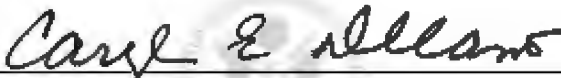


ORDERED.

Dated: December 15, 2021



Caryl E. Delano
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
www.flmb.uscourts.gov

In re:

Case No. 8:21-bk-02521-CED
Chapter 7

Mortgage Investors Corporation,
a/k/a Veteran Home Loans,
a/k/a Veterans Information Department,

Debtor.

**ORDER DENYING EMERGENCY MOTION
FOR STAY PENDING APPEAL OF ORDER GRANTING
RELATORS' MOTION FOR RELIEF FROM THE AUTOMATIC STAY**

THIS CASE came before the Court without a hearing to consider the *Emergency Motion for Stay Pending Appeal of Order Granting Relators' Motion for Relief from the Automatic Stay* (the "Stay Motion")¹ filed by Beth Ann Scharrer, as Chapter 7 Trustee, and William Edwards, as a creditor and party in interest, and the Relators' response.²

¹ Doc. No. 133.

² Doc. No. 140.

I. BACKGROUND

Debtor filed a voluntary Chapter 11 petition on May 14, 2021.³ Brian Donnelly and Victor Bibby (the “Relators”) are the relators in a case styled *U.S. ex. rel Victor Bibby and Brian Donnelly v. William L. “Bill” Edwards and Mortgage Investors Corporation*, Case No. 1:12-cv-04020-AT, now pending in the United States District Court for the Northern District of Georgia (the “District Court Case”). In the District Court Case, the Relators brought suit against Debtor under the False Claims Act; but in light of Debtor’s present financial circumstances, the Relators’ primary claim is an alter ego claim against Debtor’s principal, Mr. Edwards. The Relators allege that between 2011 and 2013—after he became aware of their claim against Debtor—Mr. Edwards diverted over \$500 million from Debtor.

On June 1, 2021, the Relators filed a *Motion for Relief from the Automatic Stay* to permit the District Court Case to proceed (the “Stay Relief Motion”)⁴ and a *Motion to Appoint a Chapter 11 Trustee or Alternatively Convert the Case to Chapter 7* (the “Motion to Convert”).⁵

The Stay Relief Motion and the Motion to Convert were set for hearing on June 23, 2021. At the hearing, Debtor’s counsel announced that Debtor would convert its case to a Chapter 7 case, and the Court continued the hearing on the Stay Relief

³ Doc. No. 1.

⁴ Doc. No. 22.

⁵ Doc. No. 23.

Motion.⁶ Beth Ann Scharrer was appointed as the Chapter 7 Trustee (the “Trustee”).⁷ Through counsel, the Trustee has represented to the Court that she has negotiated a settlement with Mr. Edwards under which Mr. Edwards will pay the estate \$3 million in exchange for a release of all claims against him.

On September 14, 2021, the Relators filed a *Motion to Dismiss Chapter 7 Case* (the “Dismissal Motion”).⁸ The Court conducted a hearing on the Stay Relief Motion and the Dismissal Motion on September 28, 2021, and directed the parties to submit memoranda regarding “ownership of the veil piercing component” of the District Court Case.⁹

At a hearing on November 19, 2021, after careful consideration of the parties’ memoranda of law,¹⁰ the Court announced its rulings, denying the Dismissal Motion and granting the Stay Relief Motion. In reaching its decision on the Stay Relief Motion, the Court applied the Eleventh Circuit’s ruling in *In re Icarus Holding, LLC*,¹¹ to determine whether the Trustee has exclusive standing, on behalf of the bankruptcy estate, to bring alter ego claims against Mr. Edwards. The Court concluded that the alter ego claims against Mr. Edwards are not general to all creditors, but – under the

⁶ Doc. No. 56.

⁷ Doc. No. 54.

⁸ Doc. No. 81.

⁹ Doc. No. 98.

¹⁰ Doc. Nos. 106, 107, 108, 114, 115, 116.

