UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE: NORWICH HISTORIC PRESERVATION TRUST, LLC,	:	
Debtor,	:	NO. 3:05CV12 (MRK)
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Michael J. Daly, Trustee,	:	
Plaintiff – Appellee	:	
v.	:	
Edwin C. St. Germain,	:	
Defendant – Appellant.	:	

RULING ON MOTION FOR STAY PENDING APPEAL

In this case, *pro se* appellant Edwin C. St. Germain appeals a December 15, 2004 order of Chief Judge Albert S. Dabrowski of the United States Bankruptcy Court, approving the Trustee's motion to sell real property located at 75 McClellan Avenue in Norwich, Connecticut (the "McClellan Property"). Approximately two months after filing his appeal, Mr. St. Germain moved this Court to enter a stay of the sale pending the appeal. *See* Motion to Stay [doc. #9]. For the reasons stated below, the Court DENIES Mr. St. Germain's Motion to Stay [doc. #9].

I.

In April 2003, the Debtor, Norwich Historic Preservation Turst, LLC, filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code. However, in July 2004, the Bankruptcy Court converted the case to Chapter 7 and appointed Michael J. Daly as Chapter 7

Trustee. The Debtor's schedules listed a number of properties, including the McClellan Property, which was shown as having a fair market value of $100,000 and secured claims of $105,000. *See* Memorandum in Support of Objection to Motion for Stay of Order Pending Appeal ("Trustee's Mem.") [doc. #19] at 2. In or about October 2004, and pursuant to order of the Bankruptcy Court, an auction was held regarding the McClellan Property, and George Mattern was the successful bidder in the amount of $90,000. *See id.* Mr. St. Germain, who is apparently the equity holder of the Debtor, objected to the sale to Mr. Mattern. *See id.* After hearing argument on the objection, the Bankruptcy Court overruled Mr. St. Germain's objections. *See* Order dated Nov. 4, 2004 [Bankr. D. Conn. Pet. #03-31954, doc. #168].

On October 27, 2004, the Trustee filed a Motion to Sell the McClellan Property Free and Clear of Liens ("Motion to Sell") to Mr. Mattern under § 363(f) of the Bankruptcy Code. *See* Motion to Sell [Bankr. D. Conn. Pet. #03-31954, doc. #164]; *see also* Trustee's Mem. [doc. #19] at 3. In view of Mr. St. Germain's claims that the property was worth more than $90,000, the Trustee also sought an opportunity to obtain higher and better offers. *See id.* Mr. Mattern once again made the highest offer of $90,000. *See id.*

Mr. St. Germain objected to the Trustee's Motion to Sell, claiming that the service and content of the Trustee's motions were defective and that the McClellan Property was worth substantially more than $90,000. *See* Objection [Bankr. D. Conn. Pet. #03-31954, doc. #208]; *see also* Trustee's Mem. [doc. #19] at 3. Chief Judge Dabrowski held a hearing on the objections on December 8, 2005 and overruled all of Mr. St. Germain's objections. He entered an order ("Sale Order") granting the Motion to Sell on December 15, 2004. *See* Order Granting Motion to Sell Free and Clear [Bankr. D. Conn. Pet. #03-31954, doc. #215]; *see also* Trustee's Mem. [doc.

#19] at 3. Mr. St. Germain then filed this appeal from the Sale Order, and at the same time sought to stay the sale pending appeal. *See* Motion to Stay [Bankr. D. Conn. Pet. #03-31954, doc. #221]; Notice of Appeal [Bankr. D. Conn. Pet. #03-31954, doc. #224]. Chief Judge Dabrowski held a hearing on Mr. St. Germain's stay request on December 22, 2004, and, at the close of the hearing, Chief Judge Dabrowski orally denied the requested stay. *See* Transcript of Oral Ruling on December 22, 2004 ("Tr."), at 73-82, attached to Trustee's Mem. [doc. #19].[1]

Considering Mr. St. Germain's request as a motion for a stay pending appeal under Rule 8005 of the *Federal Rules of Bankruptcy Procedure*,[2] the Bankruptcy Court denied the stay for the following reasons. First, as to the likelihood of Mr. St. Germain prevailing on appeal, Chief Judge Dabrowksi stated that having presided over the auction processes, he was satisfied that the "auctions were properly noticed, were procedurally correct, and were not deficient in any way." Tr. at 77, attached to Trustee's Mem. [doc. #19]. In particular, Chief Judge Dabrowksi observed that there was nothing in the record to support Mr. St. Germain's assertion that the auction was improperly noticed or conducted, and that his claims regarding the value of the property were

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[1] A signed order denying Mr. St. Germain's motion to stay apparently issued on the same day. *See* Order Denying Motion to Stay [Bankr. D. Conn. Pet. #03-31954, doc. #226].

