

IN THE SUPREME COURT OF THE STATE OF NEVADA

PACIFIC WESTERN BANK, a California
banking corporation,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT
COURT, in and for the County of Clark,
State of Nevada, and THE HONORABLE
SUSAN W. SCANN, District Judge,

Respondent,

and

JOHN A. RITTER, an individual; DARREN
D. BADGER, an individual; VINCENT T.
SCHETTLER, an individual; and DOES 1
THROUGH 50,

Real Party in Interest.

Case No. 69048 Electronically Filed
Dec 14 2015 04:29 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

District Court No: A-14-710645-B
Dept. No. 29

PETITION

**From the Eighth Judicial District Court
The Honorable Susan W. Scann, District Judge**

**APPELLANT'S REPLY TO RESPONSE TO
EMERGENCY MOTION TO STAY PENDING WRIT REVIEW**

BOB L. OLSON, ESQ.

Nevada Bar No. 6019

KELLY H. DOVE

Nevada Bar No. 10569

KARL O. RILEY, ESQ.

Nevada Bar No. 12077

SNELL & WILMER L.L.P.

3883 Howard Hughes Parkway, Suite 1100

Las Vegas, Nevada 89169

Telephone: (702) 784-5200

E-mail: bolson@swlaw.com

kdove@swlaw.com

kriley@swlaw.com

Attorneys for Petitioners

I. INTRODUCTION

Judgment debtor Darrin Badger's claim that this case is about money is true. Judgment debtors, John Ritter, Darrin Badger and Vincent Schettler (collectively, "Defendants") borrowed \$10,000,000.00 – a great deal of money – from Pacific Western Bank and have made every effort to avoid repaying that loan. Ritter and Badger's defense to Pacific Western Bank's suit to collect the loan was so aggressive that the court awarded Pacific Western Bank \$469,891.10 in attorney's fees against them in addition to the other amounts due and owing resulting in a judgment of \$3,369,488.67 against them as of September 26, 2014. Now, Ritter and Badger are doing everything possible to avoid paying the judgment against them by, among other things, filing claims of exemption to every asset that Pacific Western Bank attempts to execute upon.

Here, Badger opposes Pacific Western Bank's reasonable request to maintain the status quo of the New Mexico 529 Accounts at issue in these writ proceedings, which are not exempt under Nevada law. Badger's Response in opposition is more notable for what it does not say than for what it does. Badger fails to confront Pacific Western Bank's contentions that Badger, a Nevada citizen, may not avail himself of New Mexico exemptions, or that Nevada courts have jurisdiction to reach the 529 Accounts, both by exercising jurisdiction over the broker of the accounts, and by ordering Badger to turn over the funds pursuant to

NRS 21.320. Instead, Badger asks this Court to deny Pacific Western Bank's Motion for Stay based on unsupported statements of financial need on the part of non-parties. This Court should decline to do so and grant the stay.

II. ARGUMENT

A. The Object of the Writ Petition Will Be Defeated if the Stay Is Denied.

Badger first argues that a stay is unnecessary because there is no reason to believe that he would withdraw the funds. If Badger has no intention to withdraw funds from the Accounts, however, he should not object to a stay prohibiting him from doing so. Moreover, Badger's assurances are cold comfort for Pacific Western Bank, as Defendants have litigated aggressively to avoid collection of any amount of the judgment they undisputedly owe, despite their ability to pay. Badger's stated intention not to empty the Accounts is no reason to deny the stay.

Moreover, though Badger argues that the object of the writ petition will not be defeated absent a stay, his Response belies that argument. Indeed, the Response makes clear that Badger intends to continue using the funds in the 529 Accounts, and requests that this Court allow him to use the funds even if it orders a stay. Opp'n at 9. Badger requests that "at the very minimum, the Court must allow the funds ... to be used to pay for the Badger children's legitimate educational expenses...." *Id.* Allowing such a use of funds in the Accounts defeats the entire

purpose of a stay. Moreover, Badger's request, which he attempts to couch as a minimal carve-out, would in fact amount to a near-total denial of the stay.

Because even the Response makes clear that a denial of a stay will result in the depletion of the 529 Accounts, this Court should grant a stay.

B. Pacific Western Bank Will Suffer Substantial Harm.

Badger's argument that Pacific Western Bank is not entitled to a stay because only money is at stake, citing cases concerning a stay of proceedings, is a misunderstanding of the law. A party need not satisfy a strict injunctive relief standard to obtain a stay of a challenged order.

