UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	CR No. 92-099ML
	:	
HAROLD F. CHORNEY	:	

MEMORANDUM AND ORDER DENYING
MOTION TO COMPEL PLAINTIFF TO RETURN $4500

Defendant Harold F. Chorney ("Defendant" or "Mr. Chorney") moves to compel the United States to return $4500 that he claims he paid "under duress" as a result of an Installment Payment Order entered by this Court on January 4, 2011.[1] The Motion (ECF No. 93) has been referred to me for determination pursuant to 28 U.S.C. § 636(b)(1)(A), Fed. R. Crim. P. 59(a), DRI LR Cr 57.2(a). Because the Installment Payment Order was affirmed by the First Circuit Court of Appeals in United States v. Chorney, 453 Fed. App'x 4, 8 (1st Cir. 2011) (per curiam), Defendant was properly subject to its coercive effect at the time he made the payments that he now seeks to recover. Therefore, no hearing is required on the Motion. It is denied.

I. BACKGROUND

Since a deeper analysis of the issues underpinning Mr. Chorney's unusual Motion takes the Court into an examination of the equities, I begin with a brief overview of the genesis of the restitution that was paid down by the $4500 he now seeks to recover. I also lay out other

[1] Without supporting argument, at the end of his Memorandum in support of the Motion for return of $4500, Mr. Chorney adds the request that he "be granted a change of venue to the District of Massachusetts." ECF No. 93 at 11. The Response of the United States does not address this "request." ECF No. 94. To the extent that it may be deemed a separate Motion, it is denied without prejudice to being filed as a motion in conformity with the Local Rules, including supporting argument so that the United States can provide a meaningful response. See DRI LR Cr 47(a) ("Every motion shall bear a title . . . stating the precise nature of the motion. . . . [E]very motion . . . shall contain a short and plain description of the requested relief and shall be accompanied by a separate memorandum of law setting forth the reasons why the relief requested should be granted.").

judicially reported instances of Mr. Chorney's conduct to the extent that the conduct has a bearing on whether he comes to this Court now with unclean hands.

On May 27, 1992, following a twenty-two day jury trial, Mr. Chorney was found guilty of seven counts of making false reports and statements to a federally insured bank. United States v. Chorney, 63 F.3d 78, 79 (1st Cir. 1995); Verdict Sheet, Doc. No. 62. The evidence at trial established that Mr. Chorney, then president and owner of Cumberland Investment Corporation ("Cumberland"), submitted a false appraisal of certain collateral to Eastland Bank to induce it to extend credit to Cumberland. When the fraud was exposed, Cumberland went into bankruptcy and defaulted on all of the loans to Eastland Bank. Id. at 79-80. In addition to twenty-seven months of incarceration, Mr. Chorney's sentence included an order to pay restitution of $569,469 to the FDIC; he challenged this aspect of his sentence on appeal, but the sentence was affirmed, including his challenge to the finding of the district court that the amount of financial loss to the FDIC caused by Mr. Chorney's conduct was $569,469. Id. at 81-83; United States v. Chorney, 99 F.3d 1128, *2 (1st Cir. 1996) (per curiam) (unpublished table opinion) (denial of motion for new trial affirmed; "government had a powerful case against Chorney"), cert. den., 520 U.S. 1181 (1997).

While these matters were unfolding, Mr. Chorney also injected himself into the Cumberland bankruptcy proceedings, resulting in a contempt order based on the finding that he had "deliberately and continuously acted in bad faith to obstruct and to hinder the efficient administration of the estate." Chorney v. Weingarten, 7 F.3d 218, at *2 (1st Cir. 1993) (per curiam) (unpublished table decision). That order too was affirmed. Id. In an aside that applies equally to Mr. Chorney's litigation strategy in these proceedings, the First Circuit noted that "the selectivity of his citations, incoherent or indistinct purpose for many record references, and his

