



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
May 17, 2016

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:)	Case No.: 11-14973-MKN
)	Chapter 11
R & S ST. ROSE LENDERS, LLC,)	
)	Date: May 16, 2016
Debtor.)	Time: 9:30 a.m.
)	

**ORDER ON BRANCH BANKING AND TRUST
COMPANY’S MOTION TO STAY PENDING APPEAL¹**

On May 16, 2016, the court heard Branch Banking and Trust Company’s Motion to Stay Pending Appeal (“Stay Motion”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

On March 15, 2016, the court entered an order denying the motions of creditor Branch Banking and Trust Company (“BB&T”) and creditor Commonwealth Land Title Insurance Company (“Commonwealth”) to substantively consolidate the bankruptcy estate of the above-captioned debtor in possession (“Lenders”) with the separate Chapter 11 proceeding commenced by R&S St. Rose, LLC (“St. Rose”), denominated Case No. 11-14974-MKN. That order

¹ In this Order, all references to “Section” are to provisions of the Bankruptcy Code, 11 U.S.C. §§ 101–1532, unless otherwise indicated. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure. All references to “FRCP” are to the Federal Rules of Civil Procedure. All references to “ECF No.” are to the number assigned to the documents filed in the above-captioned case as they appear on the docket maintained by the clerk of the court. Documents filed in other cases will be similarly identified.

1 (“Second Consolidation Order”)² (ECF No. 751) was accompanied by a memorandum decision
2 (“Memorandum Decision”) (ECF No. 750) which sets forth the court’s findings of fact and
3 conclusions of law pursuant to FRBP 9014, FRBP 7052 and FRCP 52.³

4 On March 29, 2016, BB&T filed a notice of appeal and election to have its appeal of the
5 Second Consolidation Order heard by the United States District Court for the District of Nevada
6 (“USDC”). (ECF No. 762).

7 On April 6, 2016, Commonwealth filed a separate notice of appeal and election to have
8 its appeal of the Second Consolidation Order heard by the USDC. (ECF No. 774).

9 On April 18, 2016, Lenders filed an amended proposed Chapter 11 plan (“Plan”) (ECF
10 No. 794) along with an amended disclosure statement (“Disclosure Statement”). (ECF No. 793).
11 A hearing on approval of the Disclosure Statement (“Disclosure Statement Hearing”) was
12 noticed to be held on May 18, 2016. (ECF No. 795).⁴

13 On April 19, 2016, Commonwealth filed a notice scheduling a hearing on May 18, 2016,
14 for various claim objections (“Commonwealth Claim Objection”) previously filed, but never
15 argued in the case. (ECF Nos. 797 and 264).

16 On April 27, 2016, BB&T filed the instant Stay Motion. (ECF No. 804). On April 29,

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18 ² In these Chapter 11 proceedings, a prior “Consolidation Order” was entered on
19 September 4, 2012, denying substantive consolidation. (ECF No. 172). On or about March 27,
20 2014, an order was entered by the USDC vacating the Consolidation Order and remanding for
21 further proceedings. (ECF No. 312). The Second Consolidation Order and the accompanying
22 Memorandum Decision were entered after multiple days of trial encompassing more than 20
23 witnesses and hundreds of exhibits.

24 ³ The relationship between the Lenders and St. Rose bankruptcy estates, as well as the
25 parties in interest to the current Stay Motion, is explained in detail in the Memorandum
26 Decision.

27 ⁴ Also scheduled to be heard on May 18, 2016, is a motion to dismiss or convert
28 (“Dismissal Motion”) filed by the Office of the United States Trustee (“UST”). (ECF No. 748).
29 Opposition has been filed by Commonwealth (ECF No. 813), BB&T (ECF No. 816), Lenders
30 (ECF No. 819), St. Rose (ECF No. 820), the Creditor Group (ECF No. 821), Double E Family,
31 LLC (ECF No. 822), and R&S Investment Group. (ECF No. 823).

1 2016, an order was entered granting BB&T's request to shorten time to have the Stay Motion
2 heard on an expedited basis ("OST"). (ECF No. 808). On May 3, 2016, Commonwealth filed a
3 joinder in the Stay Motion, but no separate request. (ECF No. 811).