[2] Rule 8005 of the *Federal Rules of Bankruptcy Procedure* provides, in pertinent part, as follows:

> subject to the power of the district court . . . 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. Pro. 8005. Bankruptcy Rule 8005 is similar to Rule 62(c) of the *Federal Rules of Civil Procedure* and Rule 8A of the *Federal Rules of Appellate Procedure*, both of which govern stays pending appeal.

"speculative" and "hypothetical." *Id.* at 77-78.[3] Accordingly, Chief Judge Dabrowski held that Mr. St. Germain had not shown a likelihood of success on appeal or even a substantial possibility of prevailing on appeal. *See id.*

Second, Chief Judge Dabrowksi stated that while there was at least a theoretical possibility that Mr. St. Germain, who was at best an unsecured creditor, could be injured by the sale, he "consider[ed] it highly unlikely that that kind of prejudice would be visited upon him in the final analysis." *Id.* at 79. In particular, the United States Trustee argued that given the amount of secured debt and the number of properties, "I don't think there is a universe where these properties could be sold so that we could generate enough to pay all the secured debt, the unsecured creditors, and to have money go back to Mr. St. Germain as the owner of the equity on the Debtor." *Id.* at 56. Chief Judge Dabrowski agreed with the United States Trustee's assessment. *See id.* at 79-80.

Third, by contrast, the Court found that issuance of a stay would "substantially injure other parties interested in the proceedings," including both the secured and unsecured creditors. *Id.* at 78. This was also the position of the United States Trustee, who opposed a stay. *See id.* at 38-39.

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[3] The Bankruptcy Court noted in response to Mr. St. Germain's claims that the McClellan Property was worth more than $90,000:

> [You have failed] to even suggest that there would be someone out there willing to pay enough money, if ultimately this process were permitted to proceed along the lines or proceed in a way you want it, that would ultimately generate enough money so that the estate's taken care of and that you, from a personal perspective, ultimately a beneficiary. That's just whistling in the wind, that's – that's not likely to happen.

Tr. at 59, attached to Trustee's Mem. [doc. #19].

Fourth and finally, Chief Judge Dabrowski held that the public interest favored denial of a stay. *See id.* at 80. While he explained that in this case the public interest was not a significant factor, he also explained that the public would be best served by prompt resolution of the proceeding, and that a stay would only delay matters that he was satisfied had been handled properly. *See id.*

II.

The Second Circuit has established a four-part test for determining whether to grant a stay pending a bankruptcy appeal, which focuses on the following factors:

> (1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated a "substantial possibility, although less than a likelihood, of success" on appeal, and (4) the public interests that may be affected.

In re County Squire Assocs. of Carle Place, L.P., 203 B.R. 182, 183 (2d Cir. BAP 1996) (quoting *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993)); *see also In re Klinger*, No. CIV.A.3:01CV2311 (CFD), 2002 WL 1204958, at *1 (D. Conn. May 9, 2002).[4] Failure to satisfy any one of these four elements is sufficient grounds for denying a stay. *See In re Turner*, 207 B.R. 373, 374 (2d. Cir. BAP 1997); *In re Bijan-Sara Corp.*, 203 B.R. 358, 360 (2d Cir. BAP 1996).

Mr. St. Germain's motion for stay is principally, if not exclusively, founded on his

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[4] The Court is aware that some have expressed concern about whether the Second Circuit's statement of the likelihood of success test – phrased in terms of a "substantial possibility" – is consistent with the Supreme Court's articulation of the same standard, which is phrased in terms of a "strong showing that he is likely to succeed on appeal." *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987). *See, e.g.*, *In re Cacioli*, 302 B.R. 429, 431 (Bankr. D. Conn. 2003); *In re Koper*, 286 B.R. 492, 493-94 n.3 (Bankr. D. Conn. 2002). However, there is no need to resolve that dispute in order to rule on the pending motion because, as noted below, Mr. St. Germain has satisfied neither standard.

assertion that a denial of a stay will moot his appeal and therefore he will suffer irreparable harm if a stay is not granted. *See* Motion for Stay [doc. #9] at 2. It is not entirely clear that a sale of the McClellan Property will moot this appeal. *See In re Gucci*, 105 F.3d 837, 839-40 n.1 (2d Cir. 1997) ("It is not entirely clear why an appellate court, considering an appeal from an unstayed but unwarranted order of sale . . . could not order some other form of relief other than invalidation of the sale."); *Mission Iowa Wind Co. v. Enron Corp.*, 291 B.R. 39, 42 (S.D.N.Y. 2003) (discussing mootness in the context of an unstayed allocation order). However, for purposes of the present motion, the Court will assume that a denial of a stay will moot Mr. St. Germain's appeal.

