UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN

In re:

KEVIN MARK WIGGER,

Debtor.
_____/

Case No. DG 17-04014
Chapter 7
Hon. Scott W. Dales

KEVIN MARK WIGGER,

Plaintiff,
v.

STATE TREASURER, WILLIAM A. VAN ECK, ADA YOUNG and GEORGE WIGGER,

Defendants.
_____/

Adversary Pro. No. 18-80149

MEMORANDUM OF DECISION AND ORDER

PRESENT: HONORABLE SCOTT W. DALES
Chief United States Bankruptcy Judge

Defendant State Treasurer of Michigan (the "Treasurer") has filed her notice of appeal from the court's Judgment in an Adversary Proceeding (the "Judgment," ECF No. 54), together with a Motion for Stay Pending Appeal Pursuant to Fed. R. Bankr. P. 8007 (the "Rule 8007 Motion," ECF No. 55). The court scheduled the Motion for expedited hearing, by telephone, which took place on September 12, 2019. The Treasurer appeared through counsel; plaintiff Kevin Wigger ("Plaintiff" or "Mr. Wigger") appeared *pro se*.

Through the Rule 8007 Motion, the Treasurer requests that 90% of the funds held in the Plaintiff's Individual Retirement Account ("IRA") and 50% of the net proceeds of his separate

judgment against his son, George, be frozen pending resolution of the appeal to the U.S. District Court for the Western District of Michigan.

As the Treasurer notes in her brief in support of the Rule 8007 Motion, courts in the Sixth Circuit consider the factors set forth in *Michigan Coalition of Radioactive Material Users Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). The Treasurer, as the party seeking the stay, has the burden of showing that she is entitled to this relief. *Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012); *see generally In re K & D Indus. Servs. Holding Co., Inc.*, 600 B.R. 388, 389-90 (Bankr. E.D. Mich. 2019) (recent and helpful discussion of factors governing stays pending appeal).

In our circuit, the familiar standards governing preliminary injunctions apply to stays pending appeal, although a court balances them differently, given that a motion for stay pending appeal comes at the end of a case, whereas an order granting preliminary injunctive relief precedes complete development of the record and a final judgment. *Griepentrog*, 945 F.2d at 153. The familiar factors are:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Id. (citing *Ohio ex rel. Celebreeze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987)). The "test" is not rigid but flexible and highly discretionary: "[t]hese factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Id.* (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir.1985)).

The first factor -- likelihood of success on the merits of the appeal -- presents a practical problem for appellants because a motion for stay pending appeal must be presented (in the first

instance) to the court that has just ruled against the appellant on the merits. Fed. R. Bankr. P. 8007(a). It seems unlikely that the author of the judgment that is subject to the appeal, having just penned the opinion, would find a "likelihood of [its] reversal." *Griepentrog*, 945 F.2d at 153; *In re K & D Indus. Servs. Holding Co.*, 600 B.R. at 390 (noting that the court had carefully considered the arguments in rendering the decision on appeal and declining to find likelihood of success on appeal). The hurdle, however, is not insurmountable, because, as the Sixth Circuit noted in *Griepentrog:*

> The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. … Simply stated, more of one excuses less of the other.

Griepentrog, 945 F.2d at 153 (citations omitted).

Turning to the first factor, the Treasurer plainly rehashes the arguments the court has previously rejected in entering the Judgment. Repeating them in the context of this motion does not strengthen them, and the fact that the court's decision is a matter of first impression does not affect the likelihood of success on appeal. *See In re K & D Indus. Servs. Holding Co.*, 600 B.R. at 390 ("Rehashing the same arguments already rejected by the Court does not mean they are likely to prevail on appeal.").

Nevertheless, the Treasurer's arguments, though ultimately not persuasive, were thoughtful and intuitive. Indeed, it is a bit surprising that an incarcerated individual can avoid shouldering the cost of his incarceration by filing for bankruptcy protection and claiming exemptions, but the court's reading of the applicable Bankruptcy Code sections leads to that result.[1] The Treasurer

[1] The Treasurer might have addressed the incongruity of the situation by seeking to dismiss the case, if there were grounds for a motion under § 707(b). This would have deprived the Plaintiff of the benefits of the federal exemptions, which protect a debtor's interest in exempt property as long as the case is not dismissed. 11 U.S.C. § 522(c).

has arguably raised "serious questions going to the merits" of the court's decision, *DeLorean,* 755 F.2d at 1229, certainly "more than the mere 'possibility' of success on the merits,"[2] but the court remains convinced about the correctness of its decision. Thus, the first *Griepentrog* factor does not weigh in favor of granting the stay.

