

FILED

10/18/2022

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 22-0487

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 22-0487

DUANE BENDER and REBECCA ESTATES, LLC,

Plaintiffs and Appellants,

V.

STACEY ROSMAN and JOHN DOES 1-10,

Defendant and Appellees.

**DEFENDANT/APPELLEE'S OPPOSITION TO PLAINTIFF/APPELLANT
DUANE BENDER'S MOTION FOR HEARING OF STAY OF
EXECUTION OF JUDGMENT**

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County
Cause No. DV-18-1433
Honorable Colette B. Davies

APPEARANCES:

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Attorneys for Defendant/Appellee Stacey Rosman

Pursuant to Montana Rules of Appellate Procedure Rule 22, Defendant/Appellee Stacey Rosman (“Rosman”) respectfully requests the Court deny Plaintiff/Appellant Duane Bender’s (“Bender”) “Motion for Montana Supreme Court Hearing of Stay of Execution of Judgment Without Bond.”

INTRODUCTION

Bender’s request to stay execution of the judgment should be denied because Bender has not obtained the district court’s approval of a supersedeas bond as required by Mont. R. App. P. 22. Bender’s request for a hearing should be denied because there is no legal authority that would entitle Bender to a hearing. The issue of stay of execution is governed by rule and this Court can efficiently deny Bender’s motion without hearing.

Bender’s motion does nothing more than improperly argue the merits of his appeal, and improperly discloses alleged (and inaccurate) confidential mediation information. Rosman reserves all rights to seek relief from the Court for Bender’s improper disclosure of confidential mediation information.

Although Bender states that he is seeking “relief by the Montana Supreme Court form the Ordered (sic) dated September 27, 2022, by the Montana 13th Judicial District Court”, the motion does not specifically identify any errors within the district court’s September 27, 2022 order, nor does it identify good cause for the relief requested.

Instead of establishing good cause for a stay of execution and showing that he has obtained district court approval of a bond, Bender sets forth a fantastical story about how both his own attorney and mediator forced him to sign an underlying mediation agreement.¹ Bender suggests that his age and the stress of litigating this matter should somehow exempt him from the legal requirement to post a bond. There is no legal authority to justify a stay of execution without bond.

In accordance with Mont. R. App. P. 22, the Court should deny Bender's motion with prejudice.

LEGAL STANDARD

Mont. R. App. P. 22 is clear: "If the appellant desires a stay of execution, the appellant *must*... obtain the district court's approval of a supersedeas bond..." Mont. R. App. P. 22(1)(b) (emphasis added).

Bender moved the district court for stay of execution, and the district court correctly ordered: "That Bender shall post a supersedeas bond... no later than eleven (11) days from the date of this Order." District Court Order dated September 27, 2022. It is undisputed Bender failed to post the bond.

¹ This is the first time Bender alleges he was unlawfully coerced into executing the parties' mediation settlement agreement. Rosman reserves all rights to challenge this argument as improperly raised for the first time on appeal. *See City of Bozeman v. McCarthy*, 397 Mont. 134, 152-153 (2019) (finding that the failure to raise an appealable issue, whether preserved in the trial court or not, constitutes an implied waiver of the issue for the ultimate appeal to the Montana Supreme Court).

Bender presumably seeks relief from the September 27 order, although there is no error in the order. Mont. R. App. P. 22 requires Bender to “demonstrate good cause for the relief requested, supported by affidavit...” Mont. R. App. P. 22(2)(a)(i). Mont. R. App. P. 22(4) expressly states: “except in extraordinary circumstances supported by affidavit, motions under this rule which have not been filed in accordance with sections (1) and (2)(a) of this rule, and motions filed without prior notice to the opposing party, will be denied summarily.” Mont. R. App. P. 22(4).

BACKGROUND

Bender filed a Motion for Stay of Execution on August 29, 2022 in the Montana Thirteenth Judicial Court, Yellowstone County, under Case No. DV-2018-1433. Rosman did not oppose a stay of execution so long as Bender posted an appropriate supersedeas bond.

