

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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|---------------------------|---|------------------|
| UNITED STATES OF AMERICA, | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | C.A. No. 14-198M |
| | : | |
| SOJIN LIM, | : | |
| Defendant, | : | |
| | : | |
| v. | : | |
| | : | |
| PERSHING LLC, | : | |
| Garnishee. | : | |

MEMORANDUM AND ORDER

On October 15, 2013, Defendant Sojin Lim was convicted of bank fraud. United States v. Lim, Cr. No. 13-127M. She was sentenced to one day of incarceration and two years of supervised release and ordered to make restitution to the victim of the crime, Rockland Trust, in the amount of \$5,335,382.29. United States v. Lim, Cr. No. 13-127M, ECF No. 20. On April 22, 2014, the United States instituted this garnishment proceeding pursuant to the Federal Debt Collection Procedure Act (“FDCPA”), 28 U.S.C. § 3205, seeking a garnishee order directing Pershing LLC to liquidate a rollover individual retirement account (“IRA”) belonging to Defendant Lim and to disburse the funds to the United States. ECF Nos. 1, 4, 11. In seeking this order of garnishment of an IRA, the United States is acting pursuant to the Mandatory Victim Restitution Act (“MVRA”), codified at 18 U.S.C. § 3663A, which provides that “a judgment imposing a fine may be enforced against *all property* or rights to property of the person,” “[n]otwithstanding any other Federal law.” 18 U.S.C. § 3613(a), (f) (emphasis supplied); see also 18 U.S.C. § 3664(m). According to the answer of the garnishee, the IRA contains \$117,035 and is owned solely by Defendant Lim. United States v. Lim, Cr. No. 13-127M, ECF No. 8.

Defendant Lim bears the burden of establishing that her property is exempt. 28 U.S.C. § 3014(b)(2).

An IRA is a “trust . . . for the exclusive benefit of an individual or his beneficiaries” with a “written governing instrument” that meets specified IRS requirements. 26 U.S.C. § 408(a). It is a creature of the Internal Revenue Code, which provides that “[t]he interest of an individual in the balance in his account is nonforfeitable.” *Id.* § 408(a)(4). IRAs are not governed by the Employee Retirement Income Security Act (“ERISA”), which contains anti-alienability provisions protecting ERISA funds from attachment. 29 U.S.C. § 1056(d)(1); In re Meehan, 102 F.3d 1209, 1211 (11th Cir. 1997) (“IRAs are not subject to the ERISA-mandated anti-alienation provision”). However, they are generally protected by state law; in Rhode Island, they are exempt from attachment. R.I. Gen. Laws § 9-26-4(11) (IRA, as defined by Internal Revenue Code, is exempt from attachment except in divorce, for child support and as to excess payments).

Defendant Lim has challenged the motion, arguing that her IRA is “nonforfeitable” and therefore exempt from garnishment. The United States counters that her IRA, despite its status as retirement savings, is subject to garnishment for the benefit of the victim pursuant to MVRA.¹ In support, it points to the seminal decision of the Ninth Circuit Court of Appeals in United States v. Novak, 476 F.3d 1041 (9th Cir. 2007) (en banc), which examined the tension between the goals of MVRA to make offenders accountable to their victims and the goals of the federal laws protecting retirement funds, specifically the ERISA anti-alienation provisions enacted to protect retirees from penury. *Id.* at 1045-46. In a thoughtful analysis that looked at the competing policy considerations and the plain language of MVRA, which specifies that

¹ Defendant Lim relies on two pre-MVRA cases, which limited the reach of FDCA to debts owed to the United States, excluding victims. See United States v. Rostoff, 164 F.3d 63, 69 (1st Cir. 1999); United States v. Bongiorno, 106 F.3d 1027, 1039 (1st Cir. 1997). Neither is applicable in this case – MVRA has dramatically changed the landscape and enhanced the government’s ability to recover restitution for the victims of crime. United States v. Whitman, 648 F.3d 40, 45 (1st Cir. 2011).

enforcement runs to “all property,” “[n]otwithstanding any other Federal law,” the court concluded that MVRA overrides federal laws protecting retirement funds so that ERISA pension funds are subject to garnishment. *Id.* at 1059-60, 1063. This aspect of Novak has been adopted in this Circuit, United States v. Hyde, 497 F.3d 103, 108 (1st Cir. 2007), and has been cited with approval by many courts. *See, e.g., United States v. DeCay*, 620 F.3d 534, 541 (5th Cir. 2010) (adopting reasoning of Novak and citing other cases); United States v. Whitt, No. 11-50395, 2011 WL 4062459, at *4 (E.D. Mich. Sept. 13, 2011) (adopting reasoning of Novak; pension garnished to extent plan permitted to pay restitution obligation); *see United States v. Hosking*, 567 F.3d 329, 335 (7th Cir. 2009) (citing Novak to support holding that debtor’s IRA may be levied by IRS to satisfy federal tax liability as long as debtor has right to withdraw money from or liquidate account). The only limitation on the right of garnishment established by Novak is that the garnishment may take only the debtor’s present entitlement to the fund pursuant to the terms of the plan. 476 F.3d at 1064.

In this case, the United States is not seeking to garnish an asset protected by ERISA, but rather an IRA. The only provision of federal law that arguably protects an IRA may be found in 26 U.S.C. § 408(a)(4), which provides that it is “nonforfeitable.” The only other protection is the Rhode Island statute, R.I. Gen. Laws § 9-26-4(11), exempting an IRA from attachment. Both of these provisions are insufficient to exempt this IRA from garnishment under MVRA.

The contention that an IRA is protected because it is “nonforfeitable,” as that term is used in 26 U.S.C. § 408(a)(4), was made and soundly rejected by the court in United States v. Vondette, 352 F.3d 772, 775 (2d Cir. 2003), vacated on other grounds, 125 S. Ct. 1010 (2005). Vondette holds that “nonforfeitable” in the context of § 408(a)(4) refers simply to whether an individual has a vested interest in the balance in the IRA account and does not address whether

the IRA account is subject to attachment or criminal forfeiture. Id. The argument was also rejected in United States v. Infelise, which held that “nonforfeitable” in the analogous ERISA context, 26 U.S.C. § 408(b), is synonymous with “vested,” and is not intended to create any protection from criminal forfeiture. 159 F.3d 300, 304 (7th Cir. 1998). Moreover, even if Defendant Lim were right that “nonforfeitable,” as used in 26 U.S.C. § 408(a)(4), was intended by Congress to protect her IRA from attachment or seizure, the argument still fails in the MVRA context in light of its plain language, which states that the right of the United States to enforce a restitution judgment against “all property” trumps “other Federal law” to the contrary. 18 U.S.C. § 3613(a); Hyde, 497 F.3d at 108; Novak, 476 F.3d at 1059-60; see also United States v. Wahlen, 459 F. Supp. 2d 800, 821-22 (E.D. Wis. 2006) (even assuming IRA rolled over from pension is subject to ERISA anti-alienation protection, government may still garnish based on plain language of MVRA). I find that Defendant Lim’s “nonforfeiture” argument is utterly unavailing.

The other arguable protection for Defendant Lim’s IRA, based on the Rhode Island statute, may be given even shorter shrift. In plain language, FDCPA expressly preempts such state laws. 28 U.S.C. §§ 3003(d), 3613(a)(2); United States v. Cunningham, 866 F. Supp. 2d 1050, 1056 (S.D. Iowa 2012) (state law property exemptions inapplicable when government enforces a judgment for a criminal fine or restitution); see DeCay, 620 F.3d at 542 (preemption enhances effectiveness of FDCPA and MVRA by creating uniform system for prosecutors to follow instead of non-uniform procedures provided by the states); United States v. Citigroup Global Mkts., Inc., 569 F. Supp. 2d 708, 711 (E.D. Tex. 2007) (government enforcement of private victim restitution preempts state law exemptions); cf. Hyde, 497 F.3d at 108 (state law does not restrict “the reach of the MVRA’s clear language”). Finally, it is clear that no portion

of this IRA is unavailable for garnishment because Defendant Lim does not yet have the power to liquidate it – she has conceded that she is presently entitled to liquidate the entire IRA account, so that all of it is available to be garnished under MVRA.²

Based on the foregoing, the motion of the United States for Garnishee Order (ECF No. 11) is hereby GRANTED. A separate Garnishee Order will enter.

So ordered.

ENTER:

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
December 2, 2014

² Defendant Lim requested that the garnishment order be limited so that enough will be left in the account to pay any tax liability she might have as a result of its liquidation. I decline to do so. Such a remedy would effectively place the burden of paying any tax on the victim of Lim's crime.