

ORDERED.

Dated: April 26, 2023



Lori V. Vaughan
United States Bankruptcy Judge

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

In re)	
)	
Israel Otero Vicente,)	Case No. 6:22-bk-02673-LVV
)	Chapter 13
Debtor.)	
_____)	

**SUPPLEMENT TO ORDER DENYING MOTION
FOR STAY PENDING APPEAL AND MOTION TO CANCEL HEARING ON
CONFIRMATION AND HEARING ON MOTION FOR RELIEF FROM STAY**

THIS CASE came before the Court on March 21, 2023 to consider the Motion for Stay Pending Appeal and Motion to Cancel Hearing on Confirmation and Hearing on Motion for Relief from Stay (Doc. No. 54) (“Stay Motion”) filed by debtor, Israel Otero Vicente (“Debtor”). Debtor requests this Court stay consideration of his Chapter 13 Plan and place this case on hold while he appeals this Court’s orders dismissing his adversary complaint and overruling his objection to the proof of claim filed by Bank of New York Mellon (“BONYM”)¹ who holds a final judgment of foreclosure on Debtor’s home. The Court entered an order denying the Stay Motion (Doc. No. 80) (“Order”). The Order provided that the Court in its discretion may file written findings of facts and

¹ The entity’s full name is The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Benefit of the Certificate Holders of CWABS Inc., Asset-Backed Certificates, Series 2004-SD2.

conclusions of law at a later date. These are the Court’s written findings and conclusions explaining the holding and are made pursuant to *In re Mosley*, 494 F.3d 1320 (11th Cir. 2007).

I. BACKGROUND

On September 10, 2014, a Final Judgment of foreclosure (“Final Judgment”) was entered holding that BONYM held a first-priority lien on Debtor’s home at 7216 Glasgow Ave., Orlando, FL 32819 (“Home”).² After several motions for rehearing, motions to set aside or vacate the Final Judgment, and three appeals all of which were dismissed or the trial court affirmed, Debtor sought relief in bankruptcy.³ His last bankruptcy case was a Chapter 7 filed on December 19, 2016.⁴ In the Chapter 7 case, BONYM was granted stay relief to proceed with foreclosure.⁵ Debtor opposed the relief raising the same arguments he raises in this Chapter 13 case.⁶ Debtor appealed the stay relief order to the District Court and then to the Eleventh Circuit Court of Appeals. Both appeals were dismissed as moot due to the stay having expired as a result of Debtor’s discharge.⁷

This Chapter 13 case was filed on July 27, 2022.⁸ Debtor filed a Chapter 13 plan (“Plan”) on August 10, 2022.⁹ Debtor’s Plan proposed to pay the Chapter 13 Trustee \$500 per month but did not provide for any payments to secured creditors.¹⁰ Debtor never amended the Plan. BONYM objected to Debtor’s Plan arguing it did not meet the requirements of § 1325(a)(5) because it did not provide

² Doc. No. 44, Exh. A. A court may take judicial notice on its own at any stage of a proceeding of a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. See Fed. R. Evid. 201. Accordingly, the Court takes judicial notice of the case record or docket of *Bank of New York Mellon v. Otero*, No. 2014-CA-001836 (Fla. 9th Cir. Ct., filed Feb. 20, 2014), including the final judgment which is recorded at Book 10805, Page 0508 in the Public Records of Orange County, Florida.

³ See *Vicente v. Bank of New York Mellon*, No. 6:22-ap-00072 (Bankr. M.D. Fla. filed Sept. 19, 2022) (“Adv. Proc.”). Adv. Proc. Doc. No. 9, Exh. A.

⁴ *In re Otero*, No. 6:16-bk-08182 (Bankr. M.D. Fla. filed Dec. 19, 2016).

⁵ *Id.* Doc. No. 31.

⁶ See 6:16-bk-08182, Doc. No. 17.

⁷ *Id.* Doc. Nos. 52, 53.

⁸ Doc. No. 1.

⁹ Doc. No. 11.

