

DEC 14 2007

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No. AZ-07-1261-PaMkKu
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SERGIO and SANDRA RENTERIA,)	Bk. No. 02-01943
)	
Debtors.)	
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SERGIO and SANDRA RENTERIA,)	
)	
Appellants,)	
)	
v.)	M E M O R A N D U M ¹
)	
ROBERT P. ABELE,)	
Chapter 7 Trustee,)	
)	
Appellee.)	
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Argued by Video Conference and Submitted
on November 29, 2007

Filed - December 14, 2007

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Eileen W. Hollowell, Bankruptcy Judge, Presiding

Before: PAPPAS, MARKELL and KURTZ,² Bankruptcy Judges.

1. This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

2. Hon. Frank Kurtz, Chief Bankruptcy Judge for the Eastern District of Washington, sitting by designation.

1 the farm business, Debtors contacted Hartford regarding repairs
2 they had allegedly made to the pumps on the farm, and sought
3 payment under the Policy. Although Hartford questioned whether
4 the pump repairs had been made and paid for by Debtors, it
5 eventually paid Debtors \$203,507.19. Debtors did not inform
6 Trustee that they had contacted Hartford nor, later, that they
7 had received any payments.

8 In the meantime, Trustee, joined by creditors United States,
9 acting on behalf of the Farm Service Agency ("FSA"), and OXBOW
10 Int'l Corp., moved to convert the case to chapter 7, or to
11 dismiss it, on March 22, 2004. According to Trustee, Debtors had
12 repeatedly misled the bankruptcy court regarding the amount of
13 estate funds they used for purchasing a mobile home on the
14 property, improperly transferred in excess of \$60,000 of estate
15 funds to family members, and failed to produce documents and
16 information requested by Trustee. Hearings were conducted on May
17 25, and June 7, 2004. The bankruptcy court concluded that
18 Debtors had misrepresented to the court the source of funds used
19 to purchase personal assets and other uses of post-petition
20 assets. Tr. Hr'g 91:8 (June 7, 2004). It ordered the case
21 converted to chapter 7 on June 18, 2004. Trustee was appointed
22 to serve as chapter 7 trustee.

23 On October 18, 2004, Trustee commenced an adversary
24 proceeding against Debtors seeking to deny discharge under
25 § 727(a). Trustee alleged that Debtors repeatedly misrepresented
26 to the court factual information regarding assets of the estate,
27 failed to keep adequate records of farming operations and failed
28 to comply with the court's instructions to turn over documents

1 and information requested by Trustee, sold secured assets without
2 the knowledge or permission of the secured creditors, entered
3 into financing arrangements with third parties without disclosing
4 their bankruptcy status to those parties and without seeking
5 court approval of such financing contracts, and transferred
6 \$60,000 of estate funds to their daughters in 2003.

7 Without admitting any of the allegations, on November 9,
8 2004, Debtors stipulated that a judgment could be entered denying
9 Debtors a discharge. The bankruptcy court entered a judgment
10 denying discharge on December 9, 2004.

11 Trustee asserts, and Debtors do not contradict, that he was
12 not informed that Debtors had made a claim on the Policy, or that
13 they had received payments from Hartford, until early 2005. On
14 December 12, 2005, Trustee filed a Motion for Turnover of
15 Bankruptcy Estate Funds (the "Turnover Motion"). The Turnover
16 Motion sought an order directing Debtors to pay \$203,507 to
17 Trustee, representing the payments they received from Hartford
18 for repair of the pumps.

19 Debtors filed a response to the Turnover Motion on May 12,
20 2006, in which they did not deny they had sought and obtained the
21 insurance funds. Instead, Debtors asserted that they would offer
22 evidence at a hearing that some of the payments from Hartford
23 were used for pump repairs, or reimbursement for repairs, and
24 that the remainder of the funds were for repairs to pumps leased
25 to Debtors' daughters, which were not property of the estate.
26 There is no indication in the record that Debtors ever provided
27 this evidence to Trustee or the bankruptcy court.

28 On July 19, 2006, a federal grand jury indicted Debtors and

1 their daughter, Kayla Taylor. The record does not include the
2 indictment. But according to the briefs of the parties, the
3 indictment charges that Debtors conspired to impede and impair
4 the functions of FSA, disposed of property pledged as security to
5 FSA, made false statements to influence a loan, made false
6 statements in a bankruptcy case, and concealed assets in their
7 bankruptcy case.

8 Trustee moved for summary judgment on the Turnover Motion on
9 October 5, 2006 (the "Summary Judgment Motion"). He argued that
10 Debtors had provided no evidence to rebut the Turnover Motion,
11 nor did they assert any valid defense. On November 3, 2006,
12 Debtors requested an extension of time to respond to the Summary
13 Judgment Motion. Debtors argued that portions of the criminal
14 indictment were identical to the allegations in the Turnover
15 Motion and Summary Judgment Motion, and that Debtors had been
16 instructed by counsel in their criminal case to invoke their
17 Fifth Amendment privilege against self-incrimination on matters
18 related to the Turnover Motion.

19 The bankruptcy court conducted hearings on Debtors' request
20 for an extension of time to respond on February 6 and April 5,
21 2007. Debtors then filed a Request for Stay of the Turnover
22 Motion and Summary Judgment Motion on May 7, 2007. This pleading
23 did not address the substantive issues in Trustee's motions, nor
24 did it allege that disputed issues of fact existed. Debtors'
25 sole argument was that any proceedings related to the Turnover
26 Motion should be stayed pending resolution of the criminal
27 proceedings.

28 The bankruptcy court convened a hearing on Debtors' motion

1 to stay proceedings on the Turnover Motion and the Summary
2 Judgment Motion on May 23, 2007. On June 13, 2007, the
3 bankruptcy issued its order denying Debtors' request for stay and
4 granting Trustee's Summary Judgment Motion and Turnover Motion.
5 The order indicates that the court had reviewed the pleadings and
6 documentary evidence, considered the oral arguments of the
7 parties at the May 23, 2007, hearing, and granted its order "in
8 light of the record of this case, and for the reasons stated on
9 the record at the May 23, 2007 hearing." The bankruptcy court's
10 order directed Debtors to turn over the \$203,507 to Trustee, or
11 to "request a hearing if Debtors assert they have no ability to
12 comply with this order."

13 Debtors timely appealed this order on June 22, 2007.

14 15 **JURISDICTION**

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
17 §§ 1334 and 157(b) (2) (A) and (E). We have jurisdiction pursuant
18 to 28 U.S.C. § 158.

19 20 **ISSUE**

21 Whether the bankruptcy court abused its discretion in
22 denying Debtors' request to stay proceedings related to the
23 Turnover Motion pending a resolution of the criminal
24 proceedings.⁴

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27 4. In Debtors' statement of issues on appeal, they also
28 challenge "whether the court erred in granting the Trustee's Motion
for Summary Judgment on the Trustee's Motion for Turnover."
However, in their Opening Brief, Debtors concede this issue:
"[Debtors] concede that, in the absence of a stay, the Trustee is
entitled to summary judgment[.]" Debtors' Opening Br. at 5 n.1.

1 appeal will be dismissed.

2 Debtors did not comply with Rule 8009(b) (5) and (9)⁶, and
3 9th Cir. BAP Rule 8006-1.⁷ Significantly, Debtors did not
4 provide a transcript of the hearing conducted by the bankruptcy
5 court concerning their request for a stay and the Turnover
6 Motion, even though the court decided to deny a stay “for the
7 reasons stated on the record at the May 23, 2007 hearing[.]”

8 If findings of fact or conclusions of law are made orally on
9 the record, a transcript of those findings is mandatory for
10 appellate review. In re McCarthy, 230 B.R. 414, 416 (9th Cir.
11 BAP 1999). Our McCarthy decision was based on long-standing
12 Ninth Circuit precedent that failure to provide relevant
13 transcripts may require dismissal of the appeal. Jones v. City
14 of Santa Monica, 382 F.3d 1052,1056 (9th Cir. 2004); Dela Cruz v.
15 Cruz (In re Estate of Dela Cruz), 279 F.3d 1098, 1102 (9th Cir.
16 2002); Syncom Capital Corp. v. Wade,⁸ 924 F.2d 167, 169 (9th Cir.

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18 6. “Appendix to Brief. If the appeal is to a bankruptcy
19 appellate panel, the appellant shall serve and file with the
20 appellant’s brief excerpts of the record as an appendix, which
21 shall include the following: . . . ; (5) The opinion, findings of
22 fact or conclusions of law filed or delivered orally by the court
and citations of the opinion if published. . . . ; (9) The
transcript or portion thereof, if so required by a rule of the
bankruptcy appellate panel. . . .” Rule 8009(b).

23 7. “The excerpts of the record shall include the transcripts
24 necessary for adequate review in light of the standard of review to
25 be applied to the issues before the Panel. The Panel is required
26 to consider only those portions of the transcript included in the
27 excerpts of the record. Parties shall consult local bankruptcy
28 rules with regard to the proper procedure for ordering transcripts
or for indicating that transcripts are not necessary.” 9th Cir.
BAP Rule 8006-1.

8. McCarthy cited Syncom and earlier cases for the
proposition that failure to provide relevant transcripts may
justify dismissal of an appeal. The Jones and Cruz decisions show
that the proposition retains vitality.

1 1991); In re Ashley, 903 F.2d 599, 603 n.1 (9th Cir. 1990);
2 Portland Feminist Women's Health Ctr. v. Advocates for Life,
3 Inc., 877 F.2d 787, 789-90 (9th Cir. 1989); Southwest Admin'rs,
4 Inc. v. Lopez, 781 F.2d 1378, 1378-80 (9th Cir. 1986); Thomas v.
5 Computax Corp., 631 F.2d 139, 141 (9th Cir. 1980). In the
6 specific context of a review of the BAP's authority to dismiss an
7 appeal, the Ninth Circuit has observed that failing to include a
8 relevant transcript partly justified the BAP's decision to
9 dismiss the appeal. Morrissey v. Stuteville (In re Morrissey),
10 349 F.3d 1187, 1189 (9th Cir. 2003).

11 Debtors' failure to provide a transcript of the May 23,
12 2007, hearing was not inadvertent; it was intentional: "Debtors,
13 by their attorney, hereby give notice that they will not be
14 requesting a transcript in connection with the appeal filed on
15 June 22, 2007." Dkt. no. 593. At oral argument, the Panel
16 questioned counsel for Debtors about the omission of the
17 transcript from the record. Counsel responded by representing
18 that the bankruptcy court made no explanations, findings of fact
19 or conclusions of law at the hearing. He asked counsel for
20 Trustee to agree with him in that regard, but counsel for Trustee
21 did not agree, representing instead that the bankruptcy court
22 provided an explanation of its views concerning the issues in the
23 context of various colloquies with counsel at the hearing.

24 The precedent in this circuit is unequivocal that a trial
25 court's decision whether to stay civil proceedings in the face of
26 pending criminal proceedings is reviewed for abuse of discretion,
27 and that an appellate court reviewing such a decision should
28 examine the trial court's findings based on seven criteria.

1 Keating, 45 F.3d at 324.⁹ The bankruptcy court explicitly wrote
2 that its decision was "in light of the record of this case, and
3 for the reasons stated on the record at the May 23, 2007
4 hearing." Under these circumstances, the Panel is unwilling to
5 rely upon representations of Debtors' counsel as to what was, or
6 was not, said by the bankruptcy judge, at the March 23, 2007
7 hearing. Absent a transcript, we are simply unable to perform
8 the review mandated by our court of appeals of the bankruptcy
9 court's decision denying a stay of the Turnover Motion
10 proceedings.¹⁰

