IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 29

WCC No. 2008-2152

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BROCK HOPKINS

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

UNINSURED EMPLOYERS' FUND

Third-Party Petitioner

vs.

RUSSELL A. KILPATRICK

Third-Party Respondent.

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ORDER DENYING STAY OF EXECUTION OF JUDGMENT AND
DENYING WAIVER OF SUPERSEDEAS BOND

Summary: Third-Party Respondent moves for a stay of execution of judgment and to waive posting of a supersedeas bond. Petitioner opposes the stay. Respondent/Third-Party Petitioner does not oppose the stay. However, both ask the Court to require Third-Party Respondent to post a supersedeas bond.

Held: Third-Party Respondent has provided no evidence to support his request that the Court allow him to waive the supersedeas bond requirement. Since a stay of execution of judgment pending appeal may only be obtained after either presenting a supersedeas bond or by waiver of the bond, Third-Party Respondent's motion for stay of execution is denied.

Topics:

Appeals: Stay of Execution of Judgment. Where a third-party respondent moved the Court for an order staying judgment and waiving the posting of a supersedeas bond, his offer to provide his Beacon Score or credit report, combined with representations that he was able to satisfy the judgment of the Court, were insufficient to prove his ability to pay the bond. The Court was not satisfied that adequate security existed for payment of the judgment and denied the request to waive the supersedeas bond.

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Appellate Procedure – by section: Rule 7 (now Rule 22). A third-party respondent's offer to provide his Beacon Score or credit report for the Court's review, together with contentions that he owns mortgage-free real estate of greater value than the judgment; that his bear park is licensed by the state and he can be sanctioned or have his licensed revoked if he fails to pay a debt to the state; and that the county attorney could prosecute him to enforce payment of a debt owed to the state did not meet the requirements set forth in Mont. R. App. P. 7(a) and 7(b) [now Mont. R. App. P. 22(1)(a) and 22(1)(b)]. The Court was not satisfied that adequate security existed for payment of the judgment and therefore denied third-party respondent's request to waive the supersedeas bond.

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Appellate Procedure – by section: Rule 22 (formerly Rule 7). A third-party respondent's offer to provide his Beacon Score or credit report for the Court's review, together with contentions that he owns mortgage-free real estate of greater value than the judgment; that his bear park is licensed by the state and he can be sanctioned or have his licensed revoked if he fails to pay a debt to the state; and that the county attorney could prosecute him to enforce payment of a debt owed to the state did not meet the requirements set forth in Mont. R. App. P. 7(a) and 7(b) [now Mont. R. App. P. 22(1)(a) and 22(1)(b)]. The Court was not satisfied that adequate security existed for payment of the judgment and therefore denied third-party respondent's request to waive the supersedeas bond.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: ARM 24.5.346. A third-party respondent's offer to provide his Beacon Score or credit report for the Court's review, together with contentions that he owns mortgage-free real estate of greater value

than the judgment; that his bear park is licensed by the state and he can be sanctioned or have his licensed revoked if he fails to pay a debt to the state; and that the county attorney could prosecute him to enforce payment of a debt owed to the state did not meet the requirement that to secure a stay of execution he must obtain the court's approval of a supersedeas bond. The Court was not satisfied that adequate security existed for payment of the judgment and therefore denied third-party respondent's request to waive the supersedeas bond.

Proof: Sufficiency. When moving the Court for an order staying judgment and waiving the posting of a supersedeas bond, offering to provide proof – rather than providing the proof -- is insufficient to satisfy the Court that adequate security exists for the payment of the judgment.

¶1   Third-Party Respondent Russell A. Kilpatrick moves the Court for an order staying the judgment in this matter and waiving the posting of a supersedeas bond.[1] Respondent and Third-Party Petitioner Uninsured Employers' Fund (UEF) responds that it does not oppose the requested stay of execution of judgment, but objects to the waiver of the bond and requests that the Court require Kilpatrick to post a bond.[2] Petitioner Brock Hopkins objects to Kilpatrick's request for stay of judgment and also objects to the waiver of the bond.[3]

Section 39-71-2910(2), MCA, governs motions for stay and waiver of bond. It provides:

The appellant may request of the workers' compensation judge or the supreme court, upon service of a notice of appeal, a stay of execution of the judgment or order pending resolution of the appeal. The appellant may request a stay by presenting a supersedeas bond to the workers' compensation judge and obtaining the approval of the bond. . . . A court granting a stay may waive the bond requirement. The procedure for requesting a stay and posting a supersedeas bond must be the same as the procedure in Rule 22, Montana Rules of Appellate Procedure.