4 On May 10, 2016, opposition to the Stay Motion was filed by St. Rose (ECF No. 824)
5 and by Lenders (ECF No. 825). On the same date, a joinder in those oppositions was filed by the
6 Creditor Group.⁵ (ECF No. 826). On May 11, 2016, additional joinders were filed by R&S
7 Investment Group (ECF No. 827) and Double E Family, LLC. (ECF No. 828).

8 On May 13, 2016, BB&T filed a reply in support of the Stay Motion. (ECF No. 830).

9 On May 16, 2016, the Stay Motion was heard on an expedited basis pursuant to the OST.

10 **APPLICABLE LEGAL STANDARDS**

11 FRBP 8007 governs stays pending appeal in bankruptcy proceedings. FRBP 8007
12 superseded FRBP 8005 as of December 1, 2014, and is derived from Federal Rule of Appellate
13 Procedure ("FRAP") 8. See 2014 Advisory Committee Note on Fed.Rule Bankr. P. 8007,
14 published in COLLIER ON BANKRUPTCY, Appendix Part 2(c) (16th ed. rev. 2016). A stay of a
15 bankruptcy court order pending appeal ordinarily must be sought from bankruptcy court in the
16 first instance. See FED.R.BANKR.P. 8007(a). The moving party may seek to stay an order of the
17 bankruptcy court pending appeal, see FED.R.CIV. P. 8007(a)(1)(A), or to stay proceedings in the
18 bankruptcy case pending appeal. See FED.R.CIV.P. 8007(a)(1)(D) and FED.R.CIV.P. 8007(e).⁶

19 Four factors traditionally are considered in determining a motion for stay pending appeal:
20 "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the
21 merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance

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23 ⁵ The "Creditor Group" consists of various individuals and related entities who filed
24 proofs of claim in the Lenders bankruptcy proceeding and who are all represented by the same
25 counsel. Under FRBP 2019(b) and FRBP 2019(d), counsel filed the disclosures of information
26 required by FRBP 2019(c). (ECF Nos. 263, 268, and 282).

⁶ Even though FRBP 8007 is based on FRAP 8, the latter rule specifically permits a party
to seek, inter alia, the issuance of an injunction while an appeal is pending.

1 of the stay will substantially injure the other parties interested in the proceeding; and (4) where
2 the public interest lies.” Nken v. Holder, 556 U.S. 418, 434 (2009). The first two factors are the
3 most critical and neither a possibility of success on the merits nor a possibility of irreparable
4 injury will suffice. Id. at 434. The burden of demonstrating the circumstances warranting a stay
5 pending appeal rests with the appellant. See Lair v. Bullock, 697 F.3d 1200, 1203 (9th Cir.
6 2012).

7 While the Supreme Court in Nken specified that the traditional test should be applied to
8 grant a stay pending appeal, see, e.g., 556 U.S. at 438 (Kennedy, J., concurring)(“When
9 considering success on the merits and irreparable harm, courts cannot dispense with the required
10 showing of one simply because there is a strong likelihood on the other”), subsequent decisions
11 in the Ninth Circuit have applied a less restrictive approach. Thus, in Leiva-Perez v. Holder, 640
12 F.3d 962, 964-968 (9th Cir. 2011) and Lair, 697 F.3d at 1204, separate panels of the Ninth
13 Circuit concluded that a stay applicant need only demonstrate a “substantial case for relief on the
14 merits,” rather than a likelihood of success on the merits, while still demonstrating a likelihood
15 of irreparable injury.⁷ Although the Leiva-Perez panel referred to this as a “flexible approach,”
16 640 F.3d at 966, a “mere possibility of relief” from an order or judgment is not sufficient to
17 warrant a stay pending appeal. Id. at 967, quoting Nken, 556 U.S. at 435; Lair, 697 F.3d at 1204.
18 See also Risinger v. SOC LLC, 2015 WL 7573191, at * 1 (D.Nev. Nov. 24, 2015)(applying
19 substantial case for relief on the merits test); City Nat. Bank v. Charleston Associates, LLC,
20 2013 WL 5947761, at * 2 (D.Nev. Nov, 5, 2013)(same).⁸ As previously mentioned, the Court in
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22 ⁷ See generally In re Beltway One Development Group, LLC, Case No. 11-21026-MKN,
23 Order of Wells Fargo Bank, N.A.’s Motion for Limited Stay Pending Appeal at 4-9, entered
24 December 17, 2014, at Docket No. 404; In re Hari Om, a Family Limited Partnership, Case No.
25 10-14347-MKN, Order on Motion for Stay Pending Appeal at 8-13, entered December 12, 2014,
26 at Docket No. 735.

