IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

IN RE: **CHAPTER 7**

DONNA ROGERS **CASE NO. 99-05514JEE**

MARK ANTON MORIN **PLAINTIFF**

VS **ADVERSARY NO. 00-0039JEE**

DONNA ROGERS **DEFENDANT**

Hon. William C. Bell
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Edward Ellington, Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON
MOTION FOR RELIEF FROM JUDGMENT DUE TO NEWLY DISCLOSED EVIDENCE
AND *ADDENDUM* THERETO
AND
MOTION FOR STAY PENDING APPEAL WITHOUT BOND
AND *AMENDMENT* THERETO

THIS MATTER came before the Court on the *Motion for Relief from Judgment Due to Newly Disclosed Evidence* and the *Addendum* thereto filed by the Debtor, Donna Rogers, and the *Motion for Stay Pending Appeal Without Bond* and *Amendment* thereto also filed by the Debtor, as well as the *Responses* to each filed by the Plaintiff, Mark Anton Morin. The Court having considered the *Motions* and *Responses*, finds that the *Motion for Relief from Judgment Due to Newly*

Disclosed Evidence is not well taken and should be denied without prejudice, that the *Addendum* thereto is not well taken and should be dismissed, that the *Amendment to the Motion for Stay Pending Appeal Without Bond* is not well taken and should be denied without prejudice, and that the *Motion for Stay Pending Appeal Without Bond* is well taken and should be granted.

FINDINGS OF FACT

This adversary proceeding arises out of protracted divorce litigation conducted between the parties in the Chancery Court of Scott County, Mississippi. During the divorce proceedings, the Debtor accused Mr. Morin of abusing their daughter, but Mr. Morin successfully defended himself against the charge. On July 24, 1998, the state court entered a *Final Judgment of Divorce* awarding the Debtor custody of the minor child, granting Mr. Morin visitation privileges, and ordering him to pay child support payments to the Debtor. In addition, the state court, pursuant to Mississippi Code Annotated § 93-5-23, awarded Mr. Morin a judgment of $39,350.67 against the Debtor for the attorneys' fees and court costs he incurred in defending himself against the abuse allegation. The Debtor appealed the Chancery Court ruling to the Mississippi Supreme Court.

Meanwhile, on November 18, 1999, the Debtor filed her petition for relief under Chapter 7 of the Bankruptcy Code, seeing to discharge the $39,350.67 owed to Mr. Morin. On March 8, 2000, Mr. Morin initiated this adversary proceeding by filing a *Complaint* to determine the non-dischargeability pursuant to 11 U.S.C. § 523(a)(5)[1] of the Chancery Court judgment awarding him attorneys' fees and costs. Subsequently, the parties filed various pleadings and motions, including a *Motion* and a *Counter-Motion for Summary Judgment*, and on December 6, 2000, this Court

[1] Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless otherwise noted.

entered its opinion that the attorneys' fees and costs awarded to Mr. Morin were non-dischargeable in bankruptcy pursuant to § 523(a)(5).

On January 16, 2001, the Debtor timely filed her *Notice of Appeal* of this Court's decision and on the same day, filed her *Motion for Stay Pending Appeal Without Bond.* Because the Chancery Court decision was on appeal, however, on March 23, 2001, this Court entered the parties' *Agreed Order Holding all Bankruptcy Motions and Appeals in Abeyance* until the Supreme Court issued its decision on the appeal from the Chancery Court. On May 10, 2001, the Mississippi Supreme Court issued its opinion in Rogers v. Morin, 791 So.2d 815 (Miss. 2001), affirming the decision of the Chancery Court which had granted Mr. Morin attorneys' fees and costs.

On June 19, 2001, the Debtor filed in this Court a *Motion for Relief from Judgment Due to Newly Disclosed Evidence* arguing that the Mississippi Supreme Court decision has clarified the Chancery Court opinion in regard to the attorneys' fees and costs awarded to Mr. Morin and that, accordingly, this Court should reconsider its opinion of December 6, 2000.[2] However, because the Debtor had filed a *Motion for Rehearing* of the Mississippi Supreme Court's decision, on July 30, 2001, this Court entered a second *Agreed Order Holding Case in Abeyance* until the Mississippi Supreme Court rendered a decision on the pending *Motion for Rehearing.* Following the Supreme Court's denial of the petition for rehearing, this Court entered an *Order Setting Aside* the two *Agreed Orders* holding the pending motions and appeal in abeyance.

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[2] As noted in the introduction to this opinion, on September 1, 2001, the Debtor filed an *Addendum to the Motion for Relief from Judgment Due to Newly Disclosed Evidence* essentially notifying this Court that the Chancery Court has terminated child support payments from Mr. Morin to the Debtor, but raising no actual issues for this Court's consideration. Consequently, the *Addendum* is not well taken and should be dismissed.

