UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

IN RE:

LOUIS PAUL MASSA,

Debtor.

BK. NO. 92-21841
CHAPTER 7 CASE (CONVERTED FROM CHAPTER 13 TO CHAPTER 11 AND THEN FROM CHAPTER 11 TO CHAPTER 7)

On December 22, 1992 Louis Paul Massa (the "Debtor") appealed from a December 17, 1992 Order of the Bankruptcy Court denying his motion filed on November 16, 1992 to reinstate the automatic stay provided by Section 362 of the Bankruptcy Code as it affected the rights of The Canandaigua National Bank and Trust Company ("Canandaigua National") as a secured creditor. The automatic stay which the Debtor wished to have reinstated had been terminated to allow Canandaigua National to proceed with a foreclosure of its mortgage on 4100 West Lake Road, Canandaigua, New York ("West Lake Road") in accordance with an October 21, 1992 Order of the Bankruptcy Court which provided for the termination of the automatic stay for cause if the Debtor failed to comply with certain payment provisions of the Order. The October 21, 1992 Order confirmed an adequate protection stipulation and agreement entered into between the Debtor and Canandaigua National at a hearing before the Bankruptcy Court on October 9, 1992. Canandaigua National had moved to terminate the automatic stay and/or for adequate protection due to the Debtor's substantial mortgage payment delinquencies. At that hearing, the details of the adequate protection stipulation and agreement were placed on the record in open court and both the Debtor and a senior officer of Canandaigua National confirmed on the record that they fully understood the agreement, were bound by its provisions and knew that an order was to be entered confirming those terms and provisions.

West Lake Road is due to be sold at a State Court foreclosure sale scheduled on February 25, 1993 and the Debtor, pursuant to Rule 8005 of the Rules of Bankruptcy Procedure which adopts Rule 62 of the Federal Rules of Civil Procedure or pursuant to Section 105 of the Bankruptcy Code to the extent that it may be the kind of "other relief" provided for by Rule 8005, has come before the Court requesting

a stay of the sale of West Lake Road pending the hearing on his appeal of this Court's December 17, 1992 Order denying the Debtor's motion to reinstate the automatic stay.

A stay of this Court's December 17, 1992 Order denying the Debtor's motion to reinstate the automatic stay if granted pursuant to Rule 8005 will not result in a stay of the State Court foreclosure sale scheduled for February 25, 1993. No appeal was taken from this Court's October 21, 1992 Order which is the order that terminated the automatic stay without the need for a further Court order when it was not complied with. Arguably, therefore, the Debtor's motion is a motion for an injunction pursuant either to this Court's broad equity powers under Section 105 of the Bankruptcy Code or "other relief" available under Rule 8005.

Notwithstanding the procedural infirmities presented by the Debtor's current motion, whether to grant a stay pending appeal pursuant to Rule 8005 of the Rules of Bankruptcy Procedure or to grant an injunction are clearly within the discretion of the Bankruptcy Court, and require the evaluation of four factors, as follows: 1) the likelihood that the party seeking the stay or injunction will prevail; 2) the prospect of irreparable injury to the moving party which might result without the stay or injunction; 3) the relative certainty that no substantial harm will come to other parties if the stay or injunction is issued; and 4) the relative absence of harm to the public interest if the stay or injunction is granted. Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970).

Each of these four factors when carefully considered must be resolved against the Debtor.

This Court believes that there is virtually no likelihood that the Debtor can or will succeed on his appeal of this Court's December 17, 1992 Order. Section 362(d)(1) of the Bankruptcy Code provides that the Court may terminate the automatic stay for cause, including a lack of adequate protection. This basis for terminating the automatic stay is a different basis than that provided in Section 362(d)(2) where the Court must find that the Debtor has no equity in the property in question and that such property is not necessary for an effective reorganization. In this case, the value of West Lake Road was never determined by the Bankruptcy Court. This was not only because of the October 9, 1992 adequate protection stipulation and agreement entered into between the Debtor and Canandaigua National, but because of a series of false starts and failures on the part of the Debtor in attempting to reorganize, first mistakenly under Chapter 13, where his petition was jurisdictionally defective, and then under Chapter