The second factor -- the likelihood that the Treasurer will be irreparably harmed absent a stay -- favors granting a stay in this case. The Plaintiff, a chapter 7 debtor incarcerated for years, is obviously impecunious, and his IRA appears to present the only possible asset to satisfy the Treasurer's *in rem* claim. Under the circumstances, a remedy at law (*e.g.*, money damages) is not available, which shows that the Treasurer's injury will be irreparable absent a stay. If the Plaintiff puts the IRA beyond the Treasurer's reach pending appeal, the Treasurer (and the taxpayers) will be left empty-handed if the United States District Court reverses the Judgment, and damages would be an unsatisfactory remedy. *See Deckert v. Indep. Shares Corp.*, 311 U.S. 282, 288 (1940) ("We are of opinion that the bill states a cause for equitable relief. There are allegations that Independence is insolvent, that its business is practically halted, that it is threatened with many lawsuits, that its assets are endangered, and that preferences to creditors are probable.").

Moreover, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts., C.J., in chambers, quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)). The injunctive aspect of the Judgment in this case, of course, affects only the Treasurer's enforcement of the State Correctional Facilities Reimbursement Act, M.C.L. §800.401 *et seq.* (the "SCFRA"), against this Debtor's assets, but the court is not unmindful of the larger ramifications of its decision to avoid the Treasurer's lien.

---

[2] *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 261 n. 4. (6th Cir.1977).

As for the third and fourth *Griepentrog* factors, which in this case tend to merge with the second factor and with each other, they also favor granting a stay pending appeal. Taxpayers, non-parties to this proceeding, would suffer in the absence of a stay pending appeal if the United States District Court disagrees with the court's decision. Significantly, Michigan has a long-established statutory scheme under the SCFRA for shifting the cost of incarceration from the public to the offender, which presumptively serves the public interest by protecting the public fisc. For his part, the Plaintiff conceded during the hearing that his basic needs are being met (at the Treasurer's expense) during the term of his incarceration, and his confinement (and the taxpayers' support) will likely extend beyond the pendency of the appeal. For similar reasons, the fresh start that his exemptions are designed to provide will necessarily be postponed to a considerable extent during his incarceration. The balance of hardships strongly favors the Treasurer.

Balancing the *Griepentrog* factors, rather than treating them as preconditions in a checklist, the court in its discretion will grant the Rule 8007 Motion and stay its Judgment pending appeal. The potential harm to the Treasurer in the absence of a stay outweighs the court's reservations about her likelihood of success on appeal, excusing somewhat her showing on the first *Griepentrog* factor. *See Griepentrog*, 945 F.2d at 153. More generally, because the Judgment, and the rationale for entering it, promises extraordinary disruption to Michigan's statutory scheme for recouping the costs of incarceration, prudence dictates that we proceed slowly and with the benefits of appellate review.

During the hearing on the Rule 8007 Motion, the court and the parties discussed the possibility that they might stipulate to some form of amendment to the underlying state court order under the SCFRA that would (i) permit the Debtor to invest the IRA in a more lucrative manner; (ii) reinstate a stipend; and (iii) protect the Treasurer's interest in the IRA pending appeal. Nothing

in today's order resolving the Rule 8007 Motion should be construed to interfere with any such stipulation.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Rule 8007 Motion is GRANTED, and the Judgment is stayed pending resolution of the Treasurer's appeal to the United States District Court.

IT IS FURTHER ORDERED that nothing in this Memorandum of Decision and Order should be construed to preclude the parties from entering into a stipulation as contemplated during the oral argument on the Rule 8007 Motion.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Memorandum of Decision and Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Mr. Kevin M. Wigger (via first class U.S. Mail), Katherine C. Kerwin, Esq., and the United States Trustee (via first class U.S. Mail).

END OF ORDER

IT IS SO ORDERED.

Dated September 13, 2019

Scott W. Dales
United States Bankruptcy Judge