⁸ More recent lower decisions in this circuit have applied the traditional test for stays
pending appeal expressed by the Supreme Court in Nken. See, e.g., United States v. Bundy,

1 Nken expressly stated that the mere “possibility of irreparable injury” is not sufficient to warrant
2 a stay. 556 U.S. at 434. See also Jones v. Skolnick, 2015 WL 4488076, at * 1 (D.Nev. July 22,
3 2015).

4 DISCUSSION

5 The court having considered the record, in addition to the written and oral arguments and
6 representations of counsel, concludes that the Stay Motion must be denied.

7 A. Stay of the Second Consolidation Order Pending Appeal under FRBP 8007.

8 First, BB&T and Commonwealth have not made a strong showing that they are likely to
9 succeed on the merits of their appeal. Neither of them point to any part of the evidentiary record
10 that was overlooked or misinterpreted by this court, nor do they point to any controlling case law
11 or statutory language that was overlooked or misinterpreted by this court. At oral argument,
12 Commonwealth suggested that the court had taken a novel legal approach to resolving the
13 Second Consolidation Motion, but offered no suggestion or argument why the approach
14 constituted an abuse of discretion. See Clark’s Crystal Springs Ranch v. Gugino (In re Clark),
15 548 B.R. 246, 257 (B.A.P. 9th Cir. 2016)(“Upon careful review of the record, we are satisfied
16 that the bankruptcy court considered all opposing evidence before rejecting one view in favor of
17 the other. The bankruptcy court’s account of the evidence is plausible in light of the record cited
18 above and when viewed in its entirety. We may not reverse merely because we may have
19 decided the issue differently.”). Even if the strong showing on the merits is not required by
20 Nken, at most the appellants have suggested only a possibility of success on appeal. If mere
21 disagreement with the court’s decision was enough to demonstrate a substantial case on the
22 merits, then only a possibility of success would be sufficient for a stay pending appeal. Not even

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24 2016 WL 1417381, at * 4 (D.Ore. Apr. 11, 2016); Rubio v. Monsante Company, 2016 WL
25 2653309, at * 2 (C.D.Cal. Mar. 29, 2016); Kalani v. Starbucks Corporation, 2016 WL 693251, at
26 *2 (N.D.Cal. Feb. 22, 2016). But cf., Federal Energy Regulatory Commission v. Barclays Bank
PLC, 2016 WL 793999, at *2 (E.D.Cal. Mar. 1, 2016)(applying preliminary injunction sliding
scale test to stay pending appeal).

1 a flexible approach permits a stay under those circumstances.

2 Second, BB&T and Commonwealth have not demonstrated that they will be irreparably
3 injured absent a stay of the Second Consolidation Order. In fact, counsel for both parties
4 conceded at the hearing that Lenders is prohibited from distributing any funds in which either
5 BB&T or Commonwealth claims an interest unless the proposed Plan is confirmed. In other
6 words, the Second Consolidation Order has no current impact on the appellants' claims, if any,
7 in the Lenders' Chapter 11 proceeding. Both BB&T and Commonwealth also acknowledged
8 that if the Plan is confirmed, neither of them are precluded from seeking to stay implementation
9 of a confirmed Plan, i.e., to prevent the distribution of funds, if they should decide to appeal.
10 Under these circumstances, the Stay Motion is premature at best, and no irreparable injury is
11 threatened if the Second Consolidation Order is not stayed.

12 Third, BB&T and Commonwealth have not met their burden with respect to injury to
13 other parties in interest. This consideration somewhat mirrors the second factor, but does not
14 require the presence of irreparable injury. Instead the question is whether there will be
15 substantial injury to other parties. Except for continued administrative expenses, a stay of the
16 Second Consolidation Order arguably may not pose overwhelming financial burdens on St. Rose
17 because its sole asset, the real property claimed as the collateral securing obligations to both
18 Lenders and BB&T, has been sold. A stay would further delay efforts by Lenders, however, to
19 confirm a Chapter 11 plan, thereby increasing the administrative expenses occasioned by this
20 lengthy reorganization proceeding. When compared to the absence of any irreparable injury to
21 BB&T and Commonwealth, the court concludes that the injury to other interested parties from a
22 stay of the Second Consolidation Order is substantial.

