

CASE NO. A06-1409

State of Minnesota
In Court of Appeals

CHRISTINA JENSEN,

Plaintiff/Respondent,

vs.

DAVID FHIMA,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

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Argument

A. Respondent's Interpretation of Minn. Stat. § 548.29, Subd. 2, Preventing a Judgment Debtor's Attorney From Presenting Grounds for a Stay of Enforcement of a Foreign Judgment, Produces an Unreasonable and Absurd Outcome.

Both Fhima and Respondent agree that the grounds for Fhima's motion for a stay was based upon legal analysis. Fhima's legal analysis simply cannot be made by a lay person. It is entirely reasonable and proper that Fhima's attorney endeavored to perform the appropriate analysis with regard to applicability of the statute of limitations and presented it as a viable ground for a stay of the enforcement of Respondent's judgment.

Respondent argues that because Minn. Stat. § 548.29, subd. 2 does not contain language distinguishing between the judgment debtor and the judgment debtor's attorney, it is undisputable that Minn. Stat. § 548.29, subd. 2 required Fhima to personally provide a sworn affidavit in support of his motion. As noted in Fhima's original brief, and as clearly evidenced by the language of the statute, no such requirement exists. The statute says nothing at all about an affidavit.

Further, Minnesota jurisprudence contains examples wherein a party is charged with performing a certain action or complying with a rule when in reality it is anticipated and understood that the actions required will actually be performed by the party's counsel.

The Court need look no further than several of the Minnesota Rules of Civil Procedure and Rules of Appellate Civil Procedure. For example, Minn. R. Civ. P. 12.03 allows any "party" to move for judgment on the pleadings. Rule 15.01 permits a "party" to amend its pleadings under certain circumstances. During the discovery process, a "party" is allowed to serve interrogatories, requests for the production of documents, admissions, and to take

depositions. See, Minn. R. Civ. P. 33, 34, 36, and 30.01. Even though none of these rules make any distinction between the party and her attorney, in reality, unless the party is *pro se*, all of these tasks are being performed by the party's attorney.

Minn. R. Civ. P. 16.06 does contain language distinguishing between a party and the party's attorney with regard to sanctions to be imposed if a party or the party's attorney fails to obey a scheduling order or appear at a scheduling conference etc. If Respondent's logic were applied to the Minnesota Rules of Civil Procedure, this rule, and any other that separates out tasks or responsibilities among a party and her attorney, are the only ones where the attorney would have any role to play. Consequently, attorneys would have virtually no part to play in the representation of their clients. They would only be allowed to act if a rule contained specific language allowing them to perform certain services on behalf of their clients.

Similarly, many of the rules governing procedure in the Supreme Court and Court of Appeals in Minnesota also do not make a distinction between a party and her attorney. Minn. R. App. Civ. P. 131.01 governs the time frames in which the "appellant" and "respondent" shall serve and file their respective briefs. Rule 117, subd. 1, requires that any "party" seeking review of a decision of the Court of Appeals shall separately petition the Supreme Court. Rule 133.01 distinguishes between a party and her attorney in that the appellate courts may direct parties or their attorneys to appear before a justice, judge or person designated by the appellate courts to consider settlement, simplification of the issues or other matters. Again, if Respondent's logic governed, attorneys could only participate in these judicial proceedings if the rule specifically allowed for it.

Obviously unless a party, appellant or respondent is *pro se*, an attorney is performing all the tasks described above. This is universally understood and to proceed otherwise is both unreasonable and absurd. As such, it is entirely reasonable to interpret Minn. Stat. § 548.29, subd. 2 to allow a judgment debtor's attorney to present grounds for a stay of enforcement of a foreign judgment to the district court. This is especially true when the grounds for a stay are purely legal which is the case here.

B. A Bond is Not Required Until the District Court grants the Motion, at which Time the Requirement and Amount of the Bond is in the District Court's Discretion.

Respondent argues that this matter is distinguishable from *Matson v. Matson*, 310 N.W.2d 502 (Minn. 1981) because Respondent claims that Fhima is requesting that this Court waive the posting of a security bond in its entirety. See, Respondent's Brief p. 5-6. Respondent's assertion is unsupported and baseless.

Fhima's argument regarding the posting of security is that a bond is not required until the District Court grants the motion. The District Court should not have denied Fhima's motion prematurely in part because he had not yet posted security before it was ordered. Further, Fhima argued that the District Court has discretion to order a bond in an amount it deems appropriate. This could include not ordering a bond at all. Indeed on page 12 of his brief, Fhima clearly requests that this Court remand the bond issue to the District Court so that it may determine *any amount of appropriate security required, if any.* See, Fhima's Brief p. 12. (Emphasis Added).

C. **Fhima Has Presented a Good Faith and Viable Basis for a Stay of the Enforcement of Respondent's Foreign Judgment.**

Fhima moved the District Court for a temporary stay of the enforcement of the foreign judgment pending Fhima's opportunity to brief and argue the issue of whether the judgment is unenforceable and expired under the Minnesota statute of limitations.

It is significant to note that the merits of Fhima's statute of limitations argument have not yet been briefed to the district court. As such, it is premature and inappropriate for Respondent to argue the merits of the statute of limitations issue here. The issue before this Court is whether a temporary stay should have been granted in order to allow the parties to brief the statute of limitations argument.

Nevertheless, Respondent's argument that because the original judgment entered in 1994 is enforceable in Minnesota because it was properly renewed twice in California is without merit. The Law Revision Committee Comments following Cal. Civ. Pro. § 683.120 makes clear that renewal under that article does not result in the entry of a new judgment. Renewal pursuant to this article merely extends the period of enforceability of the judgment in California.

"The principle is well established that, where an action is brought in another state upon a judgment of a sister state which is a revival of an earlier judgment, and under the law of the state rendering the revival judgment it is a new judgment and not merely an extension of the statutory period in which to enforce the original judgment, a judgment of revival, as a new judgment, is entitled to full faith and credit and may not be refused enforcement on the ground that under the law of the forum the original judgment could not have been revived at the time it was revived by the judgment of the sister state." *Johnson Brothers Wholesale Liquor Co. v. Clemmons*, 223

Kan. 405, 408 (Kan. 1983) (holding that a new Minnesota judgment entered in May 1981 based upon an original Minnesota judgment entered in 1971 was valid and enforceable in Kansas in July 1981). This matter presents the opposite situation. Respondent's renewal is just an extension of the statutory period in which to enforce the judgment. No new judgment other than the original judgment entered in 1994 exists, which is why it cannot be enforced in Minnesota.

The United States Supreme Court has also held that a state may refuse to enforce the judgment of another state brought later than its own statute of limitations permits even though the judgment would still have been enforceable in the state which rendered it. See, *Union National Bank of Wichita, Kansas v. Lamb*, 337 U.S. 38, 45-46, 69 S. Ct. 911 (1949) (Frankfurter, J., dissenting), citing, *William M'Elmoyle, For the Use of Isaac S. Bailey v. John J Cohen, Administrator of Levy Florence*, 38 U.S. 312 (1839).

Minn. Stat. § 541.04 prohibits any action to enforce a judgment of both domestic and foreign judgments if they were entered more than ten years ago. It is undisputed that Respondent's original judgment was entered over twelve years ago.

Clearly, Fhima has presented a good faith basis for his motion to stay. However, this issue requires a more in-depth analysis and to be briefed after the stay is granted. At this stage, the district court should have afforded Fhima that opportunity. Fhima simply requested a stay from enforcement of the judgment while the parties had an opportunity to brief and argue the issue of whether the judgment may be enforced.

Conclusion

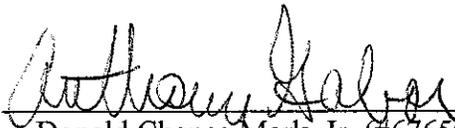
For these reasons, Fhima respectfully requests that this Court reverse the District Court's Order, grant Fhima's motion for a ninety-day temporary stay, and remand the case to the district court to determine any appropriate security required, if any.

Respectfully submitted,

FAFINSKI MARK & JOHNSON, P.A.

Dated: October 23, 2006.

By: _____


Donald Chance Mark, Jr. (#67659)
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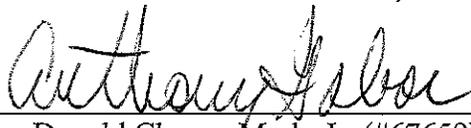
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Certificate as to Brief Length

I hereby certify that this brief conforms to the requirements of the Minn. R. Civ. App. P. 132.01, subd 3, for a brief produced with a proportional font of 13 pt. The length of the reply brief is 1,553 words. This brief was prepared using Microsoft Office Word 2003 software.

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Dated: October 23, 2006.

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