

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13476
Non-Argument Calendar

D.C. Docket No. 6:15-cr-00004-LGW-GRS-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILSON R. SMITH,

Defendant,

FRANCES W. SMITH,

Interested Party-Appellant.

Appeals from the United States District Court
for the Southern District of Georgia

(April 9, 2019)

Before WILLIAM PRYOR, GRANT and HULL, Circuit Judges.

PER CURIAM:

In this criminal case, intervenor Frances Smith, the ex-wife of the defendant Wilson Smith (“Smith”), appeals the district court’s garnishment order, which allowed the United States to garnish against the \$433,039.36 in settlement funds awarded to defendant Smith as part of a shareholder’s derivative lawsuit. The government sought to garnish the settlement funds to satisfy, at least in part, the \$1,285,000 in restitution the district court ordered as part of defendant Smith’s 2015 criminal sentence for mail fraud and aggravated identity theft. Intervenor Frances Smith claims she has a priority interest in the settlement funds under her 2018 divorce decree. After review, we affirm the district court’s garnishment order in favor of the United States.

I. BACKGROUND FACTS

A. Defendant Smith’s Federal Conviction, Sentence, and Restitution

Between 2013 and 2015, defendant Smith, a Georgia lawyer, negotiated settlements of his clients’ lawsuits without their knowledge, forged his clients’ signatures on settlement agreements, deposited forged settlement checks into his firm’s trust account, and withdrew settlement money for his own personal use. At the time, defendant Smith was a shareholder in a company called BlinkMind, Inc. (“BlinkMind”). In March 2015, shortly after defendant Smith’s arrest, a shareholder derivative action against BlinkMind and others was filed in Texas.

In May 2015, while the Smiths were still married, defendant Smith pled guilty to mail fraud and aggravated identity theft, in violation of 18 U.S.C. §§ 1341 and 1028A. The indictment was filed in the U.S. District Court for the Southern District of Georgia, and the same district court that accepted defendant Smith's guilty plea and imposed his restitution sentence also entered the garnishment order in that same criminal case. Thus, we refer throughout to the district court.

On October 20, 2015, with defendant Smith's wife Frances Smith present in the courtroom, the district court sentenced defendant Smith to a 96-month prison term and ordered him to pay \$1,285,000 in restitution to the victims of his fraud while he was a lawyer. On October 22, 2015, the district court entered a judgment of conviction to that effect.

Shortly thereafter, on October 29, 2015, the government filed a notice of lien for restitution in the Superior Court of Burke County, Georgia, which gave notice that the order of restitution against defendant Smith was in favor of the United States upon "all property belonging to the person . . . ordered to pay restitution." As the district court later found, and the parties agree, the government recorded the notice of the judgment lien in the wrong county. The government states that it mistakenly filed the notice of lien in the Burke County Superior Court in Georgia

and concedes that it should have filed the notice of lien in the Toombs County Superior Court in Georgia, where the Smiths had lived since 1992.¹

B. BlinkMind Settlement and Divorce Proceedings in State Court

In January 2018, Frances Smith learned that there might be some money coming to BlinkMind investors from the Texas lawsuit. One month later, on February 7, 2018, Frances Smith filed for divorce in the Superior Court of Clarke County, Georgia, where she had recently moved. On March 2, 2018, the BlinkMind lawsuit settled, and defendant Smith's portion of the settlement was \$433,039.36. On April 25, 2018, in the divorce proceedings, defendant Smith moved the Clarke County Superior Court to issue an order granting him permission to pay the settlement funds into the registry of the court.

C. District Court's Garnishment Proceedings as to the BlinkMind Settlement Funds

On April 26, 2018, the government filed an ex parte application for writ of garnishment against McCloskey Roberson PLLC, the Texas law firm that had filed

¹Under 26 U.S.C. § 6323(f), the government must file the notice of lien with respect to personal property "in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated." 26 U.S.C. § 6323(f)(1)(A)(ii). Personal property is "situated" at the taxpayer's (or here the judgment debtor's) residence "at the time the notice of lien is filed." Id. § 6323(f)(2)(B). Under Georgia law, federal tax liens are to be filed in "the office of the clerk of the superior court of the county where the taxpayer resides." O.C.G.A. § 44-14-571(b)(2).

In October 2015, when the notice of restitution lien was filed, defendant Smith was serving his federal sentence. Under these circumstances, for purposes of § 6323(f), defendant Smith retained his prior residence in Toombs County, Georgia as a matter of law. See Urban Indus., Inc. of Ky. v. Thevis, 670 F.2d 981, 986 (11th Cir. 1982).

the BlinkMind lawsuit and was holding defendant Smith's settlement funds in its trust account. The government represented that, as of April 23, 2018, \$51,370 had been credited to defendant Smith's restitution judgment debt, leaving an outstanding balance of \$1,233,830 that defendant Smith had not satisfied despite the government's demand for payment within the last 30 days.

Also on April 26, 2018, the district court issued a writ of garnishment to McCloskey Roberson, directing the firm to hold the settlement funds until ordered otherwise. On the same day that the district court issued its writ of garnishment, the Clarke County Superior Court issued an order directing payment of the settlement funds into that court's registry. On April 27, 2018, defendant Smith sent a letter to McCloskey Roberson demanding that the settlement funds from the BlinkMind lawsuit be paid into the Clarke County Superior Court registry.

McCloskey Roberson answered the government's writ of garnishment and advised the district court about the Clarke County Superior Court's order.

McCloskey Roberson's answer stated, inter alia, that it had no claim to the BlinkMind settlement funds, but continued to hold those funds, as it did not want to take any action that could prejudice the rights of any person making a claim to the funds.

On May 21, 2018, the Clarke County Superior Court entered a final judgment and decree of divorce granting the Smiths a total divorce. The divorce

decree also awarded Frances Smith “all of the proceeds of the derivative action, which is the amount of \$433,039.36, being held by McCloskey Roberson of Houston Texas.”

In the district court, the government moved for a final order of garnishment. Defendant Smith filed objections to McCloskey Roberson’s answer and to the government’s motion. Defendant Smith contended that he had no right or interest in the BlinkMind settlement funds because they were awarded to his ex-wife in the state court’s divorce decree. For her part, Frances Smith filed a motion to intervene in the garnishment proceedings, arguing that: (1) she had sole title and interest in the BlinkMind settlement funds pursuant to the state court’s divorce decree, and (2) the government had failed to provide her with notice of its application for garnishment under 28 U.S.C. § 3205.

At a hearing on the motions, the district court granted Frances Smith’s motion to intervene and listened to her testimony. Among other things, Frances Smith said: (1) that unbeknownst to her, her ex-husband had borrowed half a million dollars on their marital home and other real property and lost it by investing in BlinkMind; (2) that she learned of his federal crimes on the day he was arrested in January 2015; (3) that, after her husband’s arrest, all their property was foreclosed on, and she was forced to sell her car and personal belongings in order

to live; (4) that she now worked as a sales associate at a department store to support herself; and (5) that she had no retirement savings.

Frances Smith considered herself to be one of her ex-husband's victims and believed she was entitled to recover the settlement funds. Frances Smith admitted that she learned in January 2018 that BlinkMind investors might receive some money from the Texas lawsuit and that she filed for divorce 30 days afterward. She maintained, however, that the Texas lawsuit had no bearing on her decision to file for divorce. Frances Smith also admitted that she was present at defendant Smith's sentencing hearing in 2015, when the district court ordered \$1,285,000 in restitution for her ex-husband-lawyer's victims, whose money he had stolen.

D. District Court's Final Order of Garnishment

After accepting post-hearing briefs from the parties, the district court granted the government's motion for a final order of garnishment. The district court first concluded that defendant Smith's criminal judgment created an enforceable lien on all of his personal property in Georgia. The district court explained that the fact that the government filed its notice of lien in Burke County did not prevent the lien from attaching to defendant Smith's personal property because O.C.G.A. § 9-12-86(b) requires only federal money-judgment liens on real property, not personal property, to be recorded.

The district court also discussed O.C.G.A. § 9-12-81, which provides that a money judgment in Georgia creates a lien on the personal property of a defendant against third parties acting in good faith and without actual notice. See O.C.G.A. § 9-12-81. The district court found that Frances Smith was not entitled to protection under O.C.G.A. § 9-12-81 because she received actual notice of the lien when defendant Smith's criminal judgment, including the restitution award, was announced in open court at the sentencing hearing in her presence.

