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FILED
JUL 19 2016
UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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2 EASTERN DISTRICT OF CALIFORNIA

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4 In re:) Case No. 14-22173-B-13
5 YOLANDA CHRISTINE SWARTOUT,) DC No. NBC-5
6)
7 Debtor(s).)
8

9 MEMORANDUM DECISION AND ORDER DENYING MOTION FOR STAY PENDING
10 APPEAL

11 Before the court is a *Motion for Stay of Order Pending*
12 *Appeal; Memorandum of Points and Authorities* filed by Eamonn
13 Foster on behalf of debtor Yolanda Christine Swartout.¹ Mr.
14 Foster asks the court to stay the order dismissing this chapter
15 13 case pending an appeal of the dismissal order and a subsequent
16 order denying a motion to reconsider and vacate the dismissal
17 order. The dismissal order was entered on May 13, 2016. [Dkts.
18 85, 80]. The order denying the motion to reconsider and vacate
19 the dismissal order was entered on June 24, 2016. [Dkts. 100,
20 99]. Mr. Foster appealed from both orders on June 27, 2016.
21 [Dkt. 103].

22 For the reasons explained below, the motion for stay pending
23 appeal will be denied. The court also determines that further

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25 ¹The motion and memorandum of points and authorities are
26 filed as one document. Counsel are expected to comply with the
27 Revised Guidelines for the Preparation of Documents which states
28 that "[m]otions [and] . . . memoranda of points and authorities .
29 . . shall be filed as separate documents." *Id.* at § III.A; LBR
30 9004-1(a). This failure is cause to deny the motion. *See* LBR
31 1001-1(g), 9014-1(l). However, the court will waive the defect
32 and decide the motion.

1 argument will not assist it in the resolution of the motion and,
2 thus, oral argument is unnecessary. See LBR 9014-1(h). The
3 hearing on the motion set for July 19, 2016, is vacated and no
4 appearance at that hearing is necessary.

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6 **Discussion**

7 Stays pending appeal are governed by Federal Rule of
8 Bankruptcy Procedure 8007(a), which states that "[o]rdinarily, a
9 party must move first in the bankruptcy court for . . . a stay of
10 a judgment, order or decree of the bankruptcy court pending
11 appeal." Fed. R. Bankr. P. 8007(a)(1)(A). The bankruptcy court
12 has broad discretion in deciding whether to issue a stay pending
13 an appeal. Wymer v. Wymer (In re Wymer), 5 B.R. 802, 806 (9th
14 Cir. BAP 1980). In exercising this discretion, courts in the
15 Ninth Circuit adhere to a sliding-scale balancing of four
16 traditional factors. In re Vandenberg, 2012 WL 1854298 at *2
17 (Bankr. D. Ariz. 2012) (citations omitted). The traditional
18 factors are: (1) whether the applicant has made a strong showing
19 she is likely to succeed on the merits; (2) whether the applicant
20 will suffer irreparable injury absent a stay; (3) whether
21 issuance of the stay will injure other parties interested in the
22 proceeding; and (4) the public interest. Id.; see also Nken v.
23 Holder, 556 U.S. 418, 434 (2009); Wymer, 5 B.R. at 806. The
24 first two factors are the most critical, but a failure on any one
25 factor requires the court to deny the application for a stay. In
26 re Irwin, 338 B.R. 839, 843 (E.D. Cal. 2006) (citations and

1 internal quotation marks omitted); In re Rivera, 2015 WL 6847973
2 at *2 (N.D. Cal. 2015).

3 The court has considered each of the four factors and
4 concludes that Mr. Foster has not satisfied his burden with
5 respect to any of them. In other words, the court concludes that
6 each factor weighs against a stay. The court gives particular
7 weight to the first and second factors. Nken, 556 U.S. at 434.

8 **(1) No Demonstration the Debtor is Likely to Prevail on Appeal**

9 The court initially notes that Mr. Foster cannot demonstrate
10 a likelihood of success on appeal if he does not understand what
11 it is he appealed. Mr. Foster states that he "has appealed from
12 the Court's decision to grant the [chapter 13] trustee's
13 application to dismiss her case." That is not accurate.

14 This case was not dismissed on the chapter 13's application.
15 This case was dismissed under Federal Rule of Civil Procedure
16 41(b) (applicable by Federal Rule of Bankruptcy Procedure 7041)
17 because Mr. Foster willfully disobeyed a court order to file a
18 modified plan and instead took it upon himself to file something
19 else. Mr. Foster was ordered to file a modified plan to fix a
20 payment default issue that he explained on April 12, 2016, would
21 recur monthly throughout the term of the debtor's plan if not
22 fixed. It is in that context the court considers the motion for
23 a stay pending appeal. And it is in that context that Mr. Foster
24 has failed to demonstrate a likelihood of success on appeal.

25 The Order

26 Mr. Foster first maintains the court did not order him to
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1 file a modified plan or, if it did, the order to file a modified
2 plan was permissive and that meant he was free to comply with or
3 disregard the order at his election. Neither argument has merit.

4 The order that Mr. Foster disobeyed is included in the Civil
5 Minutes entered on April 12, 2016, following a hearing held on
6 the same date. That order states as follows:

7 MODIFIED PLAN **SHALL** BE FILED BY 4/22/16 AND ANY
8 RESPONSE BY TRUSTEE **SHALL** BE FILED BY 5/03/16.

9 [Dkt. 75] (emphasis added).

10 Mr. Foster insists there is no order in the Civil Minutes
11 because the Civil Minutes are not captioned as an order and there
12 is no statement in the Civil Minutes that disobedience will
13 result in sanction or dismissal. Again, neither argument has
14 merit.

15 As to the latter, an order need not warn an attorney of the
16 consequences of his or her disobedience with the order. Federal
17 Rule of Civil Procedure 41(b) (applicable by Federal Rule of
18 Bankruptcy Procedure 7041) takes care of that.

19 As to the former, the Civil Minutes required a specific act
20 by a specific date. It used the phrase "shall be filed" which is
21 mandatory and indicative of an imperative as opposed to the
22 permissive term "may."² See Fernandez v. Brock, 840 F.2d 622,

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24 ²Mr. Foster states that during the hearing held on April 12,
25 2016, the court used "permissive language" when discussing the
26 modified plan and that left him free to file a modified plan or
27 whatever else he wanted to file. Even assuming the court's
28 discussion with Mr. Foster could be characterized as
"permissive," the written Civil Minutes control. See Playmakers
LLC v. ESPN, Inc., 376 F.3d 894, 896 (9th Cir. 2004) (citation
omitted). The written Civil Minutes control because "[o]ral

1 632 (9th Cir. 1988) (citations omitted); Burklin v. Morton, 527
2 F.2d 486, 488 (9th Cir. 1975), cert. denied, 425 U.S. 973 (1976).
3 The Civil Minutes also disposed entirely of a discrete matter,
4 *i.e.*, the filing of a modified plan and the setting of a hearing
5 on shortened notice to consider confirmation of the modified plan
6 ordered filed. It was also entered on the docket and Mr. Foster
7 was notified of the docket entry. Thus, for all purposes, the
8 Civil Minutes constitute an order.³ See In Key Bar Inv., Inc. v.
9 Cahn (In re Cahn), 188 B.R. 627, 630 (9th Cir. BAP 1995) (minute
10 entry can be order if it fully adjudicates issues); see also
11 Matter of Jacobs, 2016 WL 1573310 at *3 (D. Ariz. 2016) (order
12 may be in the form of an unsigned minute entry).

13 Jurisdiction and Mootness

14 Mr. Foster's jurisdictional and mootness arguments are
15 equally unpersuasive. Both arguments were addressed in the
16 court's written decision denying reconsideration entered in the
17 Civil Minutes dated June 24, 2016. [Dkts. 99, 100]. In short,
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20 responses from the bench may fail to convey the judge's ultimate
21 evaluation. Subsequent consideration may cause the [bankruptcy]
22 judge to modify his or her views.'" Id. (quoting Ellison v. Shell
Oil Co., 882 F.2d 349, 352 (9th Cir. 1989)); see also In re
Harper, 194 B.R. 388, 392 (Bankr. D.S.C. 1996) (subsequent
written order preempts comments during hearing).

23 ³The absence of any appeal as of right from the Civil Minutes
24 does not make the Civil Minutes any less of an order as Mr.
25 Foster suggests. Nothing prevented Mr. Foster from requesting
26 leave to appeal from the Civil Minutes. In fact, that would have
27 been as simple as filing a notice of appeal which the district
28 court or bankruptcy appellate panel, in its discretion, could
treat as a motion for leave to appeal. See Fed. R. Bankr. P.
8004(d); Hupp v. Educ. Credit Mgmt. Corp. (In re Hupp), 383 B.R.
476, 478 (9th Cir. BAP 2008) (under former Rule 8003(c)).

1 the court was not without jurisdiction to order Mr. Foster to
2 file a modified plan on April 12, 2016, or to continue the April
3 12, 2016, hearing to consider confirmation of the modified plan
4 it ordered Mr. Foster to file for two reasons.

5 First, because both the chapter 13 trustee and the debtor
6 would continue to suffer "injury" monthly throughout the
7 remaining term of the debtor's confirmed chapter 13 plan, *i.e.*,
8 additional administration of the debtor's case by the chapter 13
9 trustee and the receipt of monthly notices of default by the
10 debtor, the payment default issue that the court ordered Mr.
11 Foster to fix in a modified plan was not moot even in the absence
12 of any pending dispute on April 12, 2016. Second, the
13 confirmation order entered on February 12, 2015, states that
14 "[t]he debtor shall appear in court whenever notified to do so by
15 the court." [Dkt. 67]. Thus, the confirmation order gives the
16 court continuing jurisdiction over the debtor and her confirmed
17 chapter 13 plan regardless of any pending dispute.

18 Conclusion

19 In short, Mr. Foster has not demonstrated that the debtor is
20 likely to prevail on her appeal. Therefore, the court concludes
21 this factor weighs heavily against a stay pending appeal.

