

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2015-053091

12/05/2016

HONORABLE JOHN R. HANNAH JR

CLERK OF THE COURT  
W. Tenoever  
Deputy

R L WHITMER, et al.

ROBERT S PORTER

v.

HILTON CASITAS COUNCIL OF CO-  
OWNERS, et al.

ANDREW M FEDERHAR  
R COREY HILL

**HEARING SET**

The Court has read and considered the plaintiffs' Motion for Stay of Proceedings to Enforce Judgment and to Set Supersedeas Bond, the response and reply, and the record in this case.

The plaintiffs' request for a stay with no bond, and a release of the lien created by the judgment, is premature. The defendants oppose a stay with no bond, and they have a right to be heard in opposition. In the meantime, the plaintiffs' motion for a bond "temporarily stays enforcement of, or execution on, the judgment, with the same effect as described in Rule 7(b)" except that the judgment may be recorded. Ariz. R. Civ. App. P. 7(b)(2).<sup>1</sup>

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<sup>1</sup> The defendants' argument that a Rule 7(b) stay does not apply to post-judgment discovery for purposes of "enforcement" (as opposed to "execution") of the judgment is not well taken. The argument parses the rule too finely. If the drafters of the rule had intended to permit general discovery of a judgment debtor's finances notwithstanding a stay, they would have said so much more directly.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2015-053091

12/05/2016

IT IS THEREFORE ORDERED staying enforcement of, and execution on, the judgment and all proceedings related to the enforcement of and execution on the judgment, pending the Evidentiary Hearing set pursuant to this order.

IT IS FURTHER ORDERED denying the plaintiffs' request for an immediate order directing the defendant to record a release of the lien created by the judgment.

A.R.S. section 12-2108 and Civil Appellate Rule 7(a)(4) set up a three-step process for determining the amount of the bond.

The first step requires the trial court to set the bond as the lesser of the following: the total amount of damages awarded, excluding punitive damages; 50% of the appellant's net worth; or \$25 million ("the presumed amounts"). A.R.S. § 12-2108(A)(1)–(3); ARCAP 7(a)(4)(A)-(C)... The second step permits an upward deviation from the presumed amount "up to the full amount of the judgment" if an appellee proves by clear and convincing evidence that the appellant is dissipating assets. A.R.S. § 12-2108(B); ARCAP 7(a)(5)(A). The third and final step permits a downward deviation from the presumed amount if an appellant proves by clear and convincing evidence that it will likely suffer substantial economic harm if required to post a bond in the presumed amount. A.R.S. § 12-2108(C); ARCAP 7(a)(2)(5)(B).

City Center Executive Plaza, LLC v. Jantzen, 237 Ariz. 37, 344 P.3d 339, ¶ 12 (App. 2015).

No further proceedings are necessary here to determine the "presumed amount" of the bond. The rule established in City Center Executive Plaza -- that an award of attorneys' fees does not count for purposes of determining the presumed amount of the bond -- applies to an award of attorneys' fees entered as a sanction pursuant to A.R.S. section 12-349. Kresock v. Gordon, 239 Ariz. 251, 370 P.3d 120 (App. 2016). If the only unpaid portion of the judgment is the attorneys' fees, then the presumed amount of the bond is zero.

The issue on which there must be further proceedings is whether the court should order an "upward deviation" from the presumed amount of the bond. The defendant has the right to a hearing on that issue. Ariz. R. Civ. App. P. 7(a)(2). Such hearing must be held "promptly." Id.<sup>2</sup>

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<sup>2</sup> The plaintiffs in theory have a similar right to a hearing on a possible "downward deviation" to avoid economic harm from a bond in the presumed amount, but that issue does not arise here because the presumed amount of the bond is zero.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2015-053091

12/05/2016

The defendant argues that it has the right to conduct discovery in connection with the bond-setting process. The Court holds that it does. Implicit in the right to a hearing is a right to engage in fact-gathering directed to the issue that will be addressed at the hearing. The right to discover the facts is particularly important here, given that the defendant has the burden of proving the relevant facts by a heightened "clear and convincing" standard. The Rules of Civil Procedure permit such discovery "in aid of" the judgment. Ariz. R. Civ. P. 69. And the stay pending appeal does not apply, by the plain terms of Rule 7(b)(1), since determination of the amount of the bond is neither "enforcement" nor "execution" of the judgment.

Lastly, to the extent that the plaintiffs are requesting a protective order quashing the outstanding discovery requests under Civil Rule 26(c), the Court finds that they are not entitled to such an order so long as the amount of the bond remains at issue. The defendants obviously need to know what assets the plaintiffs have in order to determine whether the plaintiffs are "intentionally dissipating" those assets. Discovery directed to the plaintiffs' wealth is therefore fair game. The plaintiffs' demand for "evidence" of dissipation of assets as a prerequisite to discovery puts the proverbial cart before the horse.

IT IS THEREFORE ORDERED setting an Evidentiary Hearing on the plaintiffs' Motion for Stay of Proceedings to Enforce Judgment and to Set Supersedeas Bond on **February 3, 2017 at 10:00 a.m.** (30 minutes allotted) in this Division. At that hearing, the Court will determine the amount of the supersedeas bond and enter a stay pending appeal pursuant to Civil Appellate Rule 7(b)(1).

IT IS FURTHER ORDERED that, to the extent that the plaintiffs are requesting a protective order under Civil Rule 26(c) directed to the defendants' outstanding discovery requests, that request is denied.