UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division
Case Number: 16-23894-CIV-MARTINEZ-GOODMAN

DEL MONTE INTERNATIONAL, GMBH,

Plaintiff,

vs.

TICOFRUT S.A.,

Defendant.
_____/

ORDER ADOPTING REPORT AND RECOMMENDATION

THE MATTER was referred to the Honorable Jonathan Goodman, United States Magistrate Judge, for a Report and Recommendation on Plaintiff's Motion for Writ of Garnishment (the "Motion") [ECF No. 1-2 at 68]. Magistrate Judge Goodman filed a Report and Recommendation [ECF No. 81], recommending that the Motion be denied without prejudice. The Court has reviewed the entire file and record and notes that no objections have been filed. After careful consideration, it is hereby:

ADJUDGED that United States Magistrate Judge Goodman's Report and Recommendation [ECF No. 81] is **AFFIRMED** and **ADOPTED**. Accordingly, it is:

ADJUDGED that Plaintiff's Motion for Writ of Garnishment [ECF No. 1-2 at 68] is **DENIED without prejudice**.

DONE AND ORDERED in Chambers at Miami, Florida, this 15 day of May, 2017.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Goodman
All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
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DEL MONTE INTERNATIONAL GMBH,

Plaintiff,

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_____/

REPORT AND RECOMMENDATIONS ON PLAINTIFF'S
MOTION FOR A WRIT OF GARNISHMENT

Plaintiff Del Monte International GMBH ("Del Monte") filed a motion for garnishment [ECF No. 1-2, pp. 68-70] against Defendant/Garnishee, Ticofrut S.A. ("Ticofrut") in Miami-Dade Circuit Court. Del Monte removed the lawsuit (with its incorporated garnishment motion) to federal court [ECF No. 1]. Del Monte filed a memorandum in support of its garnishment motion, Tico filed an opposition response, Del Monte filed a reply and United States District Judge Jose E. Martinez referred the motion to me. [ECF Nos. 7; 17; 21; 32]. Ticofrut is both the defendant and the garnishee.

Del Monte is seeking to use Florida's post-judgment garnishment statute, not its pre-judgment garnishment statute. Specifically, Del Monte has invoked the relief provided by Florida Statute § 77.03, entitled "Issuance of writ after **judgment.**"

(emphasis added). That statute permits the filing of a motion seeking a writ of garnishment "[***a***]***fter*** **judgment** has been obtained against defendant but before the writ of garnishment is issued[.]" Fla. Sta. § 77.03 (emphasis supplied).

Del Monte does not have a judgment, however. Instead, it has an unconfirmed arbitration award. It has not invoked Florida's *pre*-judgment garnishment statute. It cannot use the post-judgment statute at this procedural point, and the Undersigned therefore **respectfully recommends** that Judge Martinez **deny** the motion without prejudice (with leave to refile after Del Monte converts the arbitration award into an actual judgment or until it presents an adequate verified motion under Florida's statute for "[i]ssuance of writ *before* judgment" (i.e., Fla. Stat. § 77.031) (emphasis supplied).[1]

Factual Background

Del Monte provided the following factual history, which is, for all practical purposes, undisputed:

A Final Arbitral Award dated June 10, 2016 was issued by the International Court of Arbitration of the International Chamber of Commerce in Case No. 20097/RD in favor of Del Monte and against Inversiones y Procesadora Tropical, S.A. ("Inprotsa"). The arbitration was conducted in Miami. Inprotsa moved for correction and

[1] Ticofrut asserts other challenges to Del Monte's motion for a writ of garnishment. Given Del Monte's inability to meet the threshold requirement of having an actual judgment, the Undersigned need not now consider the other arguments.

clarification of the Final Arbitral Award, which was denied in its entirety by the Arbitral Tribunal on August 6, 2016.

Pursuant to Paragraph 122 of the Final Arbitral Award, Inprotsa was ordered to pay Del Monte damages in the sum of US $26,133,000.00, arbitral costs of US $650,000.00, and legal representation costs and fees of US $2,507,440.54, for a total amount of US $29,290,440.54, plus pre-award and post-award interest.

