

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

MARK J. POWELL,

Case No.: 4:23-cv-01755-MWB

Debtor-Appellant

Chapter 11

v.

Bankruptcy Court Case No:
4:23-bk-01417

PS BANK, A/K/A PEOPLES STATE
BANK, A/K/A PEOPLES STATE BANK
OF WYALUSING,

Creditor-Appellee.

**EMERGENCY MOTION FOR STAY OF ORDER AND REIMPOSITION OF AUTOMATIC
STAY PENDING APPEAL AND MEMORANDUM IN SUPPORT**

Pursuant to Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") 8007(b) and 7065, 11 U.S.C. §105, and Federal Rules of Civil Procedure Rule 65, MARK J. POWELL, Debtor-Appellant ("Debtor"), by and through undersigned counsel, hereby respectfully moves this Court to enter an expedited order, pending appeal, staying enforcement of the Bankruptcy Court's Order Denying in Part and Granting in Part the Motion of Debtor to Continue the Automatic Stay, Doc. 74 ("Order") entered on September 29, 2023, to the extent that the Order denied the Debtor's 11 U.S.C. 362 (c) (3) (B) motion to continue the automatic stay as to the secured Creditor PS Bank, a/k/a Peoples State Bank, a/k/a Peoples State Bank of Wyalusing (the "Bank"), and further requests that this Court reimpose the automatic stay

as to the Bank pending resolution of the instant appeal. In support of this motion the Debtor states as follows:

FACTUAL BACKGROUND

1. The Debtor previously filed a voluntary petition under Chapter 12 of the Bankruptcy Code on May 23, 2022 to number 4:22-bk-00953 MJC (the "Prior Bankruptcy Filing").

2. The Prior Bankruptcy Filing was dismissed on October 17, 2022.

3. The Prior Bankruptcy Filing was prior to the pending case for the purpose of 11 U.S.C. § 362(c)(3) (A and B).

4. Following the Prior Bankruptcy Filing, the Debtor-in-Possession's income from his trucking operation increased dramatically over what it was during prior years. See Doc. 7-1, "Affidavit", appended hereto as Exhibit A.

5. The Debtor concluded that the increase and expected continued increase in income would enable him to fund a Chapter 11 Plan. See Affidavit.

6. On June 25, 2023 ("Petition Date"), the Debtor commenced a voluntary case under Chapter 11 of the Bankruptcy Code. Doc. 1, appended hereto as Exhibit B.

7. The voluntary petition filed in the Pending Bankruptcy Case disclosed the prior bankruptcy filing. Id.

8. At the time of the Bankruptcy filing in the pending bankruptcy, Creditor PS Bank, a/k/a Peoples State Bank, a/k/a

Peoples State Bank of Wyalusing (the "Bank") had a pending Complaint in Mortgage Foreclosure against Debtor and a Sheriff Sale scheduled for June 28, 2023 on business equipment of Debtor secured by the Bank. Affidavit; Doc. 84, Transcript of Hearing appended hereto as Exhibit C ("Tr.") at pp. 75-76.

9. On June 25, 2023, the Debtor filed his Motion to Continue Stay with the Bankruptcy Court seeking entry of an Order pursuant to 11 U.S.C. 362 (c) (3) (B) continuing the automatic stay as in effect as to all creditors as to the Debtor-in-Possession, and all property of the Debtor-in-Possession, from and after the Petition Date, on the grounds that the Pending Bankruptcy was filed in good faith. Doc. 7, appended hereto as Exhibit D.

10. On August 30, 2023, the Bank filed an objection to the Motion to Continue Stay (the "Objection") with the Bankruptcy Court, asserting that the Debtor had failed to establish with clear and convincing evidence that he had filed his bankruptcy in good faith with respect to the Bank. Doc. 52, appended hereto as Exhibit E.

11. On September 24, 2023 the Debtor filed an Answer to the Objection. Doc. 63, appended hereto as Exhibit F.

12. The Debtor's Answer incorporated by exhibit a comparative profit and loss statement showing that his income had doubled for the period ending in September of 2023 from what

it had been during the prior year. Doc. 63-1, appended hereto as Exhibit G.

13. The Bank filed a Response on September 27, 2023. Doc. 68, appended hereto as Exhibit H.

14. On September 28, 2023, the Bankruptcy Court held a hearing on the Motion to Continue Stay and heard evidence presented by the Debtor and the Bank. Tr. p. 1.