11 We are also unable to obtain the transcript by other means.
12 While it need not do so, this Panel may, in appropriate cases,
13 independently consult the bankruptcy court's docket to supplement
14 the record on appeal. In re E.R. Fegert, Inc., 887 F.2d 955,
15 957-58 (9th Cir. 1989). However, even were the Panel inclined
16 to search the record for necessary information, in this case, no
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18 9. In this context, the Keating court indicated it must first
19 consider whether a party's Fifth Amendment rights were implicated
20 in the civil proceeding sought to be stayed. If the civil
21 proceedings have Fifth Amendment implications, Keating then listed
22 six additional criteria to be considered by a trial court: 1) the
23 interest of the plaintiffs in proceeding expeditiously with this
24 litigation or any particular aspect of it, and the potential
25 prejudice to plaintiffs of a delay; (2) the burden which any
particular aspect of the proceedings may impose on defendants; (3)
the convenience of the court in the management of its cases, and
the efficient use of judicial resources; (4) the interests of
persons not parties to the civil litigation; and (5) the interest
of the public in the pending civil and criminal litigation.
Keating, 45 F.3d at 903.

26 10. We fail to comprehend the logic of Debtors' counsel's
27 position that a transcript was not critical in this appeal. If
28 counsel were correct that the bankruptcy court did not make
findings nor explain the reasons for its decision on the record at
the March 23, 2007 hearing, such would support Debtors' position
that the bankruptcy court abused its discretion in not granting a
stay of the turnover proceedings.

1 transcript of the May 23, 2007, hearing appears in the docket of
2 the bankruptcy court.

3 Moreover, the hearing transcript is not the only critical
4 document missing from the record on appeal. Debtors argue on
5 appeal that a stay by the bankruptcy court of the Turnover Motion
6 was required because, according to their Opening Brief, "not only
7 [are] the civil and criminal allegations identical but the
8 debtors, if convicted, would likely face as part of any sentence
9 the very same financial consequences (restitution) that the
10 Trustee seeks." Debtors' Opening Br. at 7. But though they base
11 their arguments on the purported similarities between the
12 indictment and Trustee's Turnover Motion, Debtors' excerpts of
13 record include no information about, or pleadings from, the
14 criminal case whatsoever. At the very least, to support the
15 alleged nexus between the criminal and bankruptcy proceedings and
16 their Fifth Amendment arguments, Debtors should have provided the
17 Panel a copy of the criminal indictment. Failure to include such
18 an essential document violates Rule 8009(b)(4).^{11, 12}

19 Debtors' record on appeal is deficient in other ways. They
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21 11. "Appendix to Brief. If the appeal is to a bankruptcy
22 appellate panel, the appellant shall serve and file with the
23 appellant's brief excerpts of the record as an appendix, which
shall include the following: . . . ; (4) Any other orders relevant
to the appeal. . . ." Rule 8009(b).

24 12. We acknowledge that, pursuant to Fed. R. Evid. 201, we
25 could exercise our discretion to obtain a copy of the indictment as
26 a public document from the district court's criminal case file. If
27 we did, we could only examine it as a statement of allegations, and
28 not for the truth of any of those allegations. Further, we are
unable to take judicial notice of any supporting documentation in
the criminal case which is subject to "reasonable dispute." Fed.
R. Evid. 201(b). Under these circumstances, we decline any
opportunity to search the district court's record for the
indictment or other pleadings of import in this appeal.

1 failed to consecutively number the pages in their excerpts, to
2 provide a proper table of contents as required by 9th Cir. BAP
3 Rule 8009(b)-1(b)(2) and (3), and their excerpts did not include
4 the notice of appeal as mandated by Rule 8009(b)(8).

5 Debtors' Opening Brief is also lacking. It does not include
6 a separate statement of the standard of appellate review as
7 required by Rule 8010(a)(1)(C). It also appears that Debtors'
8 counsel did not carefully review the text of the brief for overt
9 contradictions. For example, footnote 1 on page 5 indicates,

10 Because (a) the bankruptcy court did not issue
11 written findings of fact or conclusions of law,
12 (b) the pendency of the federal indictment is not
13 disputed by the Trustee, (c) appellants concede
14 that in the absence of a stay, the Trustee is
entitled to summary judgment, appellants have not
submitted a separate Appendix. See Ehrenberg v.
Cal. State Fullerton [(In re Beachport Enter.)],
396 F.3d 1083, 1088 (9th Cir. 2005).

