Third District Court of Appeal

State of Florida

Opinion filed July 1, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-2346
Lower Tribunal No. 19-10748

Capital Development Group, LLC,
Appellant,

vs.

Buena Vista Terminal, LLC,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Natalie Moore, Judge.

AXS Law Group, PLLC, Jeffrey W. Gutchess, Anthony V. Narula, and Andrew E. Beaulieu, for appellant.

Ritter Chusid, LLP, Gregory J. Ritter, Dayami Sans, Gary S. Rosner and Evan S. Rosenberg (Coral Springs), for appellee.

Before EMAS, C.J., and FERNANDEZ, and LINDSEY, JJ.

FERNANDEZ, J.

ON MOTION FOR REVIEW
AND MODIFICATION OF SUPERSEDEAS BOND

Appellant/defendant Capital Development Group, LLC (CDG) seeks review of the trial court's "Order Staying Judgment Pending Appeal and Setting Supersedeas Bond," which stays the underlying final judgment and requires CDG to pay a $1,680,000.00 supersedeas bond. We have authority to review the trial court's stay order under Florida Rule of Appellate Procedure 9.310(f). For the following reasons, we grant CDG's motion for review of the order granting stay and setting the bond and reverse and remand to the trial court for further proceedings.

Appellee/plaintiff Buena Vista Terminal, LLC (BVT), the seller, obtained a final judgment in its declaratory relief action against CDG, the buyer, in the lower court in reference to a commercial real estate contract the parties entered in 2016. The trial court granted summary judgment on BVT's behalf. In its October 7, 2019 Order on Summary Judgment, the trial court concluded that the contract was one of indefinite duration and was thus terminable at-will by either party upon reasonable notice. The trial court concluded that sixty (60) days was reasonable time to close or terminate the contract, thus giving CDG sixty days from the date of the order to complete the purchase of the subject property or the contract would be deemed terminated. On December 2, 2019, the trial court entered its final judgment in favor of BVT on its claim for declaratory relief, adopting all the findings of fact and conclusions of law in the trial court's Order on Summary Judgment.

On December 5, 2019, CDG appealed the final judgment to this Court. In addition, pursuant to Florida Rule of Appellate Procedure 9.310(a), CDG requested a stay of execution of the final judgment, pending appeal. After an evidentiary hearing on the issue, the trial court on February 28, 2020, entered its Order Staying Judgment Pending Appeal and Setting Supersedeas Bond. It granted the stay until April 27, 2020, conditioned upon CDG posting a supersedeas bond in the amount of $1,680,000.00. On March 31, 2020, CDG filed a motion for extension of time to post the supersedeas bond, which we treated as a motion for review of the trial court's stay order. We extended the date by which CDG was to post the supersedeas bond (initially to May 18, 2020, and later to July 6, 2020). Our order granting the initial extension of time was without prejudice to CDG filing a further motion for review and modification of the supersedeas bond, which CDG filed on May 8, 2020.

In its motion, CDG contends that the supersedeas bond should be lowered to no more than $100,000.00 because $1,680,000.00 was excessive and arbitrary. CDG further requests that this Court extend the period for it to post the supersedeas bond until such time as social distancing guidelines due to the COVID-19 pandemic are relaxed and businesses reopen.

We review the trial court's order staying the action and setting bond under an abuse of discretion standard. See Waves of Hialeah, Inc. v. Machado, 2018 WL 1832446, *1 (Fla. 3d DCA 2018); Parker v. Estate of Bealer, 890 So. 2d 508, 512

(Fla. 4th DCA 2005); Pabian v. Pabian, 469 So. 2d 189 (Fla. 4th DCA 1985). We conclude that the trial court abused its discretion in setting the $1,680,000.00 supersedeas bond, not because of the amount of the bond, but because we cannot determine from the record how the trial court reached its determination of the bond amount, thus rendering the order unreviewable.

Florida Rule of Appellate Procedure 9.310, "Stay Pending Review," states, in part:

> **(a) Application.** Except as provided by general law and in subdivision (b) of this rule, a party seeking to stay a final or nonfinal order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief. A stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both.
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> **(b) Exceptions**.
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> (1) *Money Judgments.* If the order is a judgment solely for the payment of money, a party may obtain an automatic stay of execution pending review, without the necessity of a motion or order, by posting a good and sufficient bond equal to the principal amount of the judgment plus twice the statutory rate of interest on judgments on the total amount on which the party has an obligation to pay interest. Multiple parties having common liability may file a single bond satisfying the above criteria.
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> (2) *Public Bodies; Public Officers.* The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, in administrative actions under the Administrative Procedure Act, or as otherwise provided by chapter 120, Florida Statutes, when the state, any public officer in an official capacity, board, commission, or other public body seeks review; provided that an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. On motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay.

