

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

KIRK AND AMY HENRY,

Plaintiffs,

vs.

FREDRICK RIZZOLO, aka  
 RICK RIZZOLO, *et al.*,

Defendants.

Case No. 2:08-cv-00635-PMP-GWF

**ORDER**

Motion for Stay (Dkt. #334)

This matter is before the Court on Defendant Frederick Rizzolo's Motion for Stay of Enforcement and Execution Pending appeal from Judgment (#286, 287) and for Expedited Consideration (Dkt. #334), filed March 22, 2010; Plaintiffs' Opposition to Rick Rizzolo's Motion for Stay Payment of Fees and Costs Awarded Under FRCP 37(a) Pending Appeal (Dkt. #343), filed March 30, 2010; and Plaintiffs' Supplement to Opposition to Defendant Rick Rizzolo's Motion for Stay Payment of Fees and Costs Awarded Under FRCP 37(a) Pending Appeal (Dkt. #345), filed April 1, 2010.

**DISCUSSION**

On February 19, 2010, the Court ordered Defendant Rick Rizzolo to pay Plaintiffs \$5,000.00 in attorney's fees and costs by March 22, 2010. (Dkt. #286). In the present motion, Defendant requests that the Court stay the deadline to pay attorney's fees and costs until after the Ninth Circuit Court of Appeals rules on whether Judge Foley's imposition of Rule 37 sanctions was permissible. (Dkt. #334). Plaintiffs argue that Defendant Rick Rizzolo's appeal is not likely to succeed on the merits and therefore the Court should deny the stay.

...

1           The grant of a stay pending appeal is “an exercise of judicial discretion” and “the party  
2 requesting a stay bears the burden of showing that the circumstances justify an exercise of that  
3 discretion”. *Nken v. Holder*, 129 S.Ct. 1749, 1760-61 (2009) (citing *Virginian R. Co. v. U.S.*, 272  
4 U.S. 658, 672-73 (1926)); *see also Clinton v. Jones*, 520 U.S. 681, 708 (1997). In determining  
5 whether a stay pending appeal is warranted, the Court considers four factors: “(1) whether the  
6 applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the  
7 applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially  
8 injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken*,  
9 129 S.Ct. at 1761 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *Golden Gate Restaurant*  
10 *Ass’n v. City and County of San Francisco*, 512 F.3d 1112, 1115-16 (9th Cir. 2008). The Supreme  
11 Court has found that the first two factors are the most critical in evaluating whether a stay should be  
12 granted. *Nken*, 129 S.Ct. at 1761.

13           Under the first factor, the burden is on the party moving for a stay to demonstrate a “strong  
14 likelihood of success on the merits”. *Id.*; *Golden Gate Restaurant Ass’n*, 512 F.3d at 1115-16  
15 (citing *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983)). A “strong likelihood of success on  
16 the merits” requires that the likelihood of success is “better than negligible” and that there is  
17 “[m]ore than a mere ‘possibility’ of relief”. *Nken*, 129 S.Ct. at 1761. In the present motion,  
18 Defendant states that the Ninth Circuit will certainly review the appeal of Judge Foley’s issuance of  
19 Rule 37 sanctions against Defendant because the sanctions are based on the judge’s opinion and  
20 belief that certain pleadings were authored by a Ghost Writer, rather than on facts garnered at an  
21 evidentiary hearing.

22           The Court finds that Defendant has failed to meet his burden of demonstrating a strong  
23 likelihood of success on the merits of his appeal. First, the Ninth Circuit is highly unlikely to  
24 entertain Defendant’s appeal of Rule 37 sanctions because final judgment has not been entered in  
25 this case and an order imposing sanctions is not appealable prior to the entry of final judgment. *See*  
26 *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 206-09 (1999) (finding that permitting an  
27 immediate appeal from Rule 37 sanctions would undermine the very purpose of Rule 37, “which  
28 was designed to protect courts and opposing parties from delaying or harassing tactics during the

1 discovery process”). In fact, the Ninth Circuit has already issued an order for Defendant to show  
2 cause why the appeal should not be dismissed because the award of attorney’s fees during the  
3 course of an ongoing action “is normally deemed interlocutory and can be reviewed on appeal from  
4 final judgment.” *Henry, et. al. v. Rizzolo*, 9th Cir. Case No. 10-15622 (Dkt. #4). Secondly, it is  
5 unlikely that Defendant’s appeal will succeed on the merits because Defendant failed to file a  
6 timely objection to Magistrate Judge Foley’s order awarding attorney’s costs and fees. A party  
7 “who fails to file timely objections to a magistrate judge’s nondispositive order with the district  
8 judge to whom the case is assigned forfeits its right to appellate review of that order”. *Simpson v.*  
9 *Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1995) (holding appellant forfeited his “right to  
10 appeal the order imposing sanctions because he failed to file any paper challenging the order with  
11 the district judge”). See also *Henry, et. al.*, 9th Cir. Case No. 10-15622 (Dkt. #4) (stating that “this  
12 court may lack jurisdiction over the appeal because the order appealed was entered by a magistrate  
13 judge” and may not be appealable). As a result, Defendant has failed to demonstrate a strong  
14 likelihood that his appeal will succeed on the merits.

15 The Court finds the second and fourth factors also suggest that the Court should not stay  
16 enforcement of sanctions against Defendant Frederick Rizzolo. While the imposition of \$5,000.00  
17 in attorney’s fees and costs may not constitute a minor sanction, the amount is unlikely to  
18 irreparably injure Defendant absent a stay. In addition, as the Supreme Court stressed in  
19 *Cunningham*, the public interest lies in enforcing Rule 37 sanctions before final judgment as the  
20 sanctions were “designed to protect courts and opposing parties from delaying or harassing tactics  
21 during the discovery process”. 527 U.S. at 206-09. Accordingly,

22 ...

23 ...

24 ...

25 ...

26 ...

27 ...

28 ...

1           **IT IS HEREBY ORDERED** that Defendant Frederick Rizzolo's Motion for Stay of  
2 Enforcement and Execution Pending appeal from Judgment and for Expedited Consideration (Dkt.  
3 #334) is **denied**. Defendant Frederick Rizzolo shall pay Plaintiffs the total sum of \$5,000.00 in  
4 attorneys' fees and costs on or before **April 27, 2010**.

5           DATED this 12th day of April, 2010.

6  
7             
8           \_\_\_\_\_  
9           **GEORGE FOLEY, JR.**  
10           **United States Magistrate Judge**  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28