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FILED & ENTERED

MAY 25 2017

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY tatum DEPUTY CLERK

NOT FOR PUBLICATION

CHANGES MADE BY COURT

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re

BRIAN J. COOK and VICTORIA
VELASQUEZ COOK,

Case No. 2:15-bk-10768-RK

Chapter 7

**ORDER DENYING MOTION FOR STAY
PENDING APPEAL OF ORDER
AUTHORIZING COMPROMISE OF
CONTROVERSY**

Hearing Information:

DATE: May 23, 2017

TIME: 11:00 a.m.

CTRM: 1675

**255 E. Temple Street
Los Angeles, California 90012**

Debtors.

At the above date and time, the Court held a hearing on the motion (the "Motion") of debtors Brian J. Cook and Victoria Velasquez Cook and creditor Theresa J. Macellaro for a stay pending appeal of the *Order Granting Motion for Order Authorizing Compromise of Controversy with Edward Franowicz and Larissa Gallagher Pursuant to Federal Rule of Bankruptcy Procedure 9019 and Authorizing the Sale of Property of the Estate Pursuant to 11 U.S.C. § 363*. Appearances were as noted on the record.

The court has carefully considered the moving papers and the opposing papers filed by the Chapter 7 Trustee and the creditors and alleged purchasers in possession Edward Franowicz and Larissa Gallagher and the oral arguments of the parties at the

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1 hearing on the motion for stay pending appeal. The court had extensively stated its
2 reasons orally for its ruling to deny the motion for stay pending appeal on the record at
3 the hearing on the motion, but in this order, the court notes for the record that it
4 substantially agrees with the arguments and reasoning of the Trustee in her opposition to
5 the motion for stay pending appeal (Docket No. 342, filed on May 22, 2017), which are
6 persuasive in this court's view that movant is applying an incorrect legal standard and
7 thus artificially inflates her likelihood of success on appeal. Essentially, the applicable
8 legal standard is whether, under the fairness factors of *In re A & C Properties*, 784 F.2d
9 1377, 1380-1381 (9th Cir. 1986) the Trustee exercised reasonable business judgment in
10 entering into the settlement with the Franowicz/Gallagher parties, given the severe
11 litigation hazards to the estate from their claim as alleged purchasers in possession
12 under 11 U.S.C. § 365(i), and in this court's view, she did because the evidence in the
13 record on the settlement motion was strong that the Franowicz/Gallagher parties had
14 possession of the subject real property in a fully integrated purchase and sales
15 transaction between them and the debtors which included a lease out of the property
16 while the purchase and sales transaction was pending as well as other
17 contemporaneously executed transaction documents, indicating that they had a strong
18 claim under 11 U.S.C. § 365(i) likely to prevail and entitle them to the specific directive of
19 that statute to require the Trustee to transfer title to them pursuant to the purchase and
20 sales contract. Given the "all or nothing" nature of this claim, evaluating the litigation
21 hazards to the estate from the dispute that was being settled was not a simple matter of
22 computing a settlement value based on a prospective market sales price. Thus, the court
23 determined that the settlement was within the range of reasonableness, and movant's
24 burden on appeal is to show that the court's order approving the settlement is an abuse
25 of discretion under *A & C Properties*, 784 F.2d at 1380 (citations omitted), and in this
26 court's view, movant's argument that the purchaser in possession claim of the
27 Franowicz/Gallagher parties may be defeated by showing that the lease agreement
28 between the debtors and the Franowicz/Gallagher parties to allow the latter to reside at

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1 the subject real property while the purchase and sales transaction is pending should be
2 viewed in isolation from the other contemporaneously executed transaction documents is
3 not likely to succeed in demonstrating an abuse of discretion by this court in approving
4 the settlement, and thus, the court determines that movant does not have a substantial
5 case on the merits, which is one of the two critical factors to demonstrate entitlement to
6 stay pending appeal relief, *Leiva-Perez v. Holder*, 640 F.3d 962, 964, 967-968 (9th Cir.
7 2011), *citing and quoting*, *Nken v. Holder*, 556 U.S. 418, 434 (2009); *see also*, *Lair v.*
8 *Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012). Because movant has failed to demonstrate
9 a substantial case on the merits, which is the minimum showing required for the
10 likelihood of success on the merits factor, she is not entitled to stay pending appeal.
11 *Leiva-Perez v. Holder*, 640 F.3d at 967-968.

12 Moreover, the second critical factor for stay pending appeal that movant must
13 show is that “irreparable harm is probable if the stay is not granted.” *Leiva-Perez v.*
14 *Holder*, 640 F.3d at 968, *citing*, *Nken v. Holder*, 556 U.S. at 434-435. “In other words,
15 [the movant’s] burden with regard to irreparable harm is higher than it is on the likelihood
16 of success prong, as she must show that an irreparable injury is the more probable or
17 likely outcome.” *Leiva-Perez v. Holder*, 640 F.3d at 968. Movant argues that she “stands
18 to be seriously and irreparably injured by enforcement of the Order [approving the
19 settlement] if the requested stay is not issued,” that “[t]he appeal seeks to stop the
20 property from being sold,” and that “[a] stay of the sale is necessary in order that the
21 requested relief can be granted.” Motion at 1. In the Motion, movant is not specific about
22 what serious and irreparable harm will come to her if the order approving the settlement
23 is not stayed, and she does not lay out a specific argument in the Motion that any
24 irreparable harm to her is probable. Motion at 1-4. In her opposition to the Trustee’s
25 motion to approve the settlement, movant stated that she is “a creditor holding an
26 administrative claim” in this case, but there is nothing in the record about the amount of
27 such claim since she has not filed such claim. Declaration of Theresa J. Macellaro in
28 Opposition to Approve Settlement (Docket No. 312), filed on April 25, 2017, at 16. (The

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1 court notes that movant filed a prepetition general unsecured claim of \$26,000 (Claim No.
2 16) whereas the claims register shows an aggregate claim amount of over \$4 million.
3 Prepetition general unsecured claims probably out of the money in this case, even under
4 the best of outcomes, though movant's subordinated Chapter 11 administrative expense
5 claim has a better prospect of some dividend only if the Trustee can prevail in the
6 litigation of the 11 U.S.C. § 365(i) claim, which is problematic as discussed above.)
7 Movant does not show in the motion how she would be irreparably harmed if the order
8 approving the settlement is not stayed. Moreover, the court substantially agrees with the
9 Trustee in her opposition that there is no guarantee that movant would benefit from a stay
10 pending appeal because Trustee must still prevail on the claim of the
11 Franowicz/Gallagher parties, which is quite problematic as previously discussed, and she
12 must continue to fend off the efforts of the senior secured lender, Caliber Home Loans, to
13 obtain relief from the automatic stay and foreclose on its lien against the subject real
14 property, the major asset of the estate, and the real estate market needs to remain
15 stable. These are a lot of "what ifs" that at best show that any irreparable harm to movant
16 from not granting a stay pending appeal is only possible and not probable.

17 For the reasons set forth on the record and in the oppositions to the Motion,

18 **IT IS HEREBY ORDERED** that the Motion is denied.

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23 Date: May 25, 2017



24 Robert Kwan
25 United States Bankruptcy Judge
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