

**UNITED STATES OF AMERICA, Plaintiff, vs. INDIANAPOLIS BAPTIST TEMPLE, GREGORY JEROME DIXON, and NBD BANK, INC., Defendants.**

**CAUSE NO. IP 98-0498-C-B/S**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION**

*1999 U.S. Dist. LEXIS 19209; 99-2 U.S. Tax Cas. (CCH) P51,004; 84 A.F.T.R.2d (RIA) 7125*

**November 10, 1999, Decided**

**DISPOSITION:** [\*1] IBT's motion to stay execution of judgment pending appeal GRANTED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant church moved, under Fed. R. Civ. P. 62(d), to stay execution of judgment entered in favor of plaintiff United States, after court found the Free Exercise and Establishment Clauses of U.S. Const. amend. I did not bar application of tax laws for over \$ 5 million in tax liability.

**OVERVIEW:** After judgment for plaintiff United States entered for over \$ 5 million in tax liability, defendant church moved, under Fed. R. Civ. P. 62(d), to stay execution pending appeal, claiming inability to pay for bond. On the larger property, defendant's church had existed for 50 years, and school, with 300-400 students, had existed for 28 years. The court granted the motion, on condition that: defendant maintain property without diminution in quality beyond ordinary wear and tear, continue mortgage obligations, with reports to the court, maintain insurance at a level not less than the properties' appraised values and provide evidence of such coverage, provide for monthly inspection of properties, with monthly reports to the court, and post a supersedeas bond in at least the amount of its minimal cash assets as represented in defendant's sworn submissions. The court found these to be appropriate safeguards that would sufficiently protect the plaintiff's interests.

**OUTCOME:** Motion to stay execution of judgment pending appeal was granted on conditions that defendant maintain the property, ordinary wear and tear excepted, continue mortgage obligations, obtain insurance of \$ 6 million, and provide monthly reports to the court, and provide monthly inspections, and post bond in amount of cash assets.

**CORE TERMS:** church, foreclosure, supersedeas bond, pending appeal, monthly, security interest, tax liability, pendency, collection, posting, financial condition, fair market value, real property, cash assets, mortgage, stay pending appeal, amount of time, tax lien, expenditure, execute, erosion, waive, execution of judgment, real property located, accruing interest, appraisal, appraised, valuation, rights to property, irreparable harm

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For DIXON, GREGORY JEROME, defendant: GREGORY J DIXON, INDIANAPOLIS, IN.

For NBD BANK, INC., defendant: STEVEN L YOUNT, ATTORNEY AT LAW, INDIANAPOLIS, IN.

**JUDGES:** HON. SARAH EVANS BARKER, Chief Judge, U.S. District Court, Southern District of Indiana.

**OPINION BY:** SARAH EVANS BARKER

**OPINION:**

**ENTRY GRANTING DEFENDANT'S MOTION TO STAY EXECUTION OF JUDGMENT PENDING APPEAL**

Defendant Indianapolis Baptist Temple ("IBT") moves the Court, pursuant to *Federal Rule of Civil Pro-*

cedure 62(d), to stay execution of a money judgment entered in favor of plaintiff United States of America (the "United States" or "the government"). In two previous entries, dated January 19, 1999, and [\*2] June 29, 1999, respectively, we detailed the background of this litigation, familiarity with which is assumed for purposes of this entry. In short, we previously held that the Free Exercise and Establishment Clauses of the First Amendment do not bar the application of federal tax laws to IBT. We found that IBT has failed to pay to the United States over \$ 5 million in tax liability, and we granted the United States' summary judgment motion to reduce federal tax assessments to judgment and to enforce tax liens on IBT's property. n1 IBT now seeks to stay the execution of that final judgment during the pendency of its appeal, requesting that we exercise our discretion to relieve IBT of any obligation to provide a supersedeas bond. After extensive briefing by the parties, for the reasons discussed below, IBT's request for a stay is GRANTED, subject to the express conditions set forth in the following discussion.

n1 On June 29, 1999, we entered a final judgment for the United States and against IBT for purposes of appeal. See *FED. R. CIV. P. 21*, 58. On July 15, 1998, the parties filed their agreed stipulation to sever plaintiff's claims against IBT from any remaining claims, such as those against defendant **Gregory Jerome Dixon**, "each of which may result in final and appealable judgments." Agreed Order Severing Claims at 2; see, e.g., *E.S. v. Independent Sch. Dist.*, No. 196, *Rosemount-Apple Valley-Eagan*, 135 F.3d 566, 568 (8th Cir. 1998). We further note that plaintiff's severed claims against defendant Dixon have been litigated nominally, if at all, by the parties since that stipulation.

