# Florida Real Property and Business Litigation Report

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Manuel Farach

**Lagos v. United States, Case No. 16–1519 (2018).**

The words "investigation" and "proceedings" in subsection (b)(4) of the Mandatory Victims Restitution Act, 18 U. S. C. §3663A(b)(4), are limited to government investigations and criminal proceedings and funds spent by private parties are not covered under the Act.

**In Re: Amendments to Florida Rule of Civil Procedure, 1.570 and Form 1.914, Case No. SC17-1533 (Fla. 2018).**

New subdivision (e) is added to Florida Rule of Civil Procedure 1.570 and consistent therewith, new forms 1.914(b) (Notice to Appear) and 1.914(c) (Affidavit of Claimant in Response to Notice to Appear) are added. The new subdivision reads as follows:

> (e) Proceedings Supplementary. Proceedings supplementary to execution and related discovery shall proceed as provided by chapter 56, Florida Statutes. Notices to Appear, as defined by law, and supplemental complaints in proceedings supplementary must be served as provided by the law and rules of procedure for service of process.

**McCampbell v. Federal National Mortgage Association, Case No. 2D16-177 (Fla. 2d DCA 2018).**

On rehearing, the Second District clarifies that admission of copy of a loan modification agreement without explanation as to failure to produce the original is error; no conflict certified with *Liukkonen v. Bayview Loan Servicing*, LLC, No. 4D16-4193 (Fla. 4th DCA Mar. 28, 2018).

**P & S & Co. LLC v. SJ MAK, LLC, Case No. 3D16-1585 (Fla. 3d DCA 2018).**

Proceedings supplementary aimed at non-bankruptcy co-defendants and that do not seek to void fraudulent transfers do not violate the automatic stay.

**Wolentarski v. Anchor Property & Casualty Insurance Company, Case No. 3D17-2405 (Fla. 3d DCA 2018).**

The failure of a non-movant to timely submit any evidence or filings in opposition to a motion for summary judgment establishes there is no record of a material issue or a disputed fact.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## LAGOS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16–1519. Argued April 18, 2018—Decided May 29, 2018

Petitioner Sergio Fernando Lagos was convicted of using a company he controlled to defraud a lender of tens of millions of dollars. After the fraudulent scheme came to light and Lagos' company went bankrupt, the lender conducted a private investigation of Lagos' fraud and participated as a party in the company's bankruptcy proceedings. Between the private investigation and the bankruptcy proceedings, the lender spent nearly $5 million in legal, accounting, and consulting fees related to the fraud. After Lagos pleaded guilty to federal wire fraud charges, the District Court ordered him to pay restitution to the lender for those fees. The Fifth Circuit affirmed, holding that such restitution was required by the Mandatory Victims Restitution Act of 1996, which requires defendants convicted of certain federal offenses, including wire fraud, to, among other things, "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense," 18 U. S. C. §3663A(b)(4).

*Held*:

1. The words "investigation" and "proceedings" in subsection (b)(4) of the Mandatory Victims Restitution Act are limited to government investigations and criminal proceedings and do not include private investigations and civil or bankruptcy proceedings. The word "investigation" appears in the phrase "the investigation or prosecution." Because the word "prosecution" must refer to a government's criminal prosecution, this suggests that the word "investigation" refers to a government's criminal investigation. Similar reasoning suggests that the immediately following reference to "proceedings" refers to criminal proceedings. Furthermore, the statute refers to the victim's

Syllabus

"participation" in the "investigation," and "attendance" at "proceedings," which would be odd ways to describe a victim's role in its own private investigation and as a party in noncriminal court proceedings, but which are natural ways to describe a victim's role in a government's investigation and in the criminal proceedings that a government conducts.

Moreover, the statute lists three specific items that must be reimbursed: lost income, child care expenses, and transportation expenses. These are precisely the kind of expenses that a victim is likely to incur when missing work and traveling to participate in a government investigation or to attend criminal proceedings. In contrast, the statute says nothing about the kinds of expenses a victim would often incur during private investigations or noncriminal proceedings, namely, the costs of hiring private investigators, attorneys, or accountants. This supports the Court's more limited reading of the statute.

A broad reading would also require district courts to resolve difficult, fact-intensive disputes about whether particular expenses "incurred during" participation in a private investigation were in fact "necessary," and about whether proceedings such as a licensing proceeding or a Consumer Products Safety Commission hearing were sufficiently "related to the offense." The Court's narrower interpretation avoids such controversies, which are often irrelevant to the victim because over 90% of criminal restitution is never collected.

The Court's interpretation means that some victims will not receive restitution for all of their losses from a crime, but that is consistent with the Mandatory Victims Restitution Act's enumeration of limited categories of covered expenses, in contrast with the broader language that other federal restitution statutes use, see, *e.g.,* 18 U. S. C. §§2248(b), 2259(b), 2264(b), 2327(b). Pp. 3–7.

2. That the victim shared the results of its private investigation with the Government does not make the costs of conducting the private investigation "necessary . . . other expenses incurred during participation in the investigation . . . of the offense." §3663A(b)(4). That language does not cover the costs of a private investigation that the victim chooses on its own to conduct, which are not "incurred during" participation in a government's investigation. Pp. 7–8.

864 F. 3d 320, reversed and remanded.

BREYER, J., delivered the opinion for a unanimous Court.

