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IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 24-0531

HomeRiver Group,

Plaintiff and Appellee,

v.

Anders Business Solutions, LLC,

Defendant and Appellant.

RULE 22 MOTION FOR RELIEF
FROM DISTRICT COURT ORDER

Pursuant to Rule 22, M.R.App.P., Appellant moves the Court for relief from the district court Order denying Appellant Anders Business Solutions, LLC’s (ABS) Motion for Stay of Execution of the Order of Possession. Exhibit A. This matter arises from the eviction of a business supplies company from a commercial space. There is good cause for the requested stay for two reasons: (1) the district court misapplied the applicable appellate stay rules and (2) the district court ruling was predicated on a factually incorrect assumption that the eviction had been completed and a stay was thus moot.

Counsel reached out to opposing counsel concerning this motion. The motion is opposed.

Factual Background

In this case a non-legal entity (HomeRiver Group [HRG]) sued a non-tenant LLC (Anders Business Solutions, LLC [ABS]) to evict the tenant (Anderson Trust) from property that the property owner and real-party-in-interest (Louis Gingerelli) had been leasing to the tenant's family for 28 years. The tenant Trust appeared for its LLC and defended it. The Justice Court refused to allow the Trust to represent ABS and struck its filings. The Justice Court gave ABS 5 days to retain counsel. Despite diligent efforts, ABS was unable to retain counsel. The Justice Court therefore entered ABS's default. It issued an Order of Possession and Writ of Assistance ordering the Sheriff to evict ABS and the tenant Trust and to remove all of their personal property on the premises.

The Justice Court has never entered a judgment against ABS.

ABS appealed the Justice Court's interlocutory orders (Entry of Default, Order of Possession, and Writ of Assistance) to the district court and moved to stay proceedings while the matter was pending on appeal.

Two days after ABS filed the appeal and motion to stay proceedings, the Sheriff levied on the real property leasehold. The Sheriff removed all personnel from the real property. Despite the language of the order, the Sheriff failed to remove any personal property located on the real property and thus, has not completed the execution on the real property. Extensive personal property is still on the real property.

The day after the Sheriff partially executed on the real property by evicting the Trust's personnel, the Justice Court issued an *Order* stating: "The Court sets the undertaking at \$8,800. Upon the posting of such, the Court will issue a stay...." Exhibit B. The Trust immediately paid the \$8,800.00 undertaking the Justice Court required in order to stay execution. However, the Justice Court never issued the promised stay.

Under Rule 7(a)(3), Montana Uniform Municipal Court Rules of Appeal to District Court, "[i]f an execution be issued, on the filing of the undertaking, the ...judge must direct the execution officer to stay all proceedings on the same." The Rule requires the Sheriff to "relinquish" the real property levied upon and "deliver the same" to the debtor [ABS]. Despite the fact that ABS paid the \$8,800 undertaking at its earliest opportunity, neither the Justice Court nor the district court has ever directed the Sheriff to stay all proceedings and to relinquish the real property levied upon and deliver it to ABS.

The district court affirmed the default and associated rulings, and ABS has now appealed that decision to this Court. Pursuant to Rule 22, M.R.App.P., ABS moved the district court to stay the execution on the real property pending appeal to this Court and to order the Sheriff to relinquish and deliver the real property to ABS during the appeal. Exhibit C

The district court denied ABS's Motion to Stay because it erroneously relied on a non-existent Rule and erroneously believed that the Sheriff had completed the execution on the real property. Exhibit A.

