

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman**

In re:)
)
HEALTHTRIO, INC.,) **Case No. 09-34404 HRT**
)
Debtor.) **Chapter 7**
)
_____)

ORDER GRANTING MOTION FOR STAY PENDING APPEAL

This matter comes before the Court on Debtor’s *Motion for Stay Pending Appeal* (docket #68) [the “Motion”].

Under the Bankruptcy Rules, “[a] motion for a stay of the judgment, order, or decree of a bankruptcy judge . . . pending appeal must ordinarily be presented to the bankruptcy judge in the first instance.” FED. R. BANKR. P. 8005. The Debtor has appeals of the same Delaware Bankruptcy Court Order pending in both the Delaware District Court and the Bankruptcy Appellate Panel for the 10th Circuit Court of Appeals. It has presented motions for stay pending appeal to both this Court and the Bankruptcy Court for the District of Delaware. Under Rule 8005, this is the appropriate court to consider such a motion.

According to WRIGHT AND MILLER

When a motion for transfer under Section 1404(a) of the Judicial Code of the United States has been granted, and the papers lodged with the clerk of the transferee court, it is well settled that the transferor court—and the appellate court that has jurisdiction over it—loses all jurisdiction over the case and may not proceed further with regard to it.

15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3846 (3d ed. 1998); *see, also, Am. Heart Disease Prevention Found., Inc. v. Hughey*, 905 F. Supp. 893, 897-98 (D. Kan. 1995) (held that the court was without jurisdiction to consider motion to alter or amend judgment following effectuation of transfer order); *Database America, Inc. v. Bellsouth Advertising & Pub. Corp.*, 825 F. Supp. 1216, 1221-22 (D. N.J. 1993) (held that court was without jurisdiction to rule on motion for the court to reconsider its transfer order where motion was filed nine days after receipt of case file in transferee court); *Wilson-Cook Medical, Inc. v. Wilson*, 942 F.2d 247, 250 (4th Cir. 1991) (transferor court retained jurisdiction where it failed to transfer the case file following entry of the transfer order).

In this case, the Delaware Bankruptcy Court entered the transfer order on November 12, 2009. This Court docketed the case on November 16, 2009. The act of docketing the case on November 16 divested the Delaware Bankruptcy Court of jurisdiction over the case. Because

the Bankruptcy Court for the District of Delaware was divested of jurisdiction over this matter on November 16, 2009, this Court has jurisdiction over this pending Motion.

The jurisdictional issue not only has a bearing on which court is the appropriate venue to consider a motion for stay pending appeal, but also goes to the merits of the pending Motion. It was not until November 23, 2009, that the Petitioning Creditors moved the Delaware court for clarification of its November 12, 2009, order. In both the *Hughey* and *Database* cases cited above, the transferor courts found that they lacked jurisdiction to entertain Rule 60 type motions after docketing of the transferred cases in the transferee courts. Thus, it appears that the Delaware Bankruptcy Court lacked the jurisdiction to rule on the motion for clarification. But, even if the court did possess the jurisdiction to issue an order clarifying one of its prior orders, it clearly lacked the jurisdiction to amend or add to a prior ruling in any way.

The Court must consider four factors in relation to this Motion. “They 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 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.” *In re Lang*, 414 F.3d 1191, 1201 (10th Cir. 2005).

After considering the evidence, this Court believes that it is unlikely that the Bankruptcy Appellate Panel will find that an order for relief was issued by the Bankruptcy Court for the District of Delaware at any time during which that Court had jurisdiction over the Debtor’s bankruptcy proceeding. This Court has reviewed all of that court’s written orders and finds no order for relief. At the hearing on the instant Motion, the Court accepted four hearing transcripts into evidence. They are transcriptions of hearings held before the Delaware Bankruptcy Court. This Court has reviewed all of them.

The transcript from the hearing held before the Delaware Bankruptcy Court on September 15, 2009, is enlightening. It contains several discussions of an order for relief. Early in the hearing, the judge made the following comment:

THE COURT: Okay. So there were three creditors, and the debtor is not paying its debts as they come due. Is there a reason that the Order for Relief wasn’t entered?

...

But, I mean, as I understand it, it’s – should the Order for Relief have been entered and then we’ll deal with the venue issue?

Transcript of Hearing on Motion for Summary Judgment at 3, *In re HealthTrio, Inc.*, 09-10555-BLS (Bankr. D. Del. Sept. 15, 2009). That passage is unambiguous. It reflects that the judge

thinks that an order for relief probably should enter. It also reflects that he is absolutely clear on the fact it has not yet been entered.

At the end of the September 15, 2009, hearing, the following appears:

THE COURT: All right. Then we'll look forward to a hearing on the 7th of October at 2:00 p.m. And again, if the parties can come to agreement on the issue of the order for relief, then I would expect that under certification. Otherwise, we'll deal with it on the 7th.

Id. at 17. Again, the comments of the court are not open to varying interpretations. Unless the parties stipulated to the entry of an order for relief, that would remain an open issue to be addressed at the next hearing.

It appears that the October 7, 2009, hearing was rescheduled to October 19, 2009. That brief hearing was completely taken up with a discussion of the parties' discovery dispute. The transcript of the proceeding contains no mention of an order for relief. The court made orders concerning discovery and continued the pending matters to November 12, 2009.