15. The Debtor presented his own testimony (Tr. at pp. 49-85) as well as the testimony of Richard M. Fairly, CPA. Tr. pp. 10-44.

16. The Debtor submitted the following exhibits, all of which were admitted into evidence:

- a. Exhibit D-1 Profit and Loss for 12 Months (Doc. 50-3, attached hereto as Exhibit I);
- b. Exhibit D-2 Schedules I and J as amended; (Doc. 69, attached hereto as Exhibit J);
- c. Exhibit D-3 Balance Sheet; (Doc. 50-5, attached hereto as Exhibit K);
- d. Exhibit D-4 Motion to Continue Stay; (Exh. D);
- e. Exhibit D-5 Affidavit of Debtor; (Exh. A);
- f. Exhibit D-6 2022 Tax Return (Doc. 50-8, attached hereto as Exhibit L);
- g. Exhibit D-7 Profit and Loss previous year comparison. (Exh. G);

Tr. at p. 92.

17. Both the Debtor and Mr. Fairley testified on direct examination to the accuracy of figures showing that the Debtor's trucking income had increased threefold from 2019¹ and his net disposable pretax income had doubled for 2023 as compared with a similar period in 2022. Tr. pp. 16-18; 21-22; 50-54.

18. The Debtor testified on direct examination that the realty taxes he paid in 2022 were for three years and that the annual current realty tax was between \$3500 and \$4500. Tr. pp. 53-54, 82. He also testified that his fuel expense was reduced because his current trucking was for shorter distances so the fuel expense was less than it had been previously. Tr. pp. 51-52.

19. On cross-examination, counsel for the Bank pointed out that the fuel and realty tax went down for 2023 from what it was

¹ There was a brief colloquy between undersigned counsel and the Court on page 95 of the transcript wherein the Court asked undersigned counsel to identify the evidence showing that the Debtor's trucking income was up, and undersigned counsel erroneously directed the Court to Debtor's Exhibit D-7, the Profit and Loss Prior Year Comparison, which shows an increase in the Debtor's total net income, but a decrease in the Debtor's trucking income during the period from October 17, 2022 through September 26, 2023, from the same period for the prior 12 months. Undersigned counsel intended to also direct the Court to the Debtor's affidavit, Debtor's Exhibit D-5, paragraphs 7 and 8, which reflects a significant increase in the Debtor's trucking income in the 2022 tax year from the 2021 tax year. The Profit and Loss Prior Year Comparison does not reflect the Debtor's trucking income for the full 2023 tax year. The Debtor testified that he expected his trucking income for the 2023 tax year to reach \$129,000 by the end of the fourth quarter. Tr. at p. 52. Thus, although undersigned counsel conceded that the Profit and Loss Prior Year Comparison does not show an increase in trucking income (Tr. at p. 95), the evidence as a whole nonetheless showed an increase in the Debtor's trucking income.

in 2022 yet the accountant and the Debtor testified that the trucking income increase threefold from 2019 and net disposable pretax income doubled for 2023 as compared with a similar period in 2022. Tr. at pp. 34-36.

20. Mr. Fairley testified on cross-examination that he took the amounts of the Debtor's income and expense from the bank statements (Tr. at pp. 12-13), and testified on redirect that he had not performed a full audit because the cost of such an audit would be approximately \$5000 for each year. Tr. at pp. 41-42.

21. The Bank introduced as its exhibit the Notice of Sherriff's Sale, which was admitted. Tr. at p. 93.

22. On September 28, 2023, the Bankruptcy Court denied the Debtor's Motion to Strike the Objection, and granted in part and denied in part the Debtor's Motion to Continue Stay, in that the latter was granted as to all creditors except the Bank. Tr. pp. 99-105. The Court's findings and conclusions were stated in open court pursuant to FRBP 7052.

23. In pertinent part, the Bankruptcy Court found that the evidence adduced by the Debtor did not meet a "clear and convincing" standard. (Tr. at pp. 19, 20, and 97). The Bankruptcy Court indicated that the Debtor's failure to introduce his prior tax returns as referenced by the accountant

for the years 2019,2020, 2021, and all bank statements for those years, was material to its decision. Tr. pp. 18-19, 57

24. On September 29, 2023, the court entered its written Order, denying the Debtor's motion as to the Bank and granting it as to all other creditors. Doc. 74, appended hereto as Exhibit M.