This Court has indeed held that the expense of litigating a matter generally does not constitute the irreparable harm a party would need to show to justify a stay of proceedings pending appeal. Badger's reliance of such cases is misplaced, however, as that is not the situation here. Rather, Pacific Western Bank seeks to stay the effect of the district court's order that prevents it from executing upon assets of be applied to its judgment pending writ review – not a stay of proceedings.

The difference between these scenarios is made clear by the fact that a party challenging an order on appeal is entitled to a stay upon posting a supersedeas bond. *See* NRAP 62(d); *Nelson v. Heer*, 121 Nev. 832, 835, 122 P.3d 1252, 1254 (2005), as modified (Jan. 25, 2006). This is not so when a party seeks a stay of

proceedings or injunctive relief. For the reasons explained in Pacific Western Bank's Motion, and unchallenged by Badger, it makes no sense to require Pacific Western Bank, as the creditor, to post a bond. But, it is exactly the type of situation for which a stay is appropriate.

Moreover, Pacific Western Bank reasonably seeks to maintain the value of an asset at issue in these writ proceedings. Absent a stay, the asset could be of diminished value or no value by the conclusion of these writ proceedings, leaving Pacific Western Bank unable to collect over \$200,000.00 of a judgment it is undeniably owed.

Further, Badger's claims of harm to himself are without merit. Badger asserts that it is unlikely that his children will be able to pay their educational expenses without access to the funds in the 529 Accounts. Opp'n at 7-8. The Court should disregard this argument for at least two reasons. First, Badger provides no support for it. It is entirely unaccompanied by evidence, or even a self-serving affidavit. As such, this Court should not give it any weight when considering the motion to stay. Second, Badger's statement is carefully worded about his children's ability to pay their educational expenses, but says nothing of his own. Conspicuously absent from the statement is information concerning Badger's ability to pay for his children's educational expenses, likely because Badger has ample financial means to do so.

This Court should prevent depletion of the 529 Accounts at issue by ordering a stay during the pendency of these writ proceedings.

C. Pacific Western Bank Is Likely To Prevail on the Merits.

1. Badger's Unsupported Argument that the 529 Accounts Are Outside this Court's Jurisdiction Is Incorrect.

Badger argues that because the college savings program is “located in New Mexico,” and that WFA “merely administers” the 529 Accounts, the funds are beyond the reach of Nevada courts. Badger's Response utterly fails to confront Pacific Western Bank's argument that Nevada courts unquestionably have the jurisdiction to order Badger to turn over the funds, making their purported location irrelevant. Badger has thus conceded Pacific Western Bank's position on that point.

Moreover, Badger's contention that WFA's “mere administration” of the Accounts exempts them from execution in Nevada is notably devoid of legal support. As Pacific Western Bank's Motion and Petition explained in detail, it properly garnished the 529 Accounts by executing against Wells Fargo Advisors, a broker doing business in Nevada because as the court has jurisdiction over the broker, it may properly order the garnishment of any accounts held by the broker. *See, e.g., Country Bank v. Broderick*, 120 A.D. 3d 463, 464-65 (Sup. Ct. 2d App. Div. 2014) (holding a creditor possessing Connecticut judgment, which was domesticated in New York, may execute against 529 Accounts that were

established under New Hampshire law if the broker does business in New York). Thus, whether the funds are held out of state is irrelevant; all that matters is Nevada's jurisdiction over the broker. Even if the lower court did not have jurisdiction over the broker, it has authority to require Badger to withdraw the funds and deliver them to Pacific Western Bank pursuant to NRS 21.320. Because Pacific Western Bank's position is correct and legally supported, and because the Response provides no law to the contrary, this Court should entirely reject Badger's position that Nevada lacks jurisdiction to attach the 529 Accounts.

2. Badger's Claim that the Funds Are Exempt Under New Mexico Law Is Question-Begging and Wrong.

Badger argues that New Mexico law is "crystal clear" in that all money held in New Mexico 529 Accounts is exempt from creditors' claims. In so arguing, Badger assumes without argument that New Mexico law applies, when it does not. Indeed, Pacific Western Bank's Motion and Petition discuss, in detail, why Badger does not enjoy exemptions under multiple states' laws. The Response entirely fails to confront this argument, and instead applies New Mexico law without establishing that it should apply. Badger's argument based on the application of New Mexico law fails, both for the failure to respond to Pacific Western Bank's substantial and correct argument to the contrary, and for its legal infirmity.

