

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

MIGUEL A. DIAZ,

Case No. 6:02-bk-05591-ABB

Chapter 13

Debtor.

_____ /

ORDER

This matter came before the Court on the: (i) Motion for Continuing Writ of Garnishment (Doc. No. 215) filed by the Debtor Miguel A. Diaz and the oppositions thereto (Doc. Nos. 219, 223) filed by the State of Florida, Department of Revenue (“Florida DOR”) and the Commonwealth of Virginia, Department of Social Services, Division of Child Support Enforcement (“Virginia DSS”) (collectively, “Respondents”); and (ii) the Respondents’ request for a waiver of the supersedeas bond posting requirement (Doc. No. 204).

Hearings were held on November 10, 2009 and November 23, 2010 at which counsel for the Debtor, counsel for the Respondents, and the Chapter 13 Trustee Laurie K. Weatherford (“Trustee”) appeared. The Debtor’s Motion is due to be granted and the Respondents’ bond waiver request is due to be denied for the reasons set forth herein.

Event Chronology

This Court entered a Memorandum Opinion and Judgment on September 30, 2009 (collectively, “Judgment”) awarding the Debtor sanctions against Respondents for their willful and intentional violations of the automatic stay and the discharge injunction. Respondents appealed the Judgment to the United States District Court for the Middle District of Florida, Orlando Division, which: (i) entered an Order on July 22, 2010

affirming the Judgment; (ii) denied Respondents' motion for reconsideration of the July 22, 2010 Order; and (iii) denied Respondents' motion for a stay pending appeal.¹ Respondents each appealed the District Court's July 22, 2010 Order to the United States Court of Appeals for the Eleventh Circuit and the two separate appeals are pending. Respondents filed motions with the Eleventh Circuit seeking a stay pending appeal. The Eleventh Circuit denied Respondents' motions by its Order entered on December 29, 2010.²

The Debtor's Motion for Writ of Garnishment and the Respondents' bond waiver request were abated by this Court while Respondents' stay motions were pending in the District Court and the Eleventh Circuit. With the denial of the stay motions by the Eleventh Circuit on December 29, 2010, these matters are ripe for adjudication.

Garnishment Motion

The Debtor was awarded \$67,622.00 pursuant to the Judgment. He seeks to execute on the Judgment through a writ of garnishment directed to the Trustee to garnish any distributions to Respondents in the Chapter 13 cases she administers. His Motion is based upon Federal Rule of Civil Procedure 69, made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7069, and Chapter 77 of the Florida Statutes.

Respondents oppose the Debtor's Motion asserting: (i) they are immune from garnishment proceedings pursuant to the Eleventh Amendment; (ii) they are immune

¹ State of Florida Dept. of Revenue, et al. v. Miguel A. Diaz, Case No. 6:09-cv-01850-MSS (*See* Doc. Nos. 28, 31, 32, and 34).

² State of Florida Dep. Of Revenue v. Miguel A. Diaz, No. 10-14426-GG; Commonwealth of Virginia Dept. of Social Services v. Miguel A. Diaz, No. 10-14475-GG.

from garnishment proceedings pursuant to state sovereign immunity; (iii) Florida State law does not provide for garnishment actions against the State; and (iv) the Judgment cannot be paid without a special appropriation made pursuant to Virginia State law.

Each of Respondents' objections centers on the assertion of sovereign immunity. Respondents are not protected by sovereign immunity. They, by filing their proof of claim in this case, waived their sovereign immunity defense as a matter of law pursuant to 11 U.S.C. Section 106(b). Fla. Dep't of Revenue v. Rodriguez (In re Rodriguez), 367 Fed. Appx. 25, 30 (11th Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S. Ct. 128 (2010). That waiver continues throughout this proceeding to execute on the Judgment; this proceeding is part and parcel of this Court's enforcement of the automatic stay and discharge injunction. State of Ga. Dep't of Revenue v. Burke (In re Burke), 146 F.3d 1313, 1319 (11th Cir. 1998).

This Court is authorized to issue a writ of garnishment to the Trustee pursuant to Federal Rule of Civil Procedure 69 and Florida Statutory law. The procedure on execution of a money judgment "must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." FED. R. CIV. P. 69. Florida Statutory law governs the procedure on execution of the Judgment. Fla. Stat. § 77.10, *et seq.* (Section 77.01 grants every person or entity who has recovered judgment in any court against any person or entity a right to writ of garnishment).

Supersedeas Bond

Federal Rules of Bankruptcy Procedure 8005 and 7062 address the posting of a supersedeas bond with respect to appeals.³ The granting of a stay pending appeal is discretionary with the Court where an appellant fails to post a supersedeas bond. FED. R. BANKR. P. 8005.⁴ Respondents did not post a supersedeas bond in appealing the Judgment. No party has filed a motion requesting a supersedeas bond.

Respondents, on October 8, 2009, jointly filed with this Court a Motion for Stay Pending Appeal (Doc. No. 204) pursuant to Federal Rule of Civil Procedure 8005 within which they request the supersedeas bond requirement be waived. Respondents state: “Based upon the status of the Creditors in this case as agencies of State Governments any requirement for a bond should be waived.” Doc. No. 204, p. 1. Respondents cited no legal authority for their position.

Federal Rule of Civil Procedure 8005 waives the requirement to post a bond when an appeal is taken by the United States or an officer or agency of the United States. No such waiver exists for state governments or agencies of a state government. This Court is authorized to require Respondents to post a supersedeas bond pursuant to Rule 8005. Respondents’ request for waiver of the bond requirement is due to be denied.

³ Federal Rule of Bankruptcy Procedure sets forth Federal Rule of Civil Procedure 62 applies in adversary proceedings.

⁴ Rule 8005 provides, in part: “Notwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.”

Accordingly, it is

ORDERED, ADJUDGED and DECREED that Respondents' request for a waiver of the supersedeas bond (Doc. No. 204) is hereby **DENIED**; and it is further

ORDERED, ADJUDGED and DECREED that the Respondents' oppositions (Doc. Nos. 219, 223, 246, 248) to the Debtor's Motion for Continuing Writ of Garnishment are hereby **OVERRULED** and the Debtor's Motion for Continuing Writ of Garnishment (Doc. No. 215) is hereby **GRANTED**; and it is further

ORDERED, ADJUDGED and DECREED that the Clerk of Court is hereby directed to issue a Continuing Writ of Garnishment to the Garnishee Laurie K. Weatherford, Chapter 13 Trustee.

Dated this 25th day of January, 2011.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge