

STATE OF NEW YORK : SUPREME COURT
COUNTY OF ALLEGANY

2024 APR 25 AM 9: 01

ROBERT L. CHRISTMAN
CLERK
ALLEGANY COUNTY

TIMOTHY and EILEEN SHEA,

Plaintiffs,

-vs-

TAREK OTERO and IRIS & WILLIAM, LLC,

Defendants.

**MEMORANDUM OF LAW IN
IN SUPPORT OF DEFENDANTS'
MOTION TO SET AMOUNT OF
CPLR § 5519(a)(6) UNDERTAKING**

Index No.: 050237/2023

This Memorandum of Law is submitted by the Defendants, Tarek Otero and Iris & William, in support of their motion, seeking to fix the amount of the CPLR § 5519(a)(6) undertaking while an appeal, from the Order, is pending.

Pursuant to CPLR § 5519(a)(6), the stay of the Order is automatic and the setting of the amount of the undertaking is entirely ministerial. For the reasons set forth herein, Mr. Otero's and Iris & William's motion should be granted, and the amount of the CPLR § 5519(a)(6) undertaking should be fixed at \$600.

FACTUAL BACKGROUND

Submitted simultaneously herewith is the affirmation of Frank J. Jacobson, Esq. The facts concerning this action are set forth in Mr. Otero's affirmation, which is annexed to Mr. Jacobson's affirmation as Exhibit "B". The facts recited in Mr. Otero's affirmation are incorporated herein by reference as if fully repeated and restated.

PROCEDURAL HISTORY

The procedural history of this action is set forth in the affirmation of Frank J. Jacobson, Esq., which is being submitted simultaneously herewith. The procedural history set forth in Mr. Jacobson's affirmation is incorporated herein by reference, as if fully repeated and restated. In the interests of

economy, the terms defined in Mr. Jacobson’s affirmation will be used herein. Additionally, any exhibits referred to herein shall be deemed to refer to the exhibits annexed to Mr. Jacobson’s affirmation.

GROUNDS FOR GRANTING RELIEF

Pursuant to CPLR §§ 5519(a)(6), Mr. Otero and Iris & William are entitled to an automatic stay of the enforcement of the Order pending appeal; in that regard, an undertaking must be posted for the value of the use of the easement area pending the appeal. In relevant part, CPLR § 5519(a)(6) provides as follows:

(a) Stay without court order. **Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal** or determination on the motion for permission to appeal where: ...

6. the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party **will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the **appellant or moving party shall pay the value of the use and occupancy of such property**, or the part of it as to which the judgment or order is affirmed, **from the taking of the appeal until the delivery of possession of the property.** ...**

By its plain terms, CPLR § 5519(a)(6) applies where, as here, an appellant is in possession or control of real property, which an order directs to be delivered to another party.

It is well established that “**CPLR § 5519(a)(6) is broad in scope**” and applies to all types of real property litigation. Gur Associates LLC v. Convenience on Eight Corporation, 2024 WL 129369 (New York Civil Court 2024); see also APF 286 MAD LLC v. RIS Real Properties Inc., 43 Misc3d 1203(A) (New York Civil Court 2014). “[A] **showing of merit is not required** by CPLR § 5519(a)(6)”. Gur Associates LLC v. Convenience on Eight Corporation, 2024 WL 129369 (New York Civil Court 2024).

Instead, “**the stay is automatic ...**” APF 286 MAD LLC v. RIS Real Properties Inc., 43 Misc3d 1203(A) (New York Civil Court 2014); see also Mountbatten Equities v. Tabard Press Corp., 87 Misc2d 861 (New York County 1976) (holding that “under CPLR s 5519(a), par. 6 its stay without court order was intended to become automatically operative and self-executing ...”). “**The only role for the court under CPLR 5519(a)(6) is to set the amount of an undertaking.**” Gur Associates LLC v. Convenience on Eight Corporation, 2024 WL 129369 (New York Civil Court 2024). “CPLR 5519(a)(6) requires the court to make a considered determination, based on the particular facts of the case before it, of the amount of money that will prevent ‘waste’ to the property in possession of the appellant pending appeal. ... [T]he undertaking fixed should be rationally related to the amount of the potential damages.” APF 286 MAD LLC v. RIS Real Properties Inc., 43 Misc3d 1203(A) (New York Civil Court 2014).

In the case at hand, Mr. Otero and Iris & William are in possession and control of the easement area, and the Order requires them to deliver access across the easement area, for egress and ingress, to the Plaintiffs (see Exhibit “F”). Mr. Otero and Iris & William instituted an appeal from the Order, thereby automatically staying the Order pursuant to CPLR § 5519(a)(6) (see Exhibit “G”). Pursuant to CPLR § 5519(a)(6), this Court is now required to set the amount of the undertaking in any amount to prevent waste upon the property and to compensate for the value of the use of the property. In that regard, Mr. Shea has already acknowledged that the value of the use of the easement area, during the entire pendency of this action, is \$600 (see Exhibit “E”). As such, the undertaking for the much shorter period of the pendency of the appeal should be no more than \$600.

For the reasons set forth herein, Mr. Otero’s and Iris & William’s motion should be granted, and the amount of the CPLR § 5519(a)(6) undertaking should be fixed at \$600.

CONCLUSION

Pursuant to CPLR § 5519(a)(6), the stay of the Order is automatic and the setting of the amount of the undertaking is entirely ministerial. For the reasons set forth herein, Mr. Otero’s and Iris &

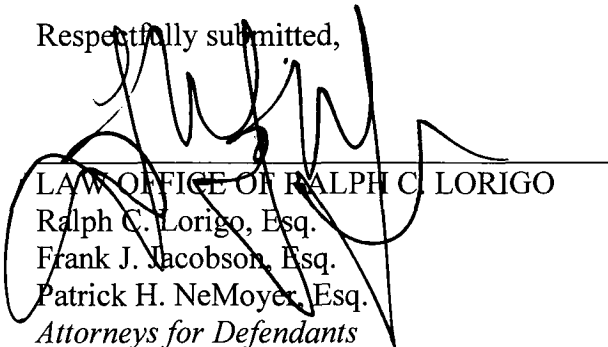
William's motion should be granted, and the amount of the CPLR § 5519(a)(6) undertaking should be fixed at \$600.

For the reasons set forth herein, it is respectfully requested that the Court grant an order as follows:

- A. An order granting the Mr. Otero's and Iris & William's motion in its entirety;
- B. An order fixing the amount of the CPLR § 5519(a)(6) undertaking at \$600; and
- C. An order granting Mr. Otero and Iris & William such other, further and different relief as the Court may deem just, equitable and proper.

DATED: April 22, 2024
West Seneca NY

Respectfully submitted,



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