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SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION, CIVIL PART
DOCKET NUMBER MER-L-2107-20

RHOMBUZZ LLC,

Plaintiff,

v.

THE McGOWAN COMPANIES;
McGOWAN & COMPANY, INC.;
McGOWAN, DONNELLY &
OBERHUE, LLC; McGOWAN
EXCESS & CASUALTY;
EDGEWATER HOLDINGS, LTD;
ABC COMPANY (IES) 1-10,

Defendants.

Decided: July 25, 2025[1]

JEFFREY A. MALATESTA, ESQ., attorney for plaintiff (Mattleman, Weinroth & Miller, P.C.)

ANTHONY J. VINHALL, ESQ., attorney for defendant (Carmagnola & Ritardi, LLC)

OSTRER, J.A.D. (retired and temporarily assigned on recall):

[1] This written opinion replaces the court's oral opinion rendered July 18, 2025.

Pending appeal in this commercial contract case, defendants move to stay enforcement of the money judgment entered against them after trial. They contend they are entitled to the stay because plaintiff, not they, filed the notice of appeal. Plaintiff intends to argue on appeal that this court should have awarded it more than the $124,981.68 plaintiff recovered. See Plaintiff's Case Information Statement (June 26, 2025) No. A-3359-24 at 2 (stating "[t]he Court Made an Improper Ruling of Law in regard to the Contract Amount for the Third Year"). Accordingly, defendants argue, plaintiff has "rejected" the trial court's judgment. And, consistent with the "general accepted practice under R. 2:9-5[,] . . . a defendant responsible for payment of a money judgment which is rejected by an appealing plaintiff is not required to seek a stay of the judgment." Defendant's Brief at 2 (quoting Elizabeth Police Superior Officers Ass'n v. Elizabeth, 180 N.J. Super. 511, 520 (App. Div. 1981)). Although the appellate court stated a losing party is not even "required to seek a stay" in such circumstances, defendants seek the reassurance of a formal stay, albeit one without a supersedeas bond or a deposit in court.

The court denies defendants' motion. The rule recited in Elizabeth Police is not as broad as defendants would like. The court said that a losing party needed no stay so long as the "plaintiff in legal effect rejects the award and defendant stands willing to pay." Ibid. (emphasis added). Here, defendants have not demonstrated a willingness to pay the judgment. Just the opposite. They have filed a cross-appeal,

asserting that the trial court erred in awarding plaintiff anything at all. See Defendant's Case Information Statement (July 8, 2025), No. A-3359-24, at 2 (stating "[t]he Trial Court erred when it found McGowan and Company, Inc. liable . . . under the contract with Plaintiff").

Defendants' posture is a far cry from the city's in Elizabeth Police. That case involved compulsory arbitration of a contract dispute with a police union. 180 N.J. Super. at 513. After the city prevailed on both economic and non-economic issues, it told the union it was ready to implement the arbitrator's award. Ibid. The union responded that it intended to sue in the trial court to vacate the award. Id. at 513-14. The city then waited to implement the award and filed a counterclaim to confirm the award. Id. at 514 and 514 n.3. The trial court ultimately confirmed the award, but ordered the city to pay interest on the award from the date of its entry. Id. at 515. The sole issue on appeal was that interest award. Id. at 513.

The appellate court held that the compulsory arbitration statute did not authorize the interest award. Id. at 519. The appellate court rejected the union's reliance on a labor statute that provided "that the pendency of a proceeding for the review of the award 'shall not of itself stay the order of the arbitrator.'" Ibid. (quoting N.J.S.A. 34:13A-20, repealed by L. 1995, c. 425, § 10). The appellate court held that the statute did not require the city to move for a stay "where plaintiff earlier indicated it would seek to vacate the award and in fact did do so." Ibid. The

appellate court then analogized to what it deemed "general accepted practice" involving appeals of trial court judgments:

> Where, however, plaintiff in legal effect rejects the award and defendant stands willing to pay, there is no more need for defendant to seek a stay than there is for any civil defendant to do so, or to seek a supercedeas bond where such defendant is not an appellant under *R.* 2:9-5 and *R.* 2:9-6. . . . *R.* 2:9-5, like *N.J.S.A.* 34:13A-20, speaks in general terms but the clear implication of both and the general accepted practice under *R.* 2:9-5(b) is that a defendant responsible for payment of a money judgment which is rejected by an appealing plaintiff is not required to seek a stay of the judgment plaintiff rejects.
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> [Id. at 520].

