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BENSON ERTOLDO BAKER & CARTER ATTORNEYS AT LAW

IN THE SUPREME COURT OF THE STATE OF NEVADA

FIESTA PALMS, L.L.C., a Nevada Limited Liability Company, d/b/a THE PALMS RESORT, Appellant, v. ENRIQUE RODRIGUEZ, an Individual, Respondent.	Supreme Court 59630 District Court No. A531538

OPPOSITION TO APPELLANT'S EMERGENCY MOTION REQUESTING TEMPORARY STAY OF ORDER REQUIRING $5.5 MILLION BOND, AND ORDER VACATING BOND REQUIREMENT

I. Introduction

On November 2, 2011, the Nevada State Gaming Control Board unanimously recommended the sale of a majority stake in the Palms to Leonard Green & Partners, L.P. and TPG Capital as current owner George Maloof neared completion of a restructuring that would reduce the property's debt.[1]

The Nevada Gaming Commission considered the board's recommendation to approve the sale on November 17, 2011.

Based on this new development, Appellee/Plaintiff filed a Renewed Motion to Post a Supersedeas Bond on an Order Shortening Time. The Motion was heard on November 15,

[1] See Exhibit "1," Review Journal Article, November 2, 2011, *Regulators recommend sale of Palms majority stake.*

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2011, at which time the Court ordered Appellant to post a $5.5 million dollar bond within ten (10) days of Entry of Order.

The District Court specifically found that the Partial Settlement Agreement[2] did not at all address the issue of supersedeas bond; that there was a dramatic change in circumstances since Appellee's/Plaintiff's initial Motion for Supersedeas Bond; and that Appellee/Plaintiff established compelling arguments with respect to all five factors enumerated in *Nelson*[3] and *McCullough*[4], warranting a supersedeas bond.[5]

Appellant, in seeking the requested relief, evidences *significant* confusion between collection proceedings and the issue of posting a supersedeas bond.

Appellant has now switched its principal argument that the *intent* of the Partial Settlement Agreement was to eliminate the need for a bond, to the argument that the stipulated stay of collection *legally* renders a supersedeas bond completely superfluous and unnecessary.

These arguments fail now, as they did at the District Court level.

As a principal matter, and as this Court has previously held, "the district court is better positioned to resolve any factual disputes concerning the adequacy of any proposed security, while this court is ill suited to such a task." *Nelson v. Heer*, 121 Nev. 832, 122 P.3d 1252 Nev.,2005, citing *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981).

Secondly, and as this Court is aware, the purpose of security for a stay pending appeal is to protect the judgment creditor's ability to collect the judgment **if it is affirmed by**

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[2] Discussed in detail herein.

[3] *Nelson v. Heer*, 121 Nev. 832, 122 P.3d 1252 Nev.,2005.

[4] *McCulloch v. Jeakins*, 1983, 659 P.2d 302, 99 Nev. 122, dismissed 808 P.2d 18, 100 Nev. 816.

[5] *See* Appellant's Supplement Exhibit, Transcript of Hearing on November 15, 2011.

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preserving the status quo and preventing prejudice to the creditor arising from the stay. NRCP 62(d).

As discussed herein, Plaintiff/Appellee had/has concerns over the financial viability of Defendant and was merely seeking to protect his ability to collect on the judgment if upheld on appeal.

II. Statement of Facts

This is a premises liability matter that occurred November 22, 2004 at the Palms Sports Bar/Sports Book. Plaintiff/Appellee ENRIQUE RODRIGUEZ was an invited guest to watch a football game. During half-time, agents, employees and/or assigns of the Palms (hereinafter known as the "PALMS GIRLS") were participating in a promotion wherein they were throwing souvenirs to Sports Bar/Sports Book patrons while blindfolded.

In response to the Palms Girl, Brandy Beavers, throwing souvenirs in the Sports Bar/Sports Book while blind-folded, a customer within the Sports Bar/Sports Book dove for a thrown souvenir and hit Mr. Rodriguez's extended and stationary left knee. Mr. Rodriguez then struck the person next to him, hitting the left side of his head, then falling down, thereby sustaining extensive injuries and damages.

A bench trial commenced in this matter on October 25, 2010 and this Honorable Court issued a verdict on March 9, 2011 for the Plaintiff/Appellee and against the Defendants FIESTA PALMS, L.L.C. and BRANDY BEAVERS in the amount of $6,051,589.38.

Defendants never posted a supersedeas bond and never timely moved for a stay of execution. Plaintiff served a Writ of Garnishment, freezing the Defendant's operating account in May of 2011. Thereafter, the parties proceeded to Mediation.

During Mediation, Plaintiff/Appellee learned that Defendant/Appellant was not financially capable of posting a supersedeas bond in an amount to permit satisfaction of the final judgment.