15 (Emphasis added.) This statement is an obvious mistake. The
16 same day Debtors filed this Opening Brief, they also filed
17 excerpts of the record (i.e., an "appendix"). In filing the
18 excerpts, counsel may have realized that the suggestion that
19 excerpts were unnecessary is simply wrong, since Rule 8009(b)
20 requires submission of excerpts to a bankruptcy appellate panel.
21 Nothing in Beachport Enter. suggests otherwise. Instead, in that
22 decision, our court of appeals held that the BAP should make
23 reasonable efforts to work with a moderately deficient record; it
24 certainly did not countenance an appellant's failure to submit an
25 essential transcript or, as here, multiple critical documents.

26 Although some of these Rule violations, considered in
27 isolation, would not justify the severe sanction of dismissing an
28 appeal, taken together, the failure to provide transcripts and

1 other critical documents to this Panel justifies dismissal.
2 Morrissey, 349 F.3d at 1193. (“[T]he inadequacy of the record and
3 the briefing afforded the BAP little choice but to affirm
4 summarily”); Hall v. Whitley, 935 F.2d 164, 165 (9th Cir. 1991)
5 (“[L]itigants should be aware that failure to provide transcripts
6 or other required materials may well result in dismissal of the
7 appeal or other sanctions”).

8 In reaching this conclusion, we are mindful of our court of
9 appeals’ instructions that the Panel consider the impact of the
10 dismissal on the parties, alternative sanctions, and the relative
11 culpability of the attorney and his client. Beachport Enter.,
12 396 F.3d at 1087 (citing In re Donovan, 871 F.2d 807, 808 (9th
13 Cir. 1989) (per curiam)); Morrissey, 349 F.3d at 1190 (“The
14 selection of the sanction to be imposed must take into
15 consideration the impact of the sanction and the alternatives
16 available to achieve assessment of the penalties in conformity
17 with the fault). We have done so.

18 We doubt dismissal of this appeal will seriously compromise
19 Debtors’ rights since, given the limited information we have been
20 provided, it appears the bankruptcy court almost surely exercised
21 proper discretion in denying a stay of the Turnover Motion.
22 Debtors were under a continuing obligation to surrender property
23 of the bankruptcy estate to Trustee. § 521(a)(4) (providing that
24 debtor shall “surrender to the trustee all property of the estate
25 . . . whether or not immunity is granted [to debtor] under
26 section 344 . . .”). In most situations, complying with a
27 turnover order does not implicate the Fifth Amendment rights of a
28 party, even when there is a pending criminal case on similar

1 issues:

2 The question is not of testimony, but of
3 surrender, -- not of compelling the bankrupt
4 to be a witness against himself in a criminal
5 case, present or future, but of compelling
6 him to yield possession of property that he
7 no longer is entitled to keep.

8 In re Harris, 221 U.S. 274, 279 (1911) (Holmes, J.). See also,
9 In re Fuller, 262 U.S. 91, 93-94 (1923) ("A man who becomes a
10 bankrupt . . . has no right to delay the legal transfer of the
11 possession and title of any of his property to the officers
12 appointed by law for its custody or for its disposition[.]")
13 These cases remain good law and form the basis for more
14 contemporary rulings that turnover of property of the estate is
15 not a testimonial act and does not implicate Fifth Amendment
16 rights. In re Ross, 156 B.R. 272, 277 (Bankr. D. Idaho 1993)
17 (turnover of assets of bankruptcy estate is not a testimonial act
18 and thus not within the scope of the Fifth Amendment); In re
19 Devereux, 48 B.R. 645-46 (Bankr. S.D. Cal. 1985) (order for
20 debtor to turn over all property of the estate to the trustee did
21 not violate Fifth Amendment); In re Kaufman, 35 B.R. 6 (Bankr. D.
22 Hawaii 1983) (privilege against self-incrimination not infringed
23 if debtor is required to turn over property of the estate).