# SUPREME COURT OF THE UNITED STATES

No. 16–1519

SERGIO FERNANDO LAGOS, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May 29, 2018]

JUSTICE BREYER delivered the opinion of the Court.

The Mandatory Victims Restitution Act of 1996 requires defendants convicted of a listed range of offenses to

> "reimburse the victim for lost income and necessary child care, transportation, and other expenses *incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense*." 18 U. S. C. §3663A(b)(4) (emphasis added).

We must decide whether the words "investigation" and "proceedings" are limited to government investigations and criminal proceedings, or whether they include private investigations and civil proceedings. In our view, they are limited to government investigations and criminal proceedings.

## I

The petitioner, Sergio Fernando Lagos, was convicted of using a company that he controlled (Dry Van Logistics) to defraud a lender (General Electric Capital Corporation, or GE) of tens of millions of dollars. The fraud involved

generating false invoices for services that Dry Van Logistics had not actually performed and then borrowing money from GE using the false invoices as collateral. Eventually, the scheme came to light. Dry Van Logistics went bankrupt. GE investigated. The Government indicted Lagos. Lagos pleaded guilty to wire fraud. And the judge, among other things, ordered him to pay GE restitution.

The issue here concerns the part of the restitution order that requires Lagos to reimburse GE for expenses GE incurred during its own investigation of the fraud and during its participation in Dry Van Logistics' bankruptcy proceedings. The amounts are substantial (about $5 million), and primarily consist of professional fees for attorneys, accountants, and consultants. The Government argued that the District Court must order restitution of these amounts under the Mandatory Victims Restitution Act because these sums were "necessary . . . other expenses incurred during participation in the investigation . . . of the offense or attendance at proceedings related to the offense." §3663A(b)(4). The District Court agreed, as did the U. S. Court of Appeals for the Fifth Circuit. 864 F. 3d 320, 323 (2017).

Lagos filed a petition for certiorari. And in light of a division of opinion on the matter, we granted the petition. Compare *United States* v. *Papagno*, 639 F. 3d 1093, 1100 (CADC 2011) (subsection (b)(4) of the Mandatory Victims Restitution Act does not cover private investigation costs), with *United States* v. *Elson*, 577 F. 3d 713, 726–729 (CA6 2009) (statute not so limited); *United States* v. *Hosking*, 567 F. 3d 329, 331–332 (CA7 2009) (same); *United States* v. *Stennis-Williams*, 557 F. 3d 927, 930 (CA8 2009) (same); *United States* v. *Amato*, 540 F. 3d 153, 159–163 (CA2 2008) (same); *United States* v. *Gordon*, 393 F. 3d 1044, 1056–1057 (CA9 2004) (same).

## II

The Mandatory Victims Restitution Act is one of several federal statutes that govern federal court orders requiring defendants convicted of certain crimes to pay their victims restitution. It concerns "crime[s] of violence," "offense[s] against property . . . , including any offense committed by fraud or deceit," and two specific offenses, one concerning tampering with a consumer product and the other concerning theft of medical products. 18 U. S. C. §3663A(c)(1)(A). It requires, in the case of property offenses, return of the property taken or its value, §3663A(b)(1); in the case of bodily injury, the payment of medical expenses and lost income, §3663A(b)(2); in the case of death, the payment of funeral expenses, §3663A(b)(3); and, as we have said, *supra*, at 1, in all cases, "reimburse[ment]" to

> "the victim for lost income and necessary child care, transportation, and other expenses *incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense*." §3663A(b)(4) (emphasis added).

We here consider the meaning of that italicized phrase. Specifically, we ask whether the scope of the words "investigation" and "proceedings" is limited to government investigations and criminal proceedings, or whether it includes private investigations and civil or bankruptcy litigation. We conclude that those words are limited to government investigations and criminal proceedings.

Our conclusion rests in large part upon the statute's wording, both its individual words and the text taken as a whole. The individual words suggest (though they do not demand) our limited interpretation. The word "investigation" is directly linked by the word "or" to the word "prosecution," with which it shares the article "the." This suggests that the "investigation[s]" and "prosecution[s]" that

the statute refers to are of the same general type. And the word "prosecution" must refer to a government's criminal prosecution, which suggests that the word "investigation" may refer to a government's criminal investigation. A similar line of reasoning suggests that the immediately following reference to "proceedings" also refers to criminal proceedings in particular, rather than to "proceedings" of any sort.

Furthermore, there would be an awkwardness about the statute's use of the word "participation" to refer to a victim's role in its own private investigation, and the word "attendance" to refer to a victim's role as a party in non-criminal court proceedings. A victim opting to pursue a private investigation of an offense would be more naturally said to "provide for" or "conduct" the private investigation (in which he may, or may not, actively "participate"). And a victim who pursues civil or bankruptcy litigation does not merely "atten[d]" such other "proceedings related to the offense" but instead "participates" in them as a party. In contrast, there is no awkwardness, indeed it seems perfectly natural, to say that a victim "participat[es] in the investigation" or "attend[s] . . . proceedings related to the offense" if the investigation at issue is a government's criminal investigation, and if the proceedings at issue are criminal proceedings conducted by a government.