¹⁰ Doc. No. 11.

payment of BONYM's claim ("Objection to Confirmation").¹¹ BONYM also filed a proof of claim in the amount of \$246,447.08 based on the Final Judgment and designated the entire claim amount as secured.¹² No other creditors filed a proof of claim in this case. On September 19, 2022, Debtor filed a Complaint against BONYM and Newrez LLC (the servicer) seeking a declaratory judgment that BONYM did not possess a lien on the Home ("Complaint").¹³ On January 12, 2023, Debtor filed an objection to BONYM's claim, arguing that it did not possess a valid lien for the same reasons argued in the Complaint ("Claim Objection").¹⁴ The Complaint was dismissed and the Claim Objection overruled as an improper collateral attack on the Final Judgment under the *Rooker-Feldman* doctrine.¹⁵ Debtor appealed both orders.¹⁶ Debtor then filed the Stay Motion requesting the Court stay this case during the appeal.¹⁷ The Court had continued confirmation twice before so that it could consider the Claim Objection.¹⁸ The Court denied the Stay Motion in open court.¹⁹ The Court also denied confirmation of the Plan and dismissed the case.²⁰

II. ANALYSIS

A motion for stay pending appeal "is an extraordinary remedy and requires a substantial showing on the part of the movant." *In re F.G. Metals, Inc.*, 390 B.R. 467, 471 (Bankr. M.D. Fla. 2008) (quoting *In re Cusson*, No. 06-10195, 2008 WL 594456, at *2 (Bankr. D. Vt. Feb. 22,

¹¹ Doc. No. 20

¹² Claim No. 1.

¹³ Adv. Proc. Doc. No. 1

¹⁴ Doc. No. 37.

¹⁵ Doc. No. 50; Adv. Proc. Doc. No. 30; *See also Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

¹⁶ Doc. No. 56; Adv. Proc. Doc. No. 34.

¹⁷ Doc. No. 54.

¹⁸ Doc. Nos. 30; 42.

¹⁹ Doc. No. 80.

²⁰ Doc. No. 59.

2008)). To prevail, movant must clearly establish that:

- (i) Movant is likely to prevail on the merits of its appeal;
- (ii) Movant will suffer irreparable injury if a stay is not granted;
- (iii) Other parties will suffer no substantial harm if a stay is granted; and
- (iv) Where the public interest is implicated, that issuance of a stay will serve, rather than disserve, such public interest.

Id. at 471-472 (quoting *In re Jet 1 Center, Inc.*, 2006 WL 449252, *1 (M.D. Fla. 2006)). Ordinarily, the first factor is the most important. *Robles Antonio v. Barrios Bello*, 2004 WL 1895123 (11th Cir. 2004). However, if the balance of the equities weighs heavily in favor of a stay, movant need only make a substantial showing on the merits. *In re Bob Hamilton Real Estate, Inc.*, 164 B.R. 703 (Bankr. M.D. Fla. 1994).

Here, Debtor has neither established a likelihood nor made a substantial showing that he will prevail on appeal. Under the *Rooker-Feldman* doctrine, “a federal district court may not review and reverse a state court civil judgment, because only the United States Supreme Court has appellate jurisdiction over judgments of state courts in civil cases.” *In re Bertram*, 746 F.App’x 943, 948 (11th Cir. 2018). For the reasons stated in its Order Granting Motion to Dismiss Adversary Proceeding, which will not be repeated here, the Court determined the *Rooker-Feldman* doctrine applied, overruling the Claim Objection and dismissing the Complaint.²¹ The Court considered the arguments made by the Debtor in the Stay Motion when making its ruling. Although the Court may have erred by dismissing with prejudice, such error does not affect the ultimate result—dismissal of the Complaint.

To be clear, Debtor filed this case solely to prevent BONYM from foreclosing. The docket in the foreclosure action shows the Final Judgment was entered over eight years ago on September

²¹ Doc. No. 50; Adv. Proc. Doc. No. 30.

10, 2014.²² After entry of the Final Judgment, Debtor filed a series of motions seeking to avoid the judgment. When those were denied, Debtor appealed and sought removal of the presiding judge. Debtor appealed the trial court three times. On the third appeal, after affirming the trial court, the Fifth District Court of Appeals entered an order barring Debtor from filing any more *pro se* pleadings due to Debtor's abuse of the legal process.²³ Having now exhausted his options in state court (but succeeded in delaying foreclosure), Debtor now seeks further delay in this Court.

Simply put, Debtor has not established a likelihood of success on the merits or even a substantial showing that he would succeed. For this reason alone, his Stay Motion fails. The Court does not question that Debtor would suffer harm if the stay were not in place, but questions whether the harm would be irreparable. Without a stay, BONYM will continue its foreclosure and Debtor will lose his home, but should Debtor ever prevail in his efforts to have the Final Judgment overturned, a money judgment would be available for the property loss. Even if the Court presumed the damage was irreparable, the Court must also consider the harm to BONYM. Debtor is wrong to say there is no harm. BONYM has a substantial debt it has been trying to recover since 2014. The collateral for that debt—the Home—is property whose value can vary widely based on its condition. Not only would BONYM be deprived of the use of moneys it is owed if a stay were in place, there is substantial risk that BONYM's collateral decreases in value due to market forces or the Home's condition. The Court cannot say BONYM would suffer no substantial harm.