23 Finally, BB&T and Commonwealth have made no persuasive argument that the public
24 interest would be served by a stay of the Second Consolidation Order. As previously discussed,
25 no distribution of any funds will take place absent a confirmed Chapter 11 plan by Lenders. In a
26 bankruptcy context a debtor's effort to reorganize has been recognized as being in the public

1 interest and therefore an interest “worthy of protection.” In re Fullmer, 323 B.R. 287, 305
2 Bankr.D.Nev. 2005). See also Official Comm. of Unsecured Creditors v. Nilson (In re
3 Woodside Grp., LLC), 427 B.R. 817, 850 (Bankr. C.D.Cal. 2010). Although prevention of
4 irreparable injury presumably is in the public interest as well, BB&T and Commonwealth have
5 demonstrated no such injury to warrant a further delay in Lenders’ efforts to confirm its
6 proposed Plan. Within this context, a stay of the Second Consolidation Order would not be in
7 the public interest.

8 **B. Stay of the Chapter 11 Proceeding Pending Appeal of the Second**
9 **Consolidation Order under the Court’s Inherent Authority.**

10 FRBP 8007(a)(1)(D) and FRBP 8007(e) permit a bankruptcy court to suspend
11 proceedings in a case or to issue any other appropriate order to protect the rights of all parties in
12 interest pending an appeal. Unlike FRAP 8(a)(1)(C) which authorizes the issuance of an order
13 suspending, modifying, restoring or granting an injunction pending appeal, FRBP 8007(e) is not
14 couched in terms of injunctive relief. Thus, the rule appears to contemplate a discretionary stay
15 under appropriate circumstances.

16 A court may stay a proceeding pending the outcome of another proceeding based on its
17 power to administer its docket and to promote judicial efficiency. See generally Dependable
18 Highway Exp., Inc. v. Navigators Insurance Co., 498 F.3d 1059, 1066 (9th Cir. 2007). See also
19 Evanston Ins. Co. v. Western Community Ins. Co., 2014 WL 2090922 at * 1 (D.Nev. May 19,
20 2014). Compare Branch Banking and Trust Co. v. Iny, 2012 WL 6644806 at * 1 (D.Nev. Dec.
21 19, 2012) (granting stay of federal litigation over state law issue pending outcome of Nevada
22 Supreme Court appeal on same issue) with Asian American Ent. Corp. Ltd. v. Las Vegas Sands,
23 Inc., 2012 WL 2190803 (D.Nev. June 14, 2012) (denial of anti-suit injunction to prevent
24 initiation of litigation in Macau). The burden falls heavily on the movant to show that its
25 requested stay is warranted. See Landis v. North American Co., 299 U.S. 248, 256 (1936).

26 The court must exercise its sound discretion in weighing the competing interests in

1 determining whether to grant a stay. See Landis v. North American Co., 299 U.S. at 254-255.
2 See also Ryan v. Gonzales, 133 S.Ct. 696, 708 (2013) (“We do not presume that district courts
3 need unsolicited advice from us on how to manage their own dockets. Rather, the decision to
4 grant a stay, like the decision to grant an evidentiary hearing, is ‘generally left to the sound
5 discretion of district courts.’”). A court cannot rely solely on judicial economy to stay
6 proceedings. See Dependable Highway Exp., 498 F.3d at 1066. If the requested stay has “even
7 a fair possibility” of causing harm to another party, the movant must show it will suffer hardship
8 or inequity without the stay. Id. Stays should not be indefinite in nature and “should not be
9 granted unless it appears likely the other proceedings will be concluded within a reasonable
10 time.” Id. at 1066, quoting Leyva v. Certified Grocers of California, Ltd., 593 F.2d 857, 864
11 (9th Cir. 1979).

12 For the reasons discussed in connection with the stay of the Second Consolidation Order
13 under FRBP 8007, the court also concludes that a stay of the Chapter 11 proceeding is
14 unwarranted. At the hearing on the Stay Motion, counsel for BB&T and Commonwealth argued
15 that in addition to staying the Second Consolidation Order, the court should stay any further
16 proceedings by Lenders to confirm its proposed Plan, including approval of the accompanying
17 Disclosure Statement. While preventing Lenders from moving forward, Commonwealth also
18 argued, with a straight face no less, that Commonwealth should be allowed to proceed with the
19 Commonwealth Claim Objection. In other words, Commonwealth maintains that it should be
20 able to take steps in the Chapter 11 proceeding that may benefit its legal position while Lenders
21 and St. Rose awaits the outcome of the appeals of the Second Consolidation Order pursued by
22 BB&T and Commonwealth. Although audacity occasionally has its moments, this is not one of
23 them.

