

Nelson v. Heer, 121 Nev. Adv. Op. 81 (Dec. 1, 2005)¹

CIVIL PROCEDURE-STAY OF PROCEEDINGS UPON SECURITY

Summary

Motion to support a stay pending an appeal by security other than a supersedeas bond.

Disposition/Outcome

Motion denied. Supreme Court modifies its holding in *McCulloch v. Jeakins* and holds that the district court has the discretion to allow security for a stay pending appeal other than a supersedeas bond upon consideration of five factors that ensure the preservation of the status quo and the protection of the judgment creditor pending an appeal.

Factual and Procedural History

Scott Heer purchased a cabin on Mt. Charleston from Judy Nelson, but after purchase he discovered a broken water pipe. He sued, claiming that the cabin was contaminated with mold, and a jury found in his favor. The district court entered judgment in the amount of \$300,000 and granted a stay pending appeal conditioned on the posting of a supersedeas bond in the judgment amount. Appellant Nelson requested the opportunity to post security other than a supersedeas bond, but the district court rejected her request.

Nelson did not obtain a supersedeas bond and Heer obtained a judgment lien on all of Nelson's real property in Clark County by recording the judgment in his favor. Heer also began to execute on the judgment by garnishing Nelson's earned income. Because Heer's actions threaten other aspects of Nelson's financial well-being, she filed this motion requesting that the stay pending appeal be conditioned upon security other than a supersedeas bond.

Discussion

Pursuant to Nevada Rule of Civil Procedure 62, an appellant may obtain a stay pending appeal by giving a supersedeas bond at or after the time of filing the notice of appeal.² As Nevada's rule is substantially based on Fed. R. Civ. P. 62(d), the Nevada Supreme Court finds persuasive federal decisions involving the Federal Rules of Civil Procedure.³ Most federal courts interpreting Fed. R. Civ. P. 62(d) recognize that courts retain the authority to grant a stay in the absence of a full bond.⁴

The Nevada Supreme Court held, in *McCulloch v. Jeakins*, that a district court retained the power to provide for bond in a lesser amount or permit security other than a bond, "when unusual circumstances exist and so warrant."⁵ Because the purposes of requiring security for a stay are to ensure the preservation of the status quo and protect the judgment creditor during the

¹ By Denise Balboni

² N.R.C.P. 62(d).

³ *Executive Mgmt. v. Vicor Title Ins Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).

⁴ *See Fed Presc. Serv. v. Am. Pharm. Ass'n*, 636 F.2d 755, 757-78 (D.C. Cir. 1980) and cases cited therein.

⁵ 99 Nev. 122, 123, 659 P.2d 302, 303 (1983).

stay, where other, reliable alternatives to a supersedeas bond exist, such bond should not be the debtor's sole remedy. The *McCulloch* standard is too restrictive and so today the Supreme Court adopts the approach endorsed by the Seventh Circuit in *Dillon v. City of Chicago*.⁶

District courts in Nevada shall consider the following factors when faced with a motion to reduce the bond amount or for alternate security:

(1) complexity of collection process; (2) amount of time required to obtain judgment after it is affirmed on appeal; (3) degree of confidence that district court has in availability of funds to pay judgment; (4) whether defendant's ability to pay is so plain that cost of bond would be waste of money; (5) and whether defendant is in precarious financial situation such that requirement of bond would place defendant's other creditors in insecure position.⁷

Conclusion

Nelson's motion is denied but she should renew her motion for alternate security to the district court for consideration consistent with the principles in this opinion.

⁶ 866 F.2d 902 (7th Cir. 1988).

⁷ *Id.* at 904-05 (internal citations and quotations omitted).