(c) Bond.

(1) *Defined.* A good and sufficient bond is a bond with a principal and a surety company authorized to do business in the State of Florida, or cash deposited in the circuit court clerk's office. The lower tribunal shall have continuing jurisdiction to determine the actual sufficiency of any such bond.

(2) *Conditions.* The conditions of a bond shall include a condition to pay or comply with the order in full, including costs; interest; fees; and damages for delay, use, detention, and depreciation of property, if the review is dismissed or order affirmed; and may include such other conditions as may be required by the lower tribunal.

…

(e) Duration. A stay entered by a lower tribunal shall remain in effect during the pendency of all review proceedings in Florida courts until a mandate issues, or unless otherwise modified or vacated.

(f) Review. Review of orders entered by lower tribunals under this rule shall be by the court on motion.

As this Court stated in Sunbeam Television Corporation, v. Clear Channel Metroplex, Inc., 117 So. 3d 772 (Fla. 3d DCA 2012):

> The Florida Rules of Appellate Procedure envision that a motion for a stay on appeal be presented in the first instance to the trial court. See Fla. R.App. P. 9.310(a), (f) (2012). . . . The trial court's decision is then subject to review by this Court under the highly deferential abuse of discretion standard. Parker v. Estate of Bealer, 890 So.2d 508, 512 (Fla. 4th DCA 2005). The idea is that the court most familiar with the controversy is in the best posture to determine the appropriateness and conditions of a stay. See City of Sarasota v. AFSCME Council '79, 563 So.2d 830, 830 (Fla. 1st DCA 1990) ("Generally, the lower tribunal has broad discretion in the matter of a stay."); see also Pabian v. Pabian, 469 So.2d 189, 191 (Fla. 4th DCA 1985) ("[T]he trial court has considerable latitude in controlling the circumstances under which the

> proceedings may be stayed pending review.") (citation and internal quotations omitted).

Furthermore, the purpose of a supersedeas bond is to insure the payment of the full amount of the order under review including costs, interests, fees, and damages for delay and use if the review is dismissed or order affirmed. See Fla. R. App. 9.310(c)(2); Cohn v. Reiss, 616 So. 2d 173 (Fla. 4th DCA 1993)173; Dice v. Cameron, 424 So. 2d 173 (Fla. 3d DCA 1983), cause dismissed on other grounds, 434 So. 2d 887 (Fla. 1983). "[T]he guiding principle in setting a supersedeas bond is to protect the party in whose favor judgment was entered by assuring its payment in the event the judgment is affirmed on appeal." Pabian, 469 So. 2d at 191. See also Knipe v. Knipe, 290 So. 2d 71 (Fla. 2d DCA 1974). As such, "the proper amount and conditions of the supersedeas bond are determined by the facts of the particular case." Pabian, 469 So. 2d at 191.

Although we found no case in Florida that outlines the specific factors that must be considered in setting a supersedeas bond pertaining to real property, we find In re Weinhold, 389 B.R. 783 (M.D. Fla. Tampa Div. 2008), a bankruptcy case from the U.S. Bankruptcy Court, Middle District of Florida, to be persuasive. In In re Weinhold, the bankruptcy court held that the posting of a bond in a case involving real property was required as a condition of stay pending appeal for adequate protection in the bankruptcy case, and the factors to be considered were: (1) the time value of the property; (2) the diminution in value or destruction of the property,

quantified as the cost of insurance on the property; (3) the cost that the appellee will incur for the appeal; (4) the estimated taxes for the property; and (5) any other expenses that the appellee will incur as a result of the delay caused by the appeal. The In re Weinhold court cited to In re Texas Equipment Company, Inc., 283 B.R. 222 (Bankr. N.D. Tx. 2002). In In re Texas Equipment Company, Inc., the bankruptcy court stated that "the value of the property is not considered the 'amount of the judgment' and is not included in the amount of the supersedeas bond." Id. at 229. This is because the purpose of the bond is to protect the non-appealing party's rights pending the appeal, not to give the non-appealing party a windfall. Id. (internal citations omitted).