repeated blurring of temporally distinct events, only serves to confuse and obfuscate the issues." Id. at *3. The bankruptcy court concluded that an "incredible amount of needless expense . . . ha[s] been heaped upon the estate, and ultimately, of course, upon the creditors . . . [a]ll of this waste has been caused unnecessarily by Harold Chorney." Id. at *2. A sanction of $200,000 was assessed representing just part of the unnecessary expense occasioned by his abuse of the bankruptcy. Id. at *3; In re Cumberland Inv. Corp., No. 1:89-bk-11051, 2004 WL 2616318, at *1 (Bankr. D.R.I. Nov. 3, 2004) (noting Mr. Chorney's "hyperactivity and ludicrous conduct . . . marked by incessant acts of bad faith and abuse of the system"). The $200,000 judgment remained unpaid as of 2006. In re Cumberland Inv. Corp., No 1:89-bk-11051, ECF No. 917 at 2 (Bankr. D.R.I. filed Jan. 17, 2006).

Since the imposition of sentence, the United States has struggled to collect for the benefit of the FDIC even a small part of the amount Defendant owes as a result of his criminal conduct.[2] By the end of 2010, he had paid a total of $3,960. United States v. Chorney, CR 92-099ML, ECF No. 91 at 2 (D.R.I. October 19, 2012).

On December 3, 2010, the United States moved for entry of an Installment Payment Order requiring Mr. Chorney to make monthly payments of at least $1000 per month. ECF No. 8 at 1. The motion made no reference to the Federal Debt Collection Procedure Act ("FDCPA"), 28 U.S.C. § 3001, *et seq*., which permits the entry of an installment payment order, or to the need to make threshold findings pursuant to 28 U.S.C. § 3204(a) of the Act. ECF No. 8. Mr. Chorney did not raise those issues either. On January 4, 2011, following an evidentiary hearing at which

[2] Mr. Chorney has repeatedly attempted to relitigate whether he owes restitution to the FDIC and the amount of restitution. His most recent attempt to reopen his sentence raised the question whether the United States was really the victim, which was rejected by this Court and affirmed on his most recent appeal. United States v. Chorney, 453 Fed. App'x 4, 6, 8. These arguments will not be addressed further here. See United States v. Rostoff, 164 F.3d 63, 69-70 (1st Cir. 1999) (FDIC is the proper victim for restitution for the crime of fraudulently inducing a federally insured financial institution to grant ill-advised loans).

the Court gave careful consideration to Mr. Chorney's income, his reasonable expenses and his lifestyle, characterized by dining out and frequent travel, this Court entered an Installment Payment Order that required Mr. Chorney to pay $500 per month starting on February 15, 2011. United States v. Chorney, CR 92-099ML, ECF No. 22 at 8, 10 (D.R.I. January 4, 2011). The Court included a stern admonishment in the Installment Payment Order: "Defendant is cautioned that if he fails to comply with this Order, the Court will enforce it through the power of contempt." United States v. Chorney, CR 92-099ML, ECF No. 22 at 10 (D.R.I. January 4, 2011).

The threat of contempt worked. Mr. Chorney made the monthly payments from February through October 2011, a total of $4500.[3] ECF No. 93 at 3. However, in advance of his first payment, Mr. Chorney made clear that he was making the payments "under duress and fear of retribution" as a result of the Installment Payment Order. ECF No. 32.[4] Meanwhile, he pursued an appeal of the Installment Payment Order to the First Circuit.

The appeal was unsuccessful to the extent that Mr. Chorney sought to have the Installment Payment Order voided *ab initio*. Instead, the First Circuit affirmed the Order, while leaving Mr. Chorney free to seek to have it modified based on two arguments presented for the first time on appeal – the applicability of 28 U.S.C. § 3204(a) and whether his social security and veterans benefits are "exempt." United States v. Chorney, 453 Fed. App'x at 8.