Moreover, to consider the statutory phrase as a whole strengthens these linguistic points considerably. The phrase lists three specific items that must be reimbursed, namely, lost income, child care, and transportation; and it then adds the words, "and other expenses." §3663A(b)(4). Lost income, child care expenses, and transportation expenses are precisely the kind of expenses that a victim would be likely to incur when he or she (or, for a corporate victim like GE, its employees) misses work and travels to talk to government investigators, to participate in a government criminal investigation, or to testify before a

grand jury or attend a criminal trial. At the same time, the statute says nothing about the kinds of expenses a victim would often incur when private investigations, or, say, bankruptcy proceedings are at issue, namely, the costs of hiring private investigators, attorneys, or accountants. Thus, if we look to *noscitur a sociis*, the well-worn Latin phrase that tells us that statutory words are often known by the company they keep, we find here both the presence of company that suggests limitation and the absence of company that suggests breadth. See, *e.g., Yates* v. *United States*, 574 U. S. ___, ___ (2015) (slip op., at 14).

We add a practical fact: A broad reading would create significant administrative burdens. The statute provides for mandatory restitution, and the portion we construe is limited to "*necessary* . . . other expenses." §3663A(b)(4) (emphasis added). The word "necessary" would, if the statute is broadly interpreted, invite disputes as to whether particular expenses "incurred during" participation in a private investigation or attendance at, say, a bankruptcy proceeding, were in fact "necessary." Such disputes may become burdensome in cases involving multimillion dollar investigation expenses for teams of lawyers and accountants. A district court might, for example, need to decide whether each witness interview and each set of documents reviewed was really "necessary" to the investigation. Similarly, the statute also limits restitution to expenses incurred only during "attendance at *proceedings related* to the offense," *ibid.* (emphasis added), inviting disputes as to whether, say, a licensing proceeding, a human resources review, an in-house disciplinary proceeding, a job interview, a Consumer Product Safety Commission hearing, or a neighborhood watch meeting qualified as "proceedings" sufficiently "related to the offense" so as to be eligible for restitution.

To interpret the statute broadly is to invite controversy on those and other matters; our narrower construction

avoids it. And one begins to doubt whether Congress intended, in making this restitution mandatory, to require courts to resolve these potentially time-consuming controversies as part of criminal sentencing—particularly once one realizes that few victims are likely to benefit because more than 90% of criminal restitution is never collected. See GAO, Federal Criminal Restitution: Most Debt Is Outstanding and Oversight of Collections Could Be Improved 25 (GAO–18–203, 2018) (explaining that the Justice Department considers 91% of outstanding criminal restitution to be "uncollectible").

There are, of course, contrary arguments—arguments favoring a broad interpretation. The Government points out, in particular, that our narrow interpretation will sometimes leave a victim without a restitution remedy sufficient to cover some expenses (say, those related to his private investigation) which he undoubtedly incurred as a result of the offense. Leaving the victim without that restitution remedy, the Government adds, runs contrary to the broad purpose of the Mandatory Victims Restitution Act, namely, "to ensure that victims of a crime receive full restitution." *Dolan* v. *United States*, 560 U. S. 605, 612 (2010).

But a broad general purpose of this kind does not always require us to interpret a restitution statute in a way that favors an award. After all, Congress has enacted many different restitution statutes with differing language, governing different circumstances. Some of those statutes specifically require restitution for the "full amount of the victim's losses," defined to include "any . . . losses suffered by the victim as a proximate result of the offense." See 18 U. S. C. §§2248(b), 2259(b), 2264(b), 2327(b). The Mandatory Victims Restitution Act, however, contains no such language; it specifically lists the kinds of losses and expenses that it covers. Moreover, in at least one other statute Congress has expressly provided for

restitution of "the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense." §3663(b)(6). Again the Mandatory Victims Restitution Act has no similar provision. And given those differences between the Mandatory Victims Restitution Act and other restitution statutes, we conclude that the considerations we have mentioned, particularly those based on a reading of the statute as a whole, tip the balance in favor of our more limited interpretation.

We add that this interpretation does not leave a victim such as GE totally without a remedy for additional losses not covered by the Mandatory Victims Restitution Act. GE also brought a civil lawsuit against Lagos for the full extent of its losses, and obtained an over-$30 million judgment against him. The Government says that GE has largely been unable to collect on that judgment, but there is no reason to think that collection efforts related to a criminal restitution award would prove any more successful.

The Government makes one additional argument. It points out that GE shared with the Government the information that its private investigation uncovered. And that fact, the Government says, should bring the expenses of that investigation within the terms of the statute even if the "investigation" referred to by the statute is a government's criminal investigation. The short, conclusive answer to that claim, however, lies in the fact that the statute refers to "necessary child care, transportation, and other expenses incurred *during* participation in the investigation or prosecution of the offense." §3663A(b)(4) (emphasis added). It does not refer to expenses incurred *before* the victim's participation in a government's investigation began. And the Government does not deny that it is those preparticipation expenses—the expenses of conducting GE's investigation, not those of sharing the results

from it—that are at issue here. We therefore need not address in this case whether this part of the Mandatory Victims Restitution Act would cover similar expenses incurred during a private investigation that was pursued at a government's invitation or request. It is enough to hold that it does not cover the costs of a private investigation that the victim chooses on its own to conduct.