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[1] [Kilpatrick's] Request for Stay of Judgment Pending Appeal.

[2] UEF Response Opposing Third-Party Respondent's Motion to Waive Bond Requirement at 1.

[3] Hopkins's [sic] Objection to Kilpatrick's Request for Stay of Judgment Pending Appeal.

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¶2   ARM 24.5.346 gives additional guidance for the waiver of the bond, explaining, "If the parties stipulate that no bond shall be required, or if it is shown to the satisfaction of the court that adequate security exists for payment of the judgment, the court may waive the bond requirement." The rule further provides that except as provided within the rule, parties shall follow the procedure set forth in the Montana Rules of Civil Procedure.

¶3   In the present case, the parties have not stipulated that no bond shall be required. Therefore, to waive the bond requirement under ARM 24.5.346, Kilpatrick must demonstrate to the satisfaction of the Court that adequate security exists for payment of the judgment. Only then may the Court waive the bond requirement. At that point the Court, as it did in *Harrison*,[4] makes a determination by balancing the interests of the parties.

¶4   In the case at bar, Kilpatrick offers in support of his request: a) to provide, for the Court's examination, his Beacon Score or Credit Report as evidence of his ability to pay monthly installments to satisfy the judgment of the Court; b) that his home and the land upon which his bear park is located is mortgage-free and of much greater value than the dollar amount requested by the State of Montana; c) that his bear park is licensed by the state and, consequently, he can be sanctioned or have his license revoked if he fails to pay a debt to the state; and d) that the county attorney could prosecute him to enforce payment of a debt owed to the state.[5]

¶5   In response, the UEF cites *Uninsured Employers' Fund v. Total Mechanical Heating,*[6] arguing that mere assertions are inadequate to prove that enough security exists to pay a judgment. In that case, the Court referenced respondents' failure to provide affidavits or other sworn evidence as indicia of their inability to post the bond.[7] The Court also determined that the unsupported representations of counsel of one of the respondents were insufficient to satisfy it regarding respondents' ability to post the bond.[8]

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[4] *Harrison v. Liberty Northwest Ins. Corp.*, 2006 MTWCC 24.

[5] [Kilpatrick's] Request for Stay of Judgment Pending Appeal at 2.

[6] *Uninsured Employers' Fund v. Total Mechanical Heating & Air Conditioning,* 2001 MTWCC 3, ¶ 5.

[7] *Id.* at ¶ 4.

[8] *Id.*

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¶6   Kilpatrick has provided no proof that adequate security exists for payment of the judgment. Kilpatrick's representations, standing alone, are insufficient to prove his ability to pay the bond. Without proof, the Court cannot assume that adequate security exists. Because I am not satisfied that adequate security exists for payment of the judgment, I am denying Kilpatrick's request to waive the supersedeas bond.

¶7   ARM 24.5.346 provides that, except as provided within the rule, the procedure to be followed is that set out in Mont. R. App. P. 7(a) and 7(b).[9] Pursuant to Mont. R. App. P. 22(1)(b), upon service of a notice of appeal, "If the appellant desires a stay of execution, the appellant *must*, unless the requirement is waived by the opposing party, obtain the district court's approval of a supersedeas bond which shall have 2 sureties or a corporate surety as may be authorized by law." Neither Hopkins nor the UEF has waived the bond requirement.

¶8   Since Kilpatrick has not posted a supersedeas bond, I must deny his motion for stay of execution of judgment. However, I will grant a stay of execution of the judgment if Kilpatrick posts a bond within fourteen days of the date of this Order.

SO ORDERED.

DATED in Helena, Montana, this 5th day of November, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Jeffrey Ellingson
    Joseph Nevin
    Russell A. Kilpatrick
Submitted: October 12, 2010

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[9] The Montana Rules of Appellate Procedure were revised October 1, 2009; Mont. R. App. P. 7(a) and (b) are renumbered as Mont. R. App. P. 22(1)(a) and 22(1)(b).

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