SO ORDERED.

SIGNED this 6th day of February, 2020.

BENJAMIN A. KAHN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:	)	
	)	
EVEX ROSS FRANKLIN,	)	Case No. 19-80661
	)	
Debtor.	)	
	)	Chapter 13

ORDER DENYING MOTION FOR STAY PENDING APPEAL

This case is before the Court on the Motion for Stay Pending Appeal ("Stay Motion") filed by Field's Management, Inc. ("Fields" or "Appellant") on February 5, 2020. ECF No. 42. In the Stay Motion, Appellant requests that "the Bankruptcy Court suspend all pending proceedings against it or its attorney indefinitely, including all matters calendared for hearing on 13 February 2020, pending the United States District Court's review on appeal." Id. at 2. Although the Stay Motion is captioned "Motion for Stay Pending Appeal," and its threadbare recitals seem to request a §stay pending appeal, the prayer for relief appears to request

that the Court instead suspend the proceedings. For the reasons herein, the Stay Motion will be denied.

Jurisdiction and Authority

The Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. Under 28 U.S.C. § 157(a), the United States District Court for the Middle District of North Carolina has referred this case and this proceeding to this Court by its Local Rule 83.11. This is a statutorily core proceeding under 28 U.S.C. § 157(b)(1) and (2). The Court has constitutional authority to enter this order.[1]

Procedural History

For purposes of the current motion, the Court will briefly summarize the procedural and factual background of the case.[2] Evex Ross Franklin ("Debtor") commenced this case on September 2, 2019, by filing a petition under chapter 13 of title 11. ECF No. 1. On September 16, 2019, she commenced an adversary proceeding, alleging that Fields willfully violated the automatic stay by activating a kill switch in Debtor's vehicle and repossessing the vehicle post-petition. ECF No. 10. The adversary complaint set forth two claims for relief. Id. In her first claim for relief,

[1] The claims in this case are constitutionally core, Budget Serv. Co. v. Better Homes of Va., Inc., 804 F.2d 289, 292 (4th Cir. 1986), and the parties have consented to this Court entering final judgments. ECF Nos. 10 and 13, Attachment 16.

[2] The procedural background and history of this case is more thoroughly set out in the Memorandum Opinion entered on January 24, 2020. ECF No. 31.

Debtor requested turnover of the vehicle. In her second claim for relief, she requested that the Court sanction Fields under 11 U.S.C. § 362(k) for the alleged violations of the automatic stay, with such sanctions to include actual damages and expenses, attorney's fees, and punitive damages, including but not limited to, monetary damages or a reduction or cancellation of Fields' lien on the Vehicle. Id. ¶¶ 41 and 42. After commencing the adversary proceeding, Debtor sought an emergency hearing compelling Fields to turn over the vehicle that Appellant had repossessed post-petition. The Court conducted an emergency hearing on October 3, 2019, and ordered Fields to return the vehicle, resolving the claim for turnover.

Fields responded to Debtor's Complaint by filing an Answer on October 17, 2019, asserting a counterclaim for common law fraud arising out of Debtor's pre-petition purchase of the vehicle, and seeking only monetary relief. ECF No. 13-16. Having resolved the claim for turnover, the Court converted the remaining claim for relief seeking damages for violation of the automatic stay to a contested matter under Fed. R. Bankr. P. 9014, and bifurcated the counterclaim to be resolved in the claims allowance process. ECF No. 12. Fields filed a proof of claim on October 18, 2019, Claim No. 3-1, asserting the claim set forth in the counterclaim, and thereafter amended its claim on November 18, 2019. Claim No. 3-2 (as amended, "the Fields Claim").

The Court conducted an evidentiary hearing on Debtor's remaining claim for damages and sanctions under § 362(k) on November 13, 2019. ECF No. 18. After considering the evidence and arguments of counsel, the Court took the matter under advisement. Thereafter, Debtor's counsel filed an Affidavit and Application for Attorney Fees in Connection with Action Filed Against Field's Management, Inc. ("Fee Application"), ECF No. 27, which the Court also took under advisement.