24 Even if Debtors' Fifth Amendment rights might be implicated
25 by the turnover order, the Constitution does not require a stay
26 of civil proceedings pending the outcome of the related criminal
27 proceedings. Fed. Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d
28 899, 902 (9th Cir. 1989). "In the absence of substantial
prejudice to the rights of the parties involved, parallel [civil
and criminal] proceedings are unobjectionable under our

1 jurisprudence." SEC v. Dresser Indus., 628 F.2d 1368, 1374 (D.C.
2 Cir. 1980).

3 The decision by the trial court whether to stay civil
4 proceedings under such circumstances should be made "in light of
5 the particular circumstances and competing interests involved in
6 the case." Keating v. Office of Thrift Supervision, 45 F.3d 322,
7 324 (9th Cir. 1995) (quoting Molinaro, 889 F.2d at 902).¹³

8 Although a debtor's Fifth Amendment rights are only one of seven
9 criteria the trial court should consider in deciding whether to
10 grant a stay of civil proceedings in light of a contemporaneous
11 criminal case, Keating, 45 F.3d at 903, Debtors' Opening Brief,
12 which consists of only eight pages, devotes but a single
13 paragraph to any analysis of the Keating criteria. We do not
14 find that short argument compelling, and as we have noted, the
15 Panel can not comply with the direction to review the record in
16 light of the Keating criteria if we do not have a transcript of
17 the hearing.

18 We also believe that there is no effective alternative to
19 dismissal to deal with the deficient record in this appeal.
20 Debtors have already benefitted from, and the bankruptcy estate
21 has been burdened by, Debtors' considerable delay in turning over
22 the insurance money to Trustee. There is evidence in the record

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24 13. Rather than rely upon Ninth Circuit case law, in their
25 Opening Brief (there was no reply brief), and at oral argument,
26 Debtors lean heavily on the district court's decision in Par Pharm.
27 Sec. Litig., 133 F.R.D. 12 (S.D.N.Y. 1990) for the proposition that
28 "The great weight of authority requires the Court to stay these
proceedings." Par Pharm., 133 F.R.D. at 13. Of course, this trial
court decision is not binding on this Panel. Indeed, for
authority, it cites decisions of other trial courts in the 2nd
Circuit (plus two references to the D.C. Circuit for general
principles).

1 that Debtors are in possession of the funds and may have
2 dissipated some of them. The bankruptcy court was presumably
3 reluctant, and justifiably so, to stay the Turnover Motion any
4 longer, given Debtors' track record in the bankruptcy case.
5 Recall, the record shows Debtors were removed as debtors-in-
6 possession during the chapter 12 case because they grossly
7 mismanaged the estate; the case was converted to a chapter 7 case
8 based upon Debtors' misrepresentations to the bankruptcy court;
9 and Debtors stipulated to a denial of discharge in the chapter 7
10 case in the face of allegations of further wrongdoing. Under
11 these circumstances, we decline to allow Debtors any further
12 opportunity to rehabilitate the record on appeal.

13 Finally, while we have some concern regarding the briefing,
14 it does not appear that Debtors' counsel is incompetent, or that
15 dismissal "may inappropriately punish the appellant for the
16 neglect of counsel." Donovan, 871 F.2d at 808. As noted above,
17 Debtors' failure to produce the hearing transcript was not
18 negligent; it was an intentional decision by Debtors' counsel, as
19 was the original decision to oppose the Turnover Motion and
20 Summary Judgment Motion which was made by Debtors at the
21 direction of their criminal counsel. In other words, Debtors
22 have not been victimized by inadequate counsel. Instead, it
23 appears Debtors, presumably in consultation with their lawyers,
24 find themselves in this predicament largely because of the
25 strategic decisions made in defending this litigation.

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CONCLUSION

Debtors, by choice and omission, have not provided this Panel with an adequate record to allow it to perform a meaningful review of the bankruptcy court's decision denying a stay of the Turnover Motion proceedings. As a result, this appeal is DISMISSED.