

ORDERED.

Dated: November 09, 2021



Caryl E. Delano  
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION  
[www.flmb.uscourts.gov](http://www.flmb.uscourts.gov)

In re:

Case No. 2:15-bk-04241-FMD  
Chapter 7

Benjamin H. Yormak,

Debtor.

**ORDER DENYING DEBTOR'S MOTION TO ALTER OR AMEND  
ORDER GRANTING IN PART STEVEN R. YORMAK'S MOTION TO STAY  
AND/OR ABATE BANKRUPTCY PROCEEDINGS PURSUANT TO RULE 8007  
[Doc. No. 916]**

THIS CASE came before the Court for hearing on October 19, 2021, to consider the *Motion to Alter or Amend the Court's Order Granting in Part Steven R. Yormak's Motion to Stay and/or Abate Bankruptcy Proceedings Pursuant to Rule 8007 (DE 914)* (the "Reconsideration Motion")<sup>1</sup> filed by Benjamin H. Yormak ("Debtor"); the Trustee's joinder in the Reconsideration Motion (the "Joinder");<sup>2</sup> Debtor's supplement to the

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<sup>1</sup> Doc. No. 916.

<sup>2</sup> Doc. No. 920.

Reconsideration Motion (the “Supplement”);<sup>3</sup> and the response to the Reconsideration Motion (the “Response”) filed by Steven R. Yormak (“Claimant”).<sup>4</sup>

As set forth below, on July 13, 2021, this Court entered its *Order Granting in Part Steven R. Yormak’s Motion to Stay and/or Abate Bankruptcy Proceedings Pursuant to Rule 8007 [Doc. No. 888]* (the “Stay Order”). In his Reconsideration Motion, Debtor asks the Court to require Claimant to post a bond as a condition to the Stay Order. The Court has carefully considered the Reconsideration Motion, the Joinder, the Supplement, the Response, and the arguments presented at the October 19, 2021 hearing, and, for the reasons set forth below, will deny the Reconsideration Motion.

#### **I. FACTS RELEVANT TO THE RECONSIDERATION MOTION**

On April 24, 2015, Debtor, an attorney, filed a Chapter 13 bankruptcy case, which he later converted to a case under Chapter 7. Claimant timely filed a proof of claim in Debtor’s bankruptcy case for \$1,095,275.00 and other unliquidated amounts. Debtor objected (the “Objection to Claim”). After years of litigation on the Objection to Claim, the parties filed motions for summary judgment. On February 3, 2021, the Court entered an order granting Debtor’s motion and disallowing Claimant’s claim in

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<sup>3</sup> Doc. No. 966.

<sup>4</sup> Doc. No. 977.

its entirety (the “SJ Order”).<sup>5</sup> On February 17, 2021, Claimant timely appealed the SJ Order (the “SJ Order Appeal”).<sup>6</sup>

On April 16, 2021, the Chapter 7 Trustee (the “Trustee”) filed a *Renewed Motion to Approve Compromise with Debtor* (the “Compromise Motion”), in which he sought approval of a settlement with the Debtor that allocated certain attorney’s fees earned by Debtor (known in this case as the “CBL Class Action Fees”) between the bankruptcy estate and Debtor, with \$401,500.00 being paid to the estate and \$698,500.00 being paid to Debtor.<sup>7</sup> In the Compromise Motion, the Trustee represented that in addition to the \$401,500.00 proposed settlement, the Trustee is holding \$558,313.37 in estate funds, and that the proposed settlement is in the best interest of creditors who “are primarily interested in receiving a distribution on their timely-filed proofs of claim.”

On May 5, 2021, Claimant filed the *Motion to Stay and/or Abate Bankruptcy Proceedings Pursuant to Bankruptcy Rule 8007* (the “Stay Motion”),<sup>8</sup> asking the Court to stay Debtor’s bankruptcy case—including the Trustee’s distribution of estate assets without Claimant’s participation—pending the outcome of the SJ Order Appeal. Debtor filed a response to the Stay Motion (the “Objection to Stay Motion”)<sup>9</sup> on the grounds that Claimant’s request for a stay was overly broad and that Claimant had

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<sup>5</sup> Doc. No. 851.

<sup>6</sup> Doc. Nos. 855, 863.

<sup>7</sup> Doc. No. 876.

<sup>8</sup> Doc. No. 888.