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As a result, the Defendant/Appellant agreed to pay Plaintiff an initial $1,000,000 as partial satisfaction of the Judgment entered by this Court. Said amount was paid as a tender of the primary level of insurance covering the Palms, and Defendant/Appellant has not made any "out-of-pocket expenditures regarding the same. Said amount was deemed non-refundable, but shall be credited against any future payments. Lastly, in exchange, Plaintiff agreed to dismiss any ongoing attempts at execution and further agreed to a permanent stay of all execution proceedings through remittitur.

A Declaratory Relief Action with respect to excess insurance has been filed by the carrier to exclude coverage because of a failure to give notice on the part of the Palms. As such, there is doubt whether this is an insured risk.

On the basis of the foregoing, Plaintiff initially sought an order requiring the posting of a supersedeas bond in an amount that would permit full satisfaction of the judgment. The request was initially denied.

Thereafter, the news of the recommended sale of the Palms majority stake heightened Plaintiff/Appellee's concern, and ultimately was deemed by the District Court to be a dramatic change in circumstances prompting the Renewed Motion.

A. <u>Plaintiff Has Concerns Over the Financial Viability of the Defendant</u>

During Mediation, Plaintiff learned that Defendant was not financially capable of posting a supersedeas bond in an amount to permit satisfaction of the final judgment.

The recommended sale of the Palms majority stake is further support of Plaintiff's concern.

Plaintiff/Appellee simply sought an order requiring the posting of a supersedeas bond in an amount that will permit full satisfaction of the judgment.

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B. The Mediation Agreement Does Not Eliminate the Requirement of an Appellate Bond

The clear and unambiguous language of the Mediation Settlement is controlling and conclusive.

The Mediation Settlement specifically states as follows:

> Defendant will pay Plaintiff the sum of $1,000,000 in partial satisfaction of the Judgment entered by Judge Walsh. Said sum shall be non-refundable, but, shall be credited against any future payments. In exchange, Plaintiff shall dismiss any ongoing efforts at execution and shall agree to a permanent stay of all collection proceedings through remittitur.

Nowhere in the Agreement does it state, intend, contemplate and/or confirm that The Palms were relieved from the supersedeas bond requirement. As clearly enunciated by the Nevada Supreme Court:

> Our equitable powers do not extend so far as to permit us to disregard fundamental principles of the law of contracts, **or arbitrarily to force upon parties contractual obligations, terms or conditions which they have not voluntarily assumed**. *McCall v. Carlson*, 63 Nev. 390, 424 (1946).

The Palms voluntarily assumed the contractual terms of the Mediation Settlement. The Palms cannot force upon the Plaintiff any terms or conditions, i.e., relief from the supersedeas bond requirement, not contained within the Mediation Settlement.

C. Purpose of the Bond is to Protect Plaintiff as the Judgment Creditor

The purpose of security is to protect the judgment creditor's ability to collect the judgment if it is affirmed by preserving the status quo and preventing prejudice to the creditor arising from the stay. *Nelson v. Heer*, 2005, 122 P.3d 1252, 121 Nev. 832, as modified.

The purpose of a supersedeas bond is to the protect prevailing party from loss resulting from a stay of execution of the judgment. NRCP 62. *McCulloch v. Jeakins,* 1983, 659 P.2d 302, 99 Nev. 122, dismissed 808 P.2d 18, 100 Nev. 816.

A supersedeas bond should usually be set in an amount that will permit full satisfaction of the judgment; however, a district court, in its discretion, may provide for a

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bond in a lesser amount, or may permit security other than a bond when unusual circumstances exist and so warrant. NRCP 62. *McCulloch v. Jeakins*, 1983, 659 P.2d 302, 99 Nev. 122, dismissed 808 P.2d 18, 100 Nev. 816.

The five factors to consider in determining when a full supersedeas bond may be waived and/or alternate security substituted include: (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position. *Nelson v. Heer*, 2005, 122 P.3d 1252, 121 Nev. 832, as modified.

In the present matter, real concern arose regarding Plaintiff's security during the pendency of Appeal in that the majority of interest in the subject premises was likely to be transferred. This situation acts as follows: 1) creates an extremely complex collection process as the Leonard Green company would have to be brought into the action (perhaps sued for fraudulent transfer); 2) creates real doubt as to the ability of the Palms to pay the judgment; 3) demonstrates that the Palms has a less than obvious ability to pay the judgment; and 4) presents no impediment to other creditors as Leonard Green will essentially assume the majority of all such liabilities.

In contrast, a supersedeas bond would protect Plaintiff's interest, would be the first out-of-pocket expense borne by the Palms, and would best insure justice herein. As such, the above criteria weigh squarely in favor of requiring a bond, and a supersedeas bond is respectfully requested herein.

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As set forth above, the District Court specifically found that the Partial Settlement Agreement did not at all address the issue of supersedeas bond; that there was a dramatic change in circumstances since Appellee's initial Motion for Supersedeas Bond; and that Plaintiff established compelling arguments with respect to all five factors enumerated in *Nelson*[6] and *McCullough*[7].

