

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

In re: CYNTHIA MOYA, a/k/a  
Cynthia A Moya, a/k/a  
Cynthia Ap Moya,

No. 7-16-13074 JA

Debtor.

**ORDER DENYING MOTION FOR STAY PENDING APPEAL**

The Debtor, *pro se*, filed a Notice of Appeal of this Court's Order Dismissing Bankruptcy Case ("Dismissal Order" – Docket No. 50). *See* Docket No. 61. The Debtor elected to have the appeal heard by the United States District Court for the District Court. *Id.* On May 24, 2017, the Debtor filed a Presentment for Stay Pending Appeal ("Motion for Stay Pending Appeal"). *See* Docket No. 73. For the reasons explained below, the Court will deny the Debtor's request for stay pending appeal.

DISCUSSION

A party requesting the stay of a bankruptcy court's order pending appeal of that order to the United States District Court ordinarily "must move first in the bankruptcy court." Fed. R. Bankr. P. 8007(a)(1). "The motion may be made either before or after the appeal is filed." Fed. R. Bankr. P. 8007(a)(2). The Court considers the following factors when determining whether to grant a motion for stay pending appeal: "(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 suffer irreparable injury unless the stay is granted; (3) whether granting the stay will result in substantial harm to the other parties to the appeal; and (4) the effect of granting the stay upon the public interest."

*Lang v. Lang (In re Lang)*, 305 B.R. 905, 911 (10<sup>th</sup> Cir. BAP 2004) (citations omitted).<sup>1</sup>

Whether to grant a stay pending appeal falls within the Court’s sound discretion. *Id.* The party requesting a stay pending appeal must satisfy all four factors to obtain a stay pending appeal. *In re Sunland, Inc.*, 507 B.R. 753, 765 (Bankr. D.N.M. 2014) (citing *Moore v. Tangipahoa Parish School Bd.*, 2013 WL 141791, \*20 (5th Cir. Jan 14, 2013) and *In re Sunflower Racing, Inc.*, 225 B.R. 225, 227 (D. Kan. 1998)).<sup>2</sup> Likelihood of success and irreparable harm to the moving party are the most important factors. *See Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (“The first two factors of the traditional standard are the most critical.”).

Debtor has not shown that she is likely to prevail on the merits of the appeal. The order dismissing the bankruptcy case was entered by default because Debtor did not file an objection to the Motion to Dismiss within the required time despite having been served with a notice specifying the objection deadline and stating the grounds for the motion. *See* Dismissal Order, ¶¶ 5 and 6 – Docket No. 50. The record provides evidentiary support for dismissal of the bankruptcy case by default. The record reflects that the Trustee filed a Notice of Deadline for Filing Objections to Trustee’s Motion to Dismiss (the “Notice”) on February 22, 2017. *See* Docket No. 40. A Certificate of Notice filed February 24, 2017 shows that on February 24, 2017 the Bankruptcy Noticing Center mailed by first class mail a copy of the Notice to Cynthia Moya at her address of record in this bankruptcy case, 1413 Tiffany Ln Se, Rio Rancho, NM 87124-

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<sup>1</sup> *See also In re Frantz*, 534 B.R. 378, 385 (Bankr. D. Idaho 2015) (observing that Rule 8007(a)(1) does not itself specify the standard for granting a request for stay pending appeal, but that, generally, courts apply the four preliminary injunction factors. Those factors are the same or nearly the same as those identified in *Lang* and applied to determine a request for stay pending appeal).

<sup>2</sup> *In re Revel AC, Inc.*, 802 F.3d 558, 576 n.3 (3d Cir. 2015) (J. Shwartz, dissenting) (observing that “the Supreme Court has presented the four-factor test as conjunctive, meaning that all four factors must be satisfied to obtain a stay.”) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776, 107, S.Ct. 2113, 95 L.Ed.2d 724 (1987)).

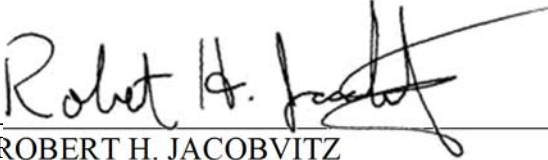
0977. *See* Docket No. 41. The Notice states that the grounds for the Motion to Dismiss were “failure of debtor to produce proof of identification and/or social security number, failure to provide tax returns and payment advices, per §521(e)(2), and refusal to be sworn unless all other participants also took oath filed by Trustee Philip Montoya.” The Notice further states that **IF YOU OBJECT** to the relief requested, you must file an objection with the Clerk of the United States Bankruptcy Court (address above) by **March 17, 2017.**” (emphasis in the original). The record reflects that Debtor did not file an objection to the Motion to Dismiss. The Court dismissed the chapter 7 case on March 23, 2017.

Debtor states in her Motion for Stay Pending Appeal that “the case was not dismissed due to any failure on my part, but was dismissed because I objected to having to swear as opposed to attest to my words being truthful during the so-called creditors meeting.” Motion, ¶ 2. However, Debtor has not provided any reason why an appellate court would reverse dismissal of the bankruptcy case by default as a result of Debtor’s failure to file an objection to the Motion to Dismiss within the required time, or at all. Further, Debtor’s assertion that she objected to having to swear as opposed to attest to the truth of her testimony at the meeting of creditors partially addresses only one of the Trustee’s stated grounds for moving to dismiss her Chapter 7 case. Thus, Debtor not shown that she is likely to prevail on the merits of the appeal.

Nor has the Debtor satisfied the irreparable harm requirement. The Motion for Stay Pending Appeal does not identify any irreparable harm the Debtor will suffer if the Court does not grant a stay pending appeal.

Because the Debtor has failed to demonstrate a likelihood of success on the merits of the appeal or irreparable harm if the Dismissal Order is not stayed, the Court will deny her request for stay pending appeal.

WHEREFORE, IT IS HEREBY ORDERED that the Motion for Stay Pending Appeal is DENIED.

  
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ROBERT H. JACOBVITZ  
United States Bankruptcy Judge

Date entered on docket: May 25, 2017

COPY TO:

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