I. The District Court incorrectly applied the Stay-of-Execution Rules

In its *Order* denying ABS's *Motion* to order the Sheriff to relinquish possession of the leasehold real property during the pendency of this appeal, the district court stated that it denied ABS's *Motion* for it to regain possession of its real property during the appeal based on Rule 6(a)(3) of the Rules of Appeal. Specifically, the Court stated that Rule 6(a)(3) "directs that when the order appealed from directs the...possession of real property, execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant...." *Order*, p. 3. Contrary to the Court's statement, Rule 6(a)(3) does not address appealed *orders* at all. Rule 6 only governs appeals from judgments. The Rule 6(a)(3) language regarding orders—upon which the Court relied—does not exist. Here, there is no judgment. Rule 6 is thus completely inapplicable to the instant case.¹

The district court erroneously treated the order in Justice Court as a judgment. The district court then erroneously believed that ABS should have posted an undertaking under Rule 6(a)(3) at the time it appealed the interlocutory orders to the district court. The district court compounded its error by then holding that, since ABS did not post the yet-unordered undertaking at the time it appealed the

¹ ABS has sought relief from the *Order* under Rule 60(a) & (b), M.R.Civ.P.

interlocutory orders, and the Sheriff had executed on the real property after ABS appealed to the district court, ABS's appeal was moot.

HRG executed on the property *after* that appeal was filed, *after* the motion for stay was filed and *after* the Justice Court finally decided it would require an undertaking (but before the Justice Court notified ABS that it would require an undertaking during the appeal.) ABS paid the undertaking as soon as the Justice Court decided it would require an undertaking. The Justice Court accepted the undertaking by taking and retaining ABS's \$8,800 undertaking. The taking and retention of ABS's \$8,800 undertaking can only be interpreted to mean that the Court believed that the stay of proceedings would issue upon ABS's payment of the undertaking. It clearly said that "Upon the posting of [the \$8,800 undertaking], the Court will issue a stay."

The district court based its denial of ABS's motion to stay on its mistaken belief that there is a money judgment in this case, that an undertaking was required at the time ABS appealed and that ABS failed to request a stay of execution during the pendency of the appeal. Those beliefs are erroneous. There is no judgment in this case, there was no undertaking required at the time ABS appealed and ABS requested a stay during the pendency of the appeal.

Moreover, the district court relied on cases that are materially distinguishable from the instant case: they involved situations where the litigation had resulted in a final judgment against the appellant for money. In such situations, an appellant

knows how much undertaking money to post to obtain a stay because the undertaking amount is determined by the amount of the money judgment. In this case, however, there is no money judgment. The appeal here is merely an interlocutory appeal. Therefore, ABS had no way of knowing how much undertaking to pay when it noted the appeal.

Additionally, those cases dealt with situations in which a money judgment was satisfied prior to conclusion of the appeal, thus rendering the appeals moot. Here, in contrast, there is no money judgment to satisfy and ABS's appeal of the interlocutory orders is not moot. ABS's appeal is merely an interlocutory appeal and is still active. Furthermore, the Justice Court did not even decide to require an undertaking until two days after ABS filed its appeal.

In its Order denying ABS's motion to order the Sheriff to relinquish possession of the leasehold property during the pendency of the appeal, the district court stated that it denied ABS's motion for it to regain possession of its property during the appeal because "ABS did not include the required undertaking with its motion to stay." This statement is erroneous because there was no undertaking required on the date that ABS filed its *Notice of Appeal and Motion to Stay*. Not only was there no undertaking required on the date that ABS filed its *Notice of Appeal and Motion to Stay*, there was not even a judgment on that date, so there is no way that ABS owed any undertaking at all.