Rather than going forward on the pending matters, the November 12, 2009, transcript reflects a continuation of the parties' discovery dispute. Again, there is no discussion of an order for relief. The court indicated that it was taking matters under advisement. If the court could issue its ruling based on the papers and transcripts of prior hearings, it would do so. Otherwise, the court indicated that it would schedule further proceedings.

On that same day, November 12, 2009, the court entered its *Order Transferring Venue*. In that Order, the court makes reference to "an order for relief having been entered in this involuntary case [Docket No. 19]." The order appearing at docket number 19 on the Delaware court's docket is its May 4, 2009, *Order Denying Motion to Dismiss*. This Court's review of the April 30, 2009, hearing transcript reveals that no evidence was taken and that the court heard oral argument on HealthTrio's motion to dismiss the petition. The argument focused on the secured or unsecured status of two of the creditors and whether or not a bona fide dispute existed as to the third creditor. The order signed by the court on May 4, 2009, specifically references the fact the Petitioning Creditors satisfied the requirements under § 303(b)(1) to file the involuntary petition. The order does not state that it is an order for relief and it does not make a finding that HealthTrio was not paying its debts as they became due under § 303(h).

The simple reality is that the Delaware Court's *Order Denying Motion to Dismiss* was not an order for relief and that court's subsequent comments at the September 15, 2009, hearing demonstrate that the Delaware Court was under no illusion that an order for relief had ever been entered.

The reference to an order for relief having entered that appeared in the November 12, 2009, *Order Transferring Venue* was simply an error. This Court concludes that no order for relief was ever entered at any time during which the Delaware court had jurisdiction over this case. Consequently, the December 10, 2009, *Order for Relief* entered by the Delaware Court cannot be characterized as an order that simply clarifies an action that court had previously taken.¹

In accordance with its analysis of the evidence, this Court believes it is likely the Bankruptcy Appellate Panel will find that the December 10, 2009, *Order for Relief* that is on appeal in that court is an order entered without jurisdiction. The Court is satisfied that there is a high probability that the Debtor will be successful in prosecuting its appeal of the December 10, 2009, *Order for Relief* entered in the Bankruptcy Court for the District of Delaware.

Next the Court must consider whether failing to grant the stay pending appeal will irreparably harm the Debtor and the Court must balance any such harm against the harm that would result to the Petitioning Creditors if the Court does grant the stay. This balancing is greatly influenced by the fact the Court finds it is highly likely the Debtor will be successful on the merits of its appeal. The relationship has been described as follows:

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

Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991).

The Debtor has made a persuasive showing of the likelihood of its success on the merits of its appeal. Under these circumstances, the Debtor's burden of demonstrating irreparable harm is not great. Virtually any harm that results from an order that is likely to be reversed is too great a harm. Conversely, when a party benefits from a court order that is unlikely to stand up to the scrutiny of the appeal process, delaying that undeserved benefit can scarcely be viewed as harmful.

¹ The Court doubts that, under these facts, the Delaware court retained jurisdiction even to enter an order clarifying its prior acts. But whether or not it could have done that much is a moot point. This Court has done an exhaustive review of the prior proceedings in this case. It finds nothing in the record of those proceedings that can be reasonably construed as an order for relief entered at any time prior to the transfer of jurisdiction to this Court.

The Court finds that allowing the process of administering HealthTrio's bankruptcy estate to move forward under these circumstances, where the very adjudication of its bankruptcy is in doubt, constitutes an irreparable harm. Delaying the recognition of that adjudication unless and until it is affirmed in the Bankruptcy Appellate Panel is not harmful to the Petitioning Creditors.

The larger issue in this case goes to due process. No party may be bound by an order of a court that goes beyond that court's jurisdiction. *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 608 (1990). Regardless of that court's good faith and even the ultimate correctness of its determination of the underlying issues, such orders may not be enforced. *U.S. v. 51 Pieces of Real Property*, 17 F.3d 1306, 1309 (10th Cir. 1994) (“[A] judgment is void if the court that enters it lacks jurisdiction over either the subject matter of the action or the parties to the action.”). There is no public policy to be furthered by this Court continuing to enforce an order where it finds it is likely the order will be vacated by the Bankruptcy Appellate Panel on account of a jurisdictional error.

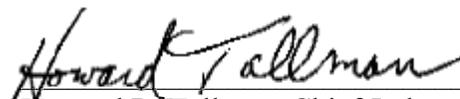
Finally, the Chapter 7 Interim Trustee expressed his concerns. He believes that his statute of limitations on recovery actions may begin to run while the Bankruptcy Appellate Panel considers the Debtor's appeal. He worries that, by the time the appeal is resolved, he may lack the time necessary to investigate the affairs of the Debtor before his time to file his recovery actions runs out. The Debtor questions the Trustee's interpretation of the relevant statute but the Court need not resolve that issue. Even if the Trustee's view of when the limitations period begins to run is correct, the Court must impose a stay under these facts. The Court is persuaded that the Order for Relief entered by the Delaware Bankruptcy Court is void for lack of jurisdiction. Certainly the Court's analysis of the factors for imposing a stay pending appeal compels the Court to impose the stay. But, beyond that, independent from that analysis, if the Court were to refuse the stay it would be enforcing an order that it believes to be void. That it cannot do.

Therefore, it is

ORDERED that Debtor's Motion for Stay Pending Appeal (docket #68) is GRANTED.

Dated this 25th day of February, 2010.

BY THE COURT:


Howard R. Tallman, Chief Judge
United States Bankruptcy Court