24 BB&T and Commonwealth have presented no evidence offering any indication of when
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1 their separate appeals of the Second Consolidation Order will be resolved by the USDC.⁹ Even
2 if it is resolved quickly by the USDC, no evidence has been presented as to whether any of the
3 parties to those appeals can or would pursue a further appeal. The contentious history between
4 the parties suggests that any additional appeals that can be pursued will be pursued.¹⁰ Because
5 the stay of proceedings requested by BB&T and Commonwealth would be indefinite in nature,
6 any stay imposed would be solely for the purposes of judicial economy.¹¹

7 In this instance, the Disclosure Statement Hearing is scheduled to go forward on May 18,
8 2016. Objections to the proposed Disclosure Statement were filed by Commonwealth (ECF No.
9 812) and by BB&T. (ECF No. 815). All parties to this proceeding are well represented. Under
10 these circumstances, a stay of the Chapter 11 proceeding pending the outcome of the appeals of
11 the Second Consolidation Order would not promote judicial economy at all. This is especially
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15 ⁹ The USDC currently has one judicial vacancy and one of the highest pending caseloads
in the Ninth Circuit.

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17 ¹⁰ As an example, the plan confirmation order entered in the St. Rose proceeding on
November 8, 2013 (St. Rose ECF No. 291), was appealed by BB&T and Commonwealth to the
USDC. (St. Rose ECF Nos. 306 and 312). After the USDC affirmed the plan confirmation order
18 on August 7, 2014 (St. Rose ECF No 446), BB&T and Commonwealth then appealed to the
Ninth Circuit. (St. Rose ECF No. 464). On November 2, 2015, the Ninth Circuit affirmed. (St.
19 Rose ECF No. 577 and 621 Fed.Appx. 505). From the date of entry of the St. Rose plan
confirmation order to the Ninth Circuit decision disposing of the appeals by BB&T and
20 Commonwealth, 724 days elapsed. An additional example is BB&T's pursuit of appeals of
adverse outcomes in a related state court proceeding that came to an end only after its petition
21 for writ of certiorari was denied by the Supreme Court. See Memorandum Decision at 3 n.3.
22 From beginning to end, that proceeding took more than five years.

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24 ¹¹ At the hearing, counsel for the Creditor Group argued that many individuals who
loaned funds to Lenders are elderly and presumably do not have the unlimited life spans of
fictitious entities such as BB&T and Commonwealth. At least one of the individuals who loaned
25 funds to Lenders has died, see Memorandum Decision at 21:11-17, and notice has been filed that
one of the primary individuals involved in the management of both Lenders and St. Rose also
26 has died. (ECF No. 666).

1 true given the ability to appeal any plan confirmation order that might be entered.¹²

2 Based on the foregoing, a discretionary stay of the Chapter 11 proceeding of Lenders,
3 pending the outcome of the BB&T and Commonwealth appeals, is unwarranted.

4 In light of the foregoing, the court concludes that BB&T and Commonwealth have not
5 met their burden of demonstrating that the circumstances in this case warrant a stay of the
6 Second Consolidation Order pending appeal. Likewise, BB&T and Commonwealth have not
7 met their burden of demonstrating that the Lenders Chapter 11 proceeding should be partially
8 stayed pending the outcome of those appeals.

9 **IT IS THEREFORE ORDERED** that Branch Banking and Trust Company's Motion to
10 Stay Pending Appeal, Docket No. 804, be, and the same hereby is, **DENIED**.

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12 Copies sent via CM/ECF ELECTRONIC FILING

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23 ¹² In the event the court enters an order denying confirmation of the proposed Plan, such
24 an order arguably would not be appealable unless such denial is with prejudice. Compare
25 Bullard v. Blue Hills Bank, 135 S.Ct. 1686, 1695-96 (U.S. 2015)(order denying confirmation of
26 Chapter 13 plan with leave to amend is not final and appealable absent grant of leave to appeal).
As previously mentioned at note 4, the UST already has filed its Dismissal Motion that is
scheduled to be heard shortly.