

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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3 FIESTA PALMS, LLC, a Nevada Limited
4 Liability Company d.b.a THE PALMS
5 CASINO RESORT,

6 Appellant,

7 vs.

8 ENRIQUE RODRIGUEZ, an individual,

9 Respondent.

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Tracie K. Lindeman
No. 59630 Clerk of Supreme Court

10 **REPLY IN SUPPORT OF EMERGENCY MOTION UNDER NRAP 27(e)**

11 **Argument**

12 **1. The partial settlement stipulation eliminated any need for a bond.**

13 Plaintiff's opposition relies primarily on case law dealing with circumstances in which
14 a bond or other form of security was required as a prerequisite to the appellant's ability to obtain
15 a stay of execution on a judgment pending appeal. For example, plaintiff cites *Nelson v. Heer*,
16 121 Nev. 832, 122 P.3d 1252 (2005) and *McCulloch v. Jeakins*, 99 Nev. 122, 659 P.2d 302
17 (1983) for the proposition that the purpose of a bond is to protect the judgment creditor by
18 "preserving the status quo" pending appeal, and to prevent prejudice to the judgment creditor
19 resulting from a stay of execution. (Opp., unnumbered fifth page, lines 21-23.) In the present
20 case, the status quo is "a permanent stay of all collection proceedings through remittitur," as
21 mandated by the stipulation. This is the status quo to which plaintiff agreed, in exchange for
22 \$1 million, memorialized in a signed stipulation that did not require a bond or any other security
23 for the stipulated stay.

24 Plaintiff's argument ignores the fact that the necessity of a bond only arises if the
25 defendant judgment debtor needs to obtain a stay of collection proceedings on the judgment, in
26 order to shield the judgment debtor's assets from execution during the appeal. Although a bond
27 may have the effect of protecting the plaintiff from potential prejudice that might arise from a
28 stay order, a bond is completely unnecessary unless the defendant needs a stay of execution that
cannot otherwise be obtained without the bond. If the defendant can obtain a stay of collection

1 proceedings through other avenues, such as obtaining a stipulated stay upon the payment of
2 valuable consideration to the plaintiff, no bond is necessary.

3 Despite plaintiff's argument to the contrary, this court has clearly and unequivocally
4 held: **"The purpose of a supersedeas bond is to stay the enforcement of a judgment."**
5 *Sherman Gardens Co. v. Longley*, 87 Nev. 558, 563, 491 P.2d 48, 52 (1971) (emphasis added).
6 A bond is inextricably tied to the defendant judgment debtor's ability to obtain a stay of
7 execution on the judgment pending appeal, if the defendant is unable to obtain a stipulated stay
8 from the plaintiff. This tie between a bond requirement and a defendant's need for a stay is
9 recognized in NRCP 62(b) and (d). Under subdivision (b), which deals with the time during
10 which a post-judgment motion is pending, the district court may require a bond to "stay the
11 execution of or any proceedings to enforce a judgment pending the disposition of [the
12 motions]." Under subdivision (d), which deals a stay pending appeal, the defendant may post
13 a bond and thereby "may obtain a stay." The rule also states: "The stay is effective when the
14 supersedeas bond is filed."

15 The tie between a bond requirement and the defendant's need to obtain a stay of
16 execution is also recognized in NRAP 8. Subdivisions (a)(1) and (2) of Rule 8 allow this court
17 to order a stay of execution pending appeal; and subdivision (1)(2)(E) allows this court to
18 "condition relief on a party's filing of a bond or other appropriate security in the district court."
19 In other words, NRAP 8 recognizes that a bond is only required if the defendant needs, and
20 moves for, an order staying execution pending appeal. A bond is irrelevant if the defendant
21 does not need a court order staying execution on a judgment.

22 Accordingly, both NRCP 62 and NRAP 8 recognize that a bond is only applicable if the
23 defendant's needs a stay of execution in order to prevent the plaintiff from pursuing collection
24 proceedings and from executing on the defendant's assets pending a post-judgment motion or
25 an appeal.

26 The inseparable tie between a supersedeas bond requirement and the defendant's need
27 for a stay of execution is also recognized in Nevada case law. For example, in *Nelson v. Heer*,
28 121 Nev. 832, 833, 122 P.3d 1252, 1252 (2005), on which plaintiff relies in the present case,

1 the court held that a supersedeas bond is used “to support a stay pending appeal.” The appellant
2 in *Nelson* moved the supreme court “for a stay pending appeal conditioned on alternative
3 security, rather than a supersedeas bond.” *Id.* The district court “granted a stay pending appeal
4 but conditioned the stay on the posting of a supersedeas bond in the judgment amount.” *Id.* The
5 appellant “filed the instant motion, asking that a stay pending appeal be conditioned on
6 alternative security, rather than a supersedeas bond.” *Id.* at 834, 122 P.3d at 1253.

7 Discussing federal court holdings on FRCP 62, which is the federal counterpart to NRC
8 62, the *Nelson* court observed that the rule “allows an appellant to obtain a stay pending appeal
9 as of right upon the posting of a supersedeas bond for the full judgment amount,” but “courts
10 retain the inherent power to grant a stay in the absence of a full bond.” *Id.* Other language in
11 *Nelson* also demonstrates the tie between a bond requirement and the defendant’s need for a stay
12 pending appeal. For example, the court held that a supersedeas bond “should not be the
13 judgment debtor’s sole remedy” to obtain a stay of execution on the judgment pending an
14 appeal. *Id.* at 835, 122 P.3d at 1254. *Nelson* demonstrates that a bond is always tied to the
15 judgment debtor’s request for a stay of execution that will protect the judgment debtor’s assets
16 during the appeal.

17 Similarly, in *McCulloch v. Jeakins*, 99 Nev. 122, 659 P.2d 302 (1983), on which plaintiff
18 also relies, the defendants moved for an order staying execution on the judgment pending their
19 appeal, without a bond. The requirement of a bond or other security was directly tied to the
20 defendants’ need for a stay pending appeal.

21 Holdings in numerous other Nevada Supreme Court opinions demonstrate the
22 relationship between bonds and stays, establishing that a supersedeas bond is only applicable
23 when a defendant needs to obtain a stay pending appeal. *See Barney v. Mt. Rose Heating & Air*
24 *Conditioning*, 124 Nev. 821, 824 fn. 1, 192 P.3d 730, 733 fn. 1 (2008) (the supersedeas bond
25 “was posted to stay the November 2004 judgment’s execution pending appeal”); *Maheu v.*
26 *District Court*, 88 Nev. 26, 29-31, 493 P.2d 709, 711-12 (1972) (supersedeas bond was
27 requested by appellant “to obtain a stay of the preliminary injunction pending his appeal,” and
28 supersedeas bond was relevant to appellant’s ability “to obtain a stay during appeal”); *Sherman*

1 *Gardens, supra*, 87 Nev. at 563, 491 P.2d at 52 (a supersedeas bond “stays proceedings to
2 enforce a judgment”); *State ex rel. Pacific Reclamation Co. v. Ducker*, 35 Nev. 214, 227, 127
3 P. 990, 994 (1912) (upon filing of a bond, appellant was entitled to a stay of proceedings
4 pending the appeal).

5 In short, a defendant who needs to protect its assets and prevent a plaintiff from pursuing
6 collection proceedings on a judgment can obtain a stay of execution by posting a supersedeas
7 bond. It logically follows that a bond is entirely irrelevant where a defendant does not need a
8 stay in a case such as the present case, where the plaintiff has already expressly agreed and
9 stipulated to a permanent stay pending appeal--in exchange for valuable consideration paid by
10 the defendant.

11 Plaintiff relies on the district judge’s observation that the stipulation did not address the
12 issue of a supersedeas bond. (Opp., unnumbered second and seventh pages.) It is true that the
13 stipulation did not expressly provide for the absence of a bond. On the other hand, the
14 stipulation did not provide that if defendant’s financial circumstances somehow changed after
15 the stipulation was signed and after defendant paid plaintiff the non-refundable \$1 million,
16 plaintiff could then seek a bond yet still keep the money.

17 There is a rather obvious reason why the stipulation did not address the issue of a bond:
18 the issue was irrelevant and meaningless under the terms of the stipulation and the
19 circumstances leading to the agreement. Plaintiff had started execution proceedings, including
20 a freeze on defendant’s bank accounts, shortly after the judgment was rendered. The parties
21 agreed to a temporary stay and a mediation. After extensive negotiations, the parties agreed to
22 a partial settlement, which provided that defendant would pay plaintiff \$1 million; the payment
23 was non-refundable, i.e., plaintiff would get to keep the money even if this court reverses the
24 judgment; and in exchange, plaintiff would agree to a permanent stay of all collection
25 proceedings pending the appeal. With plaintiff expressly agreeing to a permanent stay in
26 exchange for \$1 million, there was absolutely no reason for the parties to add a provision
27 dealing with a bond. A provision dealing with a bond would have been superfluous and
28 completely meaningless.

1 In conclusion on this argument, the partial settlement stipulation clearly eliminated any
2 need for a bond. In exchange for \$1 million (non-refundable), plaintiff stipulated as follows:
3 “Plaintiff shall dismiss any ongoing efforts at execution and shall agree to a permanent stay of
4 all collection proceedings through remittitur.” The district court had no legal basis for
5 concluding that plaintiff could ignore the stipulation and initiate collection proceedings by
6 moving to require a multi-million dollar bond.

7 **2. The district court essentially granted plaintiff equitable relief, without**
8 **any legal or factual basis, and without requiring plaintiff to “do equity” by**
9 **returning the \$1 million.**

10 Defendant’s emergency motion contended that the district court’s order was the
11 functional equivalent of granting plaintiff equitable relief from his obligation under stipulation,
12 and there was no legal or factual basis for the district court’s ruling. Defendant’s motion also
13 contended that a party who seeks equity must do equity, yet plaintiff was not required to return
14 the \$1 million as a condition to obtaining equitable relief from the stipulation. Defendant’s
15 motion provided persuasive and relevant legal authorities for both contentions.


16 Plaintiff’s opposition completely ignores both contentions. Indeed, plaintiff’s opposition
17 does not even acknowledge the contentions. Plaintiff’s failure to address the contentions is
18 presumably based on the fact that he could not formulate any plausible arguments in opposition;
19 nor could he find any legal authority against defendant’s contentions.

20 Accordingly, defendant’s contentions stand unopposed, and this court may grant
21 defendant’s motion on that basis alone. *Cf. State, Dept. of Motor Vehicles v. Stone*, 94 Nev.
22 775, 776, 587 P.2d 1325, 1326 (1978) (respondent’s failure to oppose motion, among other
23 things, treated as confession of error); *Bates v. Chronister*, 100 Nev. 675, 681-682, 691 P.2d
24 865, 870 (1984) (failure to respond to argument in opening brief treated as confession of error
25 on that issue).

26 Therefore, even if this court somehow determines that the district court had authority and
27 admissible evidence supporting a bond requirement, at the very least the district court should
28 be ordered to condition her ruling on plaintiff’s repayment of the \$1 million.

1 least, the district court should be ordered to amend her order to require plaintiff's repayment of
2 the \$1 million as a condition precedent to the bond requirement.

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4 DATED: Nov. 28, 2011

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date Appellant's **Reply in Support of Emergency Motion Under NRAP 27(e)** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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I further certify that on this date I served copies of this **Reply** by facsimile and by U.S. mail to:

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DATED this 28 day of Nov., 2011.