The district court examined the requirements contained within Mont. R. App. P. 22. *See* District Court Order dated September 27, 2022, at Dkt. No. 113. In finding that a hearing was not necessary, the court noted that it had “held many evidentiary hearings in this matter and is very familiar with facts in disputes.” *Id.* The district court further noted that Rule 22 merely required “either a supersedeas bond or an agreement by the parties to waive bond”, stating that “the appellant **must**, unless the requirement is waived by the opposing party, obtain the district’s approval of a supersedeas bond...” *Id.* (emphasis in district court order) (citing Mont. R. App. P.

22). Rosman did not consent to waive the bond requirement. Bender did not post the required bond.

On or about October 11, 2022, Bender filed the instant motion without notifying or serving undersigned counsel. Bender served Rosman with the motion Bender filed with the district court, but not serve Rosman with the motion Bender filed with the Supreme Court. It was only a matter of luck that Rosman happened to review the Supreme Court docket and saw the instant motion after it had already been filed by Bender. Otherwise, Rosman and counsel would not have known Bender had filed the motion with the Supreme Court.

ARGUMENT

Bender's instant motion should be denied because he has not posted the required bond. There is no exception in Mont. R. App. P. 22 to the bond requirement, and Bender has not established good cause for an exception even if there was one. Bender has not demonstrated good cause for the relief requested. Bender failed to comply with the requirements set forth in Mont. R. App. P. 22. Bender: (1) failed to notify opposing counseling of his intent to file the instant motion; (2) failed to serve opposing counsel with the instant motion after it had been filed; (3) failed to post the bond; and (4) failed to establish good cause for the relief requested.

Mont. R. App. P. 22(4) expressly states: "except in extraordinary circumstances supported by affidavit, motions under this rule which have not been

filed in accordance with sections (1) and (2)(a) of this rule, and motions filed without prior notice to the opposing party, will be denied summarily.” Mont. R. App. P. 22(4). Here, Bender did not give prior notice of his intent to file the instant motion. Undersigned counsel first learned of Bender’s motion only after it had already been filed. Egregiously, Bender further failed to serve undersigned counsel with a copy of the motion once it had been filed. Bender did not identify any extraordinary circumstances in his motion and supporting documents to excuse his failure to notify undersigned counsel. Absent such extraordinary circumstances, Mont. R. App. P. 22(4) requires the motion be denied.

Even if Bender was able to demonstrate extraordinary circumstances excusing his failure to notify undersigned counsel, his motion fails to demonstrate good cause that would warrant the Court granting the relief requested. There is no error in the district court’s Order. Bender failed to obtain the district court’s approval of a bond. Without the district court’s approval of a bond, execution cannot be stayed.

The district court correctly noted Bender’s “well-established history of non-compliance” and “efforts to delay and stall [] proceedings.” Order, p. 2. The district court was further correct in observing that Bender’s motion improperly sought to argue the merits of vacating the judgment against him entirely. Order, p. 3 (“Bender’s motion and his supporting affidavit do not raise new issues but rather seek to address the legal merits of his appeal”).

Here, Bender's instant motion is again similarly deficient. Bender offers no legal authority for the proposition that execution can be stayed without the district court's approval of a supersedeas bond. Rosman explicitly *does not* waive the requirement of Bender to obtain the district court's approval of a bond. Bender's motion should be denied.

CONCLUSION

Rosman respectfully requests that the Court affirm the district court's September 27, 2022 decision and deny Mr. Bender's "motion for a hearing of stay of execution of judgment without bond."

DATED this 18th day of October, 2022.

CROWLEY FLECK PLLP

/s/ David F. Knobel
David F. Knobel
Crowley Fleck PLLP

*Attorneys for Defendant/Appellee
Stacey Rosman*

CERTIFICATE OF SERVICE

I, David F. Knobel, hereby certify that I have served true and accurate copies of the forgoing Motion to the following on October 18, 2022.

Duane R. Bender
P.O. Box 31553
Billings, MT 59107-1553
palmtreemt@gmail.com
Appellant Pro Se

/s/ David F. Knobel
CROWLEY FLECK PLLP

CERTIFICATE OF SERVICE

I, David Francis Knobel, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to the following on 10-18-2022:

Duane Bender (Appellant)
P.O Box 31553
Billings MT 59107
Service Method: Conventional

Rebecca Estates, LLC (Appellant)
P.O Box 31553
Billings MT 59107
Service Method: Conventional

Electronically signed by Debbie Kobold on behalf of David Francis Knobel
Dated: 10-18-2022