### [\*3] Background

The parties do not dispute that IBT's tax liability stands at \$ 5,707,480.75, as of July 12, 1999, an amount that undoubtedly has increased since that date because of accruing interest. See Pl.'s Opp. Stay (Clayton Second Decl. P 3). The parties also appear to agree that foreclosure on IBT's real property represents the United States' primary (if not only) means of collecting on its judgment. See Pl.'s Sur-Reply at 3-4; Def.'s Reply 3-5. IBT owns two properties, both located in Indianapolis. One property ("Church property"), which appraised at a fair market value of six million dollars, consists of a church, an elementary school and high school, a single family residence, garages, and various other improvements, all located on approximately twenty-two acres of land south of downtown Indianapolis. n2 See July 26, 1999, Ap-

praisal at 23-35. The church and parish have existed at this location for fifty years, and the Indianapolis Baptist School, in which 300-400 students are now enrolled (grades K-12), has existed for twenty-eight years. See Def.'s Reply (Ex. D, Dixon Decl. PP 4-5). Bank One holds a first priority mortgage lien on the Church property in [\*4] the amount of approximately \$ 700,000, reducing IBT's equity in that property to approximately \$ 5.3 million. See Def.'s Reply (Ex. B, Steiner Decl. P 3-4).

n2 The government does not seriously dispute the value of the property or the basis on which the appraiser arrived at his valuation. In fact, the government has relied upon a 1987 appraisal of the Church property (\$ 4.5 million), conducted by the same individual supplying the recent July 1999 valuation, in estimating its ability to collect upon its judgment. While the fair market value of the Church property may not identically match the ultimate sale price, it provides a reasonable estimation of the property's value. In any event, the government does not provide an alternative valuation.

The parties estimate the fair market value of IBT's second property, located at 339 West Cragmont Drive, at no more than \$ 150,000. See Pl.'s Opp. Stay at 3; Clayton Decl. P 4; Def.'s Reply at 3. Therefore, assuming foreclosure and sale of IBT's two properties at [\*5] fair market value, the United States stands to recover approximately \$ 5.45 million, an amount that substantially, although not fully, would satisfy IBT's \$ 5.7 million tax liability. n3

n3 IBT also claims that the United States owes it a \$ 172,000 tax credit from the government's August 1, 1996, seizure and forced sale of property once owned by IBT. The United States acknowledges this possibility, although it claims that IBT has raised the argument in delinquent fashion and that IBT has not provided sufficient documentation in support of its position. We do not ignore the possibility that a credit might be appropriate under facts not yet before us, but we find resolution of the issue unnecessary to our deciding if granting a stay without a full bond would erode the United States' position during the stay period. The question of whether IBT can recover a credit is independent of IBT's financial condition or other variables that might threaten the United States' position pending appeal.

IBT also claims that its [\*6] cash assets, as of June 30, 1999, totaled merely \$ 11,036 (after expenses), an amount that represents a decline of approximately \$ 120,000 from December 1997. See Def.'s Reply at 4-5, Ex. C (cash statements), Ex. D (Dixon Decl.). Therefore, IBT claims that it cannot afford to purchase a supersedeas bond without endangering payments to other creditors and without risking its financial stability. IBT also contends that its insurance carrier quoted a bond fee of \$ 20.00 per thousand (2%), double the standard quote, which in this case would total approximately \$ 114,000 for a \$ 5.7 million bond, assuming the carrier would even provide a bond of such magnitude. See Def.'s Sur-Sur Reply (Dixon Decl. P 5).

