



UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re

ART AND ARCHITECTURE BOOKS OF
THE 21ST CENTURY,

Debtor.

Case No. 2:13-bk-14135-RK

Chapter 11

ORDER ON DEBTOR'S MOTION FOR
AN ORDER GRANTING STAY OF
FURTHER HEARINGS ON REMAND
PENDING DEBTOR'S APPEAL TO THE
NINTH CIRCUIT

Hearing Date: March 4, 2014
Time: 3:30 p.m.
Courtroom: 1675

Pending before the court is the motion of debtor Art and Architecture Books of the 21st Century, dba Ace Gallery, for an order granting stay of further hearings on remand pending debtor's appeal to the Ninth Circuit, which was noticed for hearing on March 4, 2014. Having reviewed the moving, opposing and reply papers of the parties, the debtor, the landlord and the unsecured creditors' committee, the court dispenses with oral argument, takes the motion under submission on the papers, vacates the hearing on March 4, 2014 and issues the following ruling.

Debtor's motion is based on the second sentence of Rule 8005 of the Federal Rules of Bankruptcy Procedure, which provides in pertinent part that "the bankruptcy

1 judge may suspend or order the continuation of other proceedings in the case under the
2 [Bankruptcy] Code or make any other appropriate order during the pendency of an
3 appeal on such terms as will protect the rights of all parties in interest.” *Debtor’s Motion*
4 at 4. The unsecured creditors’ committee filed a memorandum in support of debtor’s
5 motion. *Unsecured Creditors Committee’s Memorandum* at 1. The landlord filed a
6 memorandum and other pleadings in opposition to the motion. *Landlord’s Opposition* at
7 5-6.

8 The landlord argues, *inter alia*, that the court lacks authority to grant the debtor’s
9 motion because this would in effect grant a stay pending appeal of the district court’s
10 judgment vacating this court’s lease assumption order. The landlord argues specifically
11 that Rule 8005 contains limiting language that applies only “to [a] motion for a stay of the
12 judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or
13 other relief pending appeal. . . .” *Landlord’s Opposition* at 5. The landlord further
14 argues that because debtor’s appeal is of the district court’s judgment to the court of
15 appeals (i.e., the Ninth Circuit), debtor should make any motion for stay pending appeal
16 to the district court pursuant to Rule 8017(b) of the Federal Rules of Bankruptcy
17 Procedure, which provides that “[o]n motion and notice to the parties to the appeal, the
18 district court or bankruptcy appellate panel may stay its judgment pending an appeal to
19 the court of appeals.” *Id.*

20 To a limited extent, the court agrees with the debtor that it may make the motion
21 for stay of proceedings in this court pursuant to Rule 8005 because the proceedings have
22 been remanded to this court and it has a pending appeal, which circumstances bring the
23 motion within the second sentence of Rule 8005 as debtor argues rather than the first
24 sentence of Rule 8005 as argued by the landlord. The first and second sentences of
25 Rule 8005 provide for separate and different forms of relief for stay pending appeal, and
26 the plain language of Rule 8005 shows that by drawing a distinction between stay
27 pending appeal and the suspension or continuation of other proceedings. See 10
28

1 Resnick and Sommer, *Collier on Bankruptcy*, ¶¶ 8005.11 and 8005.13 at 8005-8 – 8005-
2 11 (16th ed. 2013).

3 Thus, the court in considering whether to exercise its discretion to stay the
4 proceedings remanded from the district court to this court pending appeal of the district
5 court judgment to the Ninth Circuit pursuant to Rule 8005 by suspending the remand
6 proceedings before this court would apply the traditional factors for discretionary stay
7 pending appeal. See *Fireman's Fund Insurance Co. v. Plant Insulation Co. (In re Plant*
8 *Insulation Co.)*, 485 B.R. 203, 237 (N.D. Cal. 2012), *reversed and remanded on other*
9 *grounds*, 734 F.3d 900 (9th Cir. 2013), *citing Nken v. Holder*, 556 U.S. 418, 433-434
10 (2009). The four factors for the court to consider for discretionary stay pending appeal
11 are: "(1) whether the stay applicant has made a strong showing that he is likely to
12 succeed on the merits; (2) whether the applicant will be irreparably harmed absent a stay;
13 (3) whether issuance of the stay will substantially injure the other parties interested in the
14 proceeding; and (4) where the public interest lies." *Id.* The party requesting stay
15 pending appeal bears the burden of showing that the circumstances justify the exercise
16 of judicial discretion to grant stay pending appeal. *Id.* The first two factors are the most
17 critical. *Id.*

18 In considering these factors, the court determines that debtor has not met its
19 burden of making a strong showing that it is likely to succeed on the merits of the appeal
20 and that it will suffer irreparable harm absent a stay at this time. On the first factor, it is
21 somewhat incongruous for this court to determine that the moving party can make a
22 strong showing that it is likely to succeed on the merits because this would be in effect
23 second-guessing the first tier appellate court's ruling on the landlord's appeal of this
24 court's prior order on lease assumption (i.e., determining that the district court erred in
25 determining this court erred in the lease assumption order). Moreover, any ruling that
26 this court makes under the second and third sentences of Rule 8005 is under the direct
27 supervision of the district court, which is also the first tier appellate court. It now seems
28 to this court that based on the district court's analysis in reviewing and vacating this

1 court's lease assumption order, the debtor as the moving party has not made a strong
2 showing that it is likely to succeed on the merits of the appeal. Furthermore, because the
3 purpose of the remand proceedings is to determine whether debtor may obtain relief from
4 forfeiture of the lease under applicable state law (i.e., California Code of Civil Procedure,
5 § 1179), which may allow it to assume the lease pursuant to Section 365 of the
6 Bankruptcy Code, 11 U.S.C., the debtor is not facing imminent and irreparable harm until
7 the court makes a decision on debtor's request for relief from forfeiture, which is one of
8 the issues to be addressed on the remand, and thus, debtor cannot meet its burden on
9 the second factor for discretionary relief for stay pending appeal that irreparable harm is
10 likely, not just possible, at this time. *In re Plant Insulation Co.*, 485 B.R. at 237-238
11 (citations omitted). Based on these two critical factors, the court cannot determine that
12 stay pending appeal should be granted to suspend the remand proceedings pursuant to
13 Rule 8005.

14 For the foregoing reasons, the court denies debtor's Rule 8005 motion.

15 Nevertheless, this order may not be the final word on debtor's Rule 8005 motion.
16 Under the third sentence of Rule 8005, debtor may seek further review by the district
17 court of its motion to suspend the remand proceedings, which provides in pertinent part:
18 "A motion for such relief, or for modification or termination of relief granted by a
19 bankruptcy judge, may be made to the district court or the bankruptcy appellate panel,
20 but the motion shall show why the relief, modification, or termination was not obtained
21 from the bankruptcy judge."

22 IT IS SO ORDERED.

23
24 Date: February 28, 2014



Robert Kwan
United States Bankruptcy Judge