¹¹ 391 F.3d 1315 (11th Cir. 2004). The parties agreed that *Icarus* governed the issue of whether the alter ego claims against Mr. Edwards are property of the bankruptcy estate.

specific facts presented – are unique to the Relators, such that the Trustee does not have an exclusive alter ego claim.¹² Having made that determination, the Court – consistent with *Icarus* – granted relief from the automatic stay to allow Relators to continue their litigation in the District Court Case.

On December 3, 2021, the Court entered its *Order Granting Relators' Motion for Relief from the Automatic Stay* (the “Stay Relief Order”),¹³ and the Trustee and Mr. Edwards timely appealed.¹⁴ In the Stay Motion, the Trustee and Mr. Edwards seek a stay pending the appeal to prohibit the District Court Case from going forward while their appeal is pending in the District Court.¹⁵

II. ANALYSIS

To obtain a stay pending appeal, a moving party must clearly establish four requirements:

- (i) that the movant is likely to prevail on the merits of its appeal,
- (ii) that the movant will suffer irreparable injury if a stay or other injunctive relief is not granted,
- (iii) that other parties will suffer no substantial harm if a stay or other injunctive relief is granted, and

¹² Doc. No. 124, November 19, 2021 Hearing Transcript, p. 9.

¹³ Doc. No. 129.

¹⁴ Doc. No. 135.

¹⁵ See Doc. No. 133, ¶ 11.

(iv) in circumstances where the public interest is implicated, that the issuance of a stay or other injunctive relief will serve, rather than disserve, such public interest.¹⁶

Generally, the most important of the four requirements is the moving party's likelihood of success on the merits of its appeal, and the Court must ordinarily find that the appealed decision was clearly erroneous. However, if the balance of the equities identified in the other three requirements weighs heavily in favor of granting the stay, a stay pending appeal may be granted upon a lesser showing of the movant's likelihood of success on appeal.¹⁷

A. Likelihood of prevailing on the Merits of the Appeal

On appeal, a bankruptcy court's order lifting the stay is reviewed de novo for abuse of discretion.¹⁸ An abuse of discretion may be found if the judge did not apply the proper legal standard, did not follow the proper procedure, or predicated its order on findings of fact that are clearly erroneous.¹⁹ Because a decision to lift the stay is discretionary with the bankruptcy judge,²⁰ a number of appellate courts have

¹⁶ *In re Synectic Asset Management Inc.*, 2014 WL 6065770, at *5 (M.D. Fla. Nov. 12, 2014) (quoting *In re F.G. Metals, Inc.*, 390 B.R. 467, 471-72 (Bankr. M.D. Fla. 2008)).

¹⁷ *Id.* (quoting *In re F.G. Metals, Inc.*, 390 B.R. at 472, and *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)).

¹⁸ *In re Dixie Broadcasting, Inc.*, 871 F.2d 1023, 1026 (11th Cir. 1989).

¹⁹ *In re Khan*, 2021 WL 4865278, at *2 (S.D. Fla. Oct. 19, 2021) (citations omitted).

²⁰ Under 11 U.S.C. § 362, the bankruptcy court may modify the automatic stay for "cause."

declined to find that the bankruptcy judge abused its discretion by lifting the stay to allow litigation to proceed in another forum.²¹

Here, the Trustee and Mr. Edwards contend that the Court misapplied the *Icarus* standard because they claim the Court (1) looked only to the claims filed in Debtor's Chapter 11 case to determine whether any creditors, other than the Relators, were injured by Mr. Edwards' alleged looting, and (2) did not consider Debtor's creditors who were in existence when the alleged looting occurred between 2011 and 2013. But the Trustee and Mr. Edwards acknowledge that earlier creditors did not "keep those obligations on their books."²²

Under the *Icarus* analysis, the question before the Court on the Stay Relief Motion was whether the Relators' alter ego claim against Mr. Edwards is a claim that is common to all creditors or one that is unique to the Relators. In *Icarus*, the Eleventh Circuit held that an alter ego claim is "personal" if the plaintiff itself was harmed and no other creditor has an interest in the cause, but the claim is "general" if liability extends to all creditors of the corporation "without regard to the personal dealings between such officers and such creditors."²³

²¹ See *In re Martin*, 542 B.R. 199 (6th Cir. B.A.P. 2015); *In re Kronemyer*, 405 B.R. 915 (9th Cir. B.A.P. 2009); and *In re Loudon*, 284 B.R. 106 (8th Cir. B.A.P. 2002).