Pacific Western Bank's Motion and Petition establish that Nevada law is the only law that applies here. It is black letter law that the law of a judgment debtor's

domicile controls what exemptions the judgment debtor may claim. *See In re Watson*, 192 B.R. 238, 244 (Bankr. D. Nev. 1996). As Badger lives in Nevada, he may utilize only Nevada's exemptions. Nevada's exemption, NRS 21.090(r)(5) exempts from execution only those 529 accounts formed "pursuant to chapter 353B of NRS [or] any applicable regulations adopted pursuant to chapter 353B of NRS and section 529 of the Internal Revenue Code." This language clearly excludes 529 Accounts formed under the laws of a different state, such as New Mexico. The Response, stunningly, offers no response to this argument, in favor of ignoring it and perhaps hoping this Court would do the same.

By failing to respond, Badger also concedes that the 529 Accounts are not exempt under Nevada law because they were not formed under the laws of Nevada. Finally, Defendants failed to contest Pacific Western Bank's argument that they waived any right to assert a New Mexico exemption, as it was not timely raised in his initial claim of exemption. *Dodge City Healthcare Group, LP v. Chaudhry*, No. 09-00091, 2010 WL 2399578, at *2 (D. Nev. June 9, 2010) ("Pursuant to NRS 21.075 and 21.112(1), the failure to timely file an exemption operates as a waiver of exemption rights."). By not opposing Pacific Western Bank's claim of waiver, Defendants concede that argument.

In sum, the 529 Accounts are not exempt under New Mexico law because New Mexico's laws of exemptions do not apply to Nevada residents, like Badger.

See In re Arrol, 170 F.3d 934 (9th Cir. 1999) (holding that California exemption law applies to a debtor domiciled in California, regardless of where the property claimed as exempt was located); *see also In re Watson*, 192 B.R. 238, 244 (Bankr. D. Nev. 1996). Defendants' failure to justify the application of New Mexico law in response to Pacific Western Bank's Motion is telling, as is their concession that the Accounts are not exempt under Nevada law and that they waived their ability to attempt to apply New Mexico exemptions by failing to timely assert them.

As Pacific Western Bank is likely to succeed on the merits, this Court should grant the stay.

III. CONCLUSION

For the foregoing reasons, this Court should grant Pacific Western Bank's Motion for a Stay pending writ review.

Dated: December 14, 2015

SNELL & WILMER L.L.P.

By: /s/ Kelly H. Dove

BOB L. OLSON, ESQ.

Nevada Bar No. 6019

KELLY H. DOVE

Nevada Bar No. 10569

KARL O. RILEY, ESQ.

Nevada Bar No. 12077

3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date December 14, 2015, I caused to be served a true and correct copy of the foregoing **PACIFIC WESTERN BANK'S REPLY TO RESPONSE TO EMERGENCY MOTION TO STAY PENDING WRIT REVIEW** by the method indicated:

- ☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document.

- ☒ **BY U.S. MAIL:** by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

The Honorable Susan Scann, Dept. 29
The Honorable Elizabeth Gonzalez,
Dept. 11
Regional Justice Center, Courtroom 14C
200 Lewis Ave.
Las Vegas, NV 89155
Respondent

Constable/Sheriff
Las Vegas Township
302 E. Carson Avenue
5th Floor, Box 552110
Las Vegas, NV 89101

- ☐ **BY PERSONAL DELIVERY:** by causing personal delivery by _____, a messenger service with which this firm maintains an account, of the document listed above to the person(s) at the address(es) set forth below.
- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court pursuant to EDCR 8.05(a) and 8.05(f) to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail.

to the following:

Mark W. Yocca, Esq.
Paul Kim, Esq.
The Yocca Law Firm, L.L.P.
19900 MacArthur Boulevard, Suite 650
Irvine, CA 92612

Corey Eschweiler, Esq.
Glen Lerner
4795 S. Durango Drive
Las Vegas, NV 89147

Mark J. Connot, Esq.
Fox Rothschild, LLP
3800 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169

Timothy S. Cory, Esq.
Timothy S. Cory & Associates
8831 W. Sahara Ave.
Las Vegas, NV 89117

Daniel Y. Zohar, Esq.
Zohar Law Firm, P.C.
601 S. Figueroa Street, Suite 2675
Los Angeles, CA 90017

I. Scott Bogatz, Esq.
Charles M. Vlasic III, Esq.
Reid Rubinstein & Bogatz
3883 Howard Hughes Parkway,
Suite 790
Las Vegas, NV 89169

/s/ Ruby Lengsavath

An Employee of Snell & Wilmer L.L.P.