According to Del Monte, before and after the entry of the Final Arbitral Award, TicoFrut has been purchasing pineapples from Inprotsa for consignment into Florida. TicoFrut is indebted to Inprotsa for its prior purchases of pineapple from Inprotsa. Del Monte contends that it is entitled to garnish debts that are due to Inprotsa from TicoFrut pursuant to § 77.03, Fla. Stat.

Section 77.03 states: "Issuance of writ after judgment. – After judgment has been obtained against defendant but before the writ of garnishment is issued, the plaintiff, the plaintiff's agent or attorney, shall file a motion (which shall not be verified or negative defendant's exemptions) stating the amount of the judgment. The motion may be filed and the writ issued either before or after the return of execution."

In its response, Ticofrut provides the following additional facts:

On July 18, 2016, Del Monte filed a petition seeking recognition and authorization of the Award against Inprotsa in Costa Rica. Del Monte has not otherwise

sought to confirm the Award in any court in the United States, and no court of any country has rendered a judgment confirming the Award.

Instead, on July 25, 2016, Plaintiff commenced this action against Ticofrut in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida, Case No. 16-019068 (the "Action"), asserting a series of claims based entirely on the Award. Specifically, Del Monte asserted five claims against Ticofrut: (i) tortious interference with contractual rights held by Plaintiff against Inprotsa under the Contract, as so defined by the Award; (ii) aiding and abetting Inprotsa's alleged breach of the Contact, as so defined by the Award; (iii) aiding and abetting Inprotsa's breach of an injunction entered against Inprotsa as part of the Award; (iv) conspiring with Inprotsa to violate the injunction entered against Inprotsa as part of the Award; and (v) conspiring with Inprotsa to violate its obligations to Plaintiff under the Contract, as so defined by the Award.

On September 9, 2016, Inprotsa filed a Petition to Vacate the Award in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida, Case No. 2016-023517-CA-01, on the grounds that the arbitral tribunal (i) exceeded its powers by issuing an award contrary to the plain language of the Contract and ignoring well-settled Florida law, and (ii) denied Inprotsa's fundamental due process protections by failing to consider Inprotsa's defenses or giving any weight to relevant and decisive evidence.

On September 12, 2016, Ticofrut timely filed a Notice of Removal and Del Monte filed its memorandum in support of the garnishment motion against Ticofrut on September 23, 2016.

Legal Principles and Analysis

Neither party has submitted any binding authority on the precise issue here: whether an unconfirmed arbitration award not converted to a judgment can be used to obtain a writ of garnishment under Florida's garnishment statute for a "writ after judgment." Likewise, neither party has submitted any binding authority (from either the United States Supreme Court or the Eleventh Circuit Court of Appeals) answering that question for another state's similar post-judgment garnishment statute.

Instead, the parties' memoranda discuss broad concepts which do not answer the specific question. For example, Del Monte cites authority for the general proposition that an arbitration award "is a final adjudication by a court of the parties' own choice, and is entitled to the respect due to the judgment of a court of last resort." *Carter v. State Farm Mut. Auto Ins. Co.*, 224 So. 2d 802, 806 (Fla. 1st DCA 1969). But *Carter* had nothing to do with the issue of whether an arbitration award could be used to obtain a writ of garnishment authorized by a statute applicable after a judgment.

To be sure, *Carter* does mention the language which Del Monte lifted out of the case. But the case itself concerned the issue of whether a party waived any lawful objections it might have had to an arbitration award by failing to apply to the

arbitrators for a modification or correction of a portion of the award and by failing to seek relief from a court for an award modifying or correcting that portion of the arbitration award. Because of the waiver, the award became final and the court "had no alternative but to render judgment." *Id.* at 806. The holding does not support Del Monte's position (nor does it undermine it) because it concerns a completely different question.

Likewise, Del Monte cites authority for the principle that "[t]he binding effect of the arbitration clause does not turn on whether [the prevailing parties] have enforced the award; rather, **the arbitration award becomes final once the arbitrator releases his findings**." *Centuron Air Cargo, Inc. v. United Parcel Serv. Co.*, 300 F. Supp. 2d 1281, 1286 (S.D. Fla. 2004) (emphasis in original) (internal citations omitted). But *Centurion* did not involve the present question either. Instead, the portion of the opinion involving arbitration concerned a party (i.e., UPS) which set off its monthly installment because of the opposing party's failure to comply with the arbitration order's requirement to indemnify UPS. Because the arbitration order was a "binding arbitral decision," UPS did not breach a purchase agreement by taking the set-off. It had nothing to do with the garnishment statute at issue here, nor did it concern a requirement (statutory, regulatory, contractual or otherwise) that a "judgment" be first obtained.

Ticofrut asserts the same type of generic, sweeping citations to legal authority. For instance, it cites to *Continental National Bank of Miami v. Tavormina (In re Masvidal)*,

10 F.3d 761, 763 (11th Cir. 1993), for the proposition that garnishment should be strictly construed and should be limited to only those circumstances expressly authorized by the applicable garnishment statute. To be sure, the Court there explained that a statutory garnishment proceeding "should not be pushed in its operation beyond the statutory authority under which it is resorted to[,]" and held that the service of a writ of garnishment is not the same thing as execution for the purpose of executing a lien. *Id.* (internal citation omitted). But that does not answer the question of whether a party holding only an arbitration award can obtain a writ of garnishment under the Florida statute addressing post-judgment garnishments.

Del Monte filed a notice of supplemental authority [ECF No. 78], but the two cases it cites are not helpful. One involved a writ of garnishment entered by court clerk without a challenge to the unconfirmed arbitral award and the other involved a two-sentence order entered by a state circuit court judge without any analysis or explanation in the Order.

Specifically, Del Monte called my attention to *Saturn Telecommunications Services, Incorporated v. Covad Communications Company*, Case No. 06-60251-CIV-Jordan (S.D. Fla. 2008), where a deputy clerk entered routine writ of garnishments in response to *ex parte* motions for garnishment based on an unconfirmed American Arbitration Association arbitration award and filed under seal. The motions were entitled as ones for a "post-judgment writ of garnishment." The *ex parte* motion for the garnishment writ also

represented, in the body of the motion, that it was seeking the issuance "of a post-judgment writ of garnishment" and described the unconfirmed arbitration award as a "judgment" and purported to attach a copy of the "judgment" by attaching a copy of the arbitration award. The motion relied upon *Capital Factors, Inc. v. Alba Rent-A-Car, Inc.*, 965 So. 2d 1178, 1182 (Fla. 4th DCA 2007).

After the writ was issued, the defendant filed a verified motion to dissolve the writ and requested an immediate hearing. The motion noted that the plaintiff held only an unconfirmed arbitration award, not a judgment (as represented in the title and body of the motion for a writ of garnishment). United States District Judge (now an Eleventh Circuit Court of Appeals judge) Adalberto Jordan scheduled the motion for a hearing, and the plaintiff/the garnishor then **voluntarily dismissed** the writ of garnishment. [No. 06-60251-CIV-Jordan, ECF No. 70].

Given that *Saturn Telecommunications* involved (1) a writ issued solely by a deputy clerk based on an incorrect description of the arbitration award as a judgment, (2) a district judge who never ruled upon the propriety of the writ, (3) a motion to dissolve the writ because, among other reasons, it was based on an arbitration award and not an actual judgment, and (4) a voluntary dismissal shortly before the Court was scheduled to hold a hearing to address the validity of the writ of garnishment, the case does not provide much support to Del Monte. In fact, it might actually undermine Del Monte's position because it could be interpreted as suggesting that the garnishor

recognized its inability to use Florida's post-judgment garnishment statute with only an unconfirmed arbitration award.

Del Monte also flagged *Morgan Keegan & Co., Inc. v. Rotundo,* Case No. 12-21498, a Miami-Dade state circuit court case where the garnishor represented in its motion that the *Capital Factors* Court "conclusively determined that a final, but unconfirmed, arbitration award, is subject to the garnishment procedure of Fla. Stat. § 77.01." Morgan Keegan, the party against whom the FINRA arbitration award was entered, filed an objection to the motion for garnishment, arguing that Rotundo could not obtain a writ of garnishment under the statute because he did not have a judgment. The Circuit Court entered a one-sentence order simply saying that the motion was granted (and directing the Clerk to "execute the writ)." No analysis of any kind was provided. Although the garnishor prevailed there and obtained a writ based on an unconfirmed arbitration award, the complete lack of analysis in the Order renders it unhelpful to the Undersigned.

In its initial memorandum, Del Monte cites *Capital Factors*, but not precisely for the issue that an arbitration award is the equivalent of a judgment and can be used to support the issuance of a writ of garnishment under Florida's post-judgment garnishment statute. Instead, it cites *Capital Factors* for the following propositions: (1) "Florida looks favorably upon agreements to arbitrate," (2) the "pendency of a motion

to vacate or clarify an arbitral award does not render the arbitral award non-final," and (3) "a disputed debt due is still subject to garnishment." [ECF No. 7, pp. 3-4].

But the other cases relied upon by Del Monte purport to construe *Capital Factors* as authority for the view that an unconfirmed arbitration award can sustain the issuance of a writ of garnishment under Florida's post-judgment garnishment statute.

But the case does no such thing.

The *Capital Factors* Court did not authorize *post-judgment* garnishment for an unconfirmed award, rather, it merely determined that an unconfirmed award was liquidated and qualified as a debt due to the general garnishment introduced in Section 77.01. 965 So. 2d at 1182-83.

In other words, *Capital Factors* involves a completely different factual scenario and a different legal question. Most importantly, the party seeking a writ of garnishment there **already had a judgment** it was seeking to enforce. Unlike the instant case, the issue in *Capital Factors* was whether an unconfirmed arbitration award was a "debt due" within the meaning of Florida Statute § 77.01, and thus subject to garnishment, or whether it was only a contingent or uncertain debt that could not be garnished. *Id.* at 1180.

The party seeking the writ of garnishment had a judgment against an entity named Alba in an unrelated lawsuit and served a writ of garnishment against another company named Avalon. Alba had received an arbitration award against Avalon

which had not been confirmed by a court. Avalon then entered into a settlement with Alba at the arbitration by agreeing to pay Alba. The Fourth District held that the unconfirmed arbitration award in favor of Alba and against Avalon was a "debt due" by Avalon and therefore subject to garnishment. *Id.* at 1184. It never involved the threshold question of whether a party could seek a writ of garnishment under the post-judgment garnishment statute without a judgment in its favor, which is the issue presented here. The issue there was what **property** could be garnished in a garnishment based on a judgment.

It is undisputed that Del Monte does not have a judgment against Inprotsa. All that it has is an arbitration award. Del Monte has not convinced me that an arbitration award is the functional equivalent of a judgment for purposes of invoking the state's post-judgment garnishment statute.

Under Florida law, an arbitration award may be confirmed pursuant to Florida Statute § 682.12, vacated pursuant to Florida Statute § 682.13, or modified or corrected pursuant to § 682.14. Section 682.15 provides that "[u]pon the granting of an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a *judgment* in conformity therewith. The judgment may be . . . enforced as any other judgment in a civil action." (emphasis added). No order has been entered by the Court confirming, vacating or modifying the arbitration award, and *no judgment* has been entered on an order confirming, vacating or modifying the award.

Given the nature of the arbitration award, it is appropriate to look to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (more commonly known as the New York Convention (the "Convention")), codified and implemented by Chapter 2 of the FAA, 9 U.S.C. § 201 *et seq.*, which governs the enforcement of arbitral awards subject to the Convention. Chapter 2 of the FAA in turn provides for recognition and enforcement of such an award through judicial action. *See* 9 U.S.C. §§ 207-208; *see also Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1262–63 (11th Cir. 2011).

In particular, the FAA makes clear that, to be enforced as a civil judgment, an award subject to the Convention (like the Award here) must first be confirmed and converted into a judgment by a court: "[t]he judgment so entered [upon confirmation] shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered." 9 U.S.C. § 13.

Given these provisions, the Undersigned agrees with Ticofrut that a foreign arbitration award that has not been confirmed is not a judgment. Instead, it is a contractual entitlement to receive money and must be reduced to a judgment before the party owed the debt may obtain a post-judgment writ of garnishment.

Pursuant to *Capital Factors*, of course, a judgment creditor could obtain a writ of garnishment *against* the arbitration award -- as the property subject to garnishment. But

Del Monte is not a judgment creditor. It is seeking to use the unconfirmed arbitration award as the ground to have a writ of garnishment issued in the first place -- not to have the arbitration award as the ***property*** **subject to a writ issued on a judgment.**

As explained in *C & S Plumbing, Inc. v. Live Supply, Inc.*, 397 So. 2d 998, 999 (Fla. 4th DCA 1981) (emphasis added): "A writ of garnishment is one form of final process to enforce *a judgment* solely for the payment of money." (internal citation omitted). Absent a *judgment*, Del Monte is not entitled to a writ of garnishment under the post-judgment garnishment statute. *See e.g., Guardian Sales Corp. v. John Michaels Enterprises, Inc.*, No. 23343, 2003 WL 327667, at *3 (Mich. App. Feb. 11, 2003) (noting that a writ of garnishment could not have attached before entry of an order confirming the arbitration award); c*f. Mullins Lumber Co. v. Guildway Building Supplies, Inc.*, 446 So. 2d 1083, 1083 (Fla. 4th DCA 1984) (noting that writ of garnishment was issued prematurely where the time for moving for a new trial or rehearing had not expired).

The absence of a judgment is critical. The statute concerns post-judgment relief. The significance of a judgment (and the related significance of the *absence* of a judgment) has been deemed critical in other settings concerning garnishments. For example, in *Continental National Bank,* the presence (or absence) of a judgment on the writ of garnishment determines whether service of a writ of garnishment generates a lien under Florida law. If a judgment is entered against the garnishee on the writ, then a lien is created, but if no judgment is obtained, then no lien exists. Therefore, in that case,

the Eleventh Circuit explained that "because neither Continental nor Ocean [two judgment creditors] obtained judgment against Hamilton as garnishee, they now stand as unsecured creditors and the Funds constitute property of the estate free of any liens." 10 F.3d at 764.[2]

Del Monte mentions, almost in passing, in a footnote, that the Provisional Relief Court in Rotterdam, Netherlands, issued garnishment writs to Fruitpoint B.V. and to SanLucar Fruit S.L. But Del Monte has not provided any other information about those other writs. The Undersigned does not know whether that Court invoked a statute or law permitting a garnishment writ based on an arbitration award. The decisions of that foreign court are obviously not binding on the Undersigned, but without information, I cannot even deem those writs as persuasive or even helpful to the analysis.

The Undersigned respectfully recommends that Judge Martinez **deny** (albeit without prejudice) Del Monte's motion for a writ of garnishment.

Objections

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendations within which to file written objections, if any, with the United States District Judge. Each party may file a response to the other party's objection within fourteen (14) days of the objection. Failure to file objections

[2] Ticofrut cited *Continental National Bank* in its response [ECF No. 17, p. 7], but for a different proposition (i.e., that garnishment proceedings are strictly construed and must be limited to only circumstances expressly authorized by the garnishment statute).

timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in Chambers, in Miami, Florida, on January 30, 2017.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Jose E. Martinez
All counsel of record