The bankruptcy court in In re Texas Equipment Company, Inc. went on to say:

> Those courts that have considered the proper amount for a supersedeas bond when the judgment res is real property generally look to the following factors: (1) the time value of the property, i.e. appellant must compensate non-appealing party for the rental value of the property during the pendency of the appeal, or the time value of the money that the property represents if the property is to be sold; (2) the diminution in value or destruction of the property, i.e. appellant must provide adequate insurance for property or compensate non-appellant for such insurance; (3) the costs the non-appellant will incur for the appeal (apparently excluding attorney's fees); (4) the ad valorem taxes on the property; (5) any other expenses the non-appellant will incur as a result of the time delay of the appeal. See Metz, 130 F.R.D. at 459–60 (including $500 for costs of appeal, two years of rental value of property, ad valorem taxes during appeal, and casualty and fire insurance during appeal in calculating the amount of the supersedeas bond); In re Gleasman, 111 B.R. at 603–04 (including potential diminution in value of the real property and the time value of the

> property in calculating amount of bond); In re Burkett, 279 B.R. at 817 (listing insurance, time value of property, and non-appellant's costs on appeal in setting the amount of the bond).

Id. at 230.

The factors considered by the bankruptcy court are similar to the conditions listed in rule 9.310(c)(2), which states:

> (2) Conditions. The conditions of a bond shall include a condition to pay or comply with the order in full, including costs; interest; fees; and damages for delay, use, detention, and depreciation of property, if the review is dismissed or order affirmed; and may include such other conditions as may be required by the lower tribunal.

Similarly, the transcript of the February 21, 2020 hearing before the trial court indicates that BVT's attorney argued that the court may condition a bond on the payment of interest, fees, damages for delay, use, detention, appreciation, and potential loss of the property if appellate review is dismissed, mirroring the language of rule 9.310(c)(2). In addition, BVT's attorney also asked the trial court to consider the value of the property as elicited by BVT's expert appraiser, which the expert testified was $1,935,000.00.[1]

Thus, at a minimum, a determination as to the appropriate amount of the supersedeas bond, factors to be considered by the trial court would include costs incurred as a result of the appeal, carrying costs such as insurance and tax expenses, any diminution in value of the property during the pendency of the appeal, and any

[1] CDG's expert testified that the fair market value of the property was $435,000.00.

other expenses that BVT would incur as a result of the delay caused by the appeal. Although the bankruptcy court in In re Texas Equipment Company, Inc. stated that the value of the property is not included in the supersedeas bond, in the case before us, BVT presented testimony from a representative of Wells Fargo, the holder of the mortgage on the property, that BVT was in default on the loan for failing to pay taxes and insurance. The Wells Fargo representative further testified that the property could be foreclosed at any time. Thus, foreclosure of the property resulting from a delay due to the appeal would mean BVT would lose the property. It appears the trial court took this into account and included the value of the property, as testified to by BVT's appraiser to be $1,935,000.00, in setting the supersedeas bond.

However, in the trial court's "Order Staying Judgment Pending Appeal and Setting Supersedeas Bond," the trial court summarized the evidence that was presented at the February 21, 2020 hearing. The trial court did not make any findings of fact or conclusions of law, nor did it explain how it calculated the supersedeas bond amount of $1,680,000.00. To the extent that the trial court believed that the amount of the supersedeas bond was necessary to protect BVT, we agree with CDG that the trial court abused its discretion because the court did not explain its reasoning or how it arrived at the $1,680,000.00 figure. This judgment is thus not reviewable in its present form because it lacks the type of findings necessary for meaningful appellate review.

Therefore, the trial court abused its discretion in arbitrarily setting the bond at $1,680,000.00, which requires a remand so that the trial court can re-examine "[its] findings on each of the pertinent factors" necessary to protect BVT during the pendency of the appeal. Cerrito, 406 So. 2d at 127. Although CDG contends the bond should not be more than $100,000.00, we cannot determine at this point if the $1,680,000.00 was excessive. A redetermination of the proper amount of the bond should be made by the trial court considering the factors discussed in this opinion. Pabian, 469 So. 2d at 191. See also Cohn,, 615 So. 2d at 173; Wilson v. Woodard, 602 So. 2d 545, 546-47 (Fla. 2d DCA 1991).

Accordingly, we grant the motion for review and modification of supersedeas bond in part, reverse the trial court's order as far as the amount of the supersedeas bond, and remand the case to the trial court for redetermination of the appropriate amount of the bond, consistent with this opinion.

Motion for review granted. Reversed and remanded with instructions.