UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 22-1075, *Marvin Gerber, et al v. Henry Herskovitz, et al*
Originating Case No. : 2:19-cv-13726

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Sharday S. Swain
Case Manager
Direct Dial No. 513-564-7027

cc: Ms. Kinikia D. Essix

Enclosure

No. 22-1075

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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MARVIN GERBER (Nos. 22-1097/1131);
DOCTOR MIRIAM BRYSK (Nos. 22-1075/1131),

Plaintiffs-Appellants Cross-Appellees,

v.

HENRY HERSKOVITZ, et al.,

Defendants-Appellees Cross-Appellants,

and

CITY OF ANN ARBOR, MI, et al.,

Defendants.

O R D E R

Before: SUTTON, Chief Judge; CLAY and McKEAGUE, Circuit Judges.

Plaintiffs Dr. Miriam Brysk and Marvin Gerber separately appeal, and defendants Henry Herskovitz, Gloria Harb, Tom Saffold, Rudy List, and Chris Mark (collectively, the "individual protestors") cross-appeal, an order granting in part the individual protestors' post-judgment motion for attorney fees and sanctions. Brysk moves to stay the judgment pending resolution of her appeal, No. 22-1075, and to supplement her motion to inform the court of subsequent events. The individual protestors oppose a stay, and Brysk replies.

Generally, a party must first move the district court to obtain a stay of the judgment or a supersedeas bond unless it would be impracticable. Fed. R. App. P. 8(a)(1)(A), (B), (2)(A)(i);

see also Lightfoot v. Walker, 797 F.2d 505, 507 (7th Cir. 1986). Brysk contends it would be impracticable here, given that the district court ignored our holding regarding frivolity in *Gerber v. Herskovitz*, 14 F.4th 500 (6th Cir. 2021), in awarding attorney fees and denying Gerber a stay. But the district court did not consider whether to stay its monetary judgment in the order on appeal. The factors governing a stay under Federal Rule of Civil Procedure 62 are different from those governing an award of attorney fees. Thus, it would not have been impracticable to first move the district court for a stay.

Brysk looks to the dictionary to define "impracticable," but in doing so she speeds past the most common and plausible definition to one that is better suited to advance her argument. Instead of the primary definition of "[n]ot practicable; that cannot be carried out, effected, accomplished, or done; practically impossible," she argues that we should look to one that is primarily used to describe persons: "[i]ncapable of being managed, influenced, or persuaded." *Impracticable*, *Oxford English Dictionary* (3d ed. 2000). The first definition makes significantly more sense in the context of Appellate Rule 8, where it modifies a task rather than a person: "show that moving first in the district court would be impracticable." Fed. R. App. P. 8(a)(2)(A)(i). The definition of "impracticable" as "practically impossible" accords with narrow situations where we have allowed this short cut to the circuit court in the past, such as where time constraints prevent a party from moving in the district court first. *See, e.g.*, *Commonwealth v. Beshear*, 981 F.3d 505, 508 (6th Cir. 2020) (holding that moving the district court to stay in-person classroom instruction would be impracticable when school began the following day). Otherwise, under Brysk's preferred definition no party seeking a stay of a district court ruling pending appeal would need to move in the district court first. *See Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 43 (1st Cir. 2021) ("We disagree with plaintiff that the district court's rejection of plaintiff's claims on the merits suffices to show that moving first in the district court would have been impracticable.").

Accordingly, the motion to stay is **DENIED** without prejudice to Brysk moving for a stay of the judgment in the district court. The motion to supplement is dismissed as moot.

CLAY, Circuit Judge, dissenting.

Miriam Brysk moves this Court to stay the enforcement of a money judgment against her, her co-defendant, and her attorney, while she appeals. The money judgment stems from the district court's award of attorneys' fees to the plaintiffs because the underlaying claims were frivolous. This Court found Brysk's claims to be meritless, and the Supreme Court apparently thought they were not worth reviewing. *See Gerber v. Herskovitz*, 14 F.4th 500 (6th Cir. 2021), *cert. denied sub nom*. *Brysk v. Herskovitz*, 142 S. Ct. 1369 (2022), and *Gerber v. Herskovitz*, No. 21-1263, 2022 WL 1528419 (U.S. May 16, 2022). Brysk has since filed a motion to supplement her motion to stay. For the following reasons, I would deny the motion to stay and dismiss her motion to supplement as moot.

"A party must ordinarily move first in the district court for . . . a stay of the judgment . . . pending appeal." Fed. R. App. P. 8(a)(1); 16A Charles Alan Wright et al., *Federal Practice & Procedure* § 3954 (5th ed.) ("The cardinal principle with respect to stay applications under Rule 8 is that the relief ordinarily must first be sought in the lower court."). However, "[a] motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals" upon a "show[ing] that moving first in the district court would be impracticable." Fed. R. App. P. 8(a)(2). Typically, our cases have considered the question of impracticability in the context of whether a district court has enough time to render an opinion for this Court to review. *See, e.g.*, *Commonwealth v. Beshear*, 981 F.3d 505, 508 (6th Cir. 2020) (holding that moving the district court to stay in-person classroom instruction would be impracticable when school began the following day);

Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev., 992 F.3d 518, 521 (6th Cir. 2021) (finding impracticability due to time constraints).

In the present case, Brysk does not argue that tendering her motion to the district court would be impracticable due to some time constraint. Instead, she argues that because the district court erroneously (in her opinion) applied the law when entering the judgment, it would be impracticable to ask the district court to stay enforcement of the judgment during appeal.[1] In other words, she asks us to hold that impracticability exists when a party believes that the district court is likely to deny the motion to stay because it previously rejected her other arguments. Surely, the prospect of a district court denying a motion does not make filing that motion impracticable. *See Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 43 (1st Cir. 2021) ("We disagree with plaintiff that the district court's rejection of plaintiff's claims on the merits suffices to show that moving first in the district court would have been impracticable.").

Brysk essentially argues that a party should be able to avoid moving first for a stay in the district court for no other reason than that the party harbors a subjective belief that the motion is likely to be denied.

Without presenting even a plausible argument demonstrating impracticability, Brysk has failed to satisfy the requirements of Rule 8(a); and therefore, her motion is not properly before this Court. Accordingly, I would deny the motion to stay as to Brysk and dismiss the motion to

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[1] Although the majority belabors at length its contention that Brysk's argument is predicated on her reliance on the dictionary definition of "impracticable," Brysk only mentions the definition of impracticable for the first time virtually as an afterthought buried in her Reply Brief.

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supplement as moot; further, I would leave to her whatever remedies, if any, she may be entitled to pursue in the district court to stay enforcement of the judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk