
0
1
2
3
4
5
6
7
8
10

Supersedeas on a Money Judgment

By Robert Hill

Imagine that a jury returns a verdict for the plaintiff for X amount of money, the clerk enters judgment and the circuit court gives the defendant 10 days to make post-trial motions. The defendant (now judgment debtor) plans to file post-trial motions and, if necessary, an appeal. The plaintiff (now judgment creditor) wants the money now. May she collect on the judgment now? What if she can—and does—but the judgment is later set aside or reversed?

These issues are governed by the law of supersedeas. Supersedeas refers to a party's ability to suspend a judgment's enforcement until a post-trial motion or an appeal is resolved. *See* S.C. App. Ct. R. 241(c)(1) ("The effect of the granting of a supersedeas is to suspend or stay the matters decided in the order, judgment, decree or decision on appeal …"). Parties may seek to stay many types of orders, including child custody orders in family court, administrative rulings or injunctions. This article focuses on how supersedeas works for money judgments ordered by circuit courts.

ILLUSTRATION BY MARC CARDWELL

Collection efforts are automatically stayed for 10 days.

S.C. R. Civ. P. 62(a) stays execution on the judgment for 10 days after the judgment's entry. The parties may voluntarily agree to further postpone collection efforts if, for example, the judgment debtor obtains court approval to deposit into the court the judgment amount plus any accrued interest. Paying the judgment and accrued interest into the court benefits both parties: the judgment creditor knows that funds are available to satisfy the judgment, and the judg-

ment debtor stops the further accrual of post-judgment interest. *Small v. Pioneer Machinery, Inc.*, 330 S.C. 62, 64-66, 496 S.E.2d 884, 885-86 (Ct. App. 1998).

Further delay requires an order granting supersedeas.

Absent an agreement, Rules 62(b) and (d), S.C. R.Civ. P., require a court order to further postpone collection efforts. A post-trial motion, for example, does not by itself stay the judgment's enforcement. In *Haseldon v. Haseldon*, 347 S.C. 48, 552 S.E.2d 329 (Ct. App. 2001), the family court held the father in contempt for failing to comply with an order while his motion to alter or amend was pending. He argued on appeal that the rule to show cause issued improperly because it came before the family court decided if it would reconsider its order. The Court of Appeals disagreed. It noted that the automatic stay of a judgment expires 10 days after the judgment's entry and that further stays "are not automatic and must be ordered by the court." *Id.* at 63, 552 S.E.2d at 337. The Court of Appeals affirmed the order of contempt in part because the father never sought a supersedeas to further stay the order.

A notice of appeal likewise does not by itself stay collection efforts. "A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution." S.C. Code Ann. § 18-9-130(a)(1) (2004). *See also* S.C. App. Ct. R. 214(b)(1) (listing "money judgments" as an exception to the rule that a notice of appeal automatically stays the matter being appealed); *cf.* S.C. Code Ann. § 14-23-380 (1976) (providing that an appeal automatically stays a probate court's money judgment).

Seeking supersedeas also is not enough. The stay is not effective until the court grants it. *Thornton v. Wahl*, 787 F.2d 1151, 1153-54 (7th Cir. 1986) (sanctioning a party and counsel for making the "preposterous" contention that moving for a stay acts as a stay).

To obtain the supersedeas, the petition for supersedeas must be verified by the client and must ordinarily first be made to the trial court that entered the judgment on appeal. Any party may then seek appellate review of an order granting or denying supersedeas. S.C. App. Ct. R. 241(d). Once the appellate court grants or denies supersedeas, there is no further state-court review. *Owens v. Owens*, 278 S.C. 356, 296 S.E.2d 338 (1982); S.C. App. Ct. R. 221(c) (providing that a petition to rehear a motion will not lie unless the order effectively dismisses or finally decides the appeal).

Absent a grant of supersedeas, the circuit court has jurisdiction to enforce efforts to collect the judgment while the judgment is on appeal. *See* S.C. App. Ct. R. 241(a), (authorizing trial-court jurisdiction to enforce matters not stayed by the appeal); *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 176, 672 S.E.2d 567, 570 (2009) (upholding a trial court's authority to enforce an order awarding workers' compensation benefits while the order was on appeal).

Supersedeas normally requires a bond.

Normally, a judgment debtor must also post a bond to delay collection efforts past the 10-day automatic stay. S.C. R. Civ. P. 62(b), for example, provides that motions for a stay pending post-trial motions may issue "on such conditions for the security of the adverse party as are proper …" S.C. R. Civ. P. 62(b).

In *International Wood Processors v. Power Dry, Inc.*, 102 F.R.D. 212 (D.S.C. 1984), the court applied this rule's federal counterpart. There, the defendants moved to block a judgment's enforcement until their motions for a jnov or a new trial were resolved. They did not want to post a bond.

The district court noted that Rule 62 embodies a policy against unsecured stays of execution for longer than 10 days and held that a stay required the defendants to demonstrate that a bond or other adequate security is impossible or impractical. Because the defendants failed to meet this burden, the court required some of them to post a bond equal to the amount of the judgment plus three months' interest. For other defendants, from whom the plaintiffs did not seek a bond, the court required them to hand deliver to plaintiff's counsel prior written notice of their intent to make any material disposition of their assets. *Id.* at 215-16.

