee believes that a bond in the amount of $10,000 would be an appropriate amount to require so that he may exercise his right to a stay under Rule 7062.

[4] Even if the Court believes this dispute to be a contested matter rather than an adversary proceeding it may, at its discretion, direct that Rule 7062 apply to the matter. Fed. R. Bankr. P. 7001(c).

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III. CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Memorandum Opinion and Further Order on Motion for Authority to Withdraw as Attorney for Debtor be stayed pending appeal. A proposed order granting this stay is attached hereto as Exhibit A.

Dated this 26th day of August, 2016.

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By */s/ David C. Neu*
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CERTIFICATE OF SERVICE

The undersigned declares as follows:

That she is a Paralegal in the law firm of K&L Gates LLP, and on August 26, 2016, she caused the foregoing document to be filed electronically through the CM/ECF system which caused Registered Participants to be served by electronic means, as fully reflected on the Notice of Electronic Filing.

Also on August 26, 2016, she caused the foregoing document to be mailed to the Debtor at the address listed below:

Northwest Territorial Mint LLC
c/o Ross Hansen, Member
P.O. Box 2148
Auburn, WA 98071-2148

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Executed on the 26th day of August, 2016 at Seattle, Washington.

/s/ Denise A. Evans
Denise A. Evans

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