* * *

For the reasons stated, we conclude that the words "investigation" and "proceedings" in the Mandatory Victims Restitution Act refer to government investigations and criminal proceedings. Consequently Lagos is not obliged to pay the portion of the restitution award that he here challenges. We reverse the Court of Appeals' judgment to the contrary, and we remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

# Supreme Court of Florida

No. SC17-1533

**IN RE: AMENDMENTS TO FLORIDA RULE OF CIVIL PROCEDURE 1.570 AND FORM 1.914.**

[May 31, 2018]

PER CURIAM.

This matter is before the Court for consideration of proposed amendments to the Florida Rules of Civil Procedure. We have jurisdiction. *See* art. V, § 2(a), Fla. Const. The Civil Procedure Rules Committee (Committee) has filed an out-of-cycle report proposing amendments to existing rule 1.570 (Enforcement of Final Judgments), the renumbering of existing form 1.914 (Execution), and the adoption of new forms 1.914(b) (Notice to Appear) and 1.914(c) (Affidavit of Claimant in Response to Notice to Appear). *See* Fla. R. Jud. Admin. 2.140(e). The Committee explains that it has proposed these amendments in response to 2016 statutory amendments.[1]

1. *See generally* ch. 2016-33, Laws of Fla. (amending chapter 56, Florida Statutes).

The Committee published its proposals for comment prior to filing them with the Court and received one comment regarding its proposed amendments to rule 1.570. Upon consideration of the comment, the Committee did not alter its proposals. After the Committee's proposals were filed, the Court published them for comment; one comment was filed by Robert T. Koehler, d/b/a Florida Notary Academy, addressing proposed new form 1.914(c) (Affidavit of Claimant in Response to Notice to Appear).

Having considered the Committee's report and the comments filed with the Committee and the Court, we hereby adopt the proposed amendments to the Florida Rules of Civil Procedure and Forms, with a modification. The amendments are discussed below.

Rule 1.570 (Enforcement of Final Judgments) is amended to add subdivision (e), governing proceedings supplementary to execution of an unsatisfied judgment or judgment lien. The Committee proposed adding subdivision (e) with the following language:

> **(e) Proceedings Supplementary.** The holder of an unsatisfied judgment or judgment lien is entitled to conduct proceedings supplementary to execution and related discovery, as provided by chapter 56, Florida Statutes. Notices to Appear and supplemental complaints in proceedings supplementary must be served as provided by law and rules of procedure for service of process.

However, due to our concerns over some of the language employed by the Committee in the proposed rule, and the use of phrases not defined in either the Florida Rules of Civil Procedure generally or specifically in rule 1.570, we modify the proposed new subdivision to read as follows, and adopt it with this modification:

> **(e) Proceedings Supplementary.** Proceedings supplementary to execution and related discovery shall proceed as provided by chapter 56, Florida Statutes. Notices to Appear, as defined by law, and supplemental complaints in proceedings supplementary must be served as provided by the law and rules of procedure for service of process.

We also renumber form 1.914 (Execution) to 1.914(a), and adopt new forms 1.914(b) (Notice to Appear) and 1.914(c) (Affidavit of Claimant in Response to Notice to Appear), as proposed by the Committee. New form 1.914(b) is adopted in response to 2016 amendments to section 56.29(2), Florida Statutes, which require a court in some circumstances to issue a "Notice to Appear" to a judgment debtor, as defined in that section, or third-party holder of the judgment debtor's property. Ch. 2016-33, § 18, at 6-7, Laws of Fla. Additionally, new form 1.914(c) is adopted for use as the affidavit that a claimant of property is required to file with the court in response to a Notice to Appear under section 56.29(2), Florida Statutes (2017).

Accordingly, the Florida Rules of Civil Procedure and Forms are amended as reflected in the appendix to this opinion. New language is indicated by underscoring; deletions are indicated by struck-through type. The amendments shall become effective July 1, 2018, at 12:01 a.m.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

Original Proceeding – Florida Rules of Civil Procedure

Honorable Rodolfo Armando Ruiz, Chair, Civil Procedure Rules Committee, Miami Florida; Joshua E. Doyle, Executive Director, and Mikalla Andies Davis, Staff Liaison, The Florida Bar, Tallahassee, Florida,

for Petitioner

Robert T. Koehler, Florida Notary Academy, Tampa, Florida,

Responding with comments

## APPENDIX

## RULE 1.570. ENFORCEMENT OF FINAL JUDGMENTS

**(a) – (d)** [No change]

**(e) Proceedings Supplementary.** Proceedings supplementary to execution and related discovery shall proceed as provided by chapter 56, Florida Statutes. Notices to Appear, as defined by law, and supplemental complaints in proceedings supplementary must be served as provided by the law and rules of procedure for service of process.

### Committee Notes

**1980 Amendment**. [No change]

**2018 Amendment.** Subdivision (e) has been added to address legislative amendments to chapter 56, Florida Statutes (2016).

**FORM 1.914(a). EXECUTION**

EXECUTION

THE STATE OF FLORIDA:
To Each Sheriff of the State:

YOU ARE COMMANDED to levy on the property subject to execution of ……. in the sum of $..... with interest at .....% a year from .....(date)....., until paid and to have this writ before the court when satisfied.

DATED on .....

(Name of Clerk)
As Clerk of the Court
By_____
As Deputy Clerk

**FORM 1.914(b). NOTICE TO APPEAR**

NOTICE TO APPEAR

TO …..(name of third party).....