25. On October 12, 2023, the Debtor filed a Notice of Appeal to this Court. Doc. 79, appended hereto as Exhibit N.

26. On October 12, 2023, the Debtor filed his Motion for Leave to Appeal, which is still pending. Doc. 78, appended hereto as Exhibit O.

27. On October 17, 2023, the Debtor filed a Motion for Stay of Order and Reimposition of Automatic Stay Pending Appeal in the Bankruptcy Court. Doc. 86, appended hereto as Exhibit P.

28. The Bankruptcy Court has not yet ruled on the motion.

29. The Sheriff's sale of substantially all of Movant's equipment has now been rescheduled for November 22, 2023.

ARGUMENT

Bankruptcy Rule 8007(b) provides that a party may move in the District Court where the appeal is pending for a stay of an order of the Bankruptcy Court pending appeal or an order granting an injunction while an appeal is pending. Pending appeal, this Court should stay enforcement of the Bankruptcy

Court's Order, to the extent that the Order lifted the automatic stay as to the Bank, and reimpose the automatic stay.

A lapsed stay may be reimposed under the equitable provisions of section 105(a), provided that the debtor has properly applied for such injunctive relief. In re Wedgewood Realty Grp., Ltd., 878 F.2d 693, 701 (3d Cir. 1989). In order to obtain section 105(a) injunctive relief, the debtor "has the burden of demonstrating to the court the following: substantial likelihood of success on the merits, irreparable harm to the movant, harm to the movant outweighs harm to the nonmovant, and injunctive relief would not violate public interest." Id. at 700-01.

I. The Debtor is Likely to Succeed on the Merits of His Appeal.

The Debtor is likely to succeed on the merits of his appeal, as the Bankruptcy Court abused its discretion in denying continuance of the automatic stay because it held the Debtor to the wrong evidentiary standard as to the issue of "bad faith" under 11 U.S.C. 362 (c) (3) (B).

In In re Bowman, 555 B.R. 918, 922 (Bankr. S.D. Ga. 2016), the court succinctly described the Debtor's burden to show good faith under 11 U.S.C. § 362 as follows:

The standard of proof that the moving party must meet to prove good faith depends on whether or not the statutory presumption of 11 U.S.C. § 362(c)(3)(C) applies in the

particular case. Section 362(c)(3)(C) identifies several circumstances that will trigger the presumption that the case was filed not in good faith. If one or more of those specific conditions are present, the movant must rebut the presumption by clear and convincing evidence. However, if no presumption arises, the moving party must only carry its burden of proof by a preponderance of the evidence.

Section 362(c)(3)(C)(i) lists the following circumstances that will trigger the presumption as to all creditors:

- the debtor had more than 1 case under chapter 7, 11, or 13 pending during the preceding year;
- the debtor's previous case under chapter 7, 11, or 13 was dismissed during the preceding year after the debtor failed to: file or amend the petition or other documents without substantial excuse, provide adequate protection as ordered by the court, or to perform the terms of a confirmed plan;² or
- since the dismissal of the debtor's next most previous case under chapter 7, 11, or 13 there has not been a substantial change in the financial position or personal affairs of the debtor or any other reason to conclude that the present case will conclude with either a discharge under chapter 7 or a confirmed and fully performed plan under chapter 11 or chapter 13.

In re Bowman, 555 B.R. 918, 922 (Bankr. S.D. Ga. 2016).

In Bowman, the court found that because, *inter alia*, the debtor had not had "more than one case pending within the one year preceding the filing of this current case," the presumption of bad faith did not apply and the debtor was only required to show good faith by the preponderance of the evidence. *Id.* at 922.

