Third District Court of Appeal

State of Florida

Opinion filed October 23, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-2722
Lower Tribunal No. 17-07227

Systemax, Inc.,
Appellant,

vs.

Gilbert Fiorentino,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, John W. Thornton, Jr., Judge.

Bruce S. Rogow and Tara A. Campion (Ft. Lauderdale), for appellant.

AGENTIS, PLLC, Christopher B. Spuches, Jake M. Greenberg, and Alexander G. Strassman, for appellee.

Before FERNANDEZ, SCALES, and LINDSEY[1], JJ.

PER CURIAM.

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[1] Judges Scales and Lindsey did not participate in oral argument.

I. BACKGROUND

Gilbert Fiorentino ("Fiorentino") served as a corporate director and Chief Executive of Technology Products for Systemax, Inc. ("Systemax"), a publicly traded company. Following allegations of fraud, on April 18, 2011, Systemax filed its Form 8-K,[2] where it publicly announced the conclusion of an internal audit investigation of Fiorentino. Shortly thereafter, Fiorentino resigned on May 6, 2011. Simultaneously with Fiorentino's resignation, Fiorentino and Systemax entered into a settlement agreement requiring Fiorentino to surrender assets valued at approximately $11 million to Systemax. As part of the settlement, Fiorentino agreed to five-year noncompetition and non-solicitation obligations.

Thereafter, the Federal Government charged Fiorentino with conspiracy to commit securities fraud and to impede and impair the Internal Revenue Service in violation of 18 U.S.C. § 371. Fiorentino entered into a plea agreement. Pursuant to the plea agreement, he was sentenced to 60 months of imprisonment and three years of supervised release. As part of the sentence, Fiorentino was ordered to pay $35,867,883 in restitution[3] to Systemax.

[2] A Form 8-K is the "current report" that publicly traded companies must file with the Securities Exchange Commission to announce major events or changes that shareholders should know about.

[3] The district court ordered Fiorentino to pay restitution jointly and severally with his co-defendant, Carl Fiorentino.

On March 29, 2017, Systemax recorded the restitution judgment pursuant to 18 U.S.C. § 3664 (m)(1)(B).[4] Thereafter, Fiorentino filed a counterclaim seeking declaratory and injunctive relief, along with a Section 55.509[5] objection to the enforcement of the federal judgment. Fiorentino also recorded a lis pendens as to the foreign judgment. In the counterclaim, Fiorentino contended that enforcement of the restitution order was precluded by: (1) his settlement agreement with Systemax, and (2) 18 U.S.C. § 3664 (m)(1), which, Fiorentino argued, provided the federal government the sole right to enforce an order of restitution. Systemax moved to overrule Fiorentino's objection, dissolve the lis pendens, and lift the stay of enforcement. Thereafter, Systemax served Fiorentino with discovery in aid of execution. The discovery consisted of, among other things, 103 requests for production, seeking Fiorentino's personal financial information. Fiorentino moved for a protective order and requested a stay of discovery.

Following a hearing, the trial court entered the order on appeal. In the order, the trial court concludes that, although a victim is entitled to domesticate a federal

[4] Section 3664(m)(1) of the Mandatory Victim Restitution Act of 1996 ("MVRA") codifies the right to enforce a restitution judgment. Subsection (m)(1)(B) grants victims the right to obtain an abstract of judgment and record it as a lien on the defendant's property.

[5] Under Section 55.509 of the Florida Enforcement of Foreign Judgments Act ("FEFJA"), a judgment debtor may obtain a stay of enforcement of a foreign judgment that has been recorded in Florida upon showing "any ground upon which enforcement of a judgment of any circuit or county court of this state would be stayed."

restitution judgment, only the United States government may pursue enforcement of the lien created thereby. The trial court, however, rejected Fiorentino's argument that enforcement was precluded by the settlement agreement, finding that criminal restitution is "a separate and distinct remedy from that of the civil case that was previously settled." For this reason, the trial court declined to rule on Fiorentino's request for declaratory judgment and injunctive relief. In sum, the trial court denied Systemax's motions to overrule the objection, entered a stay, and dissolved the lis pendens. Consistent with its rulings, the court granted Fiorentino's motion for a protective order and stayed discovery of Fiorentino's personal financial information. This appeal followed.[6]

The issue on appeal is whether 18 U.S.C. §3664 (m)(1)(B) authorizes a criminal victim to pursue collection of a federal restitution order in state court.

II. STANDARD OF REVIEW

As a pure question of statutory interpretation, we review this matter de novo. Borden v. East-European Ins. Co., 921 So. 2d 587, 591 (Fla. 2006).

III. ANALYSIS

A. Jurisdiction

[6] In his brief, Fiorentino argues that the trial court also erred with regard to its ruling on the effect of the settlement agreement. Because Fiorentino did not cross appeal this issue, we will not address it.

Appellant claims that we have jurisdiction based on Florida Rule of Appellate Procedure 9.030(b)(1)(A). However, that rule generally pertains to appeals from final orders. The order at issue is not a final order.

Here, the trial court's order dissolved a lis pendens. In Rodriguez v. Guerra, 254 So. 3d 521 (Fla. 3d DCA 2018), we addressed this court's jurisdiction to review an order dissolving a lis pendens:

> [w]hile appellant challenged the subject non-final order via appeal, we recognize that recent decisions of this Court indicate that the appropriate procedure for reviewing non-final orders granting or discharging a lis pendens, and non-final orders relating to lis pendens bonds, is via a certiorari petition. See Bankers Lending Servs., Inc. v. Regents Park Invs., LLC, 225 So. 3d 884, 885 (Fla. 3d DCA 2017); 100 Lincoln Rd. SB, LLC v. Daxan 26 (FL), LLC, 180 So. 3d 134, 136 (Fla. 3d DCA 2015). These recent decisions, though, did not abrogate prior decisions of this Court concluding that we have appellate jurisdiction to review such non-final orders under Florida Rule of Appellate Procedure 9.130(a)(3)(B). See Acapulco Constr., Inc. v. Redavo Estates, Inc., 645 So. 2d 182, 183 (Fla. 3d DCA 1994); Roger Homes Corp. v. Persant Constr. Co., 637 So. 2d 5, 6 n. 1 (Fla. 3d DCA 1994); Munilla v. Espinosa, 533 So. 2d 895, 895 n. 1 (Fla. 3d DCA 1988). The result in this case is not dependent upon the review mechanism, and would have been the same had appellant filed a petition for certiorari relief rather than an appeal.

254 So. 3d at 521 n. 1. Because the result in this case is likewise not dependent on the review mechanism, we have jurisdiction. Having determined that jurisdiction exists, we turn to the merits.

B. Merits

1. Mandatory Victims Restitution Act

Section 3664 of the MVRA permits victims named in a restitution order to obtain an abstract of judgment and record it as a judgment lien on the defendant's property. See 18 U.S.C. § 3664(m)(1)(B). The relevant provision states:

> **(A)(i)** An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or
>
> **(ii)** by all other available and reasonable means.
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> **(B)** At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

18 U.S.C. § 3664(m)(1).

Here, the trial court found, and Fiorentino argues, that the language stating that "[a]n order of restitution *may be enforced by the United States*" places a limitation on the victim's rights with respect to enforcing a restitution order. 18 U.S.C. § 3664(m)(1)(A) (emphasis added). Specifically, Fiorentino contends that only the United States has the power to enforce a restitution order, and that the victim's only recourse is to request an abstract of judgment and record the abstract, which "shall be a lien on the property of the defendant." 18 U.S.C. § 3664(m)(1)(B).

Systemax, on the other hand, focuses on the language that states that the abstract of judgment serves as a lien "in the same manner and to the same extent and

under the same conditions as a judgment of a court of general jurisdiction in that State." 18 U.S.C. § 3664(m)(1)(B). According to Systemax, this phrase indicates that once the victim records the judgment lien, the victim may then proceed to enforce the restitution order in state court as with any other collection proceedings.

Upon review, we find that there are no Florida cases interpreting the statutory provision at bar. There are likewise no federal cases discussing the narrow issue before this Court. Lacking any precedential case law, we must interpret the language of the federal statute in accordance with well-settled principles of statutory interpretation.