Nor does Debtor's appeals require the Court to defer considering confirmation of the Plan. The filing of a notice of appeal divests the lower court of jurisdiction over issues related to the appeal. *See In re Walker*, 515 F.3d 1204, 1211 (11th Cir. 2008); *In re Health Care Products*, 169 B.R. 753, 755 (M.D. Fla. 1994). "The purpose of the general rule is to avoid the confusion of

²² Adv. Proc. Doc. No. 9, Exh. A.

²³ Adv. Proc. Doc. No. 9, Exh. 9-5

placing the same matter before two courts at the same time and preserve the integrity of the appeal process.” *In re Whispering Pines Estates*, 369 B.R. 752, 757 (B.A.P. 1st Cir. 2007) So, a lower court cannot exercise jurisdiction over issues that may affect the appeal or circumvent the appeal process. *Id.* at 759; *In re Fontainebleau Las Vegas Holdings, LLC*, No. 09–21481, 2013 WL 1147443 at * 4 (Bankr. S.D. Fla. Mar. 19, 2013).

Courts, however, do retain jurisdiction to proceed with other aspects of the bankruptcy case which do not interfere with the appeal. *In re Murff*, No. 16-59055, 2016 WL 5118280, * 3 (Bankr. N.D. Ga. Sept. 16, 2016) (citing *In re Demarco*, 258 B.R. 30 (Bankr. M.D. Fla. 2000)). If courts could not proceed, a bankruptcy case would “freeze” upon filing of any appeal which “would inure unjustly to the benefit of any party whose interests were furthered by delay” and have the “potential to severely hamper a bankruptcy court’s ability to administer its cases in a timely manner.” *Id.* (quoting *Whispering Pines*, 369 B.R. at 758; *In re Strawberry Square Associates*, 152 B.R. 699, 702 (Bankr. E.D.N.Y. 1993)). Debtor argues the Court should defer considering confirmation of the Plan because an order on confirmation would directly or indirectly impact the appeal of the orders on the Claim Objection and dismissal of the Complaint, citing *In re Demarco*, as support.

Confirmation of a plan requires the court to consider whether a plan has met all the requirements of 11 U.S.C. §1325. If the court confirms a plan, the debtor and each creditor are bound by the plan’s terms. 11 U.S.C. §1327. Here, the Court could not confirm the Plan because it did not make any provision for BONYM’s secured claim as required by §1325(a)(5) and Debtor had not made all payments he proposed under the Plan, a requirement of §1325(a)(2).²⁴ Debtor’s failure to make payments under the Plan is wholly unrelated to Debtor’s dispute with BONYM and a basis to deny confirmation entirely. Furthermore, during the eight months the Plan was

²⁴ At the March 21, 2023 hearing, the Court ruled that the Plan could not be confirmed because Debtor was not current on his payments and the Plan did not provide for BONYM’s claim.

pending, Debtor failed to move the case forward or present a confirmable plan, which indicates the Plan may not have been proposed in good faith, also a requirement of §1325(a)(3) and basis to deny confirmation. The Court's decision to proceed and ultimately deny confirmation for reasons wholly unrelated to the appeal between Debtor and BONYM is consistent with this Court's jurisdiction to proceed with other aspects of the bankruptcy case which do not interfere with the appeal. The facts of this case are clearly distinguishable from *Demarco*, a case where the debtor proposed a confirmable plan which if confirmed, had terms that would have affected the appeal. Here, Debtor did not propose a confirmable plan, was not current on plan payments he did propose and could not have confirmed a plan for reasons wholly unrelated to the pending appeals.

III. CONCLUSION

The Court denies the Stay Motion. Debtor has not clearly established that he is likely to prevail on appeal, nor has he established irreparable injury and no substantial harm to the creditor. Debtor's appeals do not require the Court to defer the denial of confirmation of the Plan. For this and the reasons stated in open court, it is **ORDERED** that the Stay Motion (Doc. No. 54) is **DENIED**.

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The clerk is directed to serve a copy of this order on all interested parties.