<sup>9</sup> Doc. No. 895.

not satisfied the traditional four-part test for injunctive relief. However, in the Objection to Stay Motion, Debtor did not request that the Court condition any stay pending appeal upon Claimant's posting a bond. Instead, Debtor appeared to assert that the bond issue was "not ripe for review" because the SJ Order Appeal is not an appeal of a money judgment.<sup>10</sup>

On July 13, 2021, the Court entered the Stay Order, granting Claimant's Stay Motion in part. In the Stay Order, the Court ruled that (a) the effect of the SJ Order is stayed until the District Court rules in the SJ Order Appeal, meaning that Claimant is permitted to participate and be heard on pending matters in the bankruptcy case, including the Trustee's Compromise Motion, as though Claimant's claim had not been disallowed; (b) the Trustee is stayed from disbursing any funds from the estate until the District Court rules in the SJ Order Appeal; and (c) the Court would proceed with its consideration of Debtor's and Claimant's requests for prevailing party costs in connection with the SJ Order.

As set forth in the Stay Order, the Court specifically considered whether any parties other than Claimant would suffer any harm if the stay were granted, stating "the SJ Order Appeal is now fully briefed and awaiting decision, and the bankruptcy estate's assets and the CBL Class Action Fees are all secure while the appeal is concluded." Therefore, the Court concluded that "other parties will suffer no

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<sup>10</sup> Doc. No. 895, pp. 8-9.

substantial harm if a stay is granted until the District Court has ruled on the SJ Order Appeal.”<sup>11</sup>

On July 19, 2021, Debtor timely filed the Reconsideration Motion,<sup>12</sup> and the Trustee filed the Joinder.<sup>13</sup> Debtor contends that in the Stay Order, the Court did not consider or require a bond “to protect the estate, creditors of the estate and the Debtor.”

On July 27, 2021, the Court conducted a hearing on the Compromise Motion and other matters. At the hearing, the Court advised the parties that it would defer ruling on the Reconsideration Motion until *after* it entered an order on the Compromise Motion.<sup>14</sup> The Court explained that deferral of the Reconsideration Motion was appropriate because (a) the CBL Class Action Fees are currently held in an attorney’s trust account and are secure; (b) the estate will not incur unnecessary bank charges or costs until the Trustee is prepared to make distribution; (c) the Trustee will not be prepared to distribute funds to creditors until after the Court has ruled on the Compromise Motion; and (d) under the Stay Order, the stay is of limited duration and will remain in effect only until the District Court rules in the SJ Order Appeal which is “fully briefed and awaiting decision.”<sup>15</sup>

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<sup>11</sup> Doc. No. 914, p. 13.

<sup>12</sup> Doc. No. 916.

<sup>13</sup> Doc. No. 920.

<sup>14</sup> Doc. No. 926.

<sup>15</sup> Doc. No. 930, pp. 5-8.

Thereafter, on September 16, 2021, the Court entered an order granting the Compromise Motion<sup>16</sup> and entered an order establishing a briefing schedule for the Reconsideration Motion.<sup>17</sup> As directed by the Court in the order, Debtor timely filed the Supplement,<sup>18</sup> and Claimant filed the Response.<sup>19</sup>

On September 29, 2021, Claimant timely appealed the Court's order granting the Compromise Motion.<sup>20</sup>

## **II. THE PARTIES' POSITIONS**

On October 19, 2021, the Court held a hearing on the Reconsideration Motion, the Supplement, and the Response.<sup>21</sup> At the hearing, Debtor argued (a) that Federal Rule of Civil Procedure 62 ("Rule 62")<sup>22</sup> governs the issuance of a stay in this case and requires the posting of a bond as a condition to obtaining a stay; (b) that if the Stay Order were not in place, the Trustee would have \$1,725,059.11 for immediate distribution to Debtor's allowed creditors;<sup>23</sup> and (c) that as a result of the Stay Order,

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<sup>16</sup> Doc. No. 953.

<sup>17</sup> Doc. No. 954.

<sup>18</sup> Doc. No. 966.

<sup>19</sup> Doc. No. 977.

<sup>20</sup> Doc. No. 971.

<sup>21</sup> Doc. No. 982.

<sup>22</sup> Fed. R. Civ. P. 62, as made applicable to adversary proceedings in bankruptcy cases by Fed. R. Bankr. P. 7062.