The goal of statutory interpretation is to ascertain legislative intent. Patrick v. Hess, 212 So. 3d 1039, 1041 (Fla 2017). We look first to the plain language of the statute. Id. at 1041. If the language is clear and unambiguous, our inquiry stops there. Id. at 1041-42. If the language is ambiguous, however, we apply rules of statutory construction, including the doctrine of *in pari materia*. Id. at 1042. That doctrine requires statutes that pertain to the same subject or object to be construed together to harmonize them and give effect to the legislative intent. Id.; see also United States v. Witham, 648 F.3d 40, 47 (1st Cir. 2011) (quoting United States v. DiTomasso, 621 F.3d 17, 22 (1st Cir. 2010)) (stating courts "do not read individual sections of statutes in isolation because 'the meaning of statutory language, plain or not, depends on the context.'").

Here, the express language of 18 U.S.C. 3664(m)(1) authorizes enforcement of a federal criminal restitution order by two parties: (1) the United States, and (2) the victim named in the restitution order. Subsection (A) provides that right to the United States and specifically authorizes two methods of enforcement: (i) in the manner provided for in subchapter C of chapter 227 (dealing with the imposition of fines), and subchapter B of chapter 229 (dealing with collection of unpaid fines and restitution); or (ii) "by all other available and reasonable means." 18 U.S.C. § 3664(m)(1). The government's right to enforce restitution is expansive. See, e.g., Madigan v. Bronstein, 2018 WL 1768283, at *2 (S.D.N.Y. April 12, 2018) ("The robust panoply of enforcement options at the federal government's disposal includes 'the practices and procedures for enforcement of a civil judgment under Federal law or State law.'"). For example, the government can go after a defendant's pension funds and marital funds owned with a spouse, even after divorce. See, e.g., United States v. DeCay, 620 F.3d 534 (5th Cir. 2010); United States v. James, 312 F. Supp. 2d 802, 807 (E.D. Va. 2004). Further, this kind of debt may not be discharged by bankruptcy, and may even extend to homestead property. See, e.g., United States v. Jaffe, 314 F. Supp. 2d 216, 227 (S.D.N.Y. 2004), *aff'd*, 417 F.3d 259 (2d Cir. 2005) ("Florida homestead law will not protect [defendant] with respect to his duty to provide restitution to his victim [under the MVRA].").

When compared with the various forms of enforcement at the government's disposal, the victim's available tools for collecting restitution are meager at best. See Schultz v. United States, 594 F.3d 1120, 1123 (9th Cir. 2010). In fact, subsection (B) of § 3664(m)(1) does not even include the word "enforcement." Instead, it grants the victim only one option – recording the abstract of judgment as a lien. In sum, a victim's function within the MVRA statutory scheme itself is restrictive. United States v. Stoerr, 695 F.3d 271, 279 (3d Cir. 2012). As the Third Circuit in Stoerr explained,:

> [a] victim's role . . . is limited to conferring with the Government "to the extent practicable" regarding the amounts of restitution, § 3664(d)(1); submitting information to the probation officer regarding his or her losses; § 3664(d)(2)(A)(iii), (vi); petitioning the district court for an amended restitution award if he or she discovers further losses, § 3664(d)(5); moving for an adjustment of the defendant's payment schedule if the defendant's economic circumstances change, § 3664(k); and obtaining "an abstract of judgment certifying that a judgment has been entered in" his or her favor. § 3664(m)(1)(B).

Id. It is important to note that the recording of a lien is considered a method of "enforcement" in that it becomes a public record attaching to any property owned by the debtor at the time of the recording. See United States. v. Sawyer, 521 F.3d 792, 797 (7th Cir. 2008) (stating that the recording of a lien is a civil method of collection). The victim, however, is impeded from moving forward with execution, and is also precluded from pursuing other enforcement methods. See, e.g., United

States v. Kovall, 857 F.3d 1060, 1069 (9th Cir. 2017) (holding that the "MVRA does not confer on victims the right to appeal from a district court's restitution order.").

Notably, this was not always the case. In 1996, the MVRA replaced and repealed the Victim and Witness Protection Act ("VWPA"). Under the VWPA, "[a]n order of restitution [could] be enforced . . . by a victim named in the order to receive the restitution *in the same manner as a judgment in a civil action*." See 18 U.S.C. § 3663(h)(1)(B), (2), *repealed by* Pub. L. N. 104-132, § 205(a)(2) (emphasis added). But "pursuant to the new legislation in the MVRA, an order of restitution is now enforceable only by the United States." United States v. Perry, 360 F.3d 519, 542 (6th Cir. 2004) (Gibbons, J., dissenting).

Other sections of the MVRA, as well as other statutes amended by the MVRA, further support the idea that the federal government is primarily responsible for enforcing federal restitution orders. In enacting the 1996 MVRA, Congress "dramatically changed the statutory restitution scheme by mandating restitution of all victims and enhancing collection and enforcement rules." Witham, 648 F.3d at 45. The MVRA contains "a much more detailed procedure 'for issuance *and enforcement* of order[s] of restitution.'" Id. (emphasis in original). The act now mandates that the Attorney General is "responsible for collection of an unpaid fine or restitution . . . ." 18 U.S.C. § 3612(c). The Attorney General has, in turn, delegated that responsibility to each U.S. Attorney's Office. 28 C.F.R. § 0.171. In the same

statutory section, the MVRA requires "each victim to notify the Attorney General" of any changes in their contact information for restitution purposes. 18 U.S.C. § 3612(b)(1)(G). The amendments to the MVRA also expressly made "all provisions of [18 U.S.C. § 3613] available to the United States for enforcement of an order of restitution." 18 U.S.C. § 3613(f). This new "structure makes it clear that private-victim orders are within the responsibility *of the United States*." Witham, 648 F.3d at 45 (emphasis added).

Further, the differences between the victim's available means of enforcing a restitution order in the MVRA and the Crime Victims' Rights Act ("CVRA"), provide additional guidance. The CVRA, enacted in 2004, did not create any substantive rights to restitution for victims. Fed. Ins. Co. v. United States, 882 F.3d 348, 358 (2d Cir. 2018) (noting that "the CVRA's reference to restitution is a purely procedural one" and that "it does not expand any substantive rights to restitution provided by the MVRA"). However, the act expressly guarantees all crime victims the right to "full and timely restitution as provided by law." 18 U.S.C. § 3771(6). If victims are denied this right, the CVRA "provides [them] with a procedural mechanism to vindicate that right on their own behalf" via a "petition [to] the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3); Fed. Ins. Co., 882 F.3d at 357; see also Kovall, 857 F.3d at 1065, 1072.

The writ of mandamus is another enforcement mechanism that is absent from the MVRA, and its absence is no mistake. See Stoerr, 695 F.3d at 278-79; United States v. Monzel, 641 F.3d 528, 543-44 (D.C. Cir. 2011). A "statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" Mertens v. Hewitt Assocs., 508 U.S. 248, 254 (1993) (quoting Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146-47 (1985)) (emphasis in original). And here, "the MVRA's statutory scheme indicates that Congress intended for the Government, rather than for . . . victims, to be primarily responsible for ensuring proper restitution payments." Stoerr, 695 F.3d at 279; see also United States v. Hankins, 858 F.3d 1273, 1278 ("[t]aking restitution out of the hands of the criminal justice system and leaving it to private parties is not a result contemplated or countenanced by the MVRA.").

For present purposes, Systemax must abide by the MVRA and defer to the federal government for collection of the unpaid restitution. In this connection, the government can avail itself of federal law as well as state law mechanisms. See 18 U.S.C. § 3613(a) (granting the United States the power to enforce restitution "in accordance with the practices and procedures for the enforcement of a civil judgment *under Federal law or State law*."). For instance, several circuit courts have held that the United States may collect unpaid restitution via writs of garnishment under the

Federal Debt Collection Practices Act ("FDCPA"). See, e.g., United States v. Smith, 768 Fed. Appx. 926, 931 (11th Cir. 2019); United States v. Elashi, 789 F.3d 547, 551 (5th Cir. 2015); Witham, 648 F.3d at 46; United States v. Gianelli, 543 F.3d 1178, 1183 (9th Cir. 2008). The government can also utilize state law to enforce restitution orders on behalf of private victims. See, e.g., United States v. St. Germain, 363 F. Supp. 2d 1293, 1297-98 (D. Colo. 2005) (holding that a constructive trust can be used to enforce a restitution order under 18 U.S.C. § 3613(f)).

