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Superseding the "Other Judgment"

by Robert B. Gilbreath

JENKINS & GILCHRIST, P.C.
Dallas

and

Curtis L. Cukjati

CACHEAUX, CAVAZOS, NEWTON, MARTIN & CUKJATI
San Antonio

I. Introduction

Most appellate practitioners are familiar with the procedures involved in superseding money judgments. Occasionally, however, an appeal involves a nonmonetary judgment. In those instances, the steps for superseding the judgment are less familiar. This article provides an overview of the procedural rules and case law applicable to superseding nonmonetary judgments.

II. Texas Rule of Appellate Procedure 24.2(a)(3)

Texas Rule of Appellate Procedure 24.2(a)(3) governs suspension of the enforcement of "other judgments" pending appeal:

(3) Other Judgment. When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post. The security must adequately protect the judgment creditor against loss or damage that the appeal might cause. But the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if an appellate court determines, on final disposition, that that relief was improper.

TEX. R. APP. P. 24.2(3). Under the former rules of appellate procedure, this provision was contained in Rule 47(f).

A. What is an "other judgment?"

Rule 24.2(a)(3) describes an "other judgment" as a judgment "for something other than money or an interest in property." Case law indicates the term "other judgment" includes:

1. Injunctions. *See Klein Indep. Sch. Dist. v. Fourteenth Court of Appeals*, 720 S.W.2d 87, 88 (Tex. 1986); *see also Isuani v. Manske Sheffield Radiology Group, P.A.*, 805 S.W.2d 602, 608 (Tex. App.—Beaumont 1991, writ denied).
2. Some types of declaratory judgments. *Cf. Delhi Gas Pipeline Corp. v. Hassell*, 730 S.W.2d 159, 161 (Tex. App.—Tyler 1987, orig. proceeding).
3. Appointment of a receiver. *See Winfield v. Renfro*, 792 S.W.2d 524 (Tex. App.—Houston [1st Dist.] 1990, no writ); *Hawkins v. Twin Montana, Inc.*, 810 S.W.2d 441 (Tex. App.—Fort Worth 1991, no writ).

4. Writs of mandamus issued by a district court. *See Anderson v. City of Seven Points*, 806 S.W.2d 791 (Tex. 1991)(mandamus issued by trial court is a civil action subject to appeal, and the mandamus order may be superseded pending appeal); *City Council of Austin v. Save Our Springs Coalition*, 828 S.W.2d 340, 342 (Tex. App.—Austin 1992, no writ); and

5. Judgments in election contests. *See Hill v. Fourteenth Court of Appeals*, 695 S.W.2d 554 (Tex. 1985).

A turnover order may also qualify as an "other judgment." *See Schultz v. Fifth Court of Appeals*, 810 S.W.2d 738, 739 n. 3 (Tex. 1991). In *Schultz*, the Court explained that a turnover order, the purpose of which is to aid in the collection of a final money judgment, may include injunctive and declaratory relief. The Court suggested, but did not hold, that such an order may be considered an "other judgment."

Under the former rules of appellate procedure, an "other judgment" was defined as one for "other than money or property or foreclosure." TEX. R. APP. P. 47(f) (Vernon Pamph. 1997). Applying that language, the Texas Supreme Court held that an injunction *restricting* the use of property was an "other judgment" because it did not involve *recovery* of property. *Klein Indep. Sch. Dist.*, 720 S.W.2d at 88; *see also Pena v. Zardenetta*, 714 S.W.2d 72 (Tex. App.—San Antonio 1986, no writ)(judgment awarding easement is an "other judgment").

B. When is a nonmonetary judgment not an "other judgment?"

There is case law suggesting that a judgment granting declaratory and injunctive relief might be considered a money judgment rather than an "other judgment" if it involves a transfer of an exact amount of money *See Enriquez v. Hooten*, 857 S.W.2d 153, 154 (Tex. App.—El Paso 1993, orig. proceeding); *see also Man-Gas Transmission Co. v. Osborne Oil Co.*, 693 S.W.2d 576, 577 (Tex. App.—San Antonio 1985, no writ). Under the cited cases, one could argue that such a judgment is considered a money judgment subject to the ordinary rules governing supersedeas. This distinction is important because, unlike an "other judgment," the rules do not give the trial court discretion to refuse superse-

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deas of a money judgment. *See Man-Gas Transmission Co.*, 693 S.W.2d at 577.

In recent a case styled *In the Matter of the Marriage of Richards*, 1998 WL 396424 (Tex. App.—Amarillo), the court held that Rule 24.2(a)(3) does not apply to a divorce decree dividing the marital estate according to the agreement of the parties. The decree did nothing more than declare the status of the parties and establish title to specific community property in accordance with the agreement of the parties; it did not provide for any payment of cash or transfer of tangible property.

The wife perfected an appeal. Believing the appeal to be groundless, the husband, citing Rule 24.2(a)(3), asked the trial court to set an “appeal bond” in the amount of \$24,150. The trial court set a “cost bond” in the amount of \$2,000.

Reasoning that Rule 24.2(a)(3) did not apply because the husband was not a judgment creditor and the wife was not a judgment debtor, the court of appeals reversed the order setting the bond. Under the divorce decree, there was nothing upon which the husband could obtain a writ of execution. And, there was nothing for the wife to perform under the decree. Accordingly, the court of appeals concluded the husband was not entitled to force the wife to post a supersedeas bond.

C. Is there an absolute right to supersede an “other judgment?”

With respect to orders granting interlocutory relief, such as temporary injunctions, Texas Rule of Appellate Procedure 29.1 provides that simply perfecting an appeal does not automatically suspend the order (unless the appellant is entitled to supersede without security by filing a notice of appeal):

Perfecting an appeal from an order granting interlocutory relief does not suspend the order appealed from unless:

- (a) the order is superseded in accordance with 29.2; or
- (b) the appellant is entitled to supersede the order without security by filing a notice of appeal.

Rule 29.2 confirms that a trial court *may* permit an order granting interlocutory relief to be superseded pending appeal but is not required to do so:

The trial court may permit an order granting interlocutory relief to be superseded pending an appeal from the order, in which event the appellant may supersede the order in accordance with Rule 24. If the trial court refuses to permit the appellant to supersede the order, the appellant may move the appellate court to review that decision for abuse of discretion.

Under Rule 24.2(a)(3), the trial court can refuse to permit the judgment to be superseded if the prevailing party posts security that will protect the appealing party against the loss or damage that will be caused by the relief granted in the judgment. *See In Re Dallas Area Rapid Transit*, 967 S.W.2d 358, 360 (Tex. 1998); *Klein Indep. Sch. Dist. v. Fourteenth Court of Appeals*,

720 S.W.2d 87, 88 (Tex. 1986).

The trial court’s discretion to deny supersedeas, however, is not unfettered. If denial of supersedeas would prevent the party from effectively appealing the trial court’s decision, supersedeas may not be denied. *In Re Dallas Area Rapid Transit*, 967 S.W.2d at 360.

D. Are there some types of “other judgments” that cannot be superseded?

Some types of “other judgments” cannot be superseded at all. For example, Sections 125.061–125.069 of the Texas Civil Practice and Remedies Code provide civil enforcement mechanisms and remedies for abatement of gang activity. Section 125.067 provides that “a person may not continue the enjoined [gang] activity pending trial or appeal on the merits of an injunctive order in a suit brought under this subchapter.”

Likewise, orders denying interlocutory relief, such as an order denying a temporary injunction, cannot be superseded. *See Michol O’Connor*, O’CONNOR’S TEXAS RULES — CIVIL APPEALS, at 130 (1998). Other orders that cannot be superseded include orders of the Texas Alcoholic Beverage Commission refusing, canceling, or suspending a permit or license and writs of possession in a forcible entry and detainer suit (unless the premises are the principal residence of the party). *Id.*

E. What about governmental units entitled to supersede without filing a bond or other security?

Certain state and federal governmental units and officers are not required to post a bond or other security to supersede a judgment pending appeal. *See TEX. CIV. PRAC. & REM. CODE* § 6.001 *et seq.*; *TEX. TRANSP. CODE* § 452.054(b); *see also In Re Long*, 41 Tex. Sup. Ct. J. 1129 (July 4, 1998). Such governmental units or officers may suspend enforcement of a judgment merely by perfecting an appeal. *See Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478 (Tex. 1964); *Enriquez v. Hooten*, 857 S.W.2d 153 (Tex. App.—El Paso 1993, orig. proceeding).

Filing the notice of appeal automatically acts to suspend enforcement of the judgment. *Enriquez v. Hooten*, 857 S.W.2d 153, 154 (Tex. App.—El Paso 1993, orig. proceeding). The better practice, however, is to state in the notice of appeal that the appellant intends to supersede the judgment by the filing of the notice of appeal.

Some courts have held that a trial court may refuse to permit a governmental unit to supersede an “other judgment.” *State v. Schless*, 815 S.W.2d 373, 376 (Tex. App.—Austin 1991, orig. proceeding); *City of Robstown v. Westergren*, 774 S.W.2d 739, 740 (Tex. App.—Corpus Christi 1989, orig. proceeding); *but see Public Util. Comm’n v. Coalition of Cities for Affordable Util. Rates*, 776 S.W.2d 221, 222 (Tex. App.—Austin 1989, no writ). The Texas Supreme Court has not definitively answered this question. *See In Re Dallas Area Rapid Transit*, 967 S.W.2d at 360 (court noted the issue but did not address the question because it was not before the court); *In Re Long*, 41 Tex. Sup. Ct. J. at 1131 (observing in dicta that trial courts may refuse to permit a governmental officer to supersede a judgment pending appeal but also citing contrary authority).

To deny supersedeas, the trial court must comply with Rule 24.2(a)(3), requiring the appellee to post security to protect the appellant against loss or damage caused by the relief granted in the "other judgment." And if denial of supersedeas would prevent the appellant from obtaining adequate relief on appeal, the trial court may not deny supersedeas. *In Re Dallas Area Rapid Transit*, 967 S.W.2d 358 (Tex. 1998).

F. How is an "other judgment" superseded?

Rule 24.2(a)(3) provides that in cases involving an "other judgment," the trial court must set the amount and type of security the judgment debtor must post. TEX. R. APP. P. 24.2(a)(3). The security must adequately protect the judgment creditor against loss or damage that the appeal might cause. *Id.* Some courts have been willing to overlook this procedural step when the judgment awards both monetary and other relief and the appellant files a supersedeas bond covering the amount of the monetary award. *See, e.g., Delhi Gas Pipeline Corp.*, 730 S.W.2d at 161. Still, when a judgment is a combination money judgment and "other judgment," the better practice is to secure from the trial court an order setting the amount and type of security applicable to the nonmonetary portion of a judgment.

Thus, an appellant seeking to supersede enforcement of an "other judgment" must request the trial court to set the amount and type of security to be posted. At the hearing on this motion, the appellee can argue that the appellant should not be permitted

to supersede. The appellee should be prepared to explain why the appellant should not be permitted to supersede and provide support for the amount of security the appellee proposes to post for the protection of the appellant who is not permitted to supersede.

III. Conclusion

Occasionally, an appellant will find it necessary to prevent enforcement of a nonmonetary judgment during the pendency of an appeal. In such instances, an additional step is added to the supersedeas process. The appellant must obtain a ruling from the trial court setting the amount and type of security to be posted. *But see Delhi Gas Pipeline Corp.*, 730 S.W.2d 161 (in case involving both monetary relief and declaratory relief, appellant's failure to secure court order setting amount of bond for declaratory relief did not prevent supersedeas bond from suspending the declaratory relief pending appeal).

There is no absolute right to supersede an "other judgment." If the judgment creditor posts security in an amount set by the trial court sufficient to protect the judgment debtor against any loss or damage caused by the relief granted, the trial court may refuse to let the judgment debtor supersede the judgment. It appears that this may be true for governmental units otherwise entitled to automatically supersede a judgment merely by filing a notice of appeal.

Profile of the Tarrant County Bar Association Appellate Section

The Appellate Section of the Tarrant County Bar Association was formed in July 1994 and has approximately 75 members. The officers for 1998-99 are: Chair, Amy Hennessee; Vice Chair, Sue Walker; and Secretary, Melissa Smith.

The purposes of the TCBA Appellate Section are to study civil and criminal appellate practice; to develop a forum for discussion of civil and criminal appellate practice among lawyers; to teach lawyers, judges, and the public in Tarrant County about appellate practice and regulation through seminars and the use of other methods; and to develop a forum at which appellate judges, both state and federal, may speak in Tarrant County.

The Appellate Advocate Editorial Board

Editor:

Ralph H. Brock
P.O. Box 949
Lnhhock, Texas 79408-0949
(806) 762-5671
(806) 762-3534 (fax)
E-Mail Brock@abanet.org

Update Editors:

Joel M. Androphy
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