In re Ferguson, 376 B.R. 109, 120 n.20 (Bankr. E.D. Pa. 2007), a Pennsylvania bankruptcy court agreed with *Bowman* that “[w]hether the standard of proof is ‘clear and convincing’ or a ‘preponderance of the’ evidence depends on whether the rebuttable presumption has arisen that the case has been filed ‘not in good faith.’ See 11 U.S.C. §§362(c)(3)(C)(i)(III)(bb), 362(c)(4)(D). Here, as in Bowman, none of the factors giving rise to a presumption of bad faith was present. The Debtor had only one other petition pending within the year preceding her December 16, 2011 petition. This eliminates § 362(c)(3)(C)(i)(I) as a criteria for bad faith. Further, Debtor's previous petition was not dismissed for any of the reasons stated in § 362(c)(3)(C)(i)(II). Finally, Debtor did provide sufficient facts, under a preponderance of the evidence standard,² to

²Section 362(c)(3)(C)(i)(III) does not require the Debtor to prove changed financial circumstances by “clear and convincing evidence.” Pennsylvania courts have not addressed the debtor’s burden to show changed financial circumstances under Section 362(c)(3)(C)(i)(III) but courts addressing the issue have found that the debtor must only do so by a preponderance of the evidence. See In re Charles, 334 B.R. 207, 216 (Bankr. S.D. Tex. 2005) (“The statute does not address what standard of proof applies in determining whether one of the presumption factors exists and the statute does not address which party has the burden of proof with respect to the presumption factors. Absent a statute or rule to the contrary, the burden of proof in a bankruptcy case is by a preponderance of the evidence... Inasmuch as the statute does not dictate an alternate standard, the Court requires proof by a preponderance of the evidence to determine if the presumption against [the debtor] arises.”)

indicate that his changed financial circumstances would enable him to successfully complete a Chapter 11 Plan. Section 362(c)(3)(C)(i)(III) is therefore eliminated as an indication of bad faith.

Because none of the criteria in 11 U.S.C. § 362(c)(3)(C)(i) were shown to be present, the presumption of bad faith does not arise, and the Debtor asserts that as a result, as held in Ferguson, his good faith in filing should have been judged under 11 U.S.C. § 362(c)(3)(B) by a preponderance of the evidence. However, the Bankruptcy Court incorrectly applied the stricter, "clear and convincing" standard.

II. Irreparable Harm Would Result to the Debtor if the Stay is Not Reimposed, Which Outweighs Harm to the Bank, and Injunctive Relief Would Not Violate the Public Interest.

Irreparable harm to the Debtor would result if the stay is not reimposed, which outweighs any potential harm to the Bank. As set forth at greater length the Debtor's Motion for Leave to Appeal, if the Bank is relieved from the automatic stay at this stage in the litigation, the Bank would liquidate virtually all the Debtor's assets, both real and personal, rendering any appeal moot. The Sheriff's sale of substantially all of Movant's equipment has now been rescheduled for November 22, 2023, making the reimposition of the stay pressing. Additionally, if the stay is not reimposed, the Debtor will be required to resort to extensive state court litigation as to whether the mortgage foreclosure action as filed will or will not proceed to

judgment, resulting in significant costs to all parties. If the Debtor prevails on his appeal and the stay is extended, the Debtor can file a plan providing for the repayment of the Bank loans in an orderly fashion, subject to the requirements of the Bankruptcy Code, thereby avoiding any further litigation. If the Debtor does not prevail on the appeal the stay can again be lifted and the Bank will suffer only minimal inconvenience as a result of the delay.

The injunctive relief requested would not violate the public interest, and would advance the public interest in the proper administration of bankruptcy cases. See In re Daily Corp., 72 B.R. 489, 491 (Bankr. E.D. Pa. 1987) (Noting the existence of such a public interest because “[i]n contrast to general civil litigation, where cases affect only two or a few parties at most, bankruptcy cases may affect hundreds of scattered and ill-represented creditors” and therefore “active supervision is essential”).

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Movant respectfully requests that this Court (1) schedule such hearings or other procedures necessary to enter the requested relief prior to the Sheriff's sale of substantially all of Movant's equipment scheduled for November 22, 2023; (2) enter an order, pending resolution of the Debtor's appeal, staying enforcement

of the Bankruptcy Court's Order Denying in Part and Granting in Part the Motion of Debtor to Continue the Automatic Stay to the extent that the Order denied the Debtor's 11 U.S.C. 362

(c) (3) (B) motion to continue the automatic stay as to the Bank, and reimposing the automatic stay; and (3) grant such other and further relief as is just and proper.

Dated: October 31, 2023
Wilkes-Barre, Pennsylvania

Respectfully submitted,

/s/ C. STEPHEN GURDIN, JR.

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