Second, the district court determined that Frances Smith's interest in the BlinkMind settlement could be attached because a spouse's interest is not listed as an exempt property under 26 U.S.C. § 6334, and the power granted under that federal statute was broad, explicitly extending beyond state property rights. The district court concluded that any interest Frances Smith had in the settlement funds on account of her marital status was attached by the government's restitution lien because: (1) federal law permitted the judgment lien to operate on defendant Smith's property and interests in property, including the BlinkMind settlement, and (2) defendant Smith had no power in 2018 to convey the settlement proceeds to Frances Smith, as the government's restitution lien had already attached to the property. The district court declined to address whether the Smiths' divorce constituted an attempt at fraudulent conveyance of the settlement funds.

II. DISCUSSION

The issues on appeal involve whether the government had to record its 2015 restitution lien against defendant Smith in Toombs County Superior Court in order for the lien to have priority over his ex-wife's 2018 divorce decree conveying his interest in the settlement proceeds to Frances Smith. We outline some general principles about restitution liens and apply them to this case.

A. General Principles

Under the Mandatory Victims Restitution Act (“MVRA”), a restitution order establishes a lien in favor of the government “on all property and rights to property” owned by the defendant, as if the defendant’s liability were a tax liability assessed under the Internal Revenue Code (“IRC”). 18 U.S.C. § 3613(c). The lien “arises on the entry of [the] judgment.” Id.

As with a tax lien, state law determines the nature of the legal interest a person has in the property sought to be reached. See Aquilino v. United States, 363 U.S. 509, 512-14, 80 S. Ct. 1277, 1280 (1960). However, once the government’s restitution lien has attached to the state-created property interests, federal law controls the priority of competing liens asserted against the person’s “property or rights to property.” See id. at 513-14, 80 S. Ct. at 1280 (internal quotation marks omitted).

The MVRA gives the United States the power to enforce a judgment ordering restitution “in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law,” and the United States may do so “against all property or rights to property” of the defendant unless that property would be exempt from levy for payment of taxes under certain provisions of the IRC. 18 U.S.C. § 3613(a), (f).² To obtain satisfaction of a restitution judgment, the government must use the procedures in the Federal Debt Collection Procedures Act (“FDCPA”), which includes a writ of garnishment. See 28 U.S.C. §§ 3001(a)(1), 3002(3)(B) & (8), 3205(a); United States v. Duran, 701 F.3d 912, 915 (11th Cir. 2012); United States v. Bradley, 644 F.3d 1213, 1309 (11th Cir. 2011).³

Here, a restitution lien in favor of the United States arose on October 22, 2015, when the district court entered the criminal judgment against defendant Smith that included restitution in the amount of \$1,285,000, and all of defendant Smith’s “property and rights to property” were subject to the government’s restitution lien at that time. See 18 U.S.C. § 3613(c). On appeal, Frances Smith

²Frances Smith does not claim that the BlinkMind settlement funds are exempt property under the MVRA.

³We will review a garnishment order issued under the FDCPA for an abuse of discretion. See United States v. Clayton, 613 F.3d 592, 595 (5th Cir. 2010). We review issues of statutory interpretation de novo. Duran, 701 F.3d at 915. We review factual findings underlying the order for clear error. See United States v. Valladares, 544 F.3d 1257, 1269 (11th Cir. 2008).

does not dispute this point. Rather, she argues that the government's 2015 restitution lien does not have priority over her claim to the BlinkMind settlement funds because: (1) the government failed to properly record the restitution lien in accordance with either federal or state law, as required by the MVRA; and, in the meantime, (2) she obtained the sole ownership of the BlinkMind settlement funds as marital assets equitably divided pursuant to the state court's May 21, 2018 divorce decree, giving her interest priority. For the reasons that follow, neither argument has merit.