22 **(2) No Demonstration of Irreparable Harm to the Debtor**

23 Mr. Foster also has not demonstrated that the debtor will
24 suffer irreparable harm in the absence of a stay pending appeal.
25 Mr. Foster cites renewed collection efforts by the debtor's
26 creditors resulting from the loss of the automatic stay upon
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1 dismissal of the chapter 13 case as the irreparable harm the
2 debtor will suffer in the absence of a stay pending appeal. That
3 is not irreparable harm for two reasons.

4 First, economic injury generally will not support a finding
5 of irreparable harm because such injuries may be remedied by an
6 award of money damages in an action at law. Fox Broadcasting Co.
7 v. Dish Network, LLC, 905 F. Supp. 2d 1088, 1110 (C.D. Cal. 2012)
8 (citing Pyro Spectaculars North, Inc. v. Souza, 861 F. Supp. 2d
9 1079, 1092 (E.D. Cal. 2012)); see also Morgan Stanley & Co., LLC,
10 v. Couch, 134 F. Supp. 3d 1215, 1234-1235 (E.D. Cal. 2015)
11 (citations omitted). The harm that Mr. Foster claims the debtor
12 will suffer in the absence of a stay pending appeal is purely
13 economic, *i.e.*, the repayment of creditors resulting from the
14 loss of the automatic stay upon dismissal of the chapter 13 case.
15 That economic harm may be remedied by a claim for damages against
16 Mr. Foster or his insurance carrier for whatever financial loss
17 the debtor may suffer as a result of Mr. Foster's decision to
18 disobey the order in the Civil Minutes to file a modified plan.
19 See Stout ex rel. C.S. v. Oklahoma ex rel. Oklahoma Highway
20 Patrol, 2015 WL 1473504 at *6 n.7 (W.D. Okla. 2015).

21 Second, nothing prevents the debtor from re-filing another
22 chapter 13 case. And while the debtor would have a limited 30-
23 day stay in the re-filed chapter 13 case, see 11 U.S.C. §
24 362(c)(3)(A), nothing prevents the debtor from asking the court
25 to extend the automatic stay beyond that 30-day period. See 11
26 U.S.C. § 362(c)(3)(B). Although the debtor would be required to
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1 show changed circumstances, the retention of counsel who does not
2 disobey court orders or a declaration from Mr. Foster that he
3 would comply with all orders entered in the re-filed case
4 (whether in Civil Minutes or not) should suffice to demonstrate a
5 change in circumstances between the two cases sufficient to allow
6 the court to extend the automatic stay beyond the 30-day period.

7 In short, Mr. Foster has not demonstrated the debtor is
8 likely to suffer irreparable injury in the absence of a stay
9 pending appeal. Therefore, the court concludes this factor also
10 weighs heavily against a stay pending appeal.

11 **(3) Prejudice to Appellee**

12 It is prejudicial to require the chapter 13 trustee to send
13 the debtor default notices every month that the debtor then cures
14 by payment. This cycle unnecessarily increases the chapter 13
15 trustee's administration of a single case to the exclusion of all
16 other cases and it imposes an undue burden on the chapter 13
17 trustee for a single case. Therefore, the court concludes this
18 factor also weighs against the granting of a stay pending appeal.

19 **(4) Public Interest**

20 The Bankruptcy Code and bankruptcy system provide debtors
21 with extraordinary legal rights and remedies for which very
22 little is required of them. One important requirement is that
23 the attorney representing the debtor comply with orders of the
24 bankruptcy court or take permissible actions to challenge orders
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1 [. . .]

2 [T]he whole system, no matter on which side you are on
3 the substantive issues, depends on court orders being
4 followed until they're set aside by higher authority.
5 When a citizen flouts the law for the best of reasons,
6 others will find it that much easier to rationalize
7 lawlessness for venal reasons.

8 Stephen Bates, Research Paper R-23 at *12-13, The Joan
9 Shorenstein Center, Public Policy, Harvard University School of
10 Government (April 2000) (internal quotes and citations omitted).

11 In short, the public interest favors compliance - not
12 disobedience - with court orders. U.S. v. Sumitomo Marine & Fire
13 Ins. Co., 617 F.2d 1365, 1373 (9th Cir. 1980). The request for
14 stay is made in the context of Mr. Foster's disobedience of a
15 court order. Therefore, the court concludes the public interest
16 does not weigh in favor of a stay pending appeal.

17 Conclusion

18 Mr. Foster has failed to demonstrate that any of the
19 traditional factors examined upon a request for a stay pending
20 appeal weigh in favor of a stay. Therefore, for all the
21 foregoing reasons,

22 IT IS ORDERED that the debtor's motion for a stay pending
23 appeal is DENIED.

24 IT IS FURTHER ORDERED that the hearing set for July 19,
25 2016, at 1:00 p.m. is VACATED.

26 Dated: July 19, 2016.

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UNITED STATES BANKRUPTCY JUDGE

INSTRUCTIONS TO CLERK OF COURT
SERVICE LIST

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

Eamonn Foster
PO Box 190
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Yolanda Christine Swartout
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