Similar rules apply to stay collection efforts during the more lengthy appellate process. If a bond is approved and posted, a stay is automatic. S.C. R. Civ. P. 62(d) ("The stay is effective when the supersedeas bond is approved by the court."); S.C. Code Ann. § 18-9-180 (1976) (providing that a bond "shall stay all further proceedings in the court below upon the judgment appealed from."). But a bond is not always required. *See* S.C. App. Ct. R. 241(c) (using the permissive "may" to state that supersedeas "may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking[.]").

Southeastern Booksellers Association v. McMaster, 233 F.R.D. 456 (D.S.C. 2006), outlines the factors in determining if a bond is required. There, the S.C. Attorney General and the solicitors moved for an unsecured stay of the judgment pending an appeal. They argued that a bond was not necessary because the State has the financial ability to pay the award. The court required a full supersedeas bond.

The court first noted that its goal is to "preserve the status quo while protecting the non-appealing party's rights pending appeal." *Id.* 458-459. This normally requires a defendant to post a full appeal bond—defined by D.S.C. Local Civ. R. 62.01 as a bond for 150 percent of a judgment when the judgment is $10,000 or less and 125 percent when the judgment is more. *Id.* Two sets of considerations are in play in deciding whether to depart from this normal rule.

The first set of factors helps determine if a stay is warranted. This turns on whether 1) the defendant has made a strong show-

ing of the likelihood of success on the appeal; 2) irreparable harm exists absent a stay; and 3) if a stay would injure other parties or the public interest. *Id.* at 458. Of these factors, the party prevailing at trial may want to emphasize the likelihood of success on the merits because the motion is initially directed to the trial judge who just denied the post-trial motions. In *Van Romer v. Interstate Products, Inc.*, No. 6:06-2867-WMC, 2010 WL 1999528 (D.S.C. May 19, 2010), for example, the magistrate judge required a full supersedeas bond in part because he and the district judge had already rejected the arguments that the defendant intended to raise on appeal.

A second set of factors further helps determine if something less than a full bond will do. This turns on 1) the defendant's ability and willingness to pay the judgment if it is affirmed; 2) the complexity of the collection process, including how long it will take to collect the judgment if it is affirmed; and 3) whether requiring a full bond poses an undue hardship. *Southeastern Booksellers Ass'n*, 233 F.R.D. at 458-59.

Earlier this year, the General Assembly further cabined the state court's discretion in setting the amount of a bond. Effective January 1, 2012, the total amount of a supersedeas bond is capped at the lesser of the amount of the judgment or $1 million for individuals and business entities that employ up to 50 persons or had gross revenues of up to $5 million the previous tax year. For business entities that employ more than 50 people and had more than $5 million in gross revenues, the cap is the lesser of the amount of the judgment or $25 million. S.C. Code Ann. § 18-9-130(A)(1) (effective January 1, 2012). These caps are likely inapplicable in federal court. *See Leuzinger v. County of Lake*, 253 F.R.D. 469, 474-475 (N.D. Cal. 2008) ("courts routinely hold that in the event of a conflict between [federal] Rule 62(d) and a state law governing post-judgment stays, [federal] Rule 62(d) prevails.").

Other security may suffice.

There is greater flexibility in ordering other types of security. In *City of Greenville v. W.R. Grace & Co.*, 640 F.Supp. 559 (D.S.C. 1986), *aff'd on other grounds* 827 F.2d 975 (4th Cir. 1987), the court accepted the defendant's representation that it could pay the multimillion dollar judgment if it was affirmed on appeal. The court still required the defendant to give the plaintiff a pledge of assets or other security to stay the judgment. If the parties could not agree on this security, the court continued, it would order a bond to cover the judgment and the interest likely to accrue until an appeal was resolved. *Id.* at 574-75.

Besides a pledge, insurance coverage may also substitute for a bond—if coverage is uncontested and the carrier is solvent. In *Marcoux v. Farm Service and Supplies, Inc.*, 290 F.Supp.2d 457, 484-86 (S.D.N.Y. 2003), the defendant argued that it should not have to post a bond because its insurance coverage amply covered the judgment. The court disagreed and required a full bond because the primary carrier contested coverage and was in financial difficulty.

Another court ordered a bond, but only for the portion of the judgment where coverage was contested. In *Weekley v. Transcraft, Inc.* 121 F.R.D. 398, 399-400 (N.D. Ind. 1988), the court held that a bond was not required for the compensatory award because the liability carrier admitted coverage was uncontested and solvent. In contrast, the court required a bond for the full punitive damage portion of the award, plus interest, because the carrier questioned coverage for that portion of the judgment.

Lastly, one court in an excess judgment case required the defendant's insurance company to place its policy limits in an interest-bearing account; ordered discovery into the defendant's other assets; and forbade the defendant from dissipating his assets unnecessarily. *Miami Int'l Realty Co. v. Paynter*, 807 F.2d 871 (10th Cir. 1986).

These decisions give judgment creditors room to argue for supersedeas bond or for the insurer to pay the coverage limits into the court. A bond or other security should normally be required if there is an excess judgment, a coverage contest or a financially unstable insurer.

Judgment debtors have remedies if a collected judgment is reversed.

Imagine that the judgment debtor did not obtain a supersedeas and the judgment was collected before the appeal is resolved. This does not affect the appeal on its merits. *See McLemore v. Powell*, 32 S.C. 582, 10 S.E. 550 (1880) (refusing to dismiss an appeal for failing to obtain a supersedeas bond). What happens if the collected judgment is reversed?

There is a claim on any bond for the sale of property.

S.C. Code Ann. § 18-9-130(2) limits a plaintiff's ability to execute on a judgment by enforcing a sale of property. To force the property's sale, the plaintiff must provide a bond from two sureties in an amount double the appraised value of the property. This bond must cover all the damages that the defendant may sustain from the sale if the judgment is reversed. If the plaintiff goes forward with the sale and the judgment is reversed, the defendant can collect on this bond.

There is a restitution claim against the plaintiff.

The defendant also has a restitution claim directly against the plaintiff. By 1929, the U.S. Supreme Court described as "well-established" the "right to recover what one has lost by the enforcement of a judgment subsequently reversed." *Baltimore & O.R. Co. v. United States*, 279 U.S. 781, 786 (1929). The S.C. Supreme Court addressed this right in *Case v. Hemitage Cotton Mills*, 236 S.C. 515, 115 S.E.2d 57 (1960).

In *Case*, the Court was asked 1) if an employer could post a bond to avoid paying weekly workers' compensation benefits during the appeal and 2) to review the award. The Court held that an award was

stayed automatically for 30 days from the order's entry but could not be stayed any longer. The Court thus concluded that the employer wrongfully failed to pay the weekly benefits as ordered while the appeal was pending. But the Court then held that the employee was not entitled to the award. The error over the supersedeas was thus harmless because the employee would have to turn around and repay the employer any money that the employer paid. *Case*, 115 S.E.2d at 67-68.

But repayment may not be a bright-line rule. Because restitution sounds in equity, a plaintiff may have room to argue that restitution in his or her particular case is inequitable or otherwise unfair. The first Restatement of Restitution supports such a defense: it provides for restitution of money collected under a reversed judgment "unless restitution would be inequitable." Restatement (First) of Restitution § 74 (1937). A recent revision, however, suggests a split of authority on whether restitution can ever be avoided. Restatement (Third) of the Law of Restitution & Unjust Enrichment (Tentative Draft) § 18 cmt. e ("Some courts assert an equitable discretion to grant or withhold restitution upon the reversal or avoidance of a judgment, while others declare that restitution is available to the judgment debtor as a matter of right.").

Examples of avoiding restitution are, however, hard to find. The courts have held that the failure to post a supersedeas bond—which would initially block the collection—is no defense to restitution. *Bernoskie v. Zarinsky*, 927 A.2d 149 (2007). Neither is the plaintiff paying tax on the amount collected—at least when the plaintiff knows that the defendant intended to recoup the funds upon a reversal. *Miga v. Jensen*, 299 S.W.3d 98 (Tex. 2009). It is thus unlikely that a plaintiff can avoid restitution by claiming unfairness.

There may be a restitution claim against plaintiff's counsel.

Plaintiffs' attorneys may also be on the hook for any fees that they collected from a judgment that is subsequently reversed. In resolving this issue, courts distinguish between bona fide creditors and real parties in interest. A plaintiff's bona fide creditors are generally not subject to restitution claims because they are not unjustly enriched. Attorneys whose fees are unconditional are generally treated as bona fide creditors and are not liable to refund fees if the judgment was valid before its reversal. *Ehsani v. McCullough Family Partnership*, 159 P.3d 407, 410 (2007) (citing and applying Restatement (First) of Restitution, § 74 cmt. h); *Cox v. Cox*, 780 N.E.2d 951, 960-961 (2002) (citing and applying Restatement (First) of Restitution, § 74 cmt. h).

The catch is that the fee agreement must be unconditional. Plaintiffs' attorneys who work for contingency fees, or obtain statutory fees for prevailing at trial, are generally treated as real parties in interest. As such, they may be personally liable to repay fees acquired from a judgment that is later reversed. *Ehsani*, 159 P.3d at 412-413; Restatement (Third) of the Law of Restitution and Unjust Enrichment (Tentative Draft) § 18 cmt. g (stating that attorneys who work on contingency are not bona fide creditors).

Conclusion

Judgment creditors must wait 10 days after the entry of the judgment to begin collection efforts on their money judgments. After 10 days, they can require the judgment debtor to pay the judgment or obtain a supersedeas to postpone the obligation to pay. If the judgment is collected and later reversed, however, the plaintiff will almost certainly be required to repay the proceeds. Plaintiff's counsel may also have to refund his or her contingency fees and statutory fees. Thus, there are risks for both sides.

Robert Hill practices in the Law Offices of Robert Hill in Newberry.