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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

TIMOTHY GENS,
Appellant,
v.
DORIS KAELIN,
Appellee.

Case No. [17-cv-03616-BLF](#)

**ORDER DENYING MOTION FOR
STAY PENDING APPEAL**

[Re: ECF 4]

United States District Court
Northern District of California

Appellant Timothy Gens appeals an order issued in his wife’s bankruptcy case: Order Granting Trustee’s Motions to (1) Sell Real Property and Pay Fees, Costs, Taxes, and Commissions, Other than the Lien of Wells Fargo, and (2) Sell Free and Clear of Claims, Liens, and Interests (“Sale Order”). *See* Notice of Appeal, ECF 1-1. Appellant seeks a stay of that order pending appeal. Although styled as an application for temporary restraining order (“TRO”), Appellant’s motion asserts that Appellant will suffer “immediate and concrete irreparable harm . . . if a stay of the Sale Order pending appeal is not issued.” Appellant’s Ex Parte Emergency Application for a TRO Pending Appeal (“Stay Motion”) at 2, ECF 4. Appellant’s Stay Motion is DENIED for the reasons discussed below.

I. BACKGROUND

Appellant filed this pro se appeal of the bankruptcy court’s Sale Order on June 19, 2017. *See* Notice of Appeal, ECF 1-1. He also filed an application for TRO pending appeal. *See* Application for TRO, ECF 1-5. The appeal and TRO application initially were referred to the Bankruptcy Appellate Panel, but subsequently they were transferred to this Court pursuant to a Statement of Election filed by the Chapter 7 Trustee. *See* Notice of Referral to Bankruptcy Appellate Panel, ECF 1-4; Statement of Election, ECF 1-3. This Court denied the TRO

1 application without prejudice on the basis that Appellant had not presented the TRO application to
2 the bankruptcy court in the first instance as required by Federal Rule of Bankruptcy Procedure
3 8007. *See* Order Denying Application for TRO, ECF 3. Appellant subsequently filed a TRO
4 application in the bankruptcy court, which the bankruptcy court construed as a stay motion and
5 denied by written order on July 14, 2017. *See* Bankruptcy Court’s Order Denying Timothy Gens’
6 Motion for Stay Pending Appeal, ECF 416 in Case No. 15-br-53563. On the same date, Appellant
7 filed the present Stay Motion in this Court. *See* Stay Motion, ECF 4. The Stay Motion was
8 docketed and received by the undersigned on July 17, 2017.

9 **II. LEGAL STANDARD**

10 A motion for a stay pending appeal ordinarily must be brought in the bankruptcy court in
11 the first instance. Fed. R. Bankr. P. 8007(a). If a party moves for such relief in the district court,
12 “[t]he motion must: (A) show that moving first in the bankruptcy court would be impracticable;
13 or (B) if a motion was made in the bankruptcy court, either state that the court has not yet ruled on
14 the motion, or state that the court has ruled and set out any reasons given for the ruling.” Fed. R.
15 Bankr. P. 8007(b)(2).

16 Where the bankruptcy court has denied a motion for a stay pending appeal, the district
17 court may grant a stay only if it determines that the bankruptcy court’s denial was an abuse of
18 discretion. *See In re Wymer*, 5 B.R. 802, 808 (9th Cir. B.A.P. 1980) (“It is . . . important to the
19 properly functioning bankruptcy court that the trial judge’s rulings on stays pending appeal be
20 disturbed only in the event of error or abuse of discretion.”); *In re North Plaza, LLC*, 395 B.R.
21 113, 119 (S.D. Cal. 2008) (“Where the bankruptcy court has already denied a stay . . . the
22 appellate court’s review is limited to a simple determination of whether the bankruptcy court
23 abused its discretion.”). “The abuse of discretion standard on review of the bankruptcy court’s
24 order denying a stay encompasses a *de novo* review of the law and a clearly erroneous review of
25 the facts with respect to the underlying issues.” *In re North Plaza*, 395 B.R. at 119.

