IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL

TERRY GENE BOLLEA, professionally known as HULK HOGAN,

Plaintiff,

Case No. 12012447CI-011

v.

GAWKER MEDIA, LLC, *et al.*,

Defendants.

_____/

DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF LAW REGARDING ENTRY OF FINAL JUDGMENT

At the post-trial hearing on May 25, 2016, this Court asked the parties to file supplemental memoranda of law addressing whether the Court should enter final judgment, despite the pendency of Defendants' motion seeking dismissal or a new trial based on fraud on the Court. In this response, Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio demonstrate that final judgment should not be entered until the Court's judicial labor is complete. Florida law also forbids a court from authorizing execution before rendering an appealable final judgment. In fact, binding precedent from the Second District Court of Appeal holds that it would violate the essential requirements of the law, warranting certiorari relief, were the Court to do so.

Background

This Court has now denied Defendants' traditional post-trial motions for judgment notwithstanding the verdict ("JNOV"), new trial, and remittitur. One substantive motion remains to be resolved: Defendants' motion to dismiss or for a new trial based on fraud on the Court

("Motion for Dismissal"). Citing a 1931 case, Plaintiff has suggested that this Court can enter judgment despite the pendency of that motion. This Court has asked for supplemental briefing on the issue. In the meantime, Plaintiff has agreed, and this Court has ruled, that even if judgment is entered, execution on the judgment will be stayed until the parties reconvene for another hearing on June 10, 2016, so that the Court can adjudicate Defendants' motion for a stay of execution of any judgment.

Final Judgment Cannot Be Entered While Further Judicial Labor Remains.

The most basic principle of appellate practice is that a final, appealable, and executable judgment cannot be entered until the trial court's judicial labors are complete. As the Florida Supreme Court has explained, "[a] final judgment is one which ends the litigation between the parties and disposes of all issues involved such that no further action by the court will be necessary." *Caufield v. Cantele*, 837 So. 2d 371, 375 (Fla. 2002). The completion of judicial labor has long been considered the appropriate level of finality needed to support entry of an appealable final judgment. *See S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97, 99 (Fla. 1974) ("an end to the judicial labor in the cause" is the hallmark of a final judgment); *Slatcoff v. Dezen*, 72 So. 2d 800, 801 (Fla. 1954) ("[T]he test of a final judgment is whether the judicial labor is at an end."); *Hotel Roosevelt Co. v. City of Jacksonville*, 192 So. 2d 334, 338 (Fla. 1st DCA 1966) (a final judgment is one that "marks the end of the judicial labor in the case," when "nothing further remains to be done by the court to fully effectuate a termination of the cause as between the parties directly affected"); *Blount v. Hansen*, 116 So. 2d 250, 251 (Fla. 2d DCA 1959) (a final judgment "decides and disposes of the cause on its merits, leaving no questions open for judicial determination except the execution or enforcement of the decree if necessary").

The only exception to this principle is for matters collateral to the merits of the case, such as costs, attorney's fees, and issues relating to the enforcement of a judgment. *See, e.g.*, *Westgate Miami Beach, Ltd. v. Newport Operating Corp.*, 55 So. 3d 567, 574-75 (Fla. 2010). Such collateral matters may be resolved, even after judgment, and while an appeal on the merits is pending. *Id.* at 575.

Defendants' pending Motion for Dismissal requires further judicial labor and is not collateral. The Motion for Dismissal goes to the heart of the jury's verdict and requires a judicial determination as to whether a judgment on the merits should be entered at all. *See Blount*, 116 So. 2d at 251. Thus, under the traditional definition of a final judgment, entry of a final judgment allowing for execution at this time would be premature, because the Court's labors are not complete. *See Caufield*, 837 So. 2d at 375.[1]

Florida Law Also Prohibits Execution Before The Motion For Dismissal Is Resolved.

Florida law does not authorize entry of a premature judgment allowing for execution before the trial court's labors are complete, including because it permits a plaintiff to collect on a judgment before an appeal is ripe. Not only is such a scenario patently unfair, but it has been specifically recognized by the Second District Court of Appeal as a basis for certiorari relief from the judgment. In *East Avenue, LLC v. Insignia Bank*, 136 So. 3d 659, 665 (Fla. 2d DCA 2014), the Second District addressed precisely our situation. There, the trial court entered a judgment authorizing execution, but because further judicial labor remained in the trial court, the appeal was premature. *Id.* at 661. In other words, East Avenue was "exposed to enforcement of

[1] A trial court has discretion to enter final judgment while traditional post-trial tolling motions are pending, but only because execution is automatically stayed until those post-trial motions are resolved, under Rule 1.550 of the Florida Rules of Civil Procedure. Our point is that there is no authority supporting entry of a final judgment before motions to dismiss or other non-traditional post-trial motions are resolved.

the judgment at a time when it cannot obtain review of it and, importantly, it cannot shield its assets from execution." *Id.*

The Second District concluded that certiorari was warranted under these circumstances to review and quash the judgment prematurely authorizing execution. *Id.* at 664-65. Material injury and irreparable harm were established because the premature entry of judgment improperly subjected East Avenue to execution before the judgment was final and appealable. *Id.* at 665. The departure from the essential requirements of the law was obvious because permitting execution prior to completion of the litigation has long been characterized as improper. *Id.*; *see also Innovision Practice Grp., P.A. v. Branch Banking & Tr. Co.*, 135 So. 3d 501, 502-03 (Fla. 2d DCA 2014) (following *East Avenue* and explaining that the trial court departed from the essential requirements of the law when it prematurely authorized execution); *Investacorp, Inc. v. Evans*, 88 So. 3d 248, 249 (Fla. 3d DCA 2011) (reversing a partial final judgment and remanding with directions that the trial court strike the phrase "for which let execution issue, forthwith" because the litigation was not yet complete); *Molina v. Watkins*, 824 So. 2d 959, 964 (Fla. 3d DCA 2002) (addressing argument that the trial court erred in issuing judgment and ordering execution while reserving ruling on certain counts and severing others for separate trial, and holding that this form of judgment improperly "forced Molina to prematurely take an appeal in order to protect his rights").

Simply put, execution is a "final" process. *See Burshan v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 805 So. 2d 835, 839 (Fla. 4th DCA 2001) ("Execution is a final process to enforce a judgment."). It cannot be permitted before an appealable final judgment is entered. This Court would commit reversible error if, before ruling on Defendants' Motion for Dismissal, it entered a final judgment authorizing execution.

Hazen Demonstrates That Execution Is Still Premature.

During the post-trial hearing, Plaintiff referred the Court to *Hazen v. Smith*, 135 So. 813 (Fla. 1931), in support of his argument that the Court could go ahead and enter final judgment now. *Hazen*, though, is nothing like this case. If anything, its central holding actually supports the propriety of withholding judgment and execution until pending motions are resolved.

As a threshold matter, *Hazen* long predates the modern Florida civil and appellate rules. Despite the fact that issues relating to entry of final judgment arise routinely, *Hazen* has been cited only once in the past 35 years—and even there, not for the principle Plaintiff relies on. *See JSZ Fin. Co. v. Whipple*, 939 So. 2d 1189, 1191 (Fla. 4th DCA 2006) (citing *Hazen* for the proposition that a trial court possesses authority to restore the parties to their pre-judgment positions if the judgment is later invalidated); *see also Cooper v. Gordon*, 389 So. 2d 318, 319 (Fla. 3d DCA 1980) (citing *Hazen* for the proposition that a court has the inherent authority to correct its own prior wrongdoing).

Hazen involved a motion for new trial filed *after* the judgment had already been entered and execution had already commenced (and, indeed, been satisfied). *Hazen*, 135 So. at 815. Under Florida Rule of Civil Procedure 1.550, this factual scenario is no longer a possibility: "No execution or other final process shall issue until the judgment on which it is based has been recorded nor within the time for serving a motion for new trial or rehearing, and if a motion for new trial or rehearing is timely served, until it is determined." Fla. R. Civ. P. 1.550(a). Thus, the modern civil rules make clear that even if a court were to enter judgment while traditional post-trial motions are pending, that judgment may not be enforced until those post-trial motions are resolved.

Hazen is in accord, embracing this modern principle. The essential holding of *Hazen* was that the trial court properly stayed execution of the judgment (essentially, to enjoin the plaintiff from cashing the check satisfying the judgment), pending its resolution of the new trial motion:

> The respondent circuit judge could have granted the new trial and ordered plaintiff to make restitution of the money collected on the execution and judgment which would have been thus set aside by him. On the same principles of law the circuit judge has the authority to exercise the jurisdiction and make the order complained of here, which accomplishes the same result in a different way.

Hazen, 135 So. at 816. Thus, *Hazen* actually warns against entering final judgment for two reasons. First, it demonstrates the practical hazards of prematurely entering a final judgment—the possibility that assets collected might have to be returned. Equally important, *Hazen*'s legal holding confirms the principle that execution should await the completion of the court's judicial labor, including the resolution of a new trial motion.

The bottom line is that Defendants' pending Motion for Dismissal presents meritorious claims that require dismissal of the action or a new trial. Until that motion is resolved, final judgment would be premature. In any event, there is no basis in the law to authorize execution prior to the resolution of that motion.

Conclusion

For the reasons explained in this Supplemental Memorandum, Defendants respectfully request that this Court withhold entry of final judgment until it has first adjudicated Defendants' still-pending Motion for Dismissal. At the very least, binding Florida case law prohibits this Court from authorizing execution prior to its ruling on that motion. Thus, even if judgment were entered, any stay of execution that is in place through June 10, 2016, should remain in place until the Motion for Dismissal is resolved.

Dated: May 31, 2016

Respectfully submitted,

THOMAS & LOCICERO PL

By: */s/ Gregg D. Thomas*

Gregg D. Thomas
Florida Bar No.: 223913
Rachel E. Fugate
Florida Bar No.: 0144029
601 South Boulevard
P.O. Box 2602 (33601)
Tampa, FL 33606
Telephone: (813) 984-3060
Facsimile: (813) 984-3070
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com

Seth D. Berlin
Pro Hac Vice Number: 103440
Michael Sullivan
Pro Hac Vice Number: 53347
Michael Berry
Pro Hac Vice Number: 108191
Alia L. Smith
Pro Hac Vice Number: 104249
Paul J. Safier
Pro Hac Vice Number: 103437
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street, NW, Suite 200
Washington, DC 20036
Telephone: (202) 508-1122
Facsimile: (202) 861-9888
sberlin@lskslaw.com
mberry@lskslaw.com
msullivan@lskslaw.com
asmith@lskslaw.com
psafier@lskslaw.com

Steven L. Brannock
Florida Bar No.: 319651
Celene H. Humphries
Florida Bar No.: 884881
BRANNOCK & HUMPHRIES
1111 West Cass Street, Suite 200
Tampa, Florida 33606
Tel: (813) 223-4300
Fax: (813) 262-0604

sbrannock@bhappeals.com
chumphries@bhappeals.com
Secondary Email: eservice@bhappeals.com

Counsel for Gawker Media, LLC, Nick Denton, and A.J. Daulerio

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of May, 2016, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal on the following counsel of record:

Kenneth G. Turkel, Esq.
kturkel@BajoCuva.com
Shane B. Vogt, Esq.
shane.vogt@BajoCuva.com
Bajo Cuva Cohen & Turkel, P.A.
100 N. Tampa Street, Suite 1900
Tampa, FL 33602
Tel: (813) 443-2199
Fax: (813) 443-2193

David Houston, Esq.
Law Office of David Houston
dhouston@houstonatlaw.com
432 Court Street
Reno, NV 89501
Tel: (775) 786-4188

Charles J. Harder, Esq.
charder@HMAfirm.com
Douglas E. Mirell, Esq.
dmirell@HMAfirm.com
Jennifer McGrath
jmcgrath@HMAfirm.com
Harder Mirell & Abrams LLP
132 South Rodeo Drive, Suite 301
Beverly Hills, CA 90212-2406
Tel: (424) 203-1600
Fax: (424) 203-1601

Attorneys for Plaintiff

/s/ *Gregg D. Thomas*
Attorney