Thereafter, on October 10, 2001, the Debtor also filed an *Amendment to Motion for Stay Pending Appeal Without Bond* alleging that her wages are being unlawfully garnished.

The Court having considered the *Motions* and *Responses*, has thus identified three issues contained within the various pleadings. First, the Debtor requests that this Court reconsider its opinion of December 6, 2000, wherein this Court concluded that the Chancery Court judgment obtained by Mr. Morin against the Debtor is a non-dischargeable debt. Second, the Debtor requests that this Court terminate a garnishment action against her wages. And third, the Debtor requests that this Court issue a stay without bond pending her appeal of this Court's opinion issued on December 6, 2000.

CONCLUSIONS OF LAW

I.

Motion for Relief from Judgment Due to Newly Disclosed Evidence

The *Motion for Relief from Judgment Due to Newly Disclosed Evidence* filed by the Debtor requests, in essence, that this Court reconsider its opinion of December 6, 2000, pursuant to Federal Rule of Civil Procedure 60, which, with certain exceptions not pertinent here, is made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 9024. Under Rule 60, a party may seek relief from judgment for a variety of reasons, including mistake, inadvertence, surprise, excusable neglect, or newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial. The motion is to be made within a reasonable time and for the reasons stated, not more than one year after the judgment was entered. Fed. R. Civ. P. 60.

The Debtor did file her *Motion for Relief from Judgment Due to Newly Disclosed Evidence* within one year of this Court's December 6, 2000, opinion. However, this Court is of the opinion that the Debtor's timely filing of her *Notice of Appeal* deprived this Court of jurisdiction to consider the Debtor's argument because "once a notice of appeal is filed, jurisdiction over the proceeding passes to the district court." 10 Collier on Bankruptcy, ¶ 8001.03[1] (Matthew Bender, 15th Ed. Revised 2001); *see also* In re Appletree Markets, Inc., 155 B.R. 431, 436 (S.D. Tex. 1993) (notice of appeal divested bankruptcy court of jurisdiction); In re Combined Metals Reduction Co., 557 F.2d 179, 200 (9th Cir. 1977) ("The general rule is that once a notice of appeal has been filed, the lower court loses jurisdiction over the subject matter of the appeal."). "The filing of a timely and sufficient notice of appeal has the effect of immediately transferring jurisdiction from the bankruptcy court to the district court . . . with respect to any matters involved in the appeal." Id. at ¶ 8001.04. Thus after a notice of appeal is timely filed, the bankruptcy court has no power to reexamine the order from which the appeal is pending, or to vacate its decision. *See* In re Bialac, 694 F.2d 625, 627 (9th Cir. 1982) ("Even though a bankruptcy court has wide latitude to reconsider and vacate its own prior decisions, not even a bankruptcy court may vacate or modify an order while on appeal."); *see also* Contemporary Mission, Inc. v. U.S. Postal Service, 648 F.2d 97, 107 (2nd Cir. 1981) (district court properly denied plaintiff's post-judgment motion under Fed. R. Civ. P. 60(b) because notice of appeal divested district court of jurisdiction to entertain motion). Accordingly, the Debtor's *Motion for Relief from Judgment Due to Newly Disclosed Evidence* should be denied without prejudice.

II.

Amendment to Motion for Stay Pending Appeal Without Bond

The Debtor further requests that this Court order the termination of a garnishment, instituted

by Mr. Morin based on the underlying Chancery Court judgment, which is currently being executed against her wages. The Debtor alleges that although the garnishment should not have been executed upon until thirty days after service on her employer, her employer immediately began withholdings in violation of law. However, as discussed previously, based on the Debtor's timely filing of her *Notice of Appeal*, this Court is of the opinion that it has been divested of jurisdiction over matters related to the adversary proceeding. Accordingly, the Debtor's *Amendment to Motion for Stay Pending Appeal Without Bond*, which delineates the garnishment argument, should be denied without prejudice.

III.

Motion for Stay Pending Appeal Without Bond

The Court is of the opinion that it has jurisdiction to consider the *Motion for Stay Pending Appeal Without Bond.* In bankruptcy cases, stays pending appeal of all types of judgments, orders or decrees of a bankruptcy judge, including orders granting, denying or dissolving injunctions, are governed by Bankruptcy Rule 8005. Rule 8005 states that the motion for a stay must ordinarily be presented to the bankruptcy judge in the first instance, but may be made to the district court.[3] Rule 8005 expressly provides that "[n]otwithstanding Rule 7062 but subject to power of the district court . . . , the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest." Fed. R. Bankr. P. 8005. Thus, the bankruptcy court is given broad powers to stay its own orders and judgments pending appeal.