11, where the Debtor frequently failed to comply with the directions of this Court, including this Court's direction that it make mortgage payments to Canandaigua National in late August and early October, which payments were never made. As to equity in the property, as alleged by the Debtor, this Court has had filed with it not only the Debtor's appraisal showing a value of $1,150,000 but an equally persuasive appraisal obtained by Canandaigua National for $790,000. Given all of the liens against the property, a value of $790,000 would leave no value for the Debtor or his estate, which is now being administered in a Chapter 7 liquidation proceeding by a trustee. This Court's October 21, 1992 Order confirming the adequate protection stipulation and agreement and providing for the termination of the automatic stay if its provisions were not complied with was agreed to on the record in open court on October 9, 1992. There is no question that the Debtor was aware of the requirements of the agreement and the Order. The Debtor does not deny having failed to timely make the payments required by the Order. The Debtor's excuses, which are nothing more than the latest in a long series of excuses, were considered by the Court in making its determination denying the Debtor's motion to reinstate the stay and found to be without merit and insufficient to warrant the reinstatement of the stay which was terminated pursuant to Section 362(d)(1) for cause.

As to the harm to the public interest if a stay or injunction is granted in this case, it is necessary for the Bankruptcy Court to preserve its own integrity and the integrity of the Bankruptcy System that it stand behind and enforce fully negotiated settlement agreements when confirmed by a Bankruptcy Court order where: (1) all of the parties are represented by counsel; (2) the terms are reasonable; and (3) the Court knows, from hearings before it, that all of the parties are fully aware of and in agreement with the terms of the settlement agreement confirmed by the Court Order and of the consequences of the failure to comply with the agreement and Court Order. It would be detrimental to this Bankruptcy Court and the Bankruptcy System, and thus to the public interest, to allow this Debtor to avoid the consequences of his informed and fully negotiated agreements and his failure to comply with this Court's orders. This

is especially true, when as here, there is otherwise no injustice or inequity based on the overall facts and circumstances of this bankruptcy case.

As to the prospect of irreparable injury to the moving party, as set forth above, the Debtor is currently in a Chapter 7 liquidation proceeding and should obtain a discharge from any personal liability and responsibility for any and all of his debts. If, as set forth above, West Lake Road has a value of only $790,000, the liens against the property alone exceed this value, and therefore there would never be any moneys realized by the Debtor's estate or the Debtor, after all his creditors are paid, in any commercially reasonable disposition of West Lake Road. Property such as West Lake Road is sold at foreclosure sale every day when debtors fail to perform their agreements with their mortgage holders and when the facts and circumstances do not warrant a Bankruptcy Court staying such a foreclosure sale for the benefit of a debtor's creditors or a debtor. In this case, this Debtor's attempts at Chapter 13 and Chapter 11 reorganizations have failed, and there is not sufficient evidence that there is any value in West Lake Road over valid liens even for the Debtor's unsecured creditors let alone the Debtor, or that any such equity if it does exist can be realized in a timely fashion while still providing adequate protection to Canandaigua National.

As to substantial harm to other parties, it is clear from the proceedings which have taken place in this Court and in the New York Supreme Court that the Debtor's actions have caused Canandaigua National to incur substantial expenses in attempting to enforce its lawful contractual rights. In the absence of a clear valuation which indicates that these expenses will ultimately be recoverable on a disposition of West Lake Road, causing additional expenses to be incurred as the result of frivolous and unnecessary litigation may in fact result in a substantial harm to Canandaigua National.

Based on the foregoing and the Debtor's failure to post a supersedes as bond which would provide for the full payment of the amounts due to Canandaigua National, together with all accrued interest and expenses, including reasonable attorney's fees, through the date of full payment of its mortgage, this

Court denies the Debtor's motion for a stay of the State Court foreclosure sale of West Lake Road scheduled for February 25, 1993.

As to the cross-motion of Canandaigua National for Rule 9011 sanctions, this Court believes that whether or not to grant sanctions when a Bankruptcy Court decision is on appeal to the District Court and a motion is made pursuant to Rule 8005 is a determination better made by the District Court sitting as the appeals court. However, if this Court were sitting as the District Court on this matter, it would grant appropriate sanctions for the reasons set forth in the papers filed on behalf of Canandaigua National.

Rule 7052 findings and decision placed on the record by:

HON. JOHN C. NINFO, II
United States Bankruptcy Judge
February 24, 1993