YOU ARE NOTIFIED that, pursuant to section 56.29, Florida Statutes, proceedings supplementary to satisfy a judgment by application of the following:.....(identify the property, debt, or other obligation due to the judgment debtor)..... in …….County, Florida have been initiated against you by .....(name of judgment creditor)…… You are required to serve an affidavit .....date..... stating that the [property] [debt] [other obligation] belongs to you. The affidavit must include any fact or legal defense opposing the application of the [property] [debt] [other obligation] toward the satisfaction of the judgment on …..(name of the judgment creditor, or its attorney, and his/her/its address)……You must file the original affidavit with the clerk of this court either before service on the judgment creditor or immediately thereafter. Legal defenses need not be filed under oath but must be served contemporaneously with the affidavit.

If any of your property has been levied on and you choose to oppose the application of the property to be applied toward the satisfaction of the judgment, then you must furnish a bond with surety to be approved by the officer in favor of the judgment creditor. The amount of the bond must be double the value of the goods claimed as the value is fixed by the officer and conditioned to deliver said property on demand of said officer if it is adjudged to be the property of the judgment debtor and to pay the judgment creditor all damages found against you if it appears that the claim was interposed for the purpose of delay.

**YOU HAVE A RIGHT TO A TRIAL BY JURY TO DETERMINE THE RIGHT TO THE [PROPERTY, DEBT OR OTHER OBLIGATION DUE TO THE JUDGMENT DEBTOR]. YOU ARE ENTITLED TO DISCOVERY UNDER THE FLORIDA RULES OF CIVIL PROCEDURE. IF THE COURT OR JURY DETERMINES THAT THE [PROPERTY] [DEBT] [OTHER OBLIGATION] BELONGS TO THE JUDGMENT DEBTOR AND IS SUBJECT TO APPLICATION TOWARD THE SATISFACTION OF**

**ITS JUDGMENT, THEN YOU MAY BE ORDERED TO .....(PAY DAMAGES TO THE JUDGMENT CREDITOR OR SURRENDER THE PROPERTY OR OTHER OBLIGATION DUE TO THE JUDGMENT DEBTOR TO THE JUDGMENT CREDITOR)……**

ORDERED at ……., Florida, on..... (date) …..

_____

Judge

**FORM 1.914(c). AFFIDAVIT OF CLAIMANT IN RESPONSE TO NOTICE TO APPEAR**

AFFIDAVIT OF CLAIMANT IN RESPONSE TO NOTICE TO APPEAR

BEFORE ME, the undersigned authority, appeared…..(name of claimant or claimant's agent)....., who, after being first duly sworn, deposes and states, under penalty of perjury:

1. I am the ……..(claimant, or identify relationship to claimant)……

2. I (or claimant) was served with a Notice to Appear on…..(date)……

3. I (or claimant) own(s) and am/is entitled to possession of…..(describe the property, debt, or other obligation due to the judgment debtor identified in the Notice to Appear)..…

4. This property should not be applied to satisfy the judgment because…..(state all reasons why the property, debt, or other obligation due to the judgment debtor identified in the Notice to Appear should not be applied to satisfy the judgment)……

5. (Select a or b)

a. I (or claimant) request(s) a trial by jury on all issues so triable.

b. I (or claimant) request(s) a non-jury trial on all issues.

FURTHER AFFIANT SAYETH NAUGHT.

Dated: _____

_____

Signature of Affiant

Printed Name:_____

STATE OF_____

COUNTY OF _____

Sworn to or affirmed and signed before me on this ___ day of _____, 20___ by (name of affiant)_____, who is personally known to me or who has produced _____, as identification and who did take an oath.

_____

NOTARY PUBLIC, STATE OF

.....(Print, Type or Stamp Commissioned Name of Notary Public) .....

**Committee Notes**

**1980 Amendment.** The description of the property to be levied on has to be made general so it encompasses all property subject to execution under section 56.061, Florida Statutes (1979).

**2018 Adoption.** Form 1.914(c) is used by a claimant to respond to a Notice to Appear under section 56.29(2), Florida Statutes. Legal defenses need not be filed under oath, but must be served contemporaneously with the affidavit. If the claimant's property has already been levied upon, he or she may obtain possession of the property by filing with the officer having the execution a copy of this affidavit and by furnishing the officer a bond with surety, as set forth in section 56.16, Florida Statutes.

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

May 30, 2018

| | | |
|---|---|---|
| JAMES McCAMPBELL,<br><br>Appellant,<br><br>v.<br><br>FEDERAL NATIONAL MORTGAGE ASSOCIATION,<br><br>Appellee. | ) | Case No. 2D16-177 |

BY ORDER OF THE COURT:

Upon consideration of the Appellant's motion for rehearing, rehearing en banc, and request to certify conflict filed on February 23, 2018, and the Appellee's motion for rehearing/reconsideration/clarification of order granting Appellant's motion for attorney's fees incurred on appeal filed on February 26, 2018,

IT IS ORDERED on the court's own motion that the opinion dated February 14, 2018, is hereby withdrawn and the attached opinion is substituted therefor. Both the Appellant's motion for rehearing, rehearing en banc, and request to certify conflict and the Appellee's motion for rehearing/reconsideration/clarification of order granting Appellant's motion for attorney's fees incurred on appeal are denied. No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL
CLERK

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JAMES McCAMPBELL,

Appellant,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Appellee.

