**UNITED STATES BANKRUPTCY COURT**
**WESTERN DISTRICT OF NEW YORK**

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**In Re:**

**SUSAN MESSERSCHMITT f/d/b/a**
**HOWE CREATIVE FLORIST,**

**Debtor.**

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**CASE NO. 92-21820**

**DECISION & ORDER**

## BACKGROUND

On June 30, 1992, the Debtor, Susan Messerschmitt, (the "Debtor") filed a petition initiating a Chapter 13 case.

On August 11, 1992, an Order Confirming the Debtor's Plan (the "Plan") was entered. The Plan as confirmed proposed a voluntary monthly payment to the Chapter 13 Trustee (the "13 Trustee") of $297.00 for the five-year term of the Plan. The Plan also proposed to pay in full the allowed secured claim of a creditor with a lien on the Debtor's automobile, priority tax claims of in excess of $9300.00 and administrative expenses, and then to pay a pro rata distribution to unsecured creditors, estimated to be approximately 12%.

On September 17, 1993, the 13 Trustee filed a Motion pursuant to Section 1307(c) for an order dismissing the Debtor's Chapter 13 case (the "Motion to Dismiss"). The Motion to Dismiss alleged as cause under Section 1307(c) that the Debtor was $2964.00 in arrears in her Plan payments to the 13 Trustee and that the last payment had been received on May 12, 1993.

Although the Court's proceeding memo for the September 27, 1993 hearing on the Motion to Dismiss did not indicate any appearance in opposition to the Motion, and the case file does not contain any papers filed in opposition to the Motion, the proceeding memo indicated the following disposition of the Motion:

> "Debtor has 60 days to bring plan payments current or the case will be dismissed. Thereafter if the debtor misses any payments, the case will be dismissed. Order to be submitted."

On October 13, 1993, a Conditional Order of Dismissal (the "Conditional Order") was entered which indicated that the Debtor's attorney had appeared in opposition to the Motion to Dismiss.[1] The Conditional Order provided, in darker underlined type, the following:

> "...and debtor makes full plan payments by the 25th of each month, payments to commence on October 25, 1993. If any payment is delinquent for more than 10 days from the 25th of any month, the plan will be automatically dismissed; but the court will retain jurisdiction to receive and pass upon the final report of the Trustee and to make such further orders with respect to fees as may be necessary and proper;"

The case file does not indicate that any appeal was taken from the Conditional Order.

On August 24, 1994, a Final Order of Dismissal was entered (the "Order of Dismissal") which indicated that it was being entered because the Debtor had failed to comply with the provisions of the Conditional Order.

On September 12, 1994, a motion was filed on behalf of the Debtor for an order permitting and directing the reinstatement of the Debtor's Chapter 13 case (the "Reinstatement Motion").[2]

At the September 19, 1994 hearing on the Reinstatement Motion, the Court, in its discretion, denied the relief requested by the Debtor because it did not believe that the Debtor has shown the existence of any of the grounds provided for in Rule 60 of the Federal Rules of Civil Procedure or Rule 9024 of the Federal Rules of Bankruptcy Procedure. On September 29, 1994, an Order denying the Reinstatement Motion (the "Order Denying Reinstatement") was entered. That Order, submitted by the 13 Trustee, further provided that the Debtor's Chapter 13 case be closed and that the 13 Trustee's Final Report and Account previously submitted to the Court was deemed sufficient to close

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[1] Based on this wording in the Conditional Order which was submitted by the 13 Trustee, the Court believes that the relief set forth in the Order was agreed to between the Debtor's attorney and the 13 Trustee.

[2] Procedurally, the Reinstatement Motion was in the nature of a motion pursuant to Rule 9024 of the Federal Rules of Bankruptcy Procedure for relief from the Order of Dismissal.

the case. On October 3, 1994 Notice of Entry of the Order Denying Reinstatement was filed.

On October 13, 1994 the Debtor appealed the Order Denying Reinstatement. However, as of November 15, 1994, no appeal of the Order of Dismissal had been filed.

On October 31, 1994, the Debtor filed a motion pursuant to Rule 8005 of the Rules of Bankruptcy Procedure requesting a stay pending appeal (the "Stay Motion"). At the November 7, 1994 return date of the Stay Motion, the 13 Trustee and a creditor of the Debtor, Manufacturers and Traders Trust Company ("M & T"), appeared in opposition to the Motion. After hearing argument, the Court denied the Stay Motion and indicated that an order should be prepared referring to this Decision and Order.

