

1 UNITED STATES BANKRUPTCY APPELLATE PANEL  
2 OF THE NINTH CIRCUIT  
3

4 In re )  
5 ) BAP No. WW-98-1524-McMeP  
6 IMPERIAL REAL ESTATE )  
7 CORPORATION, )  
8 Debtor. )

9 MICHAEL MASTRO and )  
10 JANE DOE MASTRO, )  
11 Appellants, )

12 v. )

ORDER ON MOTION FOR STAY

13 JAMES RIGBY, in his capacity as )  
14 Chapter 7 Trustee of the estate )  
15 of IMPERIAL REAL ESTATE )  
16 CORPORATION, )  
Appellee. )

17 Appeal Argued and Submitted on December 4, 1998  
18 at Seattle, Washington

19 Memorandum<sup>1</sup> Filed January 6, 1999

20 Appeal from the United States Bankruptcy Court  
for the Western District of Washington at Seattle

21 Honorable Philip H. Brandt, Bankruptcy Judge, Presiding

22  
23 Before: McManus,<sup>2</sup> Meyers, and Perris Bankruptcy Judges.  
24

25 <sup>1</sup> This disposition is not appropriate for publication and  
26 may not be cited to or by the courts of this circuit except when  
relevant under the doctrines of law of the case, res judicata, or  
collateral estoppel. See BAP Rule 13 and Circuit Rule 36-3.

27 <sup>2</sup> Honorable Michael S. McManus, Bankruptcy Judge for the  
28 Eastern District of California, sitting by designation.

1           On July 28, 1998, Michael Mastro ("the Appellant")  
2 filed a notice of appeal from a bankruptcy court order granting  
3 summary judgment in favor of the chapter 7 trustee, James Rigby  
4 ("the Appellee"). The bankruptcy court concluded that  
5 \$220,000.00 of a real estate commission transferred by the former  
6 debtor-in-possession to the Appellant was an unauthorized post-  
7 petition transfer of property of the estate.

8           The Appellant posted a \$300,000.00 supersedeas bond and  
9 appealed to the Bankruptcy Appellate Panel. The Appellant and  
10 the Appellee executed a Stipulation For and Order Approving Bond  
11 and Certifying Judgment as Final Under [Fed.R.Civ.P.] 54(b) ("the  
12 Stipulation Pursuant to Bond").

13           The Panel affirmed the bankruptcy court's order in a  
14 memorandum decision filed on January 6, 1999. On or about  
15 February 2, 1999, the Appellant filed a notice of appeal with the  
16 Ninth Circuit Court of Appeals.

17           On April 1, 1999, the Appellee filed a motion with the  
18 bankruptcy court to compel payment on the bond. On April 16,  
19 1999, Judge Overstreet heard the motion but continued the hearing  
20 to April 30, 1999. There is neither a written order nor a  
21 transcript of that hearing available to the Panel. The parties  
22 agree, however, that the hearing was continued to permit the  
23 Appellant time to seek a stay from the Panel pursuant to  
24 Fed.R.Bankr.P. 8017.

25           Rule 8017 provides in part:

26           (a) Judgments of the district court or the bankruptcy  
27 appellate panel are stayed until the expiration of 10  
28 days after entry, unless otherwise ordered by the

1 district court or the bankruptcy appellate panel.

2 (b) On motion and notice to the parties to the appeal,  
3 the district court or the bankruptcy appellate panel  
4 may stay its judgment pending an appeal to the court of  
5 appeals. The stay shall not extend beyond 30 days after  
6 the entry of the judgment of the district court or the  
7 bankruptcy appellate panel unless the period is  
8 extended for cause shown. If before the expiration of a  
9 stay entered pursuant to this subdivision there is an  
10 appeal to the court of appeals by the party who  
11 obtained the stay, the stay shall continue until final  
12 disposition by the court of appeals. A bond or other  
13 security may be required as a condition to the grant or  
14 continuation of a stay of the judgment. A bond or other  
15 security may be required if a trustee obtains a stay  
16 but a bond or security shall not be required if a stay  
17 is obtained by the United States or an officer or  
18 agency thereof or at the direction of any department of  
19 the Government of the United States.

20 The automatic 10-day stay imposed by Rule 8017(a)  
21 expired on January 17, 1999. The Appellant did not seek a stay  
22 from the Panel pursuant to Rule 8017(b) before he filed his  
23 notice of his appeal to the court of appeals. He now seeks a  
24 stay, but after filing his notice of appeal.

25 Rule 8017(b) permits the Panel to stay its judgment  
26 pending an appeal to the court of appeals. This stay, absent  
27 good cause shown, may not extend beyond 30 days after entry of  
28 the judgment. However, if an appeal to the circuit is filed, the  
stay continues until the court of appeals disposes of the matter.

There is a split of authority concerning whether a  
district court or bankruptcy appellate panel may grant a stay  
after an appeal has been taken to the circuit. In Miranne v.  
First Financial Bank (In re Miranne), 852 F.2d 805 (5<sup>th</sup> Cir.  
1988), *overruling*, 93 B.R. 925 (E.D. La. 1988), the court  
concluded that a district court, after disposing of an appeal

1 from a bankruptcy court order, retains jurisdiction to grant a  
2 stay pending appeal despite the filing of a notice of appeal to  
3 the court of appeals before the request for the stay. Accord  
4 City of Olathe v. KAR Development Assocs. (In re KAR Development  
5 Assocs.), 182 B.R. 870, 872 (D. Kan. 1995); In re Winslow, 123  
6 B.R. 647, 647-48 n. 1 (D. Colo. 1991).

7 The district court in In re Westminster Co., Inc., 74  
8 B.R. 37, 38 (D. Del. 1987), came to the opposite conclusion. It  
9 held that Rule 8017(b) "plainly contemplates the grant of a stay  
10 by the district court or bankruptcy appellate panel only in the  
11 period before an appeal is taken." See also 10 Collier on  
12 Bankruptcy, "Stay of Judgment," ¶ 8017.02, p. 8017-2 (15<sup>th</sup> rev.  
13 ed. 1999) ("The district court or appellate panel may only grant  
14 the stay if an appeal has not yet been taken.").

15 The Panel concludes that it may rule on the motion for  
16 a stay despite the earlier filing of the notice of appeal. While  
17 Rule 8017(b) clearly contemplates that a stay may be requested  
18 before the notice of appeal to the court of appeals is filed,  
19 there is nothing in Rule 8017(b) that prohibits the issuance of a  
20 stay after the notice of appeal is filed. This conclusion is  
21 consistent with the practice under both Fed.R.Bankr.P. 8005 and  
22 Fed.R.App.P. 8(a). Rule 8005 requires that a stay pending appeal  
23 be first sought from the bankruptcy court after the filing of an  
24 appeal to the district court or to the bankruptcy appellate  
25 panel. Similarly, Rule 8(a) requires that a party seek a stay  
26 from the district court when appealing the district court's  
27 judgment to the court of appeals.

1           Therefore, the Appellant having previously posted a  
2 \$300,000.00 supersedeas bond and the Appellee having not  
3 challenged the sufficiency of that bond, the motion is **ORDERED**  
4 **GRANTED.** In re Wymer, 5 B.R. 802, 806 (B.A.P. 9th Cir. 1980).  
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