26 **III. DISCUSSION**

27 **A. Requirements of Rule 8007**

28 Appellant has complied with Rule 8007 only in part. Although he states in his Stay

1 Motion that he first sought relief in the bankruptcy court, and that the bankruptcy court denied his
2 motion, he does not “set out any reasons given for the ruling” of the bankruptcy court. Fed. R.
3 Bankr. P. 8007(b)(2). Because it can access the bankruptcy court’s Order Denying Timothy Gens’
4 Motion for Stay Pending Appeal, this Court will not deny Appellant’s Stay Motion based on his
5 failure to comply fully with Rule 8007.

6 **B. The Bankruptcy Court did not Abuse its Discretion in Denying a Stay**

7 As set forth above, this Court’s consideration of Appellant’s motion for a stay is limited to
8 determining whether the bankruptcy court’s denial of a stay was an abuse of discretion. *See In re*
9 *Wymer*, 5 B.R. at 808; *In re North Plaza*, 395 B.R. at 119. In making that determination, this
10 Court reviews the bankruptcy court’s conclusions of law *de novo* and its factual findings for clear
11 error. *In re North Plaza*, 395 B.R. at 119.

12 Before turning to that review, the Court observes that Appellant does not acknowledge or
13 discuss the abuse of discretion standard. All of his arguments focus on asserted errors in the
14 bankruptcy court’s rationale for granting the Sale Order. However, the issue presented by
15 Appellant’s motion for a stay is not whether the bankruptcy court erred in issuing that order, but
16 whether the bankruptcy court abused its discretion in denying Appellant’s motion for a stay
17 pending appeal of the order. For the reasons discussed below, this Court concludes that the
18 bankruptcy court did not abuse its discretion in denying a stay.

19 **1. The Bankruptcy Court Applied the Correct Legal Standards**

20 In order to conduct a *de novo* review of the bankruptcy court’s conclusions of law, this
21 Court must determine the correct legal standards and then decide whether the bankruptcy court
22 applied those legal standards in denying Appellant’s motion for a stay.

23 The Court first addresses the standard applicable to a motion for a stay pending appeal.
24 When considering such a motion, a court must consider four factors: “(1) whether the stay
25 applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the
26 applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will
27 substantially injure the other parties interested in the proceeding; and (4) where the public interest
28 lies.” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks and citation omitted).

1 The first two factors are the most critical. *Id.* However, “[t]he party moving for a stay has the
2 burden of proof on each of these elements, and the movant’s failure to satisfy one prong of the
3 standard dooms the motion.” *In re Silva*, No. 9:10-bk-14135-PC, 2015 WL 1259774, at *4 (C.D.
4 Cal. Mar. 17, 2015); *see also In re Rivera*, No. 5:15-cv-04402-EJD, 2015 WL 6847973, at *2
5 (N.D. Cal. Nov. 9, 2015) (“a failure on any one factor dooms the motion”) (internal quotation
6 marks and citation omitted).

7 “A stay is not a matter of right, even if irreparable injury might otherwise result.” *Nken*,
8 556 U.S. at 433 (internal quotation marks and citation omitted). “It is instead an exercise of
9 judicial discretion, and the propriety of its issue is dependent upon the circumstances of the
10 particular case.” *Id.* (internal quotation marks, citation, and brackets omitted). The party seeking
11 a stay bears the burden of showing that the circumstances justify a stay. *Id.* at 433-34.

12 The bankruptcy court applied this standard in evaluating Appellant’s motion for stay,
13 citing *Nken* in its written order and reciting the four-factor test set forth therein. *See* Bankruptcy
14 Court’s Order Denying Timothy Gens’ Motion for Stay Pending Appeal at 2-3, ECF 416 in Case
15 No. 15-br-53563. Moreover, with respect to the first *Nken* factor, the bankruptcy court stated
16 correctly that the movant must show, at a minimum, that he has a “substantial case for relief on the
17 merits.” *Id.* at 3 (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011)).

