

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:13-bk-15195-FMD
Chapter 11

The Sanibel Diamond Store, LLC,

Debtor.

**SUPPLEMENTAL ORDER DENYING
MOTION FOR STAY PENDING APPEAL**
(Doc. No. 95)

THIS CASE came on for hearing on February 21, 2014, of the *Motion for Stay Pending Appeal* filed by City of Sanibel ("City") (the "Motion for Stay").¹ This Order supplements the Court's prior order denying the Motion for Stay.²

The history of this case is described in the Court's *Supplemental Findings of Fact and Conclusions of Law to Court's Order Granting Debtor's Emergency Motion to Compel the City of Sanibel to Comply with Sale Order* (the "Supplemental Findings").³

In the Motion for Stay, the City states that it intends to appeal two orders of this Court: (i) the Court's January 27, 2014 order authorizing Debtor to conduct a liquidation sale with the assistance of a liquidator consultant (the "Sale Order");⁴ and (ii) the Court's February 14, 2014 interim order granting the Debtor's emergency motion to compel the City to comply with the provisions of the Sale Order relating to the use of signs and sign walkers (the "Motion to Compel" and the "Interim Order").⁵ In addition, at the conclusion of the February 21, 2014 continued hearing on the Motion to Compel, counsel for the City informed the Court that the City would likely

appeal the Court's final order on the Motion to Compel (the "Final Order").⁶

With respect to the Sale Order and the Interim Order, the Motion for Stay is denied because the City did not file a notice of appeal within 14 days of the date of entry of those orders, as is required by Fed. R. Bankr. P. 8002(a). But even if an appeal had been filed, or if the City files a timely appeal of the Final Order, the Court shall deny the Motion for Stay because the City is unable to demonstrate all of the requirements necessary to obtain a stay pending appeal.

To obtain a stay pending appeal, the City must show that (i) it is likely to prevail on the merits of its appeal; (ii) it will suffer irreparable injury if the stay or other injunctive relief is not granted; (iii) the Debtor and other parties will not suffer substantial harm if the stay is granted; and (iv) the stay will serve, rather than disserve, the public interest.⁷

First, the City is unlikely to prevail on the merits of an appeal of the Sale Order or the Interim Order, because an appeal of either order would likely be dismissed as untimely. And, with respect to the Interim Order, the appeal would also likely be dismissed under the doctrine of equitable mootness because the Interim Order was only in effect, by its own terms, through February 21, 2014. If an appellate court cannot grant effective judicial relief, which it would be unable to do here because there is no way to stay the effect of a Court order during a range of dates that has already passed, then equitable mootness applies.⁸ With respect to the Final Order, the City is not likely to prevail on the merits of an appeal because, as outlined in the Supplemental Findings, other than requesting the Court to take judicial notice of various sections of the Sanibel Municipal Code, the City did not present evidence in support of its objection to the Motion to Compel.

¹ Doc. No. 95.

² Doc. No. 98, p. 2.

³ Doc. No. 106.

⁴ Doc. No. 71.

⁵ Doc. Nos. 80, 89.

⁶ Doc. No. 98.

⁷ *In re Bifani*, 2014 WL 272920, *2 (M.D. Fla. Jan. 23, 2014) (Whittemore, J.).

⁸ *In re Winn-Dixie Store, Inc.*, 286 F. App'x 619, 623 (11th Cir. 2008).

Second, the City has not demonstrated that it will suffer irreparable injury if the stay is not granted, inasmuch as the City did not present evidence concerning the adverse impacts it would suffer as a result of the Debtor's use of a sign walker and other signs to advertise the sale.

Third, the City cannot demonstrate that the Debtor will not suffer substantial harm if the stay is granted. To the contrary, the Court finds that the Debtor would indeed suffer substantial harm if they stay is granted and the sale is abated pending the resolution of an appeal. As explained in the Supplemental Findings, the tourist "season" in Sanibel runs for only a few months each year. Many businesses rely heavily on the "season" to generate sufficient revenue that will offset the typically slower sales months of the year. The Court has authorized the Debtor to conduct the sale through the end of the "season," so that the Debtor may maximize sales and revenues to support its plan of reorganization. If the sale is stayed pending appeal, or terminated altogether, the Debtor will have missed out on the best opportunity to maximize sale revenues, and the success of its reorganization efforts could be placed in serious jeopardy.

Fourth, the City cannot demonstrate that a stay would serve, rather than disserve, the public interest because it has provided no evidence as to what that public interest is, let alone how it would be disserved by allowing the sale and the corresponding advertising activities to continue. Without such evidence, the Court assumes that the City is concerned that the Debtor's sale and related advertising efforts could adversely affect the public safety of its residents and guests, and detract from the overall aesthetic of the City's ideal community vision. However, no evidence on this issue was presented to the Court and the Debtor itself is a commercial enterprise operating within the City's limits; presumably there is a competing public interest in supporting the success of local businesses. Public policy also favors the satisfaction of legitimate debts, and the Debtor's sale and related advertising efforts are designed to maximize payments to the Debtor's creditors. A stay would certainly disserve the latter public interest.

For the foregoing reasons, it is

ORDERED that the Motion for Stay is DENIED.

Dated: March 5, 2014.

/s/
Caryl E. Delano
United States Bankruptcy Judge

Attorney Charles Phoenix is directed to serve a copy of this Order on all interested parties and to file a proof of service with the Court within three (3) days.