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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IN RE:

SK FOODS, L.P.,
Debtor.

SCOTT SALYER, et al.,
Appellants,

v.

SK FOODS, L.P., et al.,
Appellees.

CIV. S-11-2987 LKK

O R D E R

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I. BACKGROUND

On July 11, 2011, this court considered the Bankruptcy Court’s decision to approve the compromise the Trustee had reached with the Bank of Montreal (“BMO,” as agent for the secured lender creditors). See Salyer v. SK Foods, L.P. (In re SK Foods, L.P.), Civ. S-10-3467-LKK (E.D. Cal. July 11, 2011). In the compromise, the Trustee would turn over to BMO certain accounts receivables and other assets, make a cash payment to BMO of \$2.4 million and grant

1 BMO a "super-priority claim" of \$27.66 million. In exchange for
2 that, BMO would get in line with the un-secured non-priority
3 creditors in hopes of getting paid the remainder of the
4 \$190 million it lent SK Foods.

5 This court remanded the matter to the Bankruptcy Court with
6 instructions to consider the "Brincko Declaration," which the
7 Bankruptcy Court had previously excluded from its consideration of
8 the matter. The Bankruptcy Court has now considered the Brincko
9 Declaration and allowed discovery of Mr. Brincko. On December 21,
10 2011, the Bankruptcy Court again approved the compromise after
11 addressing the Brincko declaration.

12 The Salyer entities again appeal the approval of the
13 compromise to this court. They moved before the Bankruptcy Court
14 for a stay of the order approving the compromise. The Bankruptcy
15 Court denied the motion for a stay. The Salyer entities have now
16 moved this court for a stay.

17 **II. STANDARD**

18 **A. District Court's Standard**

19 Pursuant to Fed. R. Bankr. P. 8005, an appellant seeking a
20 stay of the Bankruptcy Court's order must first present the request
21 to the Bankruptcy Court itself. Where, as here, the Bankruptcy
22 Court denies the stay, the appellant may then bring the motion to
23 the district court, but must "show why the relief ... was not
24 obtained from the bankruptcy judge." Fed. R. Bankr. P. 8005.

25 The Rule does not indicate whether the district court in that
26 case is "reviewing" the Bankruptcy Court's order, or making its own

1 de novo decision. Nevertheless, both sides agree that under Rule
2 8005, this court "reviews" the Bankruptcy Court order denying the
3 stay, and that the "abuse of discretion" standard applies.
4 Appellants cite Bankruptcy Appellate Panel and Eastern District
5 decisions for this proposition, although there appears to be no
6 binding authority. In Ohanian v. Irwin (In re Irwin), 338 B.R. 839
7 (E.D. Cal. 2006), Judge Ishii discussed at length whether the
8 proper standard was "abuse of discretion" or de novo, and concluded
9 that the "abuse of discretion" standard applied.¹ See also
10 Universal Life Church v. U.S., 191 B.R. 433, 444 (E.D. Cal. 1995)
11 (Wanger, J.), citing (Wymer v. Wymer) In re Wymer, 5 B.R. 802, 807
12 (9th Cir. BAP 1980).

13 The Bankruptcy Appellate Panel for the Ninth Circuit has also
14 held that the "abuse of discretion" standard applies here. Wymer
15 v. Wymer (In re Wymer), 5 B.R. 802, 807 (9th Cir. BAP 1980). The
16 Wymer decision however, relies entirely upon decisions from 1894
17 to 1963,² none of which involved bankruptcy cases, or addressed the
18 standard the district court should use when the bankruptcy court
19 had denied the request for a stay. Wymer does not address whether
20 the principles taken from those cases - on appeals of district

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22 ¹ Judge Ishii found no binding authority on the issue, but
23 also found that most district courts in the Ninth Circuit have used
the abuse of discretion standard.

24 ² Sommer v. Rotary Lift Co., 58 F.2d 765 (9th Cir. 1932);
25 American Strawboard Co. V. Indianapolis Water Co., 81 F. 423 (7th
26 Cir. 1894); Hormann v. Northern Trust Co., 114 F.2d 118 (7th Cir.),
cert. denied, 311 U.S. 713 (1940); U.S. v. Platt Contracting Co.,
324 F.2d 96 (1st Cir. 1963); Chadeloid Chem. Co. V. H.B. Chalmers
Co., 242 F. 71 (2d Cir. 1917).

1 court stay denials - carry over to modern bankruptcy practice.

2 Nevertheless, the court is aware of no authority to indicate
3 any other standard of review, and accordingly it will adopt the
4 "abuse of discretion" standard in reviewing the bankruptcy court's
5 denial of the stay.

6 **B. Bankruptcy Court's Standard**

7 Both sides agree on the standard that the Bankruptcy Court was
8 required to use in determining the stay motion, specifically, a
9 standard drawn from the preliminary injunction context:

10 The seeker of the stay ... has the burden of showing (1)
11 he is likely to succeed on the merits of the appeal; (2)
12 he will suffer irreparable injury; (3) no substantial
13 harm will come to Appellee; and (4) the stay will do no
14 harm to the public interest.

15 In re Irwin, 338 B.R. at 845. Once again, there does not seem to
16 be Ninth Circuit authority on the issue. However an appeal from
17 this bankruptcy case was previously decided by Judge England, in
18 SS Farms, LLC v. Sharp (In re SK Foods, L.P.), 2009 WL 5206639
19 (E.D. Cal. December 24, 2009). In determining the motion for a
20 stay of the Bankruptcy Court's order, Judge England applied the
21 Irwin standard. This court will accord Judge England's
22 determination "law of the case" stature even though it was made in
23 a different adversary proceeding. In the absence of any argument
24 to the contrary from the parties, the court determines that it
25 would be too disruptive to have different appellate standards apply
26 to the various appeals from a bankruptcy case, depending solely

1 upon which district judge happened to hear the appeal of the
2 particular adversary matter at issue.

3 **IV. ANALYSIS**

4 **A. Likelihood of Success on the Merits.**

5 Appellants cannot establish the first factor - their
6 likelihood of success on the merits of the appeal.³ On the appeal,
7 this court will review the Bankruptcy Court's approval of the
8 compromise for an abuse of discretion. Martin v. Kane (In re A &
9 C Properties), 784 F.2d 1377, 1380 (9th Cir.) ("the bankruptcy
10 court's order approving the trustee's application to compromise the
11 controversy is reviewed for an abuse of discretion"), cert. denied,
12 479 U.S. 854 (1986).

13 The Bankruptcy Court has now permitted discovery on the
14 Brincko Declaration, and considered the declaration in reaching its
15 conclusion. In its new decision approving the compromise, the
16 Bankruptcy Court sets out a detailed analysis of the Brincko
17 declaration and how it affects the determination of whether to
18 approve the compromise. The Bankruptcy Court accordingly appears
19 to have done exactly what it was supposed to do in deciding the
20 motion. The crux of the Salyer entities' objection to the
21 Bankruptcy Court decision, as they succinctly stated at oral
22 argument, is that the Bankruptcy Court "got it wrong." That is not

24 ³ Appellants agree that they must establish their "likelihood"
25 of success on the merits. However, they go on to argue that they
26 have a "fair chance" of success on the merits. Whichever standard
applies does not matter, because appellants have not made their
case using either formulation.

1 sufficient to establish a likelihood of success on the merits.

2 In any event, the Bankruptcy Court reasonably found that
3 Appellants' arguments for a stay ignored critical evidence the
4 Bankruptcy Court considered, and improperly characterized its
5 overall view of the evidence before the court, and its role in
6 considering the motion to approve the compromise. In short, the
7 Bankruptcy Court reasonably rejected Appellants' assertion that,
8 in essence, the court simply made the wrong decision. Given that
9 this court will review the approval under the abuse of discretion
10 standard, it is not enough to argue that the Bankruptcy Court
11 weighed the evidence differently than the Appellants would have.

12 **B. Appellant's Irreparable Harm**

13 Appellant argues that if no stay is granted, its appeal will
14 be mooted. The court has already accepted appellant's contrary
15 argument put forth in the prior appeal, namely that the appeal is
16 not mooted by the absence of a stay. Salyer v. SK Foods, L.P. (In
17 re SK Foods, L.P.), Dkt. No. 21, Civ. S-10-3467 (E.D. Cal. July 11,
18 2011) (Karlton, J.). That decision is the law of the case.

19 **C. The Public Interest.**

20 Appellants argue that a stay will preserve the integrity of
21 the right to appellate review, without further explanation. As
22 best the court can tell, this can only refer to their view that the
23 appeal will be mooted in the absence of a stay. That argument has
24 already been rejected as the law of case.

25 **D. Harm to Appellee.**

26 Appellants argue that no harm will come to Appellee by issuing

1 a stay because the stay merely preserves the status quo.
2 Appellants simply assert that there is no danger of diminution of
3 assets if a stay is issued. They offer no evidence, and make no
4 showing that they could offer such evidence if given the
5 opportunity. The Bankruptcy Court reasonably points out that a
6 stay will "force the estate to incur costs of preserving and
7 prosecuting claims assigned to BMO in the compromise, and render
8 those claims more difficult to prosecute as time passes and
9 evidence - and memories - deteriorate." Accordingly, appellants
10 have failed to show that a stay will cause no harm to the appellee.

11 **IV. CONCLUSION**

12 The Bankruptcy Court did not abuse its discretion in declining
13 to issue a stay. Appellants' motion for stay (Dkt. No.6), is
14 **DENIED.**

15 IT IS SO ORDERED.

16 DATED: January 31, 2012.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT