

# Third District Court of Appeal

State of Florida, January Term, A.D. 2008

Opinion filed December 31, 2008.

Not final until disposition of timely filed motion for rehearing.

---

No. 3D07-1573

Lower Tribunal No. 04-11717

---

**Thomas Kramer,**  
Appellant,

vs.

**Verena von Mitschke-Collande and Claudia Miller-Otto, as heirs of  
the deceased, Siegfried Otto,**  
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Robert M. Deehl, Senior Judge.

Greenberg Traurig and Hilarie Bass, Elliot H. Scherker, Barry Rothberg, and Daniel M. Samson, for appellant.

Hunton & Williams and Christopher N. Johnson, for appellees.

Before COPE, WELLS, and ROTHENBERG, JJ.

ROTHENBERG, J.

Thomas Kramer (“Kramer”) appeals from an order domesticating an adverse

Swiss partial judgment in the amount of approximately \$100 million. We affirm.

The facts underlying the instant litigation are set forth in Otto's Heirs v. Kramer, 797 So. 2d 594 (Fla. 3d DCA 2001). Under the applicable Florida statute, the Swiss partial judgment can be domesticated here if it is a “foreign judgment that is final and conclusive and enforceable where rendered, even though an appeal therefrom is pending or is subject to appeal.” § 55.603, Fla. Stat. (2004). A foreign judgment is defined simply as “any judgment of a foreign state granting or denying recovery of a sum of money.” Id. § 55.602(2).

In April 2000, the District Court of the Canton of Zurich, the Swiss trial-level court, entered the initial partial judgment. On January 9, 2003, after its own plenary review, the High Court of the Canton of Zurich affirmed the judgment of the Zurich District Court, and entered the judgment that forms the basis for the instant appeal. Kramer's nullity appeal to the Swiss Court of Cassation was rejected on November 17, 2003, and subsequently, a certificate of indefeasibility was attached to the January 9, 2003 partial judgment. The certificate of indefeasibility states that the Zurich High Court's January 9, 2003 judgment is “rechtskräftig,” or final and conclusive, and capable of being enforced. Meanwhile, further proceedings were pending on another portion of the Swiss litigation, whereby an accounting was to be conducted, and eventually a second judgment for an additional amount was entered.

In the Florida trial court, after the judgment creditors came forward with a foreign judgment—which on its face awarded a monetary sum certain and stated that it was final, conclusive, and capable of enforcement in Switzerland—the burden shifted to Kramer to specify and prove a ground for non-recognition. § 55.604(2), Fla. Stat. (2004); Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1005 (5th Cir. 1990); Kam-Tech Sys., Ltd. v. Yardeni, 774 A.2d 644, 650 (N.J. Super. Ct. App. Div. 2001); Dart v. Balaam, 953 S.W.2d 478, 480 (Tex. App. 1997). Kramer sought to prove that the certificate of indefeasibility was erroneously affixed to the Swiss judgment, and that in fact, the judgment is not enforceable in Switzerland.

Both sides presented experts who offered conflicting opinions on whether, as a matter of Swiss law, the January 9, 2003 partial judgment of the High Court of the Canton of Zurich is enforceable in Switzerland at this time. Kramer’s experts posited that despite the certificate of indefeasibility entered in the Cantonal system, the January 9, 2003 partial judgment was neither final nor enforceable in Switzerland. Under their analysis, the prevailing party cannot enforce the judgment in Switzerland until a final judgment disposes of the remaining claims between the parties.<sup>1</sup> Kramer argued that at that point, Swiss law affords him the

---

<sup>1</sup> The District Court of the Canton of Zurich entered a final judgment disposing of the remaining claims on March 23, 2005, and Kramer filed an appeal with the High Court of the Canton of Zurich. Under the pre-2007 Swiss federal statute governing

right—should he choose to do so—to lodge a constitutional appeal with the Swiss Federal Supreme Court. Kramer argued that **if** he files such an appeal, the enforceability of the January 9, 2003 judgment will then be stayed pending resolution of the appeal, and therefore, it cannot be enforced at this time, either.

The Florida trial court considered the testimony and entered its judgment finding that the January 9, 2003 Swiss partial judgment is final, conclusive, and enforceable in Switzerland, and therefore, suitable for recognition and enforcement in Florida. This case presents a mixed question of fact and law. We do not disturb the trial court's findings of fact because they are supported by competent substantial evidence. Acoustic Innovations, Inc. v. Schafer, 976 So. 2d 1139, 1143 (Fla. 4th DCA 2008). We review the trial court's determinations of foreign law de novo. Transportes Aereos Nacionales, S.A. v. DeBrenes, 625 So. 2d 4, 5 (Fla. 3d DCA 2008).

On appeal, Kramer urges this Court to find that the trial court erred in recognizing the January 9, 2003 judgment, because Kramer's right to pursue a future appeal renders the judgment currently unenforceable in Switzerland. In

---

appeals, the taking of the appeal resulted in an automatic stay of judgment. According to the expert testimony, the Swiss federal laws applicable to appeals have changed effective January 1, 2007. The changes include a modification of the procedure for obtaining a stay pending appeal, so that a stay pending appeal under the new code will no longer be automatic. The new code will apply to appeals initiated after January 1, 2007.

support of this argument, Kramer directs our attention to a recent order of the Swiss Federal Supreme Court relating to the litigation between the parties. In that proceeding, Kramer sought a temporary order enjoining the enforcement of the January 9, 2003 judgment. The Swiss Federal Supreme Court entered a four-page order denying Kramer's request. The Swiss Federal Supreme Court noted that "in principle" Kramer could challenge the January 9, 2003 order along with a future decision of the Court of Cassation entered on the remaining claims. However, the Swiss Federal Supreme Court declined to declare whether such an appeal would be admissible, and critically, it declined to issue any order staying the enforcement of the January 9, 2003 order. The Swiss Federal Supreme Court also noted that Kramer's future appeal will be governed by the new Swiss code, which, according to expert testimony, does **not** automatically impose a stay of enforceability upon the judgment on appeal.

Thus, after being presented with Kramer's arguments, the highest court in Switzerland made two important rulings. First, the Swiss Federal Supreme Court stated that Kramer may or may not be able to challenge the January 9, 2003 order by way of a future appeal. Second, the same court refused to stay the enforceability of the January 9, 2003 order, or to clarify that it is not currently enforceable. Kramer argues that these rulings, along with the testimony below, establish that the trial court's recognition of the foreign judgment was erroneous.

We disagree.

The sole issue in this appeal is whether Kramer carried his burden to specifically establish grounds for the non-recognition of the January 9, 2003 judgment. Kramer, after pursuing this case through the entire court system in Switzerland, failed to establish that any stay of enforceability is in effect. Furthermore, Kramer failed to establish that he even has a definitive right to a future appeal. All that Kramer could establish is that the January 9, 2003 judgment—which is stamped as final, conclusive, and capable of enforcement, and to which the courts of Switzerland have unanimously refused to apply suspensive effect—might be subject to an appeal sometime in the future. In such a situation, Florida’s Uniform Out-of-country Foreign Money Judgment Recognition Act is instructive: “This act applies to any foreign judgment that is final and conclusive and enforceable where rendered, **even though an appeal therefrom is pending or is subject to appeal.**” § 55.603, Fla. Stat. (2004) (emphasis added). The order on appeal is affirmed in all respects.

Affirmed.

WELLS, J., concurs.

COPE, J. (dissenting).

This is an appeal of an order which domesticates in Florida a Swiss partial final judgment in the amount of \$108,315,766. Under Florida law, the Swiss judgment can be domesticated here if it is “final and conclusive and enforceable where rendered, even though an appeal therefrom is pending or is subject to appeal.” § 55.603, Fla. Stat. (2007). The sole issue on appeal is whether this Swiss judgment is enforceable in Switzerland.

I.

By way of background:

In December, 1991, Siegfried Otto, a prominent and successful German businessman, entrusted some \$145 million to his then son-in-law, Thomas Kramer. Kramer invested approximately \$100 million thereof in various Florida business entities and real properties situated on Miami Beach. Under the parties' agreement, Kramer was to make periodic payments to Otto. The deal soured and Otto commanded the immediate return of his money. The dispute resulted in a written agreement whereby Kramer would return \$20 million to Otto immediately, and make continuing additional payments. The agreement contained a forum selection clause wherein the parties agreed to bring any suit against one another in the courts of Switzerland.

Thereafter, Kramer initiated in the Swiss courts that which we would consider a declaratory judgment, seeking a determination that Kramer had fulfilled all his obligations to Otto. . . .

Otto then defended the Swiss action, wherein he also brought a counter-claim seeking recovery of his money. During the pendency of that action, Otto died and his heirs at law were substituted as parties Plaintiff. Some four years later the Swiss court resoundingly concluded that the parties' settlement agreement was valid and fully enforceable by Otto's heirs. In that order, the Swiss court termed Kramer's position as "dubious" "groundless" and "quite simply incomprehensive". Accordingly, the Swiss court entered a partial final judgment, determining the heirs were entitled, at that point, to some \$90,834,469.16. Also, the Swiss court retained jurisdiction to supervise an accounting to determine what additional sums Kramer might owe the heirs. Kramer appealed the Swiss ruling and that judgment is presently stayed pending appeal.<sup>1</sup>

FN1. Under Swiss law, the filing of a notice of appeal and the posting of a cost bond, which in this case was approximately a half million dollars, is all that is required to stay the enforcement of a judgment. For this reason, the Swiss judgment may not be enforced under § 55.601 Fla. Stat. (2000), at this time. Otto's heirs do not challenge the lack of a supersedeas bond on any basis and consequently, we do not reach that issue.

. . . .

We are told by Kramer that applying the doctrine of comity, we must respect the Swiss court's stay and take no action to enforce the judgment in the heirs' favor. We entirely agree.

Otto's Heirs v. Kramer, 797 So. 2d 594, 595-97 (Fla. 3d DCA 2001).

The issue in the above quoted case was whether allowing a pure bill of discovery violated the Swiss court's stay. Id. at 597. This court allowed the pure bill of discovery to proceed. Id.

As matters stood in 2001, then, a partial final judgment had been entered in the Swiss trial court, which is their District Court. Kramer had filed a notice of appeal and cost bond, which was sufficient to stay the enforcement of the partial final judgment. Id. at 596 n.1.

## II.

Under the Swiss system, there is a District Court (trial court), a Higher Court (equivalent to our court of appeal), a Court of Cassation (similar to the Florida Supreme Court), and the Swiss Federal Court, which would be similar to the United States Supreme Court. However, the Swiss Federal Court has a mandatory jurisdiction, that is, the court must review all appeals properly brought there.

Kramer appealed the 2000 partial final judgment to the Higher Court, which affirmed in 2003. He then pursued an appeal to the Court of Cassation. He lost that appeal in 2003 as well.

At this stage of the proceedings, Kramer did not file an appeal with the Swiss Federal Court. Kramer's analysis is that under the Swiss federal law, a partial final judgment is not immediately reviewable in the Swiss Federal Court.

Instead, Kramer states that under the applicable statute, a litigant must wait until there is a final judgment disposing of the entire case. When a final judgment is rendered, the litigant may appeal not only the final judgment, but any previously entered partial final judgment. There is a limited list of matters that can be the subject of an immediate appeal to the Swiss Federal Court, such as jurisdictional matters, but a partial final judgment is not among them.

The appellees, Verena von Mitschke-Collande and Claudia Miller-Otto (“the heirs”) argue the opposite. The heirs contend that there was a recently developing trend in the Swiss Federal Court not only to allow, but to require, that a partial final judgment be appealed immediately. The heirs’ position is that Kramer was obligated to pursue an appeal of the partial final judgment to the Swiss Federal Court and, having failed to do so, the partial final judgment became final.

After the time for taking a further appeal expired, the High Court Clerk issued a certificate of indefeasibility, which was attached to the High Court judgment. This would normally signify that the judgment is final and enforceable.

Controversy about the certificate ensued, and the Clerk issued a clarification stating that under the applicable statute (which is referred to as the OG)<sup>2</sup> the “legal

---

<sup>2</sup> OG is an abbreviation for the Federal Law on the Organization of the Judicial System. This governed the Federal Supreme Court’s jurisdiction until December 31, 2006.

force and enforceability is granted with the proviso of article 48 . . . OG, according to which partial judgments for reasons of federal law as a rule are only final and absolute in conjunction with the final decision.” That clarification was issued in 2003, and issued again in 2004.

### III.

Acting on the premise that the partial final judgment had become enforceable, the heirs pursued enforcement in England. The heirs contended that the partial final judgment was enforceable while Kramer contended that it was not. To determine enforceability, the British Court directed Kramer to transfer \$100,000 to a specific bank account in Zurich, Switzerland. This was done in order to afford the heirs the opportunity to initiate enforcement proceedings in Switzerland, so that Swiss courts would authoritatively determine the issue of enforceability. The heirs declined to proceed in Switzerland and the British court permanently stayed the proceedings in England.

Meanwhile, litigation proceeded between the heirs and Kramer in the Swiss District Court. In 2005, the District Court entered a final judgment on the remaining amount of damages, thus concluding the entire case. Kramer appealed that judgment to the Swiss High Court and the appeal is pending there.

---

A new law, the Swiss Federal Law on the Supreme Court (referred to as the BGG) went into effect January 1, 2007. It does not apply retroactively.

#### IV.

In 2004, the heirs initiated the instant action which seeks to domesticate the Swiss partial final judgment in Florida. As was true of the proceedings in England, the entire issue here is whether the partial final judgment is currently enforceable within Switzerland. The trial court conducted an evidentiary hearing in March 2007. Both sides presented experts on Swiss law. Both sides' experts have substantial credentials. The trial court relied on the certificate of infeasibility as indicating that the partial final judgment was immediately enforceable. The court then entered final judgment in favor of the heirs, and Kramer has appealed.

#### V.

I am sympathetic to the position of the heirs, who hold a large, unsatisfied judgment with appellate proceedings pending but no bond posted. Our task, however, is a narrow one. We are to determine whether the Swiss partial final judgment is enforceable in Switzerland, and thus entitled to enforcement in Florida. See § 55.603, Fla. Stat. (2007). Based on the existing record and a recent decision of the Swiss Federal Court, the conclusion is inescapable that the partial final judgment is not presently enforceable. We are therefore obligated to reverse the judgment.

At the trial the heirs presented the expert testimony of Dr. Barbara Graham-Siegenthaler, a law professor. Dr. Graham-Siegenthaler acknowledged that an

authoritative treatise on Swiss law (Frank, Strauli & Messmer) stated that partial judgments of the higher cantonal courts do not acquire formal *res judicata* effect before the expiration of the time limits for the filing of an appeal against the final judgment to the Federal Supreme Court. The expert acknowledged that the treatise so stated, but also pointed out that the treatise explained that this view had been strongly criticized.

The expert said that in her view there was a distinction to be drawn between a partial final judgment awarding money damages, on the one hand, and interlocutory decisions on procedural matters, on the other. The expert stated that the law regarding the appealability of partial judgments had been undergoing change. She explained that some exceptions had been recognized as early as 1978, and that in 2004 the Federal Court had ruled that an international arbitral matter was appealable whether in the form of a partial or complete judgment. The expert also cited a 2004 ruling allowing appealability of a partial judgment in a probate case. Dr. Graham-Siegenthaler opined that as a result of those decisions, the Swiss Federal Court's interpretation of the law had changed. She said that the partial final judgment was one which must be immediately appealed to the Swiss Federal Court and, since that was not done, the partial judgment had become final and enforceable.

The heirs also presented the testimony of Professor Karl Spühler, who had previously been a member of the Swiss Federal Court. Dr. Spühler's opinion was to the same effect.

Kramer presented as an expert Dr. Balz Gross, who represented Kramer in the Swiss proceedings. Kramer also presented Dr. Nicolas von Werdt, an attorney and part-time judge with the Swiss Federal Court. To make a long story short, both opined that the partial final judgment was (with narrow exceptions) not subject to an immediate appeal, has not become final, and is not enforceable in Switzerland.

What divided the experts was the question whether there had been a recent change in the rulings of the Swiss Federal Court on when a partial final judgment had to be appealed. Both sides agreed that under the traditional view, a partial final judgment was not immediately appealable (except on narrow grounds, see below) and a plenary appeal could not be taken except in conjunction with the appeal of the final judgment in the case.

Where the two sides differed was over the question whether Swiss Federal law had recently changed, such that a partial final judgment for money damages not only could be, but had to be, appealed immediately. The heirs' experts contended that the international arbitration case had changed the rules regarding

the immediate appealability of a partial final judgment. Kramer's experts opined that no such change had occurred.

While this Florida appeal was pending, the Swiss Federal Court issued an opinion (in a proceeding filed by Kramer) which answers the question. The rules have not changed. The partial final judgment was not immediately appealable.

This opinion was issued because Kramer filed a petition in the Swiss Federal Court, attempting to have that court take jurisdiction of the entire Swiss dispute. He requested entry of an order which would stay execution of both Swiss judgments, the earlier partial final judgment and the 2005 final judgment. The Swiss Federal Court issued a written opinion denying relief on the ground of lack of jurisdiction.<sup>3</sup>

In its opinion, the Swiss Federal Court addressed the applicable Swiss jurisdictional principles. The Court said that the heirs' partial final judgment "is not a final decision within the meaning of Art. 87 OG. On the contrary, it is a decision that adjudicated only a part of the claims being asserted, and is thus a

---

<sup>3</sup> The jurisdictional problem was that Kramer's appeal of the final judgment was pending in the Swiss High Court and had not yet reached the Swiss Federal Court. That being so, the Swiss Federal Court concluded that it had no power to take jurisdiction of Kramer's petition, and on that basis denied Kramer's request for extraordinary relief.

partial judgment[.]” Bundesgericht [BGer] [Federal Court] June 13, 2007, para. 3.2.

Important for our purposes, the Court explained, “**Interim decisions can only be appealed independently in exceptional cases**, where they relate to a question of jurisdiction or a request for recusal or where they could result in an irreparable disadvantage.” Id. (emphasis added). Otherwise an interim decision can only be appealed in conjunction with the appeal of the final decision in the case.<sup>4</sup>

The significance of the Swiss Federal Court’s opinion is in its language (quoted above) addressing what interim decisions can be independently appealed. The opinion confirms what Kramer’s experts said in the trial court here in Florida. It completely undercuts the heirs’ experts’ opinions that recent Swiss Federal Court decisions had changed the rules so as to require an immediate appeal of a partial final judgment.

In light of the Swiss Federal Court’s ruling, it is clear that the Swiss partial final judgment is not enforceable in Switzerland at this time. It is therefore necessary to reverse the judgment now before us.

---

<sup>4</sup> The Swiss Federal Court also left open the question of how to interpret the interrelationship of the new appellate law, the BGG, which would govern the appeal from the final judgment, and the previous appellate law, the OG, which would apply to the partial final judgment.