

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

Case No. 2006 CT 9733 NC

JOHN C. FABIAN, ET AL.,

Defendant.
_____ /

ORDER ON EMERGENCY MOTION FOR STAY OF CIVIL CONTEMPT

THIS CAUSE having come before the Court on CMI's Emergency Motion for Stay of Civil Contempt regarding compounding fines that the County Court levied against CMI, and the Court being fully advised herein, finds as follows:

As to the issue of jurisdiction, this Court recognizes that the jurisdiction of the County Court is up to \$15,000. This case has 32 consolidated cases. This Court is not certain at this time as to whether or not on each of those cases the Court would have an authority to go up to \$15,000 or would be constrained to \$15,000 total. Without specific case law or argument on the issue, this Court declines to address it at this time.

However, on the Order of Stay Pending Appeal, the County Court felt that the stay was appropriate. Utilizing the two-prong test to determine if a stay is appropriate, the County Court found that CMI had met both prongs. The first prong is satisfied in that courts of different jurisdictions including Florida have issued conflicting opinions as to the underlying discovery issues. The second prong is satisfied because CMI will continue to accrue substantial fines of \$3,200.00 per day while the appeal is pending.



FILED FOR RECORD
2007 NOV -2 AM 9:58
KAREN E. HARRIS
CLERK OF CIRCUIT COURT
SARASOTA COUNTY, FL

Florida Rule of Appellate Procedure 9.130(a) provides that a stay pending review may be conditioned upon the posting of a good and sufficient bond, other conditions, or both. Typically, the amount of the bond is determined by the facts of the particular case in light of the guiding principles that the setting of supersedeas bond is to protect the Party in whose favor judgment was entered by assuring its payment in the event it is affirmed on appeal.

The County Court recognized CMI's likelihood of success on the merits of appeal and the likelihood of harm should the stay be granted. The County Court felt that the posting of the supersedeas bond was appropriate based on the facts and circumstances in this case, including its previous finding that CMI had willfully disobeyed court orders, voluntarily elected not to appear before the Court at the show cause hearing July 18, 2007, the substantial impact of CMI's noncompliance on the Court, as well as the Defendant's right to material evidence.

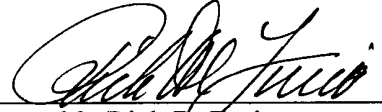
This Court can understand the County Court's rationale but finds that it abused its discretion regarding Fla. R. App. Pro. 9.130 that states the amount of bond is determined by the facts of a particular case in light of the guiding principles that the setting of a supersedeas bond is to protect the party in whose favor judgment was entered by assuring its payment in the event it is affirmed on appeal.

This Court agrees with CMI in that there is no party in this case to protect. Thus, no supersedeas bond is appropriate. Additionally, the fine in this case was a purge, a coercive type of fine. CMI has promised that it is in the process of producing the source code. Thus, it appears that once this is accomplished the fine would be purged anyway and most if not all of the money would be returned had there been a bond.

To sum, a supersedeas bond is not appropriate in this case because there is no party to protect and the fine if not stayed would be punitive and coercive after the fact.

ORDERED AND ADJUDGED that the *Order of Civil Contempt* issued by the County Court in this case and fines associated with it are hereby stayed pending appeal in this matter.

DONE AND ORDERED in Chambers in Sarasota County, Florida, this 31 day of October, 2007.



Honorable Rick DeFuria
Circuit Court Judge

cc: Robert N. Harrison, Esq., Attorney for Defendants
Cliff Ramey, Assistant State Attorney
Michael Taaffe, Esq., Attorney for CMI

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA,)	
)	
Plaintiff,)	
)	Case No. 2006-CT-9733
vs)	
)	
JOHN C. FABIAN, ET AL.,)	
)	
Defendant.)	
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EXCERPT OF PROCEEDINGS

Transcript of proceedings reported in the above-entitled cause, held before the Honorable RICK DeFURIA, Circuit Judge, at the Sarasota County Judge Lynn N. Silvertooth Judicial Center, pursuant to notice, on October 26, 2007.

APPEARANCES:

MICHAEL S. TAAFFE, ATTORNEY AT LAW
On behalf of CMI

ROBERT HARRISON, ATTORNEY AT LAW
On behalf of the Defendant

OFFICIAL COURT REPORTERS

Twelfth Judicial Circuit

1 (THE FOLLOWING PROCEEDINGS ENSUED IN OPEN COURT
2 OUT OF THE PRESENCE OF THE DEFENDANTS.)

3 * * *

4 THE COURT: We're here in State of Florida versus
5 John C. Fabian, et al., 2006-CT-9733-NC, emergency
6 motion for review of order denying stay of fine without
7 a bond.

8 The order of stay pending an appeal as to order of
9 contempt signed by Judge Bonner on the 4th day of
10 October 2007 clearly refers to the appeal that's taking
11 place of her order that she entered, order of civil
12 contempt on July the 10th, 2007. That order in part
13 states:

14 It is further ordered and adjudged that CMI, Inc.
15 of Kentucky will pay a compensatory fine of \$770, which
16 may be satisfied by paying said sum to the trust
17 account of Robert Harrison. That's per costs, I'm not
18 involved in that.

19 It is further ordered and adjudged that if CMI,
20 Inc. of Kentucky fails to comply with the subpoena
21 within this time, CMI, Inc. of Kentucky will be fined a
22 sum of \$100 per day of each of the 32 consolidated
23 cases for a total of \$3,200 per day until CMI, Inc. of
24 Kentucky purges itself of said contempt by producing
25 the Intoxilizer 8000 source code EPROM Verizons

1 8100.24, 8100.25, 8100.26, and 8100.27 or until further
2 order of the court.

3 Regarding the issue of jurisdiction, the
4 jurisdiction of a county court is up to \$15,000.
5 Frankly, this Court is not certain since there are 32
6 consolidated cases, but there are 32 separate
7 defendants. The Court is not certain as to whether or
8 not on each of those cases the Court would have an
9 authority to go up to \$15,000, so I'm not making a
10 ruling on that, not having any specific case law
11 instructing me.

12 However, on the order of stay pending appeal,
13 Judge Bonner felt that the stay pending the appeal was
14 appropriate, she found that we know it's a two-prong
15 test, and the Court finds that CMI has met both of
16 these prongs.

17 Addressing the second prong, first CMI will
18 continue to accrue substantial fines, \$3,200 per day
19 while the appeal is pending. In addition, CMI has no
20 control over the circuit court's docket. The first
21 prong is satisfied in that courts of different
22 jurisdictions including Florida have issued conflicting
23 opinions as to the underlying discovery issues and CMI
24 raises a jurisdictional issue as to the contempt order,
25 so the jurisdictional issue raised.

1 Florida Rule of Appellate Procedure 9.130(a)
2 provides that a stay pending review may be conditioned
3 upon the posting of a good and sufficient bond, other
4 conditions, or both. That's a given. That's what the
5 law says. That's what the rule says. Typically, the
6 amount of the bond is determined by the facts of the
7 particular case in light of the guiding principles that
8 the setting of supersedeas bond is to protect the party
9 in whose favor was entered by assuring its payment in
10 the event it is affirmed on appeal. Okay. That we all
11 agree to.

12 The Judge said that the motion for stay pending
13 appeal is granted, and that was based upon her finding
14 that the appellant has met the two prong test,
15 including the moving parties likelihood of success on
16 the merits and the likelihood of harm should the stay
17 not be granted.

18 So we've come this far, so Judge Bonner at least
19 recognized the moving party's likelihood of success on
20 the merits.

21 Judge Bonner felt that the posting the supersedeas
22 bond was based on the facts and circumstances in this
23 case. She said in her order, these include the Court's
24 previous finding that CMI willfully disobeyed court
25 orders and voluntarily elected not to appear before the

1 Court at the show cause hearing July the 18th, 2007 and
2 the substantial impact of CMI's noncompliance on the
3 Court as well as the defendant's right to material
4 evidence.

5 I can understand that rationale and I'm in no way
6 critical of that. I believe Judge Bonner certainly
7 exercised her discretion, and properly so, by granting
8 the stay finding the two prongs have been met.
9 However, I find that the Court exceeded her discretion
10 because of Florida rule of appellate procedure 9.130(a)
11 that states the amount of the bond is determined by the
12 facts of a particular case in light of the guiding
13 principles, this is what case law tells us, that the
14 setting of a supersedeas bond is to protect the party
15 in whose favor judgment was entered by assuring its
16 payment in the event it is affirmed on appeal.

17 I agree with CMI. Who is the party? There is no
18 party to protect. The Court felt somebody was in
19 contempt. They issued fines. But that same court used
20 its discretion, I would feel wisely, to stop the
21 stay -- I mean, stop the fines from running up because
22 she felt the appeal probably had some merit.

23 And, also at this time, noting that CMI has
24 promised and is in the process of turning over these
25 source codes, that because this was a purge, a coercive

1 type of fine, that although I can't speak a hundred
2 percent for the lower court, it appears as though once
3 they do that, most, if not all, of this money would
4 probably be returned.

5 But anyway, I believe that's an abusive discretion
6 because there's no real parties to protect, and
7 frankly, I think it continues to be punitive and
8 coercive after the fact. CMI said they're appealing
9 it. She said they have good grounds to do it, and she
10 stayed the running of it, so I don't think a bond is
11 necessary.

12 I know that was long winded, but I just tried to
13 give as many facts as I could for whatever anybody
14 wants to do.

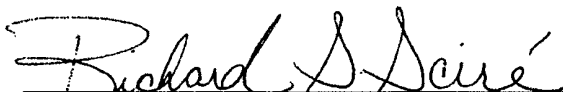
15 * * *

16 (END OF EXCERPT OF PROCEEDINGS)

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C E R T I F I C A T E

I, RICHARD S. SCIRÉ, RPR, Official Court Reporter in and for the Twelfth Judicial Circuit of the State of Florida, do hereby certify that I reported, by shorthand machine, the proceedings had and testimony taken in the above-entitled cause, and that the foregoing pages were truly and accurately transcribed from my shorthand notes taken at the time and place herein set forth.


RICHARD S. SCIRÉ, RPR
Official Court Reporter

OFFICIAL COURT REPORTERS

Twelfth Judicial Circuit