<sup>23</sup> The \$1,725,059.11 consists of \$1.1 million in CBL Class Action Fees and \$625,059.11 in what are known in this case as the Qui Tam Fees.

these funds will be diminished by approximately \$548,365.42, which Debtor calculates as follows:<sup>24</sup>

1. Bank charges/technology fees since the date of the SJ Order - \$29,400.00;<sup>25</sup>
2. Risk of loss of the settlement generating the CBL Class Action Fees - \$250,000.00;
3. Interest loss - \$99,708.42;<sup>26</sup> and
4. Trustee's attorney's fees to defend Claimant's appeals - \$169,257.00.<sup>27</sup>

Accordingly, Debtor contends that to protect the estate against this alleged diminution in value, Claimant should be required to post a bond in the amount of \$548,365.42.

Claimant objects to Debtor's request for a bond on at least seven grounds: (a) that Federal Rule of Bankruptcy Procedure 8007 ("Rule 8007") governs the Stay Motion and permits, but does not require, the posting of a bond or other security as a condition to obtaining a stay; (b) that in the Objection to Stay Motion,<sup>28</sup> Debtor did not ask the Court to condition the stay on the posting of a bond; (c) that the Court

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<sup>24</sup> Doc. No. 966, p. 9.

<sup>25</sup> Debtor estimates the bank fees and charges as "\$900 per month since February 2021 annual rate of \$9,800 for three years."

<sup>26</sup> Calculated at the judgment rate of interest.

<sup>27</sup> In the Reconsideration Motion, Debtor stated that "special counsel fees as of September 30, 2020 were \$59,257.60," that unbilled fees were estimated at \$75,000.00, that future fees were estimated at \$150,000.00, and that any bond should include these "expected and conservative" estimates in the total amount of \$225,000.00. (Doc. No. 916, p. 10).

<sup>28</sup> Doc. No. 895.

implicitly ruled in the Stay Order that no bond was required when it found (1) that Debtor voluntarily subjected his assets to the jurisdiction of the Court when he filed his bankruptcy case, (2) that the estate's assets, including the CBL Class Action Fees, are secure until the District Court rules on the SJ Order Appeal, and (3) that "the harm to Debtor or other creditors from any delay in distribution [is] minimal in comparison to the potential injury to Claimant if a stay is not granted;"<sup>29</sup> (d) that a motion for reconsideration may not be utilized to advance arguments or theories that could or should have made before the Court entered the Stay Order; (e) that Debtor has not demonstrated that the Stay Order contains a manifest error of law or fact or any other grounds for reconsideration of the Stay Order; (f) that Debtor has not provided any evidentiary support for his allegations that the estate will be diminished as a result of the Stay Order; and (g) that the Trustee's attorney's fees in connection with pending appeals in this case may not be considered in calculating a bond because it would constitute impermissible fee-shifting in the absence of a statutory or contractual right to the prevailing party attorney's fees.

### III. DISCUSSION

Having carefully considered the Reconsideration Motion, the Joinder, the Supplement, the Response, the arguments at the October 19, 2021 hearing, and the entire record in this bankruptcy case, the Court will deny the Reconsideration Motion.

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<sup>29</sup> Doc. No. 914, p. 13.

**A. Federal Rule of Civil Procedure 62 does not apply in contested matters.**

Under Federal Rule of Bankruptcy Procedure 7062 (“Rule 7062”),<sup>30</sup> Fed. R. Civ. P. 62 applies in adversary proceedings. Adversary proceedings are generally governed by the “Part VII Rules” in the Federal Rules of Bankruptcy Procedure, Rule 7001, *et seq.*

An objection to claim in a bankruptcy case initiates a contested matter under Rule 9014, not an adversary proceeding.<sup>31</sup> Although Rule 9014 contains a list of the “Part VII Rules” that apply in contested matters, that list does not include Rule 7062. As the court in *In re Texas Equipment Company, Inc.*, held, unless the court orders otherwise, Rule 7062 does not apply in contested matters.<sup>32</sup>

Here, the Court entered the SJ Order on the Objection to Claim, and the Court has not entered an order directing that either the Part VII Rules or Rule 7062 applies. Therefore, Fed. R. Civ. P. 62 does not apply to the Stay Motion or the Reconsideration Motion.

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<sup>30</sup> Unless otherwise stated, citations to Rules are to the Federal Rules of Bankruptcy Procedure.

<sup>31</sup> *In re Blue Eagle Farming, LLC*, 2019 WL 1466981, at \*2 (Bankr. N.D. Ala. April 1, 2019) (“[A]n objection to claim is a contested matter, not an adversary proceeding.”) (citation omitted).