Case No. 2D16-177

Opinion filed May 30, 2018.

Appeal from the Circuit Court for Sarasota County; Lee Haworth, Judge.

Mark P. Stopa of Stopa Law Firm, Tampa, for Appellant.

Robert R. Edwards of Choice Legal Group, P.A., Fort Lauderdale, for Appellee.

CASANUEVA, Judge.

In this appeal from a final judgment of foreclosure, James McCampbell contends that the trial court erred in admitting copies of his loan modification agreement, and Federal National Mortgage Association (Fannie Mae) concedes that the admission of the copies was improper. Accordingly, we reverse.[1]

[1]We do not find merit in Fannie Mae's argument that the appeal should be affirmed based on the tipsy coachman doctrine because, although the trial court took judicial notice of certain bankruptcy pleadings, no other pleading accompanied the judicial notice request.

On October 26, 2007, Mr. McCampbell signed the original mortgage and promissory note on the property, and on July 14, 2010, an agreement modifying the original loan and all of the original loan documents was executed. At trial, Fannie Mae called one witness to testify and that witness did not produce the original loan modification agreement nor did the witness explain its absence. Rather, Fannie Mae sought the admission of a copy of the agreement. Over objection, the trial court admitted the copy.

During this appeal, Fannie Mae conceded that the admission in evidence of the copy of the loan modification agreement, without an explanation by Fannie Mae as to its failure to produce the original, was error. For purposes of this appeal, we accept Fannie Mae's concession of error.

We note that since the oral argument of this matter, the Fourth District Court of Appeal has clarified its prior holding in Rattigan v. Central Mortgage Co., 199 So. 3d 966 (Fla. 4th DCA 2016). In Liukkonen v. Bayview Loan Servicing, LLC, No. 4D16-4193, 2018 WL 1517240, at *2 (Fla. 4th DCA Mar. 28, 2018), the court held that "[a] copy of a modification is admissible to the same degree as an original, as it is not a negotiable instrument as defined in section 673.1041."

We reverse and remand for a new trial. See Heller v. Bank of Am., NA, 209 So. 3d 641, 645 (Fla. 2d DCA 2017) (reversing and remanding final judgment of foreclosure for a new trial where trial court improperly allowed the bank's witness to give hearsay testimony regarding content of business records which had not been admitted into evidence).

Reversed and remanded for further proceedings.

SALARIO and BADALAMENTI, JJ., Concur.

# Third District Court of Appeal

**State of Florida**

Opinion filed May 30, 2018.
Not final until disposition of timely filed motion for rehearing.

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No. 3D16-1585
Lower Tribunal No. 13-3923

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**P & S & Co. LLC (P & S & CO), PS Inc., Shayeh Dove or Dov a.k.a. Steve Dov or Dove, Allura Dov or Dove a.k.a Adina Soskin, and Pamela Manson,**
Appellants,

vs.

**SJ MAK, LLC,**
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jorge E. Cueto, Judge.

Tom Regnier Appeals, P.A. and Thomas Regnier (Sunrise), for appellants.

Trujillo Vargas Gonzalez & Hevia, LLP and Anthony C. Hevia and Stephanie C. Hopple, for appellee.

Before FERNANDEZ, LUCK and LINDSEY, JJ.

LUCK, J.

When a judgment-debtor files for bankruptcy, the federal bankruptcy code generally stays any actions seeking to collect from the debtor. But does the stay

preclude a trial court from impleading non-debtor third party defendants into a post-judgment supplementary proceeding? Here, we conclude it did not because the supplementary proceedings did not seek to void fraudulent transfers and the stay did not extend to the non-bankrupt codefendant. Thus, we affirm the judgment against the third party defendants.

*Factual Background and Procedural History*

In 2012, SJ Mak, LLC, a real estate investment firm, bought the notes and mortgages for several properties from P & S, Inc. and Notez, LLC. Pamela Manson was P & S's corporate director, and Shayeh Dov was Notez's director. Pamela and Shayeh were a couple, and the companies were located in their home. SJ Mak wired $143,000 to P & S, and $230,000 to Notez. But P & S and Notez never transferred the mortgages and notes to SJ Mak.

SJ Mak sued P & S and Notez for breach of contract and fraud. SJ Mak alleged P & S and Notez never owned the mortgages and notes they had sold, and instead pocketed SJ Mak's money with no intention of transferring them. P & S and Notez did not answer the amended complaint, and a default judgment was entered against them on July 26, 2014. The final judgment ordered P & S to pay $167,701.66 (including interest and attorneys' fees) and Notez to pay $261,188.34 (same).

SJ Mak tried to collect on the final judgment by moving to garnish P & S and Notez's money from the same Bank of America account where SJ Mak wired the money in 2012. Bank of America responded to the writ of garnishment that Notez's accounts had been closed since 2010 (before SJ Mak's agreement to purchase the mortgages and notes), and the bank had no current accounts for P & S and Notez. The account that SJ Mak wired in 2012 was the college student account for Shayeh and Pamela's daughter, Allura Dov.

On August 31, 2015, SJ Mak moved to commence supplementary proceedings against Shayeh, Pamela, their son and daughter (Shimon and Allura), and related entities P & S & Co. and PS Inc. The motion sought to pierce P & S and Notez's corporate veil, and hold the couple, their children, and the related entities liable for the final judgment.

While the supplementary proceedings motion was pending, on September 21, 2015, Notez filed a suggestion of bankruptcy explaining that the company had filed a voluntary petition under chapter seven of the bankruptcy code, and gave the case number. The suggestion also explained that "[t]he filing of the Petition in Bankruptcy operate[d] as an automatic stay against all actions, proceedings, and enforcement against the Defendants under 11 U.S.C. Section 362."

While Notez's bankruptcy case was pending, the trial court granted the motion to commence supplementary proceedings, ordered that the couple, their

children, and the related entities be impleaded as third party defendants in execution, and set the matter for a hearing on February 8, 2016 so the third party defendants could "be examined concerning their property." That hearing was later continued to February 11, 2016.

Notez's bankruptcy petition was dismissed on February 9, 2016, and the proceedings supplementary hearing went forward on February 11. SJ Mak's corporate representative, and another victim of P & S and Notez's fraud, testified. The third party defendants did not present any evidence. At the end of the hearing, the trial court concluded that the corporate veil had been pierced and entered judgment against the couple, holding them personally liable for the fraud.

The third party defendants appeal.

*Standard of Review*

"We review de novo the scope or applicability of the automatic stay under the Bankruptcy Code, 11 U.S.C. § 362, because it is a question of law." In re Palmdale Hills Prop., LLC, 654 F.3d 868, 875 (9th Cir. 2011).

*Discussion*

The third party defendants contend that the trial court erred: (1) by granting the proceedings supplementary motion and impleading them into the case because it violated the automatic bankruptcy stay; and (2) by piercing the corporate veil without sufficient evidence. We affirm without an extended discussion the trial

court's decision to pierce the corporate veil and hold the couple personally liable for the judgment against Notez and P & S. SJ Mak presented competent substantial evidence that Notez and P & S were Shayeh and Pamela's alter egos, and the couple used the companies to sell mortgages and notes they did not own in order to defraud SJ Mak and others. See Gasparini v. Pordomingo, 972 So. 2d 1053, 1055 (Fla. 3d DCA 2008) ("To 'pierce the corporate veil' three factors must be proven: (1) the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence, was in fact non-existent and the shareholders were in fact alter egos of the corporation; (2) the corporate form must have been used fraudulently or for an improper purpose; and (3) the fraudulent or improper use of the corporate form caused injury to the claimant." (quotation omitted)).

We also affirm the trial court's order granting the motion for proceedings supplementary and impleading the third party defendants. "The filing of a bankruptcy petition imposes an automatic stay under the United States Bankruptcy Code." Puig v. PADC Marketing, LLC, 26 So. 3d 45, 46 (Fla. 3d DCA 2009). Filing a bankruptcy petition operates as a stay of

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; . . .

> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; [and] . . .
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title . . . .

11 U.S.C. § 362(a)(1), (3), (6).[1] The question here is whether the trial court's order impleading the third party defendants was precluded by the automatic stay.

It was not. Subsection (1) bars the commencement of a judicial action, and the issuance of process, "against the debtor." The trial court's order impleading the third party defendants did not include Notez, which was the entity that filed the bankruptcy petition. The impleaded third party defendants were the couple, their children, and related entities to P & S, all of which were not "the debtor" in the pending bankruptcy case.

Subsection (3) stays any acts a court may take to obtain possession or exercise control over the property of the bankruptcy estate. The order here impleading the third party defendants did not "obtain possession" or "exercise control over" Notez's property. The order merely granted the motion for proceedings supplementary; impleaded the couple, their children, and the related P & S entities; set a hearing date; and ordered that the impleaded third party

[1] There are other provisions of the bankruptcy stay statute but the third party defendants do not rely on them in this appeal.

defendants be served. The order did not enjoin or direct that anything be done with the property of any party.

Subsection (6), finally, stays any act by the courts to "collect, assess or recover a claim against the debtor" from before the bankruptcy. The order impleading the third party defendants did not seek to collect, assess, or recover anything against Notez. The order only impleaded nonparties into the case, ordered that they be given notice, and set a hearing. It was not until months later, when the bankruptcy stay had been lifted, that the trial court entered judgment against the impleaded parties.

The third party defendants respond that the bankruptcy stay extends to proceedings supplementary that seek to void fraudulent transfers. See In re Saunders, 101 B.R. 303, 306 (Bankr. N.D. Fla. 1989) (Section "362(a)(1) operates to stay a creditor with a claim against the debtor from commencing or continuing a fraudulent transfer action or from utilizing the process of another court, as is the situation in this case, to recover that claim from property that should have been available for levy and execution but for the transfer to a third party in fraud of creditors."). While the third party defendants are right on the law, the fraudulent-transfer rule doesn't apply here for two reasons. First, SJ Mak's proceedings supplementary motion did not seek to void a fraudulent transfer. There were no fraudulent transfers to void. SJ Mak's money went directly to the bank account of

