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4 UNITED STATES BANKRUPTCY COURT
5 EASTERN DISTRICT OF CALIFORNIA
6 SACRAMENTO DIVISION
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9 In re)
10 WILLIAM WAYNE WEISMANN,) Case No. 05-27320-A-13J
11) Docket Control No. None
12 Debtor.) Date: Ex Parte
13) Time: Ex Parte
14)

14 **MEMORANDUM DECISION**

15 The chapter 13 debtor has filed an appeal from the order of
16 the United States Bankruptcy Court for the Northern District of
17 California transferring venue in this chapter 13 case to the
18 Eastern District of California.

19 The debtor now asks the court to enter a stay pending
20 appeal. The proposed order lodged by the debtor provides that
21 "the Debtor's motion for a Stay of Order/Case Pending Appeal is
22 granted and this bankruptcy case is stayed pending resolution of
23 debtor's appeal." In other words, the debtor will get the
24 benefit of the automatic stay while prosecuting his appeal but
25 not be burdened by any of the duties imposed on a chapter 13
26 debtor, such as appearing at a first meeting or making payments
27 under his proposed chapter 13 plan. See 11 U.S.C. §§ 343, 1326.

28 The motion will be denied for the reasons explained below.

1 First, were the court willing to grant any relief, it would
2 be limited to staying the transfer of venue. It would not
3 suspend all prosecution of the case while the appeal is being
4 prosecuted.

5 Second, while a notice of appeal was filed within 10 days of
6 entry on the Northern District's docket of the order transferring
7 venue as required by Fed. R. Bankr. P. 8002, that order is an
8 interlocutory order. See, e.g., United States Trustee v.
9 Sorrells (In re Sorrells), 218 B.R. 580, 582 (B.A.P. 10th Cir.
10 1998). To appeal it, the debtor must file a motion for leave to
11 appeal. 28 U.S.C. § 158(a)(3), Fed. R. Bankr. P. 8003. No such
12 motion has been filed.

13 Third, because the Bankruptcy Appellate Panel might consider
14 the notice of appeal as a motion for leave to appeal as permitted
15 by Fed. R. Bankr. P. 8003(c), the stay will be denied, not only
16 because the scope of the stay requested is too broad and because
17 no motion requesting leave to appeal has been filed, but also
18 because the debtor has not proven he is entitled to a stay.

19 The stay of a judgment afforded by Fed. R. Bankr. P. 7062,
20 incorporating by reference portions of Fed. R. Civ. P. 62, is not
21 applicable in this case. It is expressly made applicable only to
22 adversary proceedings. A change of venue is requested by motion,
23 See Fed. R. Bankr. P. 1014(a). A motion is a contested matter
24 rather than an adversary proceeding. Fed. R. Bankr. P. 4001(a),
25 9013, and 9014.

26 Therefore, any stay pending appeal must be issued pursuant
27 to Fed. R. Bankr. P. 8005. Under Rule 8005, a stay may issue if
28 the appellant makes a strong showing that (1) he is likely to

1 succeed on the merits, (2) he is likely to sustain irreparable
2 injury without the stay, (3) the appellee is unlikely to be
3 injured by a stay, and (4) the public interest will not be harmed
4 if the stay is granted. See Wymer v. Wymer (In re Wymer), 5 B.R.
5 802, 806 (B.A.P. 9th Cir. 1980).

6 No irreparable injury to the debtor will flow from the
7 change in venue. The debtor currently resides in Folsom State
8 Prison. The debtor's incarceration will continue until
9 approximately the summer of 2006. The prison is located within
10 the Eastern District of California and is approximately 35 miles
11 from the courthouse in the Sacramento Division of the Eastern
12 District.

13 The debtor's physical proximity to the Sacramento Division
14 of this court will simplify the trustee's conduct of the meeting
15 of creditors. To perform the proposed plan, all the debtor (or
16 someone on his behalf) need do is mail a monthly check to the
17 trustee. Performance of the plan is made no more difficult by
18 the change in venue.

19 The debtor's residence in Folsom State Prison, while
20 temporary, is enough to make the Eastern District a proper venue
21 for this case. Section 1408(1) of title 28 makes venue proper in
22 any district where an individual debtor, among other places, is
23 domiciled or resides. One may reside in a district without being
24 domiciled in that district. See, e.g., In re Vaughn, 188 B.R.
25 234 (Bankr. E.D. Ky. 1995). Assuming that the debtor is
26 domiciled in the Northern District, and acknowledging that Folsom
27 Prison is the debtor's temporary residence, the fact remains that
28 Folsom State Prison was the debtor's place of abode before the

1 petition was filed and it is where he now resides.

2 No irreparable injury has been demonstrated.

3 A separate order will be entered.

4 Dated:

5 By the Court

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Michael S. McManus, Chief Judge
United States Bankruptcy Court
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