On January 24, 2020, the Court entered the Memorandum Opinion, ECF No. 31, and Order (the "Judgment"), ECF No. 32, which (1) granted Debtor's motion for sanctions; (2) approved the Fee Application; (3) directed Fields to pay Debtor's counsel a sum of $18,963.90 within 14 days from entry of the Memorandum Opinion and Judgment for its willful and egregious violations of the automatic stay in the case; (4) directed Debtor's counsel to hold $15,000.00 of the amount paid in trust pending further Order of the Court; and (5) scheduled a hearing for February 13, 2020, to determine whether Fields had timely complied with the Court's Memorandum Opinion and Judgment. The Court contemporaneously entered a Show Cause Order, ECF No. 33, directing Chris A. Kremer, counsel for Fields, to appear on February 13, 2020, and show cause as to why the Court should not impose sanctions against him for violating Bankruptcy Rule 9011(b)(3) or (4).

While the Court had Debtor's request for damages and sanctions under advisement, Debtor filed an objection to the merits of the Fields Claim. ECF No. 22. Fields filed a timely response to Debtor's objection. ECF No. 28. Fields also filed an objection to confirmation of Debtor's plan. ECF No. 29. The hearings on confirmation of Debtor's plan and Debtor's objection to the Fields Claim also are scheduled February 13, 2020. It is unclear whether the Stay Motion only seeks a suspension of the compliance hearing and the Show Cause Order, or whether it seeks a suspension of the entire bankruptcy case, including the confirmation hearing and hearing on the objection to claim. It also is unclear from the Stay Motion whether Appellant seeks a stay of enforcement of the judgment reflected in the Memorandum Opinion and Judgment. For purposes of this Order, the Court assumes that Appellant is seeking a stay of the Judgment and a suspension of the entire bankruptcy case, pending the district court's resolution of Appellant's appeal.

On February 4, 2020, Appellant timely filed a Notice of Appeal of the Memorandum Opinion and Judgment. ECF No. 41. The following day, Appellant filed the Stay Motion under Rule 8007. ECF No. 42. On February 6, 2020, Debtor responded in opposition to the Stay Motion. ECF No. 43.

Discussion

Rule 8007(a)(1) authorizes the bankruptcy court to stay the enforcement of a judgment, order, or decree of the bankruptcy court, pending appeal. Fed. R. Bankr. P. 8007(a)(1). Rule 8007(e)(1) further permits the bankruptcy court in its discretion to "suspend or order the continuation of other proceedings in the case." The Court will consider the potential relief afforded under these rules seriatim.

A. Stay Pending Appeal

This Court has held that the standards for determining whether a party is entitled to a stay pending appeal "are essentially the same as those required for the issuance of a preliminary injunction." In re Advanced Sports Enterprises, Inc., Ch. 11 No. 18-80856, ECF No. 331 at 5 (Bankr. M.D.N.C. Jan. 4, 2019); In re Raintree Healthcare of Winston-Salem, LLC, Ch. 11 Case No. 17-50375, ECF No. 109 at 6 (Bankr. M.D.N.C. July 5, 2017)(citing In re Convenience USA, Inc., 290 B.R. 558, 561 (Bankr. M.D.N.C. 2003)); In re MAC Panel Co., Bankr. Case. No. 98-10952C-11G, 2000 WL 33673784, at *3 (Bankr. M.D.N.C. March 8, 2000).[3]

Previously, courts in the Fourth Circuit applied a balance-of-hardship test in determining whether to grant stays pending

[3] The United States District Court for the Eastern District of North Carolina has applied these standards in considering whether to grant a stay pending appeal. See CWCapital Asset Mgmt., LLC v. Burcam Capital II, LLC, No. 5:13-CV-278-F, 2013 WL 3288092, at *2 n.5 (E.D.N.C. June 28, 2013).

appeal, relying on the opinion in Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co., Inc., 550 F.2d 189 (4th Cir. 1977). Under this test, the courts applied a "'flexible interplay' among all the factors considered . . . for all four [factors] are intertwined and each affects in degree all the others." Id. at 196. When applying this flexible interplay, the degree of likelihood of success that the party must show varied inversely with the degree of injury that it would suffer without the stay. In re Convenience USA, Inc., 290 B.R. at 562. The less irreparable injury that the moving party will suffer, the greater its showing of likelihood of success will have to be and vice-versa. Id. If the balance of hardships tipped decidedly in favor of the party seeking the stay then a lesser showing was required on the likelihood of success factor.

In Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 129 S.Ct. 365 (2008), the Supreme Court addressed the appropriate rubric for courts considering whether to grant a preliminary injunction. The Court stated that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Id. at 20. In the opinion below, the United States Court of Appeals for the Ninth Circuit granted the injunction. Id. at 17.

