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Good Cause for Stay of Execution in Florida

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GOOD CAUSE FOR STAY OF EXECUTION IN FLORIDA

Section 55.38, Florida Statutes 1955, states:

> "The court before which an execution is returnable may, on a motion and notice to the adverse party, for good cause, upon such terms as the court may impose, direct a stay of the same, and the suspension of proceedings thereon."

The statute in substantially the same form was first enacted in 1844, and it has been carried forward in each compilation of general laws until the present date.[1]

The cases construing good cause can be classified under three headings: those in which an execution as issued is illegal because of a defect in form or wording, those in which facts occurring after judgment make it unjust to enforce the execution, and those involving a default. A fourth section will be devoted to the few limitations on the trial court's discretion announced by the Supreme Court.

ILLEGALITY OF FORM

Any definition of good cause under section 55.38 must consider section 55.37, also dealing with stay of execution. This statute, first enacted in 1834, reads in part:

> "If any execution shall issue illegally, the defendant in execution, his agent or attorney, may procure a stay of the same by making and delivering to the officer having the execution an affidavit stating the illegality and whether any part of the execution be due, and a bond payable to the plaintiff with two good and sufficient sureties in double the amount of the execution or the part of which a stay is sought."

The statutes were first compared in 1857, in *Mitchell v. Duncan*.[2] It was contended that section 55.38 repealed the earlier statute by implication. The Florida Supreme Court, with a strong dissent, dis-

[1] THOMPSON, DIGEST 360 (1847); FLA. GEN. STAT. §1625 (1906); FLA. REV. GEN. STAT. §2829 (1920); FLA. COMP. GEN. LAWS. ANN. §4516 (1927).

[2] 7 Fla. 13 (1857). Defendant sought a stay based on the fact that the writ of execution did not bear the seal of the court. The Supreme Court ruled that the stay was properly quashed, as the error was not material.

posed of the contention by citing a presumption against repeal by implication, but made it clear that good cause included illegally issued execution and that the statutes were to be construed in *pari materia.*

An example of an illegally issued execution is treated in *Higgins v. Driggs.*[3] A judgment was obtained against the defendant as administrator, but the execution sued out on the judgment did not indicate his representative capacity. This clearly was good cause for obtaining a stay, since the administrator's individual property might have been seized under the execution. In another case[4] the Court said that the defendant had good cause if a deficiency decree was rendered in contravention of a statute.

Section 55.37 has become progressively less important. Since an illegally issued execution is also good cause under section 55.38, most defendants are loath to post a bond if they can achieve the desired result without it.

EQUITABLE GROUNDS

In an early case[5] construing section 55.38 the Court stated:

> "The proceeding then under this statute is in the nature of an application for an injunction in chancery. . . . The remedy therefore afforded by this statute though analogous to that obtained by injunction, is more ample and convenient by reason of dispensing with the question of equity jurisdiction . . . ."

One authority in equity[6] classifies the cases in which an injunction will interfere with the processes of a law court as those in which (1) the defendant has a purely equitable defense that the court will not recognize or enforce; (2) the defendant is entitled to affirmative equitable relief, for example, cancellation or reformation of a deed; (3) judgment is predicated on fraud, mistake, or accident at the trial *dehors* the record, including tampering with the defendant's witnesses and preventing him from presenting a meritorious defense by false and

[3]21 Fla. 103 (1884).

[4]Clinton v. Colclough, 54 Fla. 520, 44 So. 878 (1907). The Court pointed out that review of the trial court's action must be by writ of error and not appeal, even from stay of a chancery decree.

[5]Mitchell v. Duncan, 7 Fla. 13, 17 (1857).

[6]4 POMEROY, EQUITY JURISPRUDENCE §§1362-64 (5th ed. 1941).

fraudulent representations that the proceedings will not be carried on against him. Grounds (1) and (3) have been specifically recognized as bases for stay of execution in Florida.[7]

Traditional equity remedies are stated largely in terms of the inadequacy of remedies at law. Since the trial court has the chancellor's powers in preventing injustice by enjoining execution added to its broad inherent power over issuance of process, it is clear why the Florida Supreme Court has announced few restrictions on the power of a court to stay executions. In some cases the stay is used merely to prevent an unjust execution of a valid judgment; in others the stay is a device to destroy the efficacy of the judgment itself.

Unjust Execution

In an early case[8] the defendant moved for stay of execution on the ground that he had satisfied a judgment. The Supreme Court stated that the motion was properly made and presented a fact issue for determination by the trial court as to whether the judgment had actually been paid. In a similar case[9] the defendant in execution paid to the plaintiff a sum agreed upon as full satisfaction for an outstanding judgment. The plaintiff, apparently regretting the compromise, later sued out execution on the judgment. The Court stated that the defendant had good cause for a stay of execution.

In *Barnett v. Hickson*[10] the defendant claimed that he had a counterclaim against the plaintiff that he could not have presented in the trial. He sought an injunction in chancery, which the court refused to grant on the ground that he had an adequate remedy at law. The Court further stated that the judge could have afforded full relief by staying the judgment temporarily or perpetually.[11] Similarly, in another case[12] the Court stated that equity was not the place to get a stay of eviction pending an action for betterment; the law court could stay execution of the judgment while the betterment action was pending.

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[7]*E.g.*, Ground (1), Barnett v. Hickson, 52 Fla. 457, 41 So. 606 (1906); Ground (3) Fair v. Tampa Elec. Co., 158 Fla. 15, 27 So.2d 514 (1946) (defense based on fraud).

[8]Mathews v. Hillyer, 17 Fla. 498 (1880).

[9]Griffin v. Lacourse, 31 Fla. 125, 12 So. 665 (1893).

[10]52 Fla. 457, 41 So. 606 (1906).

[11]*Id.* at 460, 41 So. at 607.

[12]Raulerson v. Peeples, 81 Fla. 206, 87 So. 629 (1921).

Sarasota v. State ex rel. Evans[13] indicates the great discretion a trial court has in staying execution from a valid judgment that might work injustice. A holder of municipal bonds brought a suit for mandamus to compel the city to levy in one year a tax for all past due bonds. The Supreme Court affirmed the granting of the writ of mandamus but stated that the trial court still had discretion to stay the writ for a period sufficient to determine whether the city's finances would be greatly harmed by immediate enforcement.

In another case[14] a stay of execution was used to arrive at a procedure very similar to interpleader. The defendant was adjudged to owe the plaintiff $1500. Before payment a third-party creditor of the plaintiff garnished the judgment to the extent of $500. The defendant, fearing double liability by execution on the outstanding judgment, obtained from the trial court a stay of execution conditioned on his paying into court the amount of the debt to the plaintiff.

Stay While Attacking Judgment

The most obvious ground for a stay is an undisposed-of motion for a new trial. In *Hazen v. Smith*[15] the plaintiff had collected a judgment while a motion for new trial was pending. The Supreme Court, in ruling that the trial court could order restitution of the judgment, stated that a motion for new trial does not per se stay execution of the judgment. "If the party making a motion for a new trial in a case at law wishes the entry of judgment suspended, or the execution of it stayed or superseded, he can and should apply to the Judge for a special order to that effect."[16]

In *Fair v. Tampa Elec. Co.*[17] the trial court was given broad equitable power in reopening a case. After judgment the defendant's attorney discovered that a material witness had given perjured testimony at the instance of the plaintiff's attorney. The Supreme Court stated that the case could be reopened by a stay of execution, even though the time for a motion for new trial had passed. In reopening a judgment on the ground that fraud is good cause whether intrinsic or extrinsic to the case, the Court also settled in Florida one of the

13127 Fla. 126, 172 So. 728 (1937).
14Dr. P. Phillips Co. v. Billo, 109 Fla. 316, 147 So. 579 (1933).
15101 Fla. 767, 135 So. 813 (1931).
16*Id.* at 770, 135 So. at 815.
17158 Fla. 15, 27 So.2d 514 (1946).

great conflict areas.[18] "By its terms a court to which an execution is returnable is empowered to direct the stay if the cause shown is meritorious and notice has been given the adverse party."[19] The Court put into words what is implicit in all other cases construing good cause: no technical limitations are to be attached to the broad language of the statute.

DEFAULTS

Perhaps it is in the default cases that the stay is the most powerful weapon in the judge's arsenal. In some instances the stay is a method of attacking the jurisdiction of the court upon a contention of improper or complete failure of service;[20] in others it permits the judge to reopen the case after a default, even though valid service was had, to avoid injustice in refusing the defaulting party a trial on the merits.

The Court in *Morgan v. Marshall*[21] implied that a validly entered default could be opened by a stay of execution. The defendant claimed that he had left the suit completely in the hands of his attorney. The attorney asserted that he did not defend the suit because of the illness of one of his children. The trial court refused to grant a stay of execution. In upholding the refusal on the ground that the defendant did not meet the burden of proving the trial judge in error, the Supreme Court stated:[22]

> "Whether a default properly entered shall be opened is within the sound judicial discretion of the trial courts. . . . Certainly if defendants can be relieved of the consequences of a default by motion to stay execution after final judgment, their showing

[18]The acts for which a court of equity will, on account of fraud, grant relief from a judgment have relation to extrinsic or collateral fraud; intrinsic fraud is not sufficient for equitable relief. *Judgments,* AM. JUR. §654 (1940). There is great conflict as to whether various frauds are intrinsic or extrinsic. *Id.* §§660-76.

[19]158 Fla. 15, 19, 27 So.2d 514, 516 (1946).

[20]*E.g.,* Bartlett v. Cohn, 97 Fla. 256, 120 So. 357 (1929) (in holding that the trial court can stay execution when the defaulting defendant claims he was not served, the Court stated, "this statute contemplates a liberal discretion on the part of trial courts in the matter of control over executions issued from them"); Clements Naval Stores Co. v. Betts, 85 Fla. 49, 95 So. 126 (1923) (motion to stay could test sheriff's return); Houstoun v. Bradford, 35 Fla. 490, 17 So. 644 (1895) (on hearing for stay of execution, trial judge could determine whether the home where service was left was actually defendant's residence).

[21]78 Fla. 59, 82 So. 609 (1919).

[22]*Id.* at 62, 82 So. at 611.

should not fall short of that required to open a default before final judgment."

The Supreme Court took the next logical step in *Kellerman v. Commercial Credit Co.*[23] The plaintiff had obtained a valid judgment by default. Though there was no contention of invalid service, the defendant obtained a stay of execution 109 days after the default was entered. In upholding the stay the Court stated:[24]

> "The motion to stay the execution in this case was predicated on fraud, mistake, and surprise. This was a question of fact for the Court to settle and if the motion to stay was granted for this reason it was proper to make it permanent."

The Court further stated that the parties could proceed as though there had been no default and final judgment. In a later case[25] the Court indicated that the "fraud, mistake, and surprise" consisted of the willful failure of the plaintiff's attorney to notify the defendant's attorney that his pleas and motion to dismiss had been stricken.

LIMITATIONS

Although there are no Florida cases construing the point on appeal from a stay of execution, the most obvious limitation on the judge's power to grant a stay is based on the strong policy of res judicata. If a defendant has had a reasonably fair day in court, even though the result may be unjust he cannot reopen the case.[26] A Florida case[27] has held by implication that a stay cannot be used to give a

[23]138 Fla. 133, 189 So. 689 (1939).

[24]*Id.* at 135, 189 So. at 690.

[25]Fair v. Tampa Elec. Co., 158 Fla. 15, 27 So.2d 514 (1946).

[26]*E.g.*, in Hay v. Salisbury, 92 Fla. 446, 456, 109 So. 617, 620 (1926), in denying plaintiff a trial on the merits of a case adjudicated before, the Court quoted with approval from Sauls v. Freeman, 24 Fla. 209, 4 So. 525 (1888): "'A judgment on the merits is an absolute bar to a subsequent action on the same claim, and concludes the parties and their privies, not only as to every matter which was offered and received to sustain or defeat the claim, but also as to any other admissible matter that might have been offered for either purpose.'" See also *Judgments*, AM. JUR. §165 (1940), for a discussion and citation of cases expounding the policy of res judicata.

[27]Childs v. Boots, 112 Fla. 282, 152 So. 214 (1933) (chancellor based stay on rehearing motion; Supreme Court upheld the stay but stated that the rehearing was illegal).

party a rehearing after expiration of the time for making a motion for rehearing.

A mere error in the form of the writ of execution does not present good cause; the trial court should simply direct correction of the error.[28]

In *Leesburg State Bank v. Lyle*[29] the defendant moved to stay execution until further proceedings were had in connection with the matters involved in the suit. Although the opinion did not state what the further proceedings were, the Supreme Court upheld the action of the trial court in refusing the stay, since "the motion did not in any way attack the regularity or the legality of the execution and, therefore, did not come within the statutory provisions of [sections 55.37 and 55.38]."[30] This is a vague limitation, for the ground for the motion was not set out in its entirety; the result can probably be attributed to the Supreme Court's willingness to uphold the trial court's determination of lack of good cause.

In another case, in upholding the trial court's action in refusing to modify past due payments on a support decree the Court stated:[31]

> "Where rights have vested or been acquired in good faith under a decree of any sort, which has become final, the courts generally refuse to stay or withhold execution of the decree.
>
> "The lower court is without authority to so modify the original decree as to affect the past due installments, as rights have become vested thereunder . . . ."

This opinion did not state a real limitation. It was based primarily on the fact that the circumstances of the plaintiff had not changed; he could still well afford to pay the amounts decreed.

The fact that the sheriff is about to levy on exempt property is not good cause. In *Coral Gables v. Hepkins*[32] the defendant city moved to stay permanently the execution of a valid judgment because it appeared that the sheriff was going to sell the city golf course, held in trust for the people of the city. The Supreme Court stated that, since a court has control over its own processes, the correct procedure would have been a motion to set aside the particular levy.

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[28]Mitchell v. Duncan, 7 Fla. 13 (1857).

[29]100 Fla. 1520, 131 So. 374 (1930).

[30]*Id.* at 1521, 131 So. at 375.

[31]Pottinger v. Pottinger, 133 Fla. 442, 446, 182 So. 762, 763 (1938).

[32]107 Fla. 778, 144 So. 385 (1932).

It is clear that the trial court's determination will be overruled in any case that shocks the Supreme Court's sense of "justice and fair play." In *Lewis v. Jennings*[33] the Court reversed the trial court's action in granting a second vacation of judgment based on absence of the defendant's attorney because it was apparent that the default was caused by the attorney's negligence. Though the trial court's action was based on its inherent power over court processes and not on section 55.38, undoubtedly the same principle would have applied to a stay of execution.

In conclusion, it can generally be said that the trial court has almost total discretion in determining whether good cause exists. Though this discretion is reviewable by the Supreme Court, in practice there are few restrictions on the trial court. In the more than forty cases construing section 55.38 and its predecessors, almost all have upheld the trial court's finding of good cause. The Florida Supreme Court has usually arrived at a common-sense result based on the facts of each case.

The liberal construction of "good cause" aids the courts in arriving at justice. It is to be hoped that the phrase does not become overly engrafted with the technical distinctions that have emasculated some other equitable rules of procedure.

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[33]64 So.2d 272 (Fla. 1953).