## DISCUSSION

This Court has consistently expressed its view that the Bankruptcy Code and the Bankruptcy System provide debtors with extraordinary legal rights and remedies for which very little is required of them. However, one important requirement that debtors must meet is that they comply with the orders of the Bankruptcy Court. In this case, the Conditional Order clearly and unambiguously set forth the obligation of the Debtor to make future Plan payments in a timely manner, and the consequences (dismissal of the case) if she failed to do so. There were no allegations made in the Reinstatement Motion or at the oral argument on the Motion that the Debtor did not receive a copy of the Conditional Order, had not understood its terms, had actually complied with its terms or had sought relief from its terms in anticipation of her inability to comply.

In addition, there were no allegations made in the Reinstatement Motion or at the oral argument on the Motion that the Debtor had the ability to comply with the terms of the Conditional Order by bringing all Plan payments current for periods on and after October 25, 1994 until a time subsequent to the hearing on the Reinstatement Motion.

Furthermore, the Debtor did not allege or prove the existence of any of the grounds set forth in Rule 60 of the Federal Rules of Civil Procedure or Rule 9024 of the Federal Rules of Bankruptcy Procedure.[3] The Debtor's sole argument on the Reinstatement Motion was that the Final Order of

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[3] Rule 60 of the Federal Rules of Civil Procedure provides:

> (a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.
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> (b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 9024 of the Federal Rules of Bankruptcy Procedure provides:

> Rule 60 F.R. Civ. P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or

Dismissal should be vacated because the Debtor might now be in a position to bring the Plan current, which the Debtor contended would be in her best interests and in the best interests of her creditors. Such a contention did not and does not constitute grounds for relief from an order under Rule 60 of the Federal Rules of Civil Procedure or Rule 9024 of the Federal Rules of Bankruptcy Procedure, nor did it or does it otherwise warrant the Court exercising its discretion as a court of equity to grant such relief.

A request for a stay pending appeal is addressed to the sound discretion of the Court, and requires that the Court take into consideration the following four factors:

1. The likelihood that the party seeking the stay will prevail on appeal;

2. The prospect of irreparable injury to the moving party which might result without the stay;

3. The relative certainty that no substantial harm will come to other parties if the stay were issued; and

4. The relative absence of harm to the public interest if the stay were granted. *See Hirschfield v. Board of Elections,* 984 F.2d 35, 39 (2d Cir. 1993).

When each of these four factors, are carefully considered and balanced, the relief requested by the Debtor must be denied.

This Court believes that there is little likelihood that the Debtor can or will succeed on her appeal of this Court's October 13, 1994 Order Denying Reinstatement. As previously set forth, the

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> disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by §727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by §1144, §1230, or §1330.

Debtor did not allege or prove the existence of any of the grounds provided for in Rule 60 of the Federal Rules of Civil Procedure or Rule 9024 of the Federal Rules of Bankruptcy Procedure, nor did she otherwise demonstrate facts and circumstances which would warrant this Court exercising its broad equity discretion to grant her such relief.

At oral argument on the Motion for Stay Pending Appeal, counsel for the Debtor indicated a concern that without a stay of the Order Denying Reinstatement the case would be closed and the Debtor would lose the benefit of the automatic stay, thereby allowing M & T and others to take legal action against her. However, as a result of the Order of Dismissal and the Debtor's failure to appeal that Order, pursuant to the provisions of Section 362(c)(2)(B), the automatic stay has been terminated as to most, if not all, of the actions by creditors which the Debtor seems to be concerned about. Therefore, the Court does not believe that the Debtor has shown that substantial irreparable injury would result from a failure to grant a stay pending appeal of the Order Denying Reinstatement, especially in view of the Court's belief that there is little, if any, likelihood that the Debtor can or will succeed on her appeal of that Order.[4]

As to harm to the public interest, the Court believes that it would frustrate the clear purpose and intent of the Conditional Order and the Order of Dismissal to grant the Debtor the stay pending appeal which she seeks. Such a stay would allow the Debtor to continue to enjoy some of the extraordinary rights and remedies of the Bankruptcy Code and the Bankruptcy System, including the automatic stay provisions, which those clear, unambiguous and never appealed from Orders were intended to terminate. Such a result would not promote the interests of the Bankruptcy System.

## CONCLUSION

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[4] There has been no showing of substantial harm to another party.

Based on the foregoing, the Court denies the Debtor's Motion for a Stay Pending Appeal of the Order Denying Reinstatement.

**IT IS SO ORDERED.**

**_____/s/_____**
**HON. JOHN C. NINFO, II**
**U.S. BANKRUPTCY COURT JUDGE**

**Dated: November 16, 1994**