B. Notice of the Government's Lien

Upon entry of the criminal judgment, the government's restitution lien arises automatically and attaches to all property of the defendant as against third parties. 18 U.S.C. § 3613(c). Generally speaking, the MVRA does not require the government to record the lien for it to gain priority over third parties, but it does protect certain limited classes of third-party interest holders, as follows:

(d) Effect of Filing Notice of Lien.--Upon filing of a notice of lien in the manner in which a notice of tax lien would be filed under section 6323(f)(1) and (2) of the Internal Revenue Code of 1986, the lien shall be valid against any purchaser, holder of a security interest, mechanic's lienor or judgment lien creditor The notice of lien shall be considered a notice of lien for taxes payable to the United States for the purpose of any State or local law providing for the filing of a notice of a tax lien. A notice of lien that is registered, recorded, docketed, or indexed in accordance with the rules and requirements relating to judgments of the courts of the State where the notice of lien is registered, recorded, docketed, or indexed shall be considered for all purposes as the filing prescribed by this section.

Id. § 3613(d) (emphasis added).

In other words, under § 3613(d), the government must record its restitution lien, either in compliance with 26 U.S.C. § 6323(f) or with the state’s recording statute for state court judgments, to be valid against, and thus have priority over, a purchaser, holder of a security interest, mechanic’s lienor, or judgment lien creditor. Id.; see also 26 U.S.C. § 6323(a) (providing same as to federal tax liens); Equity Inv. Partners v. Lenz, 594 F.3d 1338, 1342-45 (11th Cir. 2010) (explaining that for an investment partnership’s interest in the property to have priority over the government’s tax lien under § 6323(a), it had to show it was a holder of a security interest).

Under § 6323(f), the lien is filed either: (1) in an office designated by the laws of the state, in which the personal property subject to the lien is situated; or (2) in the office of the clerk of the U.S. district court for the judicial district in which the personal property subject to the lien is situated, whenever the state has not by law designated an office. 26 U.S.C. § 6323(f)(1)(A)(ii), (B).

The problem for Frances Smith is that she does not argue that she is among the limited classes of interest holders protected by the recording requirements in § 3613(d). Frances Smith does not purport to be a “purchaser, holder of a security interest, mechanic’s lienor or judgment lien creditor” with respect to the BlinkMind settlement funds. See id. § 6323(h)(1), (2), & (6) (defining

“purchaser,” “security interest,” and “mechanic’s lienor” for purposes of § 6323(f). Therefore, Frances Smith has not shown she was entitled to a recorded notice of the restitution lien under § 3613(d) in order for the restitution lien to be valid against whatever interest she has in the BlinkMind settlement funds. Cf. In re Terwilliger’s Catering Plus, Inc., 911 F.2d 1168, 1176 (6th Cir. 1990) (stating that a federal tax lien need not be filed to gain priority over interests that do not fall within the limited categories of liens identified by § 6323(a); rather, “it is perfected at the time the lien is assessed”). Because Frances Smith was not entitled to record notice under § 3613(d), the fact that the government admittedly failed to file the notice of restitution lien in the right Georgia county in compliance with § 6323(f)(1)(A)(ii) is immaterial.

Because Frances Smith did not claim to be an interest holder protected by the recording requirements of § 3613(d), there is no merit to her argument that the MVRA required the government to record the restitution lien in compliance with Georgia law to have priority over her claim. In any event, the district court did not err when it determined that, under Georgia law, Frances Smith was not entitled to a recorded notice of the restitution lien because she had received actual notice.

Under Georgia law, a judgment debtor’s personal property is automatically bound by judgment as of the date the judgment is rendered. See Tunnelite, Inc. v. Estate of Sims, 266 Ga. App. 476, 477, 597 S.E.2d 555, 557 (Ga. Ct. App. 2004);

O.C.G.A. § 9-12-80. The general rule in Georgia is “that when property is transferred to one for value, the transferee not having actual notice of any lien against the property, and no lien being recorded, he takes the property free of the lien.” Matter of Fulton Air Serv., Inc., 777 F.2d 1521, 1523 (11th Cir. 1985) (emphasis added) (quoting Kilgore v. Buice, 229 Ga. 445, 448, 192 S.E.2d 256, 259 (Ga. 1972)). But under Georgia’s recording statutes, “if the lien is properly recorded so as to give constructive notice of its existence to all would-be transferees, then the transferee has notice of the lien, and the transferred property in his possession is subject to the lien.” Id. Specifically, the Georgia recording statute provides that no “money judgment” obtained in any state or federal court in Georgia creates a lien upon “the property of the defendant” against “third parties acting in good faith and without notice,” unless it is recorded in the defendant’s county of residence. O.C.G.A. § 9-12-81 (emphasis added).

Here, the district court found that Frances Smith had actual notice of the restitution lien against her then-husband’s personal property because she was present during the sentencing hearing when defendant Smith’s sentence, including the restitution award, was pronounced. The district court’s factual finding on this point was not clear error. The sentencing hearing transcript indicates that Frances Smith was present at defendant Smith’s sentencing. Additionally, Frances Smith admitted during the garnishment hearing that she was at the sentencing hearing.

Because Frances Smith had actual notice of the federal restitution judgment, she was not a “third part[y] acting . . . without notice” under O.C.G.A. § 9-12-81, and the government was not required by Georgia law to record the restitution lien for it to be enforceable against her as the transferee.

Frances Smith relies upon O.C.G.A. § 9-12-86(b), which imposes a duty on a judgment creditor to record the judgment for it to “affect or become a lien upon the title to real property.” O.C.G.A. § 9-12-86(b) (emphasis added). By its plain terms, § 9-12-86(b) applies only to real property, not personal property. As discussed above, Georgia law does not impose such a duty on a judgment creditor for a lien to attach to personal property. Thus, the district court correctly determined that the state requirement that a federal judgment be recorded with the clerk of the superior court of the county in which the real property is located did not apply to the government’s restitution lien on the BlinkMind settlement funds, which constituted personal property.

C. Enforceability of the Government’s Restitution Lien

The district court also correctly concluded that defendant Smith’s property and rights to property included the entire BlinkMind settlement, regardless of its transfer to Frances Smith in the Smiths’ divorce proceedings. Under the MVRA, the district court’s entry of the criminal judgment against defendant Smith on October 22, 2015, a lien in favor of the United States arose and at that time

attached to all of defendant's Smith's property and rights to property, as created by state law. See 18 U.S.C. § 3613(c); United States v. Craft, 535 U.S. 274, 278, 122 S. Ct. 1414, 1420 (2002) (explaining that the IRC itself creates no property rights but merely attaches consequences, federally defined, to rights created under state law).

Under Georgia law, a spouse has no equitable interest in property solely owned by the spouse during the marriage. See Miller v. Fulton Cty., 258 Ga. 882, 883, 375 S.E.2d 864, 865 (Ga. 1989) (explaining that even though property of one spouse obtained during the marriage is subject to equitable division upon divorce, “no property rights are created in the assets of the marriage while the parties are still married”). Thus, on October 22, 2015, when the restitution lien arose and attached to defendant Smith's property, Frances Smith had no equitable interest in the BlinkMind shares by virtue of marriage. At that point, defendant Smith, as the BlinkMind shareholder, was the sole owner of any contingent interest in settlement of the BlinkMind shareholder's lawsuit.

Having attached to all “property and rights to property” of defendant Smith, including his contingent interest in the lawsuit settlement, the government's restitution lien on defendant Smith's interest in the settlement funds continued to exist even after he transferred the property to Frances Smith through divorce. See United States v. Bess, 357 U.S. 51, 57, 78 S. Ct. 1054, 1058 (1958) (“The transfer

of property subsequent to the attachment of the lien does not affect the lien, for it is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes cum onere.” (internal quotation marks omitted)).

As Frances Smith concedes, her interest in the BlinkMind settlement funds was created on May 21, 2018, by equitable division in the divorce decree. Therefore, under federal law, the government’s restitution lien has priority over her claim. See United States v. McDermott, 507 U.S. 447, 449, 113 S. Ct. 1526, 1528 (1993) (stating that for purposes of federal law, priority of liens “is governed by the common-law principle that the first in time is the first in right” (internal quotation marks omitted)).

III. CONCLUSION

In sum, the district court did not err when it determined that the government had an enforceable restitution lien on the BlinkMind settlement funds, regardless of the later equitable transfer of the property to Frances Smith in the divorce decree. And, the district court correctly determined that the government’s restitution lien had priority, as Frances Smith was not entitled to record notice of the judgment lien under federal or state law.

For all these reasons, we affirm the district court’s garnishment order, dated August 15, 2018. The district court did not abuse its discretion in concluding that

the government could properly garnish the BlinkMind settlement funds under the FDCPA to satisfy defendant Smith's restitution obligation under the MVRA.

AFFIRMED.