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JUDGE: M. A. Mahoney

PARTIES: Kenneth E. Rhea, Kathleen Rhea, Internal Revenue Service, United States of America

CHAPTER: 11

ATTORNEYS: C. K. Ide, I. Grodsky

DATE: 11/12/97

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

KENNETH E. RHEA
KATHLEEN RHEA

Case No. 94-12571-MAM-11

Debtors.

**ORDER DENYING MOTION OF UNITED STATES OF AMERICA
FOR STAY PENDING APPEAL**

Carol Koehler Ide, Washington, DC for United States of America
Irvin Grodsky, Mobile, AL for Kenneth E. Rhea

This matter is before the Court on the Motion of the United States for Stay Pending Appeal of the order confirming plan of Dr. Rhea dated October 15, 1997 and the order dated October 2, 1997 determining validity of Paragraph 4.0 of Debtor's Plan. This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. The motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the motion is denied.

The United States seeks a stay of the part of the orders validating Paragraph 4.0 of the order confirming Dr. Rhea's plan which requires the Internal Revenue Service to release its tax liens against Dr. Rhea upon payment by him of the sum of \$2,400 to the IRS. (Paragraph 4.0 of the Amended Plan.) The Debtor, Dr. Kenneth E. Rhea, opposes it.

Stays pending appeal are to be granted in appropriate circumstances. Courts use four factors to determine if a stay is warranted: (1) whether the movant has made a strong showing of a likelihood of success on the merits; (2) whether there will be irreparable harm to a party if the stay is not granted; (3) whether there is an absence of substantial harm to other parties if the stay

is granted; and (4) whether granting the stay would serve the public interest. If the four factors are present, a stay should be granted. *Hilton v. Braunskill*, 481 U.S. 770 (1987); *In re First South Savings Assoc.*, 820 F.2d 700 (5th Cir. 1987).

A.

The Court does not conclude that there is a reasonable likelihood that the United States will prevail on the merits of its appeal. In an earlier case in this district, the District Court ruled against the IRS. *In re Haas*, 195 B.R. 933, 942 (Bankr. S.D. Ala. 1997), *aff'd*, CA 96-0502-AH (S.D. Ala., August 12, 1997). Other case law also supports this position. *In re Butler*, 139 B.R. 258 (Bankr. E.D. Okla. 1992). The IRS relies on the case of *Dewsnup v. Timm*, 502 U.S. 410, 418 (1992) which predates the *Haas* case. It also involved a Chapter 7 debtor. Chapter 7 debtors do not have plans of reorganization which are governed by the language in 11 U.S.C. § 1129.

B.

The Court concludes that the IRS may be irreparably harmed if a stay is not imposed. Payment of the \$2,400 would discharge the lien and moot the appeal. *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988), *cert. denied*, 488 U.S. 823 (1988).

C.

Dr. Rhea argued that any stay which precluded consummation of his plan would irreparably harm him. He needs to begin payment of his debts while he is working and able to work in order to allow his plan to be feasible. The IRS argued that it did not wish to preclude consummation of the plan in any way except preclusion of lien discharge. The United States can request a limited stay pursuant to Rule 8005. Rule 8005 states:

Notwithstanding Rule 7062 . . . 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.

In re Westwood Plaza Apartments, Ltd., 150 B.R. 163 (Bankr. E.D. Tex. 1993) (stay of confirmation of plan granted subject to debtor being allowed to pay certain other claims under plan).

The harm to the debtor is very substantially lessened if the plan is consummated except for the lien discharge provision. All creditors commence receipt of distributions.

D.

The public interest in the issue is not great save the interest of collection of greater tax revenues.

CONCLUSION

The Court concludes that denial of the motion is appropriate, due mainly to the prior District Court affirmance of an identical provision in the plan in the *Haas* case. Without that opinion, the Court would view the legal issues as less certain of outcome; however, the District Court opinion makes at least a District Court affirmance likely. Therefore, this Court believes that the District Court should grant a stay if it concludes that one is appropriate, but based upon the District Court case authority, it would not be appropriate for this Court to do so.

Therefore, it is ORDERED that the motion for stay pending appeal is DENIED.

Dated: November 12, 1997

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE