

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI – DADE COUNTY, FLORIDA

STATE OF FLORIDA, OFFICE OF
FINANCIAL REGULATION,

GENERAL JURISDICTION DIVISION
CASE NO.: 07-43672 CA 09

Plaintiff,

vs.

BERMAN MORTGAGE CORPORATION,
a Florida corporation, M.A.M.C.
INCORPORATED, a Florida corporation,
DANA J. BERMAN, as Owner and Managing
Member,

THE ORIGINAL
FILED ON:
MAR 19 2010
IN THE OFFICE OF
CIRCUIT COURT DADE CO., FL

Defendants,

and

DB ATLANTA, LLC, a Florida Limited Liability
Company, et al.,

Relief Defendants.

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF RECEIVER MICHAEL I.
GOLDBERG'S MOTION TO SELL THE PROPERTY OF OCEANSIDE
ACQUISITIONS LLC FREE AND CLEAR OF LIENS,
CLAIMS AND ENCUMBRANCES**

Michael I. Goldberg, as Court Appointed Receiver over Defendants Berman Mortgage Corporation, M.A.M.C. Incorporated, et al., and Relief Defendants DB Atlanta LLC, et al., by and through its undersigned counsel, hereby files this Supplemental Memorandum which sets forth the applicable case-law and statute in support of this Court's jurisdiction and authority to

enforce the Order Granting Receiver Michael I. Goldberg's Motion to Sell the Property of Oceanside Acquisitions LLC Free and Clear of Liens, Claims and Encumbrances (the "Order") despite the pendency of an appeal.

ANALYSIS OF THE LAW

This Court has jurisdiction to enforce the Order during the pendency of an appeal regarding the Order because there has been no motion to stay filed and no bond that has been posted. As Fla. R. App. P. 9.310, in pertinent part, states:

(a) Application. Except as provided by general law and in subdivision (b) of this rule, a party seeking to stay a final or non-final order pending review **shall** file a motion in the lower tribunal, which shall have continuing jurisdiction, **in its discretion**, to grant, modify, or deny such relief. A stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both.

(b) Exceptions. (1) *Money Judgments*. If the order is a judgment **solely** for the payment of money,¹ a party may obtain an automatic stay of execution pending review, without the necessity of a motion or order, by posting a good and sufficient bond equal to the principal amount of the judgment plus twice the statutory rate of interest on judgments on the total amount on which the party has an obligation to pay interest.

(emphasis supplied). Thus, by the terms of Fla. R. App. P. 9.310(a), a lower court has discretion to set the conditions under which an order may, or may not, be stayed pending appellate review. *See Cerrito v. Kovitch*, 406 So.2d 125 (Fla. 4th DCA 1981); *Mariner Health Care of Nashville*,

¹ The Order is not "solely" for the payment of money. For example, a judgment for recovery of money otherwise secured, as by a mortgage on real property, calls into play the general rule set out in Fla. R. App. P. 9.310 (a) rather than the exception contained in (b) for money judgments. *See Cerrito v. Kovitch*, 406 So. 2d 125, 126 (Fla. 4th DCA. 1981) (finding that a final judgment in foreclosure is not an order "solely for the payment of money").

Inc. v. Baker, 739 So. 2d 608, 609 (Fla. 1st DCA 1999). The rationale for this broad discretion is that based on its knowledge of the facts and circumstances regarding a judgment or order, the trial court is in the superior position to determine whether a bond or other conditions should be required before a judgment or order is stayed and, if so, the amount of the bond or the nature of the conditions. See *MSQ Properties v. Florida Dept. of Health & Rehabilitative Services*, 626 So. 2d 292, 293 (Fla. 1st DCA 1993).

A party seeking to stay enforcement of a non-monetary order must file a motion for stay in the lower tribunal. See Fla. R. App. P. 9.310(a); *FMS Mgmt. Sys., Inc. v. IDS Mortg. Corp.*, 402 So. 2d 474, 475 (Fla. 4th DCA 1981). The filing of a notice of appeal alone does not divest the trial court of jurisdiction to enforce a final order. See *Parsons v. Whitaker Plumbing of Boca Raton*, 730 So. 2d 839 (Fla. 4th DCA 1999) (explaining “the well settled principle that absent a stay or bond, the filing of a notice of appeal does not divest the trial court of jurisdiction to enforce a final order”).

Therefore, in the absence of a stay pending appeal, this Court retains the power to enforce the Order that has been appealed. See e.g. *Mann-Stack v. Homeside Lending, Inc.*, 982 So. 2d 72, 74 (Fla. 2d DCA 2008) (finding that because appellant had posted no bond and there was no stay pending appeal at the time the order of disbursement was entered, the trial court was within its authority to enter appropriate orders enforcing the previous judgment despite the fact that the foreclosure judgment was on appeal); *FMS Mgmt. Sys., Inc.*, 402 So. 2d at 475 (holding that, in the absence of a bond or stay, the lower tribunal may proceed in the cause, even as to the subject matter of the appeal). In fact, absent a motion to stay a non-monetary judgment, this Court lacks any authority to institute a stay or even to require the posting of a bond. See *Starkey v. Linn*, 727 So. 2d 386, 388 (Fla. 5th DCA. 1999) (court had jurisdiction to enforce the order being appealed,

absent a motion to stay or the posting of a bond, but the trial court did not have the authority to order party appealing the order to post the bond as a condition of the court not enforcing its final judgment because that party never sought to stay the order).

Even if a motion to stay was, or will be, filed pending the appeal, this Court nonetheless has broad discretion to deny such a motion to stay. See Fla. R.App. P. 9.310(a); *Open MRI of Okeechobee, LLC v. Aldana*, 969 So. 2d 589, 590 (Fla. 4th DCA 2007); *Eicoff v. Denson*, 896 So. 2d 795, 799 (Fla. 5th DCA 2005) (finding that trial court did not abuse its discretion in denying motion for stay pending appeal because trial court has broad discretion to grant or deny a motion to stay); *Cerrito*, 406 So. 2d at 126 (“The trial court is ...given considerable latitude in controlling the circumstances under which the proceedings may be stayed pending review”). Furthermore, this Court’s enforcement of the Order during the pendency of an appeal is appropriate because such enforcement would not moot issues of the appeal. See *Rafel Indus. Group Ltd. v. Gough*, 556 So. 2d 1174, 1175 (Fla. 4th DCA 1990) (appellant’s rights are not abolished merely because the underlying property on which an appeal is based has been disbursed before the reviewing court renders its judgment regarding entitlement to the res).

CONCLUSION

For all of the foregoing reasons, this Court has the jurisdiction and authority to enforce the Order during the pendency of an appeal. No motion to stay has been filed. Additionally, this Court has broad discretion to deny any request for a stay or, alternatively, to fashion conditions upon which any stay, if requested, may be granted.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this **19th day of March, 2010**, to the attached service list.

Respectfully submitted,

BERGER SINGERMAN

Attorneys for Receiver, Michael Goldberg

1000 Wachovia Financial Center

200 South Biscayne Boulevard

Miami, Florida 33131

Phone: (305) 755-9500 / Fax: (305) 714-4340

By: _____

~~JAMES D. GASSENHEIMER~~

Florida Bar No. 959987

E-Mail: jgassenheimer@bergersingerman.com

ARIADNA HERNANDEZ

Florida Bar No. 020953

E-Mail: ahernandez@bergersingerman.com

SERVICE LIST

<p>Cristina Saenz Assistant General Counsel STATE OF FLORIDA OFFICE OF FINANCIAL REGULATION 401 N.W. 2nd Avenue, Suite N-708 Miami, FL 33128</p>	<p>Alan M. Sandler, Esquire <i>Counsel for Joel and Deborah Sokol, Darlene Levasser, Robert Dzimidas IRA, Lawrence Meyer IRA, Lawrence Meyer Roth IRA Mary Joe Meyer SD IRA; Mary Joe Meyer Roth IRA</i> SANDLER & SANDLER 117 Aragon Avenue Coral Gables, FL 33134</p>
<p>Charles W. Throckmorton, Esquire <i>Attorneys for Dana Berman</i> KOZYAK TROPIN THROCKMORTON, P.A. 2525 Ponce de Leon Boulevard, 9th Floor Coral Gables, FL 33134</p>	<p>Paul Huck, Esquire Dean C. Colson, Esquire COLSON HICKS EIDSON 255 Aragon Avenue, Second Floor Coral Gables, FL 33134</p>
<p>Jason S. Miller, Esquire <i>Counsel for Flagstar Bank</i> ADORNO & YOSS, LLP 2525 Ponce de Leon Boulevard, Suite 400 Coral Gables, FL 33134</p>	<p>Maurice Baumgarten, Esquire ANANIA, BANDKLAYDER, BLACKWELL, BAUMGARTEN, TORRICELLA & STEIN Bank of America Tower – Suite 4300 100 SE 2nd Street Miami, FL 33131</p>
<p>Mark A. Basurto, Esquire and Charles Evans Glausier, Esquire, Attorneys for Gulf Island Beach and Tennis Club Condominium Association, Inc. BUSH ROSS, P.A. Post Office Box 3913 Tampa, Florida 33601-3913</p>	<p>Charles L. Neustein, Esquire CHARLES L. NEUSTEIN, P.A. 777 Arthur Godfrey Road, Second Floor Miami Beach, FL 33140</p>
<p>William Dufoe, Esquire Robert W. Lang, Esquire HOLLAND & KNIGHT, LLP 100 North Tampa Street, Suite 4100 Tampa, FL 33602</p>	<p>Deborah Poore Fitzgerald, Esquire WALTON LANTAFF SCHROEDER & CARSON, LLP Corporate Center, Suite 2000 100 East Broward Boulevard Fort Lauderdale, FL 33301</p>
<p>Peter Valori, Esquire DAMIAN & VALORI, LLP 1000 Brickell Avenue, Suite 1020 Miami, FL 33131</p>	

cc: The Honorable Jerald Bagley (*via Hand Delivery*)
Michael Goldberg, Esq., as Receiver (*via e-mail*)
The Investor(s)/Lender(s) Group (*via e-mail*)
Posted to the Berman Mortgage Website

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