<sup>32</sup> *In re Texas Equipment Co., Inc.*, 283 B.R. 222, 225 (Bankr. N.D. Tex. 2002); *In re Hill*, 305 B.R. 100, 109 (Bankr. M.D. Fla. 2003) (“Effective December 1, 1999, Rule 9014, Fed. R. Bankr. P., was amended to remove the applicability of Rule 7062 to contested matters.”); *In re Greene*, 2012 WL 279434, at \*3 (Bankr. E.D. Tenn. Jan. 31, 2012).

**B. Under Rule 8007, bankruptcy courts may exercise discretion in conditioning a stay pending appeal upon the posting of a bond.**

Rule 8007(a) applies to motions for a stay pending appeal filed in the bankruptcy court. Under Rule 8007(a)(1)(B), a party moving for a stay may ask the bankruptcy court for “the approval of a bond or other security provided to obtain a stay of judgment.” As the bankruptcy court stated in *In re 160 Royal Palm, LLC*: “Unlike Fed. R. Bankr. P. 7062, Rule 8007 does not provide for the granting of a stay as of right upon the filing of a sufficient bond,” and “the determination of whether to grant a stay pending appeal is left to the discretion of the Court. If a stay pending appeal is warranted, the Court *may* condition the stay on the posting of ‘a bond or other security.’”<sup>33</sup>

The Court concludes that a bond under Rule 8007(a)(1)(B) is discretionary, not mandatory,<sup>34</sup> and a bankruptcy court may enter a stay pending appeal without a bond.<sup>35</sup>

**C. The Court addressed the issue of a bond in the Stay Order.**

The purpose of a bond or security is “to protect the opposing party or parties, which may include the bankruptcy estate generally, against loss that may be sustained

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<sup>33</sup> *In re 160 Royal Palm, LLC*, 2020 WL 4791964, at \*2 (Bankr. S.D. Fla. Feb. 13, 2020) (emphasis added).

<sup>34</sup> *In re Sindesmos Hellinikes-Kinotitos of Chicago*, 607 B.R. 898, 912 (Bankr. N.D. Ill. 2019).

<sup>35</sup> *In re Motors Liquidation Company*, 539 B.R. 676, 686 (Bankr. S.D. N.Y. 2015).

as a result of a failed appeal.”<sup>36</sup> Here, the parties who are affected by a delay in distribution include creditors with allowed claims, and also include Debtor because this case will be a “surplus” case if the SJ Order is affirmed on appeal and Claimant’s claim is disallowed in its entirety.<sup>37</sup>

As discussed above, the Stay Order specifically addresses the harm that parties other than Claimant may suffer as a result of the stay. First, the Court found that the CBL Class Action Fees, the subject of the Compromise Motion, are held in an attorney’s trust account and are secure, while other estate funds are held by the Trustee. And second, the Court granted the request for a stay on a temporary basis, extending the stay only until the District Court rules in the SJ Order Appeal, which is “fully briefed and awaiting decision.” Under these circumstances, the Court concluded that the harm to Debtor and creditors from any delay in distribution is minimal in relation to the potential harm to Claimant if the stay is not granted.<sup>38</sup> Thus, the Court specifically addressed the factors that it would have considered in determining whether to condition the Stay Order upon Claimant’s posting a bond.

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<sup>36</sup> *In re 160 Royal Palm, LLC*, 2020 WL 4791964, at \*2.

<sup>37</sup> If the District Court affirms the SJ Order, Claimant’s claim will be disallowed and Debtor’s bankruptcy case will be a surplus asset case. After paying administrative claims and timely filed unsecured claims (exclusive of Claimant’s claim, totaling \$140,941.14 as calculated by the Trustee), the Trustee will disburse the surplus funds to Debtor.

<sup>38</sup> Doc. No. 914, p. 13.