Shayeh and Pamela's daughter; the money never went through debtor Notez. SJ Mak's proceedings supplementary motion sought to hold the third party defendants personally liable for the judgment and garnish their non-Notez assets. It did not seek to claw-back fraudulent transfers from Notez's bank account to the third party defendants. See Sanchez v. Renda Broadcasting Corp., 127 So. 3d 627, 629 (Fla. 5th DCA 2013) (explaining that a party may use proceedings supplementary to pierce the corporate veil, even where there is no allegation of fraudulent transfer). This is different from Saunders, and the other cases cited by the third party defendants,[2] where the judgment creditor sought to use Florida statutes to void fraudulent transfers. Sanders, 101 B.R. at 303 ("The specific provision followed by Professional is set forth at § 56.29(6)(b) Fla. Stat. which states . . . 'When any gift, transfer, assignment or other conveyance of personal property has been made or contrived by defendant to delay, hinder or defraud creditors, the court shall order the gift, transfer, assignment or other conveyance to be void and direct the sheriff to take the property to satisfy the execution.'").

Second, the trial court's order did not void any transfers under the proceedings supplementary statute. The trial court simply put the third party defendants on notice of the supplementary proceedings and set a hearing date.

[2] E.g., In re Zwirn, 362 B.R. 536, 539 (Bankr. S.D. Fla. 2007) ("[A]ll courts appear to agree that commencing a bankruptcy case stays any state court fraudulent conveyance actions by a creditor . . . ." (emphasis omitted)).

That also is different than Saunders, where the federal bankruptcy court found the stay had been implicated because judgment was entered while the stay was in place. See id. at 304 ("A final judgment memorializing this ruling was entered post-petition on February 23, 1989."). Here, judgment against the third party defendants was not entered until after the automatic stay had been lifted.

The automatic stay in section 362(a) does not apply to the trial court's order impleading the third party defendants. But even if the bankruptcy stayed the proceedings supplementary as to Notez, it did not stay the proceedings involving the same third party defendants as to Notez's codefendant, P & S.

"Although the scope of the automatic stay under section 362 is broad, the clear language of section 362(a) stays actions only against a 'debtor.' The language of section 362 refers only to actions against the debtor and does not relate to any other interparty claims." Puig, 26 So. 3d at 46-47 (citation omitted). Here, the bankruptcy stay could not affect the proceedings supplementary as to Notez's codefendant, P & S, because P & S was not a debtor under the bankruptcy code. The third party defendants were properly impleaded based on the allegations against P & S.

The third party defendants contend that the stay should be extended to P & S because there was such identity between debtor Notez and codefendant P & S that a judgment against P & S will in effect be a judgment against Notez. The third

party defendants are correct that the stay may be extended to codefendants under "unusual circumstances . . . when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment and the third-party defendant will in effect be a judgment or finding against the debtor." Id. (quotation omitted). Trial courts are "authoriz[ed] [] to extend the automatic stay to non-bankrupt co-defendants" under these unusual circumstances. Id.

But here the third party defendants never asked the trial court to extend the automatic stay to P & S. The trial court cannot err by failing to exercise discretion it was never asked to exercise. We do not expect trial courts to read minds or make arguments for the parties. In our adversarial judicial system, it is the litigants' responsibility to ask the trial court for the relief they are seeking. Because P & S was not a bankruptcy debtor and did not move to extend the stay, the trial court did not err in granting the motion for proceedings supplementary, and impleading the third party defendants, as to P & S.

*Conclusion*

The trial court's order impleading the third party defendants did not violate the automatic bankruptcy stay, and competent substantial evidence supported the trial court's conclusion that the corporate veil had been pierced and Shayeh and

Pamela were personally liable for Notez and P & S's fraud. We affirm the judgment against the couple.

Affirmed.

FERNANDEZ, J., concurs.
LINDSEY, J., concurs in result only.

# Third District Court of Appeal

**State of Florida**

Opinion filed May 30, 2018.
Not final until disposition of timely filed motion for rehearing.

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No. 3D17-2405
Lower Tribunal No. 16-14993

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**Daniel Wolentarski and Maria Wolentarski,**
Appellants,

vs.

**Anchor Property & Casualty Insurance Company,**
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jorge E. Cueto, Judge.

Dieppa Law Firm P.A., and Eduardo E. Dieppa III; Tabares Law P.A., and Jasiel Tabares, for appellants.

Groelle & Salmon, P.A., and Robert Groelle and Bethany C. Ruiz, for appellee.

Before ROTHENBERG, C.J., and SUAREZ and LOGUE, JJ.

ROTHENBERG, C.J.

Daniel and Maria Wolentarski ("the appellants") appeal the final judgment entered in favor of Anchor Property & Casualty Insurance Company ("Anchor") issued after the trial court entered summary judgment in favor of Anchor. Because the appellants failed to timely submit any evidence or filings in opposition to Anchor's motion for summary judgment, there was no record evidence of a material issue of disputed fact. The trial court, therefore, correctly granted Anchor's motion for summary judgment. See Fla. R. Civ. P. 1.510(c) (providing that evidence in opposition to summary judgment must be served at least five days prior to the day of the hearing or delivered no later than 5:00 p.m. two business days prior to the date of the hearing); Deshazior v. Sch. Bd. of Miami-Dade Cty, Fla., 217 So. 3d 151, 152 (Fla. 3d DCA 2017) (holding that the trial court's decision not to consider an untimely affidavit in opposition to a motion for summary judgment was not an abuse of discretion).

Affirmed.