IV. Conclusion

Based on the foregoing, Appellee respectfully requests that Appellant's Motion be denied in its entirety.

Dated this 23rd day of November, 2011.

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[6] *Nelson v. Heer*, 121 Nev. 832, 122 P.3d 1252 Nev.,2005.

[7] *McCulloch v. Jeakins*, 1983, 659 P.2d 302, 99 Nev. 122, dismissed 808 P.2d 18, 100 Nev. 816.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of BENSON, BERTOLDO, BAKER & CARTER, CHTD. and that on this 23rd day of November, 2011, I caused the above and foregoing document entitled OPPOSITION TO APPELLANT'S EMERGENCY MOTION REQUESTING TEMPORARY STAY OF ORDER REQUIRING $5.5 MILLION BOND, AND ORDER VACATING BOND REQUIREMENT to be served by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada.

Michael K. Wall, Esq. NBN: 2098 Hutchison & Steffen 10080 W. Alta Drive, Suite 200 Las Vegas, NV 89145 Attorneys for Respondent	Keith Gillette, Esq. Archer, Norris 2033 North Main Street, Suite 800 P.O. Box 8035 Walnut Creek, California 94596-3728 925-930-6600 Telephone 925-930-6620 Facsimile Co-Counsel for Appellant
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An Employee of Benson, Bertoldo, Baker & Carter

EXHIBIT 1

Regulators recommend sale of Palms majority stake

BY CHRIS SIEROTY
LAS VEGAS REVIEW-JOURNAL

Posted: Nov. 2, 2011 | 2:18 p.m.

The state Gaming Control Board on Wednesday unanimously recommended the sale of a majority stake in the Palms to Leonard Green & Partners L.P. and TPG Capital, as owner George Maloof nears completion of a restructuring that will reduce the property's debt.

Leonard Green and TPG have already purchased the property's $459 million outstanding loan. The Nevada Gaming Commission will consider the board's recommendation to approve the sale on Nov. 17.

"It will be 10 years since we opened this month," Maloof told the three-member board. "We've had great success. We are very fortunate to have two great partners."

Maloof also thanked the board for the opportunity to work in Nevada for almost 25 years. He said 600 of the property's 2,000 employees have been at the Palms since it opened in 2001.

Under the deal, Leonard Green and TPG will own 98 percent of the Las Vegas celebrity hangout through a company called FP Holdings L.P. Maloof will own 2 percent of the Palms, with options to acquire an additional 7.5 percent.

Matthew Dillard, a partner with Dallas-based TPG, said Maloof has a 10-year employment agreement and will remain as the new company's chairman of the board.

Dillard also said the Palms was expected to have access to a $60 million line of credit from Wells Fargo & Co.

"We are currently in extensive negotiations with Wells Fargo to provide $60 million," he said. "I believe it will close by the (gaming commission) meeting in two weeks."

Dillard said FP Holdings will use $30 million to pay down the loan on Palms Place, while the other $30 million will be invested in various projects.

The Palms casino was expected to be the first remodeling project, along with upgrades to the existing Palms tower. Updates of the resort's restaurants and food court are also expected to start in the first quarter of 2012.

Palms President Joe Magliarditi said the hotel would spend $3.5 million for 214 new slot machines by year's end. In all, the Palms casinos will see $5 million in upgrades.

"I can't say enough about how good of a job (George) did building the Palms brand," Magliarditi said. "We are reinvigorating that brand."

He stressed that the hotel-casino will continue to focus on local customers as it extends it brand to outside markets.

In other business, the board recommended Ronald Paul Johnson's appointment as receiver for Goldman Sachs Mortgage Co. to oversee operations of the Las Vegas Hilton, if approved by the Clark County District Court.

Bud Hicks, a partner in the Las Vegas firm McDonald, Carano, Wilson LLP, told the board that Goldman Sachs' petition to "assume control" of the Las Vegas Hilton is pending before District Court Judge Elizabeth Gonzalez.

He said Goldman Sachs wants to "keep the Las Vegas Hilton afloat" but wants Johnson, a former Riviera executive, to oversee day-to-day operations of the historic property.

"Goldman Sachs Mortgage Co. is willing to dump funds into the property," Hicks assured the board.

Colony Resorts LVH Acquisitions LLC, a subsidiary of billionaire Thomas Barrack's Los Angeles company Colony Capital LLC, owns the Las Vegas Hilton.

In August, Colony Resorts disclosed it had defaulted on its $252 million term loan after skipping three payments over the summer totaling $3.5 million to conserve cash for operating expenses.

Hicks said the next hearing in the case is set for Tuesday. Goldman Sachs has been trying to foreclose on the 2,950-room property and install Johnson as a receiver to displace current management.

Contact reporter Chris Sieroty at csieroty@reviewjournal.com or 702-477-3893.

Find this article at:
http://www.lvrj.com/business/regulators-recommend-sale-of-palms-majority-stake-133108318.html

☐ Check the box to include the list of links referenced in the article.