Some courts have held that in certain circumstances the mooting of an appeal can constitute irreparable harm. *See In re County Squire*, 203 B.R. at 183 (mooting of an appeal is the "quintessential form of prejudice") (internal quotations omitted); *In re Permian Producers Drilling, Inc.*, 263 B.R. 510, 522 (Bankr. W.D. Tex. 2000) (mooting of appeal can constitute irreparable injury); *but see In re Turner*, 207 B.R. at 375 (in denying stay pending appeal, court held that appellants would not be irreparably injured if foreclosure sale proceeded during appeal). Other courts have held that the fact that an appeal may be mooted does not in and of itself satisfy the requirement for a showing of irreparable harm. *See, e.g.*, *In re Fullmer*, Nos. BKS-03-23102BAM, 04-1228BAM, --- B.R. ---, 2005 WL 891542, at *14 (Bankr. D. Nev. April 5, 2005) ("[T]he majority of cases that have considered the issue have held that the risk that an appeal may become moot does not by itself constitute irreparable injury.") (collecting cases); *In re Convenience USA, Inc.*, 290 B.R. 558, 559-60 (Bankr. M.D. Ala. 2003) (same).

Here, the Trustee makes a persuasive argument, also articulated by Chief Judge Dabrowski, that Mr. St. Germain, at most an unsecured creditor, will not suffer any injury by

proceeding with the sale. Nevertheless, the Court will assume for present purposes that Mr. St. Germain has satisfied the irreparable harm prong of the four-part stay test because of his concern that the lack of a stay will moot his appeal. Satisfying one element of the four-part test is not enough, however. Instead, Mr. St. German has the burden of proving that he satisfies each of the other three elements as well, and he has not even remotely come close to satisfying these other elements.

Even construing his *pro se* pleadings liberally, the Court concludes that Mr. St. Germain has not shown that he has a substantial possibility of prevailing on his appeal. His brief merely repeats his assertion, previously pressed in the Bankruptcy Court, that there were procedural defects in the motions and notices and that the McClellan Property is worth more than $90,000. But beyond his conclusory assertions, Mr. St. Germain has not provided the Court with any citations to the record or any case law that would support his position. Merely claiming error, as Mr. St. Germain has done in this case, is not sufficient to satisfy the standard for obtaining a stay. *See In re Klinger*, 2002 WL 1204958, at *1 (denying stay where movant "has not provided the Court with a sufficient record on which to base a determination in his favor"). For if it were, a stay would be granted in every case. Yet, in fact, stays pending appeal are the exception, not the rule. *See In re Gucci*, 105 F.3d at 840 ("We do not mean to imply that district courts should routinely grant stays pending appeal, or even routinely grant brief stays to permit this Court to consider granting such stays. There may well be substantial reasons for closing a sale promptly and assuring a good faith buyer that the sale cannot be undone.").

Mr. St. Germain also has not rebutted Chief Judge Dabrowski's finding that other persons, secured and unsecured creditors, would suffer substantial injury if a stay were granted

and the sale of the McClellan Property were further delayed. In particular, there is nothing binding Mr. Mattern, the only person who has ever expressed any interest in buying the McClellan Property, to wait indefinitely. Finally, Mr. St. Germain has not even attempted to show that the public interest would favor granting of a stay. As the Trustee states in his brief opposing a stay, he and the other creditors have been patiently waiting while the Bankruptcy Court allowed Mr. St. Germain to press his objections on numerous occasions. *See In re Fullmer*, 2005 WL 891542, at *15 (public interest is best served by prompt resolution of bankruptcy proceedings).

At most, therefore, Mr. St. Germain has shown that he meets one of the four requirements necessary for issuance of a stay. Unfortunately for Mr. St. Germain, that is three requirements short of what he needs to show that he is entitled to a stay. *See In re Permian Producers*, 263 B.R. at 523 (denying stay pending appeal where movant had shown irreparable harm and the public interest favored a stay but had failed to show likelihood of success on appeal).

III.

For the reasons stated, the Motion to Stay [doc. #9] is DENIED.

IT IS SO ORDERED.

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: April 21, 2005.