Unlike the city in Elizabeth Police, which announced its intention to abide by the arbitrator's award, defendants here did not indicate they were willing to pay the judgment this court entered. Rather, they have filed a cross-appeal, seeking to avoid liability entirely. When a losing party expresses resistance to paying anything, the prevailing party is generally less secure, and needs security more, than when the losing party says it is ready and willing to pay the judgment.

Also, defendants gain no traction from the fact that city in Elizabeth Police filed a counterclaim to confirm the award. The city's counterclaim is nothing like defendants' cross-appeal. By its counterclaim, the city sought to uphold the arbitrator's award. By its cross-appeal, defendants seek to reverse this court's judgment.

The court recognizes that the discussion in Elizabeth Police of Rule 2:9-5 is dictum. The case did not involve a stay pending appeal. It involved interest pending an action in the trial court to vacate an arbitrator's award in a police labor dispute. Nonetheless, this court is bound by an appellate court's "carefully considered dictum." See Myers v. Ocean City Zoning Bd. of Adjustment, 439 N.J. Super. 96, 102 n. 2 (App. Div. 2015).

That said, this court notes that nothing in Rule 2:9-5's plain language (or in Rule 4:59-1, governing execution of judgments) entitles a losing party to prevent execution of a judgment against it, without a stay, simply because the winning party wants more on appeal. Some federal courts and one respected commentator have questioned the conclusion that a losing party should be shielded from execution of a judgment simply because the winning party wants more on appeal. See BASF Corp. v. Old World Trading Co., 979 F.2d 615, 16-17 (7th Cir. 1992); Trustmark Ins. Co. v. Gallucci, 193 F.3d 558, 558-59 (1st Cir. 1999); Ensearch Corp. v. Shand Morahan & Co., 918 F.2d 462, 463-64 (5th Cir. 1990); 12 Moore's Federal Practice – Civil §62.01 (2025); contra Tenn. Valley Auth. v. Atlas Mach. & Iron Works, Inc., 803 F.2d 794, 797 (4th Cir. 1986). It would be different if the prevailing party sought relief on appeal – say specific performance – that was inconsistent with the money judgment secured at trial. See Ensearch, 918 F.2d at 464.

The reasoning in BASF Corp. is instructive. Like plaintiff here, BASF appealed a favorable judgment, contending it was entitled to more, and defendant Old World, like defendants here, cross-appealed, contending the plaintiff should get zero. Old World also argued its $1 recovery on its counterclaim should be increased. The court rejected Old World's argument that BASF was barred from enforcing the judgment while Old World was not obliged to post a bond. The court explained:

> Now that BASF has carried its burden of persuasion and possesses a judgment, it is entitled to be made secure during the steps leading to the final disposition. So much would be clear if Old World were the only appellant. Old World's belief that BASF should get nothing does not justify leaving the prevailing party at risk. A bond secures both sides: the winner is sure to recover if the judgment is affirmed, and the loser need not fear inability to recoup if the judgment is reversed. If the loser must pay or post security even though the judgment may be too high, the need for security is even more urgent if the judgment may be too low. To see this, suppose BASF is right and the judgment should be increased; in that event BASF is under-secured even if Old World posts a bond for the full amount of the judgment. If instead BASF is wrong and the judgment is proper, then security for the full amount of the judgment remains appropriate, just as if Old World were the only appellant.
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> [Id. at 617].

BASF provides logical force behind this court's conclusion that defendants-cross-appellants here are not entitled to stay without a bond or a deposit in court, simply because plaintiff wants more.

In sum, Elizabeth Police does not compel a stay in this case. Defendants do not "stand[] willing to pay." Therefore, the court denies the motion. The court does so without prejudice, so as not to prevent defendants from seeking relief under Rule 2:9-5(a) and Rule 2:9-6(a)(1), (2) for other good cause.