18 **2. The Bankruptcy Court’s Factual Findings are not Clearly Erroneous**

19 Having determined that the bankruptcy court applied the correct legal standards, the Court
20 next must determine whether the bankruptcy court’s factual findings are clearly erroneous. The
21 bankruptcy court determined that Appellant had not shown a substantial case for relief on the
22 merits of his appeal because his stay motion was “almost entirely composed of copied-and-pasted
23 text” from previous filings. Bankruptcy Court’s Order Denying Timothy Gens’ Motion for Stay
24 Pending Appeal at 4, ECF 416 in Case No. 15-br-53563. The bankruptcy court found that
25 Appellant’s stay motion was “a simple rehash of arguments that were explicitly rejected in the
26 Bankruptcy Court’s Sale Orders,” and that Appellant “neither advance[d] any new arguments nor
27 suggest[ed] any previously unasserted error in the Bankruptcy Court’s reasoning.” *Id.* With
28 respect to Appellant’s lien validity argument, the bankruptcy court concluded that the argument

1 was waived because it had not been raised in opposition to the motions that resulted in the Sale
2 Order. *Id.* at 3. The bankruptcy court also noted that it repeatedly had ruled that the lien validity
3 argument was untenable when it was raised in other contexts throughout the case. *Id.* at 4.

4 The bankruptcy court’s characterization of Appellant’s stay motion is supported by the
5 record and, in particular, Appellant’s Objection to Motion for Authority to (I) Enter into Purchase
6 and Sale Agreement for Real Property, Subject to Overbid; (II) Pay Fees, Costs, Taxes and
7 Commissions Related to Sale of Real Property, ECF 331 in Case No. 15-br-53563; the bankruptcy
8 court’s Order Overruling Objections to Claims of Wells Fargo Bank, ECF 109 in Case No. 15-br-
9 53563; and the bankruptcy court’s Order Granting Wells Fargo’s Second Motion for Allowance of
10 Postpetition Attorney’s Fees and Costs, ECF 368 in Case No. 15-br-53563. Repetition of
11 arguments previously made and rejected is insufficient to satisfy the first *Nken* factor. *See Griffen*
12 *v. Harrington*, No. CV 10-08753-VBF-SP, 2013 WL 3873958, at *3 (C.D. Cal. Jan. 18, 2013)
13 (first *Nken* factor not satisfied where “respondent’s brief in support of a stay pending appeal
14 merely reasserts arguments . . . which this Court discussed and rejected” in a prior order).

15 Based on the record before it, the Court concludes that there is ample support for the
16 bankruptcy court’s factual finding that Appellant’s stay motion was merely a rehash of arguments
17 previously made and rejected. That factual finding supports the bankruptcy court’s determination
18 that Appellant failed to show a likelihood of success on the merits. Failure to satisfy even one
19 factor of the four-factor test dooms a motion for a stay. *See In re Silva*, 2015 WL 1259774, at *4;
20 *In re Rivera*, 2015 WL 6847973, at *2. Accordingly, the Court need not reach the other factors to
21 conclude that the bankruptcy court did not abuse its discretion in denying Appellant’s motion for a
22 stay pending appeal.

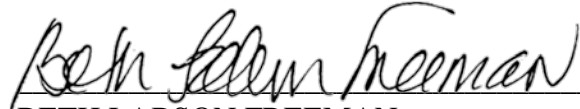
23 Appellant clearly is desperate to prevent the sale of his home, and his arguments reflect a
24 strong belief that the bankruptcy court erred in issuing the Sale Order that is the subject of his
25 appeal. However, those arguments are misplaced here. This Court’s task is limited to determining
26 whether the bankruptcy court abused its discretion in denying a stay pending appeal. Appellant
27 has not demonstrated – or even argued – that the bankruptcy court did abuse its discretion and
28 therefore he cannot prevail on his motion.

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IV. ORDER

Appellant's motion for a stay pending appeal is DENIED.

Dated: July 18, 2017



BETH LABSON FREEMAN
United States District Judge