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[3] If made to the district court, the motion must show why relief was not obtained from the bankruptcy judge.

Under Bankruptcy Rule 7062, an appellant may obtain a stay of a judgment pending appeal by filing a supersedeas bond in a sum satisfactory to the bankruptcy court. In most cases, a stay is available as of right, subject only to the condition that a satisfactory bond be filed. 10 Collier on Bankruptcy, ¶ 8005.03 (Matthew Bender, 15th Ed. Revised 2001); *see also, e.g.*, In re Gleasman, 111 B.R. 595, 599 n. 6 (Bankr. W.D. Tex. 1990) (money judgment associated with non-dischargeability complaint is common example of applicability of supersedeas stay); In re Normco, Inc., 1997 WL 695722 (N.D. Ill. 1997) (bankruptcy court automatically grants stay when appellant posts supersedeas bond).[4] Normally, the bond must be in a sum sufficient to protect the rights of the party who prevailed in the bankruptcy court. With respect to judgments awarding money, it has long been held that a supersedeas bond should be in a sum sufficient to indemnify the appellee not only for costs, damages and interest, but for the value of the judgment itself. Jerome v. McCarter, 88 U.S. 17, 22 L.Ed. 515 (1874). The amount of the bond and the sufficiency of the sureties are matters entrusted to the determination of the bankruptcy court. 10 Collier on Bankruptcy, ¶ 8005.07 (Matthew Bender 15th Ed. Revised 2001); *see also* Farmer v. Crocker Nat. Bank, 21 B.R. 12 (Bankr. 9th Cir. 1982).

However, the bankruptcy court has discretion to grant a stay pending appeal without requiring posting of a bond. In re Byrd, 172 B.R. 970 (Bankr. W.D. Wash. 1994); In re Sphere Holding Corp., 162 B.R. 639 (E.D.N.Y. 1994). That is, "the court is free to fashion a remedy other than requiring the posting of a supersedeas bond where the appellant's financial condition prevents

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[4] There are, however, important exceptions. For example, a stay is not available as of right pending an appeal from a judgment in an action for injunction. Stays pending appeals from such orders are discretionary with the bankruptcy court.

it from obtaining such a bond." Id.; *see also* Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc., 600 F.2d 1189 (5th Cir. 1979); In re Gleasman, 111 B.R. at 599. Thus, as reflected by Rule 8005 and the above cited cases, the stay in this case may be conditioned upon any terms as will protect the rights of the parties during the pendency of the appeal. 10 Collier on Bankruptcy, ¶ 7062.05 (Matthew Bender 15th Ed. Revised 2001).

In determining whether a discretionary stay should be granted, courts have adopted the standard used in determining whether to grant a preliminary injunction. Consequently, the Debtor in this case must prove that:

> (1) she is substantially likely to succeed on the merits,
> (2) a substantial threat exists that she will suffer irreparable injury if the court does not grant the injunction,
> (3) the threatened injury to her outweighs the threatened injury to Mr. Morin, and
> (4) granting the injunction will not disserve the public interest.

In re Shurley, 171 B.R. 769, 787 (Bankr. W.D. Tex. 1994), *rev'd on other grounds*, 115 F.3d 333 (5th Cir. 1997); *see also* In re First South Savings Assoc., 820 F.2d 700 (5th Cir. 1987). Case law suggests that all four criteria must be satisfied for a stay to be issued. In re Holtmeyer, 229 B.R. 579 (E.D.N.Y. 1999). If the movant does not succeed in carrying its burden on any one of the four elements, the stay may not issue. In re Shurley, 171 B.R. at 787.

Bankruptcy cases emphasize that generally the most important factor is the likelihood of success on the merits. In re Holtmeyer, 229 B.R. at 582. Yet,

> [t]he importance of each of these elements . . . may vary with the facts of each case. Courts apply a sliding-scale type balancing to two elements in particular, adjusting the likelihood of success on the merits by the gravity of the harm incurred, such that where, absent injunction, the harm is great to the [Debtor] and insignificant to the [opposing party], the relative weight of the likelihood of [the opposing party's] success on the merits is diminished.

In re Shurley, 171 B.R. at 788.

Weighing the factors, the Court concludes that the nature of this particular adversary proceeding is such that it may, on appeal, be considered a matter of first impression. In ruling on the *Motion for Summary Judgment* in the adversary proceeding, this Court found that the expansive language of Fifth Circuit case law regarding § 523(a)(5) dictated a finding of non-dischargeability of the state court judgment held by Mr. Morin, a judgment which was issued in accordance with Mississippi Code Annotated § 93-5-23. This Court, however, was not aware of nor did the parties cite any cases which expressly reconciled § 523(a)(5) with Mississippi Code Annotated § 93-5-23. As this proceeding may offer the appellate court an opportunity to clarify the relationship between the two statutes, the Court concludes that the Debtor's appeal presents a "substantial case on the merits" which involves a "serious legal question." In re First South Savings Assoc., 820 F.2d at 704.