In so doing, the lower court applied a balancing test between the factors, and found that because there was a strong likelihood of success on the merits, the plaintiff only was required to demonstrate the "possibility" of irreparable harm. Id. at 19. The Court reversed, rejecting this "possibility" standard, and focused on its past reiteration of the factors requiring a likelihood of success on the merits. Id. at 22.

The Fourth Circuit has interpreted Winter to require that "all four requirements must be satisfied" for a court to impose a preliminary injunction. Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 347 (4th Cir. 2009), vacated on other grounds and remanded, 559 U.S. 1089 (2010), standard reaffirmed in 607 F.3d 355 (4th Cir. 2010). As a result, the Fourth Circuit concluded that, "[b]ecause of its differences with the Winter test, the Blackwelder balance-of-hardship test may no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit." Real Truth About Obama, 575 F.3d at 347. The opinion in Real Truth About Obama makes clear that a party requesting a preliminary injunction in the Fourth Circuit must independently demonstrate every aspect entitling the party to an injunction, and a court should not balance the four factors. See CWCapital Asset Mgmt., 2013 WL 3288092, at *8 (citing Winter, 555 U.S. at 22).

The decision whether to grant a stay pending appeal lies within the sound discretion of the court, and "the burden on the

movant seeking the extraordinary relief of a stay is a 'heavy' one." In re Sabine Oil & Gas Corp., 551 B.R. 132, 143 (Bankr. S.D.N.Y. 2016) (citing In re Gen. Motors Corp., 409 B.R. 24, 30 (Bankr. S.D.N.Y. 2009)); see also In re Alpha Nat. Res., Inc., 556 B.R. 249, 263 (Bankr. E.D. Va. 2016)("A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."(quoting BDC Capital, Inc. v. Thoburn Ltd. P'ship, 508 B.R. 633, 636–37 (E.D.Va.2014))(internal citations omitted)).

1. Likelihood of Success on the Merits

Appellant, without elaboration, asserts that its "appeal has merit and is likely to succeed." ECF No. 42 at 1. The Stay Motion does not identify a single legal or factual error in the Memorandum Opinion. Appellant does not cite any legal authority in support of Appellant's naked assertion that its appeal is likely to succeed on the merits. In sum, the allegations in the Stay Motion are insufficient to support Appellant's contention that the Court erred or abused its discretion.

Appellant baldly asserts that it will seek review of the Court's order converting the adversary proceeding to a contested matter, ECF No. 12, and will request reinstatement of the adversary proceeding without any basis on which the Court's order was error. Appellant does not give any basis whatsoever for any contention that the bifurcation and conversion was improper, and only states

that "Field's will seek review" of the order. This appears to be yet another dilatory tactic by this creditor, and Appellant's underlying motive is revealed by its prior inconsistent position on this very issue.[4] For these reasons, the reasons set forth in the Court's order bifurcating the claims and converting the request for sanctions under § 362(k) to a contested matter, and the reasons set forth in the Memorandum Opinion, the Court finds that Appellant is unlikely to succeed on the merits with any assertion that the Court erred by bifurcating the proceedings. See also In re Meadows, 396 B.R. 485, 498 (B.A.P. 6th Cir. 2008) (holding that requests for sanctions for violations of the automatic stay are properly brought as contested matters).

Appellant similarly does not state any basis on which it contends the Court committed an error of law or fact on the underlying merits in the Memorandum Opinion, and, for the reasons set forth in the Memorandum Opinion, it is unlikely that Appellant will succeed on any appeal of the Memorandum Opinion and Judgment.

2. The Likelihood of Irreparable Harm

Appellant similarly has failed to establish that it will suffer irreparable harm if the Stay Motion is denied. Appellant offers no argument or evidence that it will suffer irreparable injury if forced to pay Debtor's counsel the sum of $18,963.90.

[4] At the evidentiary hearing, counsel for Appellant stated that the adversary proceeding "need not have been filed at all" and that "the adversary proceeding was completely unnecessary." ECF No. 18, 1:12:00 through 1:12:45.