²² Doc. No. 133, ¶¶ 3-4.

²³ *In re Icarus Holding, LLC*, 391 F.3d at 1321 (internal citations omitted).

Here, the Court found that none of Debtor's current creditors—largely attorneys retained by Debtor and Mr. Edwards to represent them in the District Court Case—could state an alter ego claim based on financial transactions between Debtor and its principal (Mr. Edwards) that occurred years before they extended credit to Debtor. Under the specific circumstances of this case, the Court found that because the Relators are the only creditors who could assert alter ego claims against Mr. Edwards, (1) the alter ego claims are unique to the Relators and are not “general claims common to all creditors,” and (2) the Trustee does not hold an exclusive alter ego action against Mr. Edwards.²⁴ Accordingly, under the *Icarus* analysis, the Court granted the Stay Relief Motion.

The Court concludes that the Trustee and Mr. Edwards have not established that the Court abused its discretion in granting the Relators' Stay Relief Motion to allow the District Court Case to proceed, and they have not established that they are likely to prevail on the merits of their appeal of the Stay Relief Order.

B. Irreparable Injury if the Stay Is Not Granted

The Trustee and Mr. Edwards contend that if a stay pending appeal is not granted, they will be forced to defend the Relators' claims in the District Court Case, and the Trustee's potential \$3 million settlement with Mr. Edwards will be

²⁴ Doc. No. 124, November 19, 2021 Hearing Transcript, pp. 8-9.

jeopardized because the funds earmarked for the settlement will be expended in the defense of the Relators' claims.²⁵

But the loss of potential settlement funds²⁶ or the loss of "money, time, and energy necessarily expended in the absence of a stay" are not sufficient to establish irreparable injury for purposes of a motion for stay pending appeal.²⁷

The Trustee and Mr. Edwards have not established that they will be irreparably injured if the Stay Motion is not granted.

C. Substantial Harm to Other Parties if the Stay Is Granted

The Trustee and Mr. Edwards recognize that a stay pending their appeal of the Stay Relief Order will delay the District Court Case, but they contend that the Relators would suffer only minimal harm by the delay because the District Court Case has been pending for more than ten years and "the additional delay necessary for an appeal is relatively short."²⁸

But when Debtor filed its Chapter 11 petition, the District Court Case had been "specially set" for a 13-day trial to begin in October 2021.²⁹ The Trustee and Mr.

²⁵ Doc. No. 133, ¶ 11.

²⁶ *In re Gould*, 371 B.R. 6, 9 (Bankr. D. Conn. 2007).

²⁷ *In re F.G. Metals, Inc.*, 390 B.R. at 477 (quoting *In re Lickman*, 301 B.R. 739, 748 (Bankr. M.D. Fla. 2003) (quoting *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987)).

²⁸ Doc. No. 133, ¶ 12.

²⁹ Doc. No. 22.

Edwards have not established that other parties, including the Relators, will suffer no substantial harm if the Stay Motion is granted.

D. The Public Interest

The Trustee and Mr. Edwards contend that the public interest will be served by a stay pending appeal, but they do not identify the specific public interest that will be protected. Instead, they address only the interests and parties affected by this particular bankruptcy case.³⁰

The Trustee and Mr. Edwards have not established that the public interest will be served by a stay pending appeal.

III. CONCLUSION

Because the Trustee and Mr. Edwards have not demonstrated that the Court abused its discretion by entering the Stay Relief Order to allow the District Court Case to proceed, they have not established that they are likely to prevail on the merits of their appeal. In addition, the Trustee and Mr. Edwards have not established that the other three factors considered for a stay pending appeal— irreparable injury to the movant, substantial harm to other parties, and the public interest— weigh heavily in favor of granting the stay.

³⁰ Doc. No. 133, ¶ 13.

Accordingly, it is

ORDERED that the *Emergency Motion for Stay Pending Appeal of Order Granting Relators' Motion for Relief from the Automatic Stay* (Doc. No. 133) is **DENIED**.

Clerk's Office to serve on interested parties via CM/ECF.