The United States seeks to foreclose on IBT's property immediately, recognizing that "the only likely avenue for collection of the United States' money judgment would be through the foreclosure of the tax liens on the two parcels of real property." Pl.'s Resp. Def.'s Sur-Sur Reply at 3. The United States correctly notes that it already possesses a security interest in the properties, pursuant to federal statute, 26 U.S.C. § 6321, which creates a tax lien [\*7] in favor of the United States "upon all property and rights to property, whether real or personal," belonging to a person who refuses or neglects to pay tax after demand. IBT rejoins that staying the foreclosure of these properties will not threaten the United States' interest in the property since that option will still exist after appeal. We now address the legal merits of these contentions.

#### Discussion

*Federal Rule of Civil Procedure 62(d)* allows an appellant to obtain an automatic stay of execution of judgment pending appeal by posting a supersedeas bond. See *FED. R. CIV. P. 62(d)*. The function of a supersedeas bond is to "protect the judgment creditor's position from erosion during any period that its right to execute is obstructed by a stay pending appeal." *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 786 F.2d 794, 800 (7th Cir. 1986) (Easterbrook, J., concurring). Yet, the posting of supersedeas bond is not mandatory to stay execution of judgment under Rule 62(d), especially where the district court is satisfied that the bond expenditure is unnecessary to protect the appellee during the pendency of appeal. *Id.* at 796; *Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 281 (7th Cir. 1986). [\*8] In the alternative, the appellant may request that the district court employ its discretion to waive the bond requirement. See *Dillon v. City of Chicago*, 866 F.2d 902, 904 (7th Cir. 1988) ("The applicable standard of review in this area is an abuse of discretion.")

A district court may look to several criteria when determining whether to waive the posting of bond, includ-

ing: (1) the complexity of the collection process; (2) the amount of time required to execute on a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position. *Id.* at 904-05.

An application of these factors to the case at bar, bearing clearly in mind the underlying goal to prevent an erosion of the United States' interests pending appeal, convinces us that a stay of execution of judgment pending appeal [\*9] without the requirement of a full bond, but with appropriate safeguards, will sufficiently protect the United States' interests under the circumstances of this case. n4 The United States is a judgment creditor who also holds a tax lien, pursuant to federal statute, on the property in question. The United States does not claim that a stay pending appeal will subordinate its security interest in the property vis-a-vis other creditors, whether IBT is solvent or bankrupt. Rather, the United States claims that its interest may be eroded in the properties during appeal because: (1) interest will continue to accrue on IBT's tax liability, (2) IBT has no incentive to maintain the property because it is unlikely to succeed on appeal, and (3) a delay in foreclosure may increase the likelihood that an unexpected event could dramatically impair the property's value. See Pl.'s Resp. Sur-Sur Reply at 3-4.

n4 In considering whether to grant a stay pending appeal, the parties also urge us to import factors typically associated with issuance of stays under Rule 62(c), which pertains to injunctions pending appeal, not money judgments. See *Fed. R. Civ. P. 62(c)*. While we recognize that on one, prior occasion we did import Rule 62(c) standards into the Rule 62(d) context, see *Endress + Hauser, Inc. v. Hawk Measurement Sys Pty, Ltd.*, 932 F. Supp. 1147, 1148-49 (S.D. Ind. 1996)), we regard the factors detailed in *Dillon* as more appropriate guidelines for deciding whether to waive a supersedeas bond when staying execution of judgment under Rule 62(d). Nonetheless, a consideration of the public interest, IBT's likelihood of success on the merits, and any injury to the parties from issuance of a stay without bond would not alter our decision to order a stay under the conditions explicated in this decision (*infra*). The irreparable harm incurred from foreclosure on IBT's property, including both the loss of a situs of worship and religious community and the

disruption of the education of children enrolled in IBT's elementary and high schools, weighs dispositively in the balance even if IBT's likelihood of prevailing on appeal is remote. Moreover, the safeguards we are imposing to protect the property at issue prevents the subversion of the government's interest in ultimate recovery during the pendency of appeal.