Generally, "irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate." Danielson v. Local 275, 479 F.2d 1033, 1037 (2d Cir. 1973). In the Stay Motion, Appellant states that a stay is necessary to preserve the "status quo," but does not explain what those circumstances are. Appellant merely argues that fourteen days is too short of notice to turnover payment because Appellant is a small business and cannot afford to pay the damages. This conclusory statement is insufficient. A "perceived inability to pay the award is not a justification for finding irreparable harm." Thompson Indus. Servs., LLC v. Haggenmaker, 2018 WL 3518468, at *4 (W.D.N.C. 2018); see also Morton v. Beyer, 822 F.2d 364, 372 (3rd Cir. 1987)("loss of income alone [does not] constitute[] irreparable harm").

3. The Balance of the Equities

Appellant entirely fails to address or mention the balance of the equities in the Stay Motion. Therefore, Appellant has failed to establish that the balance of the equities weighs in its favor.

4. The Public Interest

Once again, Appellant offers a naked assertion that the public interest will be served by a stay, yet Appellant offers no factual or legal support for this assertion. Therefore, the Appellant has not carried its burden of establishing that a stay would be in the public interest. Accordingly, the Court has considered the four

factors and concludes that none supports entry of a stay pending appeal.

B. Suspension of Proceedings

An order suspending proceedings under Rule 8007(e) is committed to the discretion of the bankruptcy court. 10 Collier on Bankruptcy ("Collier") ¶ 8007.12 (16th ed. 2019). "[W]hile the Court should not consider matters which would interfere with an appeal and the jurisdiction of the appellate court, 'the court does have jurisdiction over, and should proceed with other aspects of the case.'" In re Murff, 2016 WL 5118280, at *3 (Bankr. N.D. Ga. 2016) (citing In re Demarco, 258 B.R. 30, 32 (Bankr. M.D. Fla. 2000)). To deny the bankruptcy court of jurisdiction of different parts of the case "would inure unjustly to the benefit of any party whose interests were furthered by delay." In re Strawberry Square Associates, 152 B.R. 699, 702 (Bankr. E.D.N.Y. 1993). While "[a] stay pending appeal is designed to keep an appellant's position from eroding while the issues on appeal are decided" that "stay should not operate to give an appellant a tactical advantage it would not have enjoyed had it been successful in the lower court." Id. at 702.

In considering a motion to suspend other proceedings in the case under Rule 8007(e), courts have applied the same standards as those for imposing a stay pending appeal. See Collier ¶ 8007.12 n.4; see also In re Cherrett, 2016 WL 10744700, at *1 (Bankr. C.D.

Cal. Oct. 6, 2016) ("When analyzing requests to stay or suspend proceedings under Bankruptcy Rule 8007(e), bankruptcy courts consider the [four preliminary injunction] factors."); In re Junk, 533 B.R. 639, 642 (Bankr. S.D. Ohio 2015) (applying the test for whether to grant a preliminary injunction to a request to suspend other proceedings under Rule 8007(e)).[5]

Once again, it is entirely unclear from the Stay Motion which specific "proceedings" Appellant wishes to suspend. Debtor correctly points out in her response that Appellant over-broadly requests that the Court stay "all proceedings against it and/or its attorney." For the reasons set forth above, Appellant has failed to meet its burden to justify the Court suspending the proceedings in this case. The Court may determine the viability of Appellant's underlying claim without intruding on the automatic stay issues under appeal, and Debtor's current plan proposes to pay Appellant's allowed secured claim in full. Whether Appellant willfully violated the automatic stay or not, and whether the Court committed any error of fact or law in assessing the discretionary punitive damages in this case therefore do not affect the other matters before the Court. Any decision arising out of the show cause hearing scheduled for February 13, where the Court will

[5] The court in Junk, as it was required to do under Sixth Circuit precedent, determined that the four factors should be balanced, with the absence of any one or more factors not being determinative. Id. As set forth above, the Fourth Circuit no longer permits this balancing approach.

determine whether Mr. Kremer violated Rule 9011, will have no effect on the issues pending before the district court. Rather, any sanctions imposed will be against Mr. Kremer, not his client, and are wholly separate from the automatic stay issues involved in the appeal.

Similarly, the underlying merits of Appellant's claim and the confirmation of Debtor's chapter 13 plan do not interfere with the appeal and jurisdiction of the district court. In fact, a stay of the proceedings would unduly delay confirmation of the case and disbursement of estate funds to other creditors. Suspending Debtor's entire chapter 13 case and plan because Appellant violated the automatic stay would be decidedly inequitable.

IT IS THEREFORE ORDERED that the Stay Motion is denied, and all hearings scheduled for February 13, 2020, in this case shall continue as scheduled.

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