**D. The record does not support the amount of the requested bond.**

Debtor requests that the Court require Claimant to post a bond of \$548,365.42 as necessary to ensure that the funds in the estate will “not be further depleted.”<sup>39</sup> But Debtor provided no evidence to show that the estate is being depleted in the amounts that he asserts. First, Debtor estimated that bank charges are being incurred at the rate of \$900.00 per month, or a total of \$29,400.00 for three years, but failed to provide evidence of bank charges actually incurred.<sup>40</sup> Second, Debtor did not explain his basis for asserting that the CBL Class Action Fees may be lost as a result of the Stay Order; although Claimant appealed the order approving the settlement that generated the CBL Class Action Fees, the order was not conditioned on any subsequent settlements or events.<sup>41</sup> Third, Debtor asserts that interest should be calculated at the judgment rate for “an estimated 3-year period,” but does not provide any basis for his contention that the bond should include judgment interest on the entire amount that he claims as undisbursed funds (\$1,725,059.11), or for his estimation that distribution to creditors will be delayed for three years. And finally, Debtor asserts that the bond should include the estimated amount of attorney’s fees that the Trustee may incur in defending Claimant’s appeals, but Debtor (1) includes in his calculation attorney’s fees

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<sup>39</sup> Doc. No. 916, p. 2.

<sup>40</sup> At the October 19, 2021 hearing, the Court noted that the Trustee’s last Interim Report was filed on November 2, 2020, for the period ending September 30, 2020 (Doc. No. 850).

<sup>41</sup> Doc. No. 930, p. 6.

that the Trustee incurred prior to the entry of the Stay Order, and (2) fails to state a legal basis for assessing attorney's fees against Claimant in the absence of any contractual provision or statutory authority.

For these reasons, even if the Court found that Claimant should be required to post a bond as a condition of the Stay Order, the record does not support the amount of the bond requested by Debtor.

**E. Debtor has not demonstrated grounds for reconsideration of the Stay Order.**

Finally, Debtor filed the Reconsideration Motion under Rule 9023, which incorporates Federal Rule of Civil Procedure 59.<sup>42</sup> Reconsideration of an order under Fed. R. Civ. P. 59(e) is an extraordinary remedy to be granted sparingly because of the interest in the finality of orders and the conservation of judicial resources. In the Eleventh Circuit, the only grounds for granting a motion for reconsideration under Rule 59(e) are newly discovered evidence or manifest errors of law or fact.<sup>43</sup> Rule 59 may not be used to relitigate old matters or to raise arguments or present evidence that could have been presented before the entry of the challenged order. If the movant had an opportunity to introduce the arguments and evidence prior to entry of the order, denial of his motion to reconsider is proper.<sup>44</sup>

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<sup>42</sup> Doc. No. 916, p. 1.

<sup>43</sup> *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999)).

<sup>44</sup> *In re Strunk*, 2016 WL 675819, at \*3 (Bankr. M.D. Fla. Feb. 18, 2016) (citations omitted).

Here, Debtor has not established either of the two grounds for reconsideration permitted under Fed. R. Civ. P. 59(e). First, Debtor alleges that the estate is being diminished by bank charges, interest, attorney's fees, and the risk that settlement of the CBL Class Action Fees will be lost, but he did not "newly discover" these contentions after entry of the Stay Order. And second, Debtor has not demonstrated that the Court made a manifest error when it entered the Stay Order without requiring Claimant to post bond. For example, in the Stay Order, the Court considered that the estate's assets (funds held in trust accounts) are secure, and only extended the Stay Order until the District Court rules in the SJ Order Appeal, an appeal that is fully briefed and in which the District Court may rule at any time. In other words, the Court specifically tailored the Stay Order to protect the interests of all parties by limiting the duration of the order's prohibition against distribution to creditors.

Finally, Debtor had the opportunity to request a bond before the Stay Order was entered. He filed a written response to the Stay Motion,<sup>45</sup> but did not ask the Court to condition the stay on the posting of a bond. In fact, he appeared to assert that the issue of a bond was irrelevant because the SJ Order Appeal is not an appeal from a money judgment.<sup>46</sup> Therefore, Debtor is precluded from using his Reconsideration Motion to

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<sup>45</sup> Doc. No. 895.

<sup>46</sup> Doc. No. 895, pp. 8-9.

belatedly assert that Claimant is required to post a bond based on an alleged diminution of the estate caused by the stay.

Accordingly, for the foregoing reasons, it is

**ORDERED** that Debtor's *Motion to Alter or Amend the Court's Order Granting in Part Steven R. Yormak's Motion to Stay and/or Abate Bankruptcy Proceedings Pursuant to Rule 8007 (DE 914)* (Doc. No. 916) is **DENIED**, without prejudice to Debtor's right to file a motion in District Court seeking a bond under Fed. R. Bankr. P. 8007(b) in the event that (1) the District Court affirms the SJ Order, and (2) Claimant appeals the District Court's ruling to the Eleventh Circuit Court of Appeals.

Clerk's office to serve via CM/ECF.