[\*10]

The United States' concern regarding accrued interest is well-taken; however, IBT's current assets fall well short of satisfying full judgment even if the United States were to foreclose immediately, and accruing interest in any event does not threaten the government's present security in the property. As long as protective measures are provided to ensure the value of the property pending appeal, the bulk of the United States' judgment is protected, even if the government is unable to recover amounts in excess of the value of the land after the appeal, for it is clear that it could not recover that excess amount right now either. See *Olympia*, 786 F.2d at 800 (recognizing the difficulty of making the judgment creditor "as well off during the appeal as it would be if it could execute at once, but no better off") (Easterbrook, J., concurring). Moreover, IBT's continuing mortgage payments on the Church property pending appeal (approximately \$ 21,000 per month until mortgage maturity in August 2002) inure to the United States' benefit since IBT's equity in its property increases in the event of a foreclosure. See Def.'s Reply (Ex. B, Steiner Decl. PP 4-6). These payments [\*11] effectively serve as monthly installment payments to the United States if it prevails on appeal. To the extent that these installment payments and any appreciation of the property fail to offset the accruing interest (we have not been provided with even a monthly estimate of that amount), this difference is tolerable, given the strain of a bond's cost on IBT's financial condition and due to the irreparable harm IBT parishioners would incur in the event of an immediate foreclosure.

The question of how to ensure the value of IBT's property, and therefore the government's security interest in it, naturally involves the United States' two remaining concerns about IBT's maintenance of the property and the possibility of a calamitous event impairing its value pending appeal. While we doubt that IBT would allow its church, schools and other properties to deteriorate while actively using them for worship, education and living (indeed, IBT contends it will prevail on appeal and retain its property), we will nonetheless require, as a condition of the stay, that the parties designate, with the assistance of the Court, if necessary, a mutually acceptable official to inspect the condition of the [\*12] properties on a monthly basis and provide a written report to the Court

so long as the stay is in effect. The latest July 1999 appraisal of the Church property tendered to the Court describes the land and the improvements thereon in detail; thus, it provides a useful baseline against which the United States may assess the condition of the Church property during the pendency of appeal. As further conditions of the stay, we will require IBT to maintain its property reasonably and to continue meeting its monthly mortgage obligations. Finally, IBT must obtain, maintain, and provide proof of comprehensive insurance coverage for its two properties in amounts no less than their appraised values (\$ 6 million for the Church property and \$ 150,000 for the Cragmont Drive property), verification of which IBT shall submit to the Court no later than five business from the date of this entry.

We emphasize that changed circumstances, whether they be IBT's declining or deteriorating financial condition or failure to comply with the conditions outlined in this entry, shall supply grounds for either party to request modification of this stay order. These conditions as well as the balance of the remaining [\*13] factors for granting a stay without supersedeas bond favor an exercise of our discretion to that effect in this case. Two of the remaining factors, the complexity of the collection process and the amount of time required to obtain a judgment upon affirmance, weigh equally in the balance. The amount of time necessary to appoint a receiver and negotiate a sale may delay the United States' recovery, but the process of selling or transfer of the two properties represents a straightforward real estate transaction that we would not characterize as complex in nature. Likewise, the fourth and fifth factors point in contradictory directions. IBT's ability to pay the judgment clearly is not so plain that they are "good for" that amount, but the \$ 120,000 expenditure for a bond (or \$ 60,000 if IBT could obtain a better rate) would jeopardize both IBT's financial stability and the position of its creditors, especially given IBT's ending cash balance of approximately \$ 11,000 and its steady decline in cash assets since December 1997.

We are left, finally and appropriately, with an assessment of the third factor as applied to this case, the degree of confidence that the district court has in the [\*14] availability of funds to pay the judgment. We have stated previously that the value of IBT's real property approaches, but would not completely satisfy, the judgment amount obtained by the United States if foreclosure occurred immediately. Based on the conditions we have imposed on IBT to protect the integrity of its property, we are satisfied that the United States' security interest in its judgment, in the form of its tax lien on IBT's property, will not suffer significant erosion during the pendency of appeal. And while the value of the property after appeal may still fall short of the tax liability then due (as it does

with the amount now due), we regard the measures we have required as sufficient to ensure that the property now available for foreclosure will remain intact after appeal, thereby protecting the United States' security interest during the interim.

A final matter deserves attention before we conclude our discussion of IBT's request for a stay without posting full bond. We have relied upon IBT's representations (including sworn declarations) and supporting documentation that its financial condition prevents it from obtaining a supersedeas bond without incurring serious [\*15] hardship and endangering the position of its other creditors. While it may be accurate that IBT's cash assets total only approximately \$ 11,000 as of June 30, 1999, the United States surely would have attempted to secure those funds if it had executed its judgment immediately following our June 29, 1999, entry. Therefore, as a condition of this stay of execution of judgment pending appeal, we will require IBT to post a supersedeas bond for the amount of its ending cash reserves as of June 30, 1999, which we regard to be a rather modest and manageable expenditure for IBT, given the alternative.

We have attempted to strike an appropriate balance of both parties' interests under the unique circumstances surrounding the government's collection of its judgment in this case, and we have exercised our discretion in IBT's favor by waiving the requirement that it post an almost six million dollar bond, as IBT requested. However, if IBT elects not to comply with the conditions outlined in this decision (due to its religious convictions or otherwise), IBT risks immediate foreclosure on its church and schools as a result. IBT has that prerogative, of course; but we can do no more than we have [\*16] done here, under the dictates of law, to stay foreclosure of the property at issue. Accordingly, IBT's motion to stay execution of judgment pending appeal is GRANTED, provided that IBT (1) maintains the property in satisfactory physical condition without diminution in quality beyond ordinary wear and tear and usual uses, continues paying its monthly mortgage obligations, and provides monthly proof to that effect through filings with the Court, (2) obtains and maintains insurance coverage on the two properties in question at a level not less than their appraised values and provides evidence of such coverage to the Court, (3) provides for a monthly inspection of the properties by the parties' designee or by an inspector selected by this Court, if necessary, with monthly reports to that effect filed with the Court, and (4) posts a supersedeas bond in at least the amount of its cash assets as of 6/30/99 as represented by IBT in their sworn submissions to this Court.

It is so ORDERED this 10th day of November 1999.

SARAH EVANS BARKER, CHIEF JUDGE

United States District Court

Southern District of Indiana

JUDGMENT ORDER INCLUDING  
FORECLOSURE AND SALE

In accordance with the [\*17] terms of this Court's "Entry Granting Plaintiff's Motion for Summary Judgment" of June 29, 1999,

IT IS ORDERED THAT:

1. Judgment is entered in favor of the United States and against Indianapolis Baptist Temple in the sum of \$ 5,319,750.27, plus interest and other additions pursuant to law accruing from and after July 27, 1998.

2. The federal tax lien of the United States on all property and rights to property of Indianapolis Baptist Temple is foreclosed on the real property located at 2711 South East Street and at 339 West Cragmont Drive, both in Indianapolis, Indiana.

3. In accordance with 26 U.S.C. §§ 7402 and 7403(d), the real property located at 2711 South East Street and 339 West Cragmont Drive, both in Indianapolis, Indiana, shall be offered for sale by a receiver, the identity and compensation of which shall be established by a future order of this Court, free and clear of any rights, titles, liens, claims or interest of Indianapolis Baptist Temple, NBD Bank, Gregory J. Dixon, or the United States of America. The real property shall be offered for sale subject to confirmation by this Court, and upon such confirmation the United States Marshal shall [\*18] deliver to the purchaser a quit claim deed.

4. NBD Bank, N.A., now known as Bank One Indiana, N.A., has a lien on the real property located at 2711 South East Street, which lien has priority over the federal tax lien of the United States.

5. The proceeds of the sales of the real property shall be distributed to such parties and in such amounts as provided by law and as set forth by the further order of this Court.

Done at Indianapolis, Indiana, this  
10th day of November, 1999.

HON. SARAH EVANS BARKER

Chief Judge, U.S. District Court

Southern District of Indiana