Moreover, the Court concludes that the gravity of the injury to the Debtor in not issuing the stay outweighs the harm suffered by Mr. Morin in granting the stay. A review of the Debtor's financial condition as reflected by her bankruptcy schedules indicates that her monthly expenses significantly exceed her income. That fact, coupled with the recent loss of child support, persuade this Court that the Debtor will be injured if required to post a bond sufficient to cover the judgment. Furthermore, the Court finds that since a serious question going to the merits of the adversary proceeding will be raised on appeal such that the appellate court may ultimately find Mr. Morin's state court judgment dischargeable in the Debtor's bankruptcy, the Debtor would suffer irreparable harm by Mr. Morin's collection of the judgment during the pendency of the appeal. Although Mr. Morin will be required to wait to collect on the judgment if it is eventually found to be non-dischargeable, the Court is persuaded that any inconvenience to him caused by the delay is

outweighed by the potential harm to the Debtor. The Court also recognizes that Mr. Morin's judgment does not relate to a secured debt such that he would suffer injury unless his collateral were safeguarded against depreciation. *See* In re Sphere Holding Corp., 162 B.R. 639 (where no collateral at stake, creditors would not be damaged if debtor was unsuccessful on appeal). In fact, the Debtor in this case has no apparent assets, other than her wages, to protect from depletion during appeal. However, in the event the Debtor acquires any additional assets by way of inheritance or otherwise, the Court directs the Debtor, conditional to the issuance of the stay, to promptly disclose any such assets to the attorney for Mr. Morin and to the District Court, and further directs that she not transfer, deplete or otherwise dispose of such assets.

As a final matter, the Court concludes that the granting of the stay will not disserve the public interest as this is a private matter between the two parties.

For these reasons, the Court concludes that the Debtor's *Motion for Stay Pending Appeal Without Bond* is well taken and should be granted.

CONCLUSION

Based on the foregoing, the Court concludes that the *Motion for Relief from Judgment* is not well taken and should be denied without prejudice, that the *Addendum* thereto should be dismissed, that the *Amendment to Motion for Stay Pending Appeal without Bond* is not well taken and should be denied without prejudice, and that the *Motion for Stay Pending Appeal Without Bond* is well taken and should be granted, subject to the conditions that the Debtor promptly disclose any additional assets she might acquire by way of inheritance or otherwise, to the attorney for Mr. Morin and to the District Court, and that she not transfer, deplete or otherwise dispose of such assets.

A separate final judgment consistent with this opinion will be entered in accordance with Federal Rules of Bankruptcy Procedure 7056 and 9021.

This the 24th day of October, 2001.

UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

IN RE:	**CHAPTER 7**
DONNA ROGERS	**CASE NO. 99-05514JEE**
MARK ANTON MORIN	**PLAINTIFF**
VS	**ADVERSARY NO. 00-0039JEE**
DONNA ROGERS	**DEFENDANT**

FINAL JUDGMENT ON
MOTION FOR RELIEF FROM JUDGMENT DUE TO NEWLY DISCLOSED EVIDENCE
AND *ADDENDUM* THERETO
AND
MOTION FOR STAY PENDING APPEAL WITHOUT BOND
AND *AMENDMENT* THERETO

Consistent with the Court's opinion dated contemporaneously herewith, it is hereby ordered and adjudged that:

1. The *Motion for Relief from Judgment Due to Newly Disclosed Evidence* filed by the Debtor is not well taken and is hereby denied without prejudice.

2. That the *Addendum to the Motion for Relief from Judgment Due to Newly Disclosed Evidence* filed by the Debtor should be dismissed.

3. That the *Amendment to Motion for Stay Pending Appeal without Bond* filed by the Debtor is not well taken and is hereby denied without prejudice.

4. That the *Motion for Stay Pending Appeal Without Bond* filed by the Debtor is well taken and is hereby granted, subject to the following conditions:

a. In the event the Debtor acquires any additional assets by way of inheritance or otherwise, she is hereby directed to promptly disclose such assets to the attorney for Mr. Morin and to the District Court, and

b. The Debtor is further directed that she not transfer, deplete or otherwise dispose of any such assets.

5. This judgment is a final judgment pursuant to Federal Rules of Bankruptcy Procedure 7056 and 9021.

SO ORDERED AND ADJUDGED this the 24th day of October, 2001.

UNITED STATES BANKRUPTCY JUDGE