The district court stated further that “[s]ince no stay was issued prior to possession, the issue of possession is now moot.” That statement is erroneous. The issue of possession would only be moot if there were a money judgment that was fully satisfied by the execution. This finding is directly contradicted by Rule 7(a), Rules of Appeal, which provides that the Sheriff must relinquish property executed on during the appeal and return it to the debtor during the appeal. Rule 7(a) says that, 1) if the case is under appeal and 2) if the execution has already taken place at the time the undertaking is paid, the court must order the sheriff to *relinquish all property levied upon and deliver the same to the debtor.* Rule 7(a) directly applies to the situation in this case. 1) The case is under appeal to this Court, and 2) the execution had already begun one day before ABS paid the undertaking that was not even required until *after ABS had appealed.* In this situation, Rule 7 plainly requires the court to order the sheriff to relinquish all property levied upon and deliver the same to the debtor. Obviously, the Sheriff cannot relinquish the leasehold property that he took away from ABS if he does not give it back to ABS. The fact that an execution has already partially occurred at the time that the undertaking is posted is no bar whatsoever to ABS regaining possession of the property that the Sheriff levied upon during the pendency of the appeal of the interlocutory orders. That is exactly what Rule 7(a) requires. The issue of possession is not moot because this case was under an interlocutory appeal when the execution took place and is continuing to be on appeal to this Court and there

is no judgment. ABS is entitled to possession of its leasehold property during the pendency of its appeal.

There would be no reason for the Justice Court to require ABS to post an \$8,800 undertaking during the interlocutory appeal process if ABS still could not regain possession of its leasehold during the appeal. That procedure would not make any sense whatsoever. The reason for requiring the appellant to give undertaking money to the court is to secure the appellee if the appellee wins the interlocutory appeal. In exchange, the appellant is allowed to keep possession of the property executed on during the appeal. Here, however, that procedure has been ignored. ABS gave money to the Court to secure HRG if HRG ultimately wins the appeal of the interlocutory orders, but HRG also got to keep the leased property. ABS gained nothing by posting the undertaking. ABS was wrongfully deprived of both its leasehold and its \$8,800 of undertaking money it gave the Court during the appeal.

II. The District Court Mistakenly Concluded that Execution was Complete

As noted to the district court, the Sheriff has never completed the execution because he failed to remove the personal property from the real property, as the Writ of Assistance ordered. That Writ ordered the Sheriff to “eject and remove...all the personal effects of every person holding possession of the premises...” This language notwithstanding, the Sheriff did not remove any *personal effects*. The Sheriff only removed the *persons* holding possession of the

premises. There was 62-years' accumulation of personal effects located at the premises. Said personal effects are still located at the premises. Therefore, the execution has not yet been completed. The fact that the execution is incomplete and Lessee, its personnel and customers have been deprived of all their personal property located on the premises for over 4 ½ months is even more reason why the Court should order the Sheriff to relinquish the real property levied upon and deliver the same to the during the lessee pending appeal to this Court.

For the foregoing reasons, Appellant has demonstrated good cause for issuance of the stay.

RESPECTFULLY SUBMITTED this 18th day of October, 2024.

/s/ Charles H. Carpenter

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 16 and 22 of the M.R.App.P., I certify that this Motion is printed with a proportionately-spaced text typeface of 14 points or more; is double-spaced; and does not exceed ten pages of text.

/s/ Charles H. Carpenter

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing Motion upon each counsel of record using the court's electronic filing system.

/s/ Charles H. Carpenter

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DECLARATION OF TERRY
SULLIVAN IN SUPPORT OF
RULE 22 MOTION FOR RELIEF
FROM DISTRICT COURT ORDER

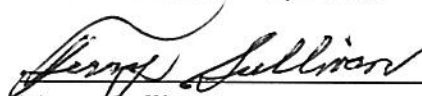
I hereby declare the following:

1. On September 6, 2024 I made a Declaration concerning this case, which I incorporate herein by reference.

2. I hereby declare that the facts and matters I stated in that Declaration are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Missoula, Montana on October 18, 2024.


Terry Sullivan

CERTIFICATE OF SERVICE

I, Charles H. Carpenter, hereby certify that I have served true and accurate copies of the foregoing Motion - Opposed to the following on 10-18-2024:

Joseph David Houston (Attorney)
2625 Dearborn Avenue, Ste. 102A
Missoula MT 59804
Representing: HomeRiver Group
Service Method: eService

Electronically Signed By: Charles H. Carpenter
Dated: 10-18-2024