Further, as mentioned above, the Attorney General has delegated the responsibility of collecting unpaid restitution to each U.S. Attorney's Office. 28 C.F.R. § 0.171. Specifically, each U.S. Attorney has the authority to "establish an appropriate unit within his office, to be responsible for activities related to the satisfaction, collection, or recovery, as the case may be, of judgments, fines, penalties, and forfeitures (including bail-bond forfeitures)." 28 C.F.R. § 0.171(b). The U.S. Attorney's Office for the Southern District of Florida, for example, maintains a Financial Litigation Unit ("FLU"), whose "primary function . . . is to litigate and enforce the collection of criminal debts owed to the United States and third parties, *including criminal restitution*, fines, and penalties." *About the Office, The United States Attorney's Office Southern District of Florida*, U.S. DEP'T OF JUST., https://www.justice.gov/usao-sdfl/civil-division (last visited Sept. 23, 2019).

Here, the language in the restitution order is consistent with the aforementioned procedural mechanism. Specifically, the order states that "[t]he restitution shall be made payable to Clerk, United States Courts," and that "[t]he restitution will be forwarded by the Clerk of the Court to the victim on the attached list." More importantly, the order specifically instructs that "[t]he U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order." These excerpts reinforce the fact that, under the MVRA, the federal government is the sole entity with the ability to enforce a restitution order.

Consistent with the above, we hold that Section 3664(m)(1) does not permit a private victim, like Systemax, to pursue collection of a restitution order in its favor in state court. Accordingly, we affirm the trial court's order insofar as it entered a protective order, stayed discovery in aid of execution, and dissolved Fiorentino's lis pendens.

2. <u>Florida Enforcement of Foreign Judgments Act</u>

The omnibus order entered by the trial court grants a stay of enforcement proceedings, but required no bond in connection with the same. The Florida Enforcement of Foreign Judgments Act ("FEFJA"), §§ 55.501-55.509, Florida Statutes, and relevant case law are instructive on this issue.

The purpose of the FEFJA is "to provide an efficient method of enforcing foreign judgments without [the] undue cost and difficulty associated with filing a

new, separate action to domesticate a foreign judgment." Hess, 212 So. 3d at 1042; see also SCG Travel, Inc. v. Westminster Fin. Corp., 583 So. 2d 723, 725-26 (Fla. 4th DCA 1991). Once a foreign judgment is domesticated pursuant to the FEFJA, the judgment has the same effect as a Florida judgment, and "it may be enforced, released, or satisfied, as a judgment of a circuit or county court of this state." §55.503, Fla. Stat. (1984).

The FEFJA stems from the Full Faith and Credit Clause, which requires states to give the same effect to foreign judicial proceedings as the rendering jurisdiction gives them. 28 U.S.C. § 1738 (1948) (extending the application of the Full Faith and Credit Clause to federal court judgments); § 55.502, Fla. Stat.; see also Hess, 212 So. 3d at 1042.

The FEFJA states, in relevant part:

> If the judgment debtor shows the circuit or county court any ground upon which enforcement of a judgment of any circuit or county court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, **upon requiring the same security for satisfaction of the judgment which is required in this state**.

§ 55.509(2), Fla. Stat. (1989) (emphasis added). This section of the FEFJA is an adaptation of section 4 of the Uniform Enforcement of Foreign Judgments Act (1964), 13 U.L.A. 175. SCG Travel, 583 So. 2d at 725. Courts have interpreted the phrase "any ground upon which enforcement . . . would be stayed" to include "supersedeas or stays pending review under rule 9.130, Florida Rules of Appellate

Procedure, as well as any other recognized legal or equitable basis for suspending the effectiveness of a final judgment." Id. at 726.

Here, we have identified a "recognized legal or equitable basis for suspending the effectiveness" of the final judgment restitution order—Systemax does not have the power to enforce the restitution order under the MVRA. See id. Accordingly, the appropriate bond should have been required in this case because "[a]llowing a stay in Florida without [a bond] gives [Fiorentino] more rights here under the final judgment" than he does under federal law, and in turn gives Systemax less. See id. Further, granting an unconditional stay might deprive Systemax of rights to execution that the rendering court would otherwise grant—which would contravene the Full Faith and Credit Clause. See id. Here, the record reflects that Fiorentino has already begun to make payments towards satisfying his restitution obligations. Thus, "[w]e leave to the discretion of the trial [court] whether the foreign judgment should be secured by" Fiorentino's satisfaction thus far of the restitution order, "or [by] some other form of valuable consideration, or any combination thereof." Walters v. Aquatic Sensors Corp., 633 So. 2d 475, 477 (Fla. 1st DCA 1994).

IV. CONCLUSION

Accordingly, we affirm in part, and reverse in part with instructions, consistent with this opinion.