[3] The Clerk's Office has advised the Court that the $4500, which Mr. Chorney paid pursuant to the Installment Payment Order, has been disbursed to the FDIC, the victim identified in his restitution order. See Rostoff, 164 F.3d at 69-70 (Federal Debt Collection Procedure Act is a proper collection vehicle for restitution owed to the FDIC).

[4] The parties both invest significant energy briefing the meaning of "duress" in arguing whether Mr. Chorney was truly under duress in making the disputed payments. This Court finds that he made the payments as a result of the coercive effect of the Installment Payment Order. Whatever "duress" may mean in this context, Mr. Chorney was crystal clear that he was paying under protest. This Court takes that as a given in its consideration of this Motion.

At the hearing on Mr. Chorney's motion to reopen held on October 12, 2012, the United States initially argued that the Installment Payment Order should be modified, but ultimately informed the Court that it was not opposed to the Court vacating the Order. This was done by Order dated October 19, 2012. ECF No. 91 at 10. As a result, this Court did not address the "knotty questions" covered by the mandate. United States v. Chorney, 453 Fed. App'x at 5. With the Installment Payment Order no longer in effect, there was no need to address whether it could be modified.

One related matter requires comment. With the Installment Payment Order vacated, Mr. Chorney now suggests – though with no request for relief – that the United States is attempting to collect a new deficiency based on the $4000 still owing on the Installment Payment Order. To be clear, the Installment Payment Order is vacated. Therefore, no further collection efforts arising from it may be pursued. Mr. Chorney owes the original restitution, less amounts actually paid, plus any additional amounts supported by applicable law. The United States may continue its collection efforts directed towards that obligation, though it should do so mindful of the "knotty questions" raised in the First Circuit's decision.

This Motion, which seeks to recover the $4500 actually paid to the FDIC pursuant to the Installment Payment Order, followed.

II. ANALYSIS

The narrow issue presented by this Motion is made simple by the clear language of the First Circuit: "the prudent course is to affirm the district court judgment on the basis of lack of plain error." United States v. Chorney, 453 Fed. App'x at 5. Because the Installment Payment Order, as entered on January 4, 2011, was affirmed, Mr. Chorney's payments were properly made in compliance with an Order of this Court. To the extent that Mr. Chorney experienced

duress as a result of the coercive power of the Court behind the Order, these payments were made under such duress. Therefore, Mr. Chorney's Motion for an order that would require the victim of his crimes[5] to disgorge this pittance of what he owes must be denied.

Even if the Court were to posit that the prospective vacating of the Installment Payment Order actually had the unintended effect of voiding it *ab initio*, the Court can employ its equitable powers to deny Mr. Chorney the relief he seeks – an order of disgorgement directed at the victim of Mr. Chorney's crime, the FDIC.

The enforcement of restitution under the FDCPA "is continually subject to the equitable supervision of the district court." See United States v. Rostoff, 164 F.3d 63, 68 (1st Cir. 1999) (citing 18 U.S.C. § 3013) (the court at any time may deny, condition, regulate, extend or modify the use of any enforcement procedure authorized under the FDCPA). Restitution is traditionally considered an equitable remedy; "even mandatory restitution is nourished by the equitable roots of the concept of common-law restitution – namely, restitution for loss." United States v. Agate, 613 F. Supp. 2d 315, 320, 325 (E.D.N.Y. 2009). A criminal restitution order also acts as a rehabilitative and punitive tool. Agate, 613 F. Supp. 2d at 326; United States v. Rich, 603 F.3d 722, 729-30 (9th Cir. 2010) (restitution is compensatory to the victim and penal to the defendant and the state); see also United States v. Ziskind, 471 F.3d 266, 270 (1st Cir. 2006) (restitution is a criminal penalty meant to have deterrent and rehabilitative effects).

Common law equitable principles make clear that a defendant is not entitled to recover a payment when an invalid judgment compelled the defendant to pay a valid debt. Restatement (Third) of Restitution & Unjust Enrichment § 18 cmt. e (2011). Thus, if a defendant satisfies a

[5] This Court notes that, if it were inclined to grant Mr. Chorney's Motion, it would not do so without affording the FDIC an opportunity to be heard regarding its entitlement to retain the restitution payments that it received. Among other issues, the FDIC could assert the sovereign immunity of the United States as a bar to the relief Mr. Chorney seeks.

judgment, and the judgment is later vacated for lack of jurisdiction, the defendant is not entitled to restitution of that payment as long as the underlying debt remains legal, valid and enforceable. Id., illus. 6. Here, Mr. Chorney is seeking to recover the money he paid pursuant to the Installment Payment Order, which has been disbursed to the FDIC. Because the underlying debt (the restitution owed to the FDIC) is valid,[6] equitable principles are plain that any legal deficiency in the Installment Payment Order does not give rise to the right to recover these payments. Id. § 18. Mr. Chorney's circumstances are not analogous to cases where the order to make restitution to the victim itself is voided. See, e.g., United States v. Beckner, 16 F. Supp. 2d 677, 679 (M.D. La. 1998); United States v. Venneri, 782 F. Supp. 1091, 1093 (D. Md. 1991); see also Rich, 603 F.3d at 728 (restitution abated when defendant dies before exhausting appeal).

Consistent with these principles, in an analogous context, courts routinely order criminals to make restitution despite procedural defects in the government's pursuit of an appropriate order to pay. For example, courts hold that the failure to set restitution within ninety days of sentencing, as required by the Mandatory Victims Restitution Act, does not deprive the court of the power to order restitution. Dolan v. United States, 130 S. Ct. 2533, 2539-40 (2010); United States v. Zakhary, 357 F.3d 186, 191-93 (1st Cir. 2004). Dolan reasons that depriving the sentencing court of the power to order restitution is illogical because it would harm the victims of the crime. Dolan, 130 S. Ct. at 2450. From the defendant's perspective, the failure to order timely restitution is usually harmless; the purpose of the ninety-day rule is not to protect

[6] Despite its age, Mr. Chorney's judgment to pay restitution remains a viable debt. At the time it was entered, the Victim and Witness Protection Act of 1982 (the "VWPA") controlled, which limited Mr. Chorney's liability to pay restitution to twenty years after the entry of judgment. See 18 U.S.C. § 3613(b)(1) (1994). The Mandatory Victim Restitution Act of 1996 ("MVRA") amended 18 U.S.C. § 3613(b) so that liability to pay restitution terminates "the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person fined." 18 U.S.C. 3613(b). Here, Mr. Chorney's amended judgment was entered on April 15, 1994; therefore, the judgment remains viable at least through April 14, 2014, if not longer. See United States v. Richards, 472 Fed. App'x 523, 525 (9th Cir. 2012) (MVRA, not VWPA, applies to enforcement of restitution even if judgment was entered prior to enactment of MVRA).

defendants from drawn out sentencing, but to protect victims from the willful dissipation of the defendant's assets. Agate, 613 F. Supp. 2d at 324.

Likewise, defendants are not entitled to equitable recovery when they come to the court with unclean hands. Restatement (Third) of Restitution & Unjust Enrichment § 63 (2011) ("Recovery in restitution to which an innocent claimant would be entitled may be limited or denied because of the claimant's inequitable conduct in the transaction that is the source of the asserted liability."); see also Kingston Hill Acad. v. Chariho Reg'l Sch. Dist., 21 A.3d 264, 270 (R.I. 2011) (describing unclean hands doctrine). This doctrine obligates this Court to consider the fairness of ordering the FDIC, the victim, the return funds to Mr. Chorney, the criminal, as well as to consider Mr. Chorney's conduct in exacerbating the adverse impact of his crime in the related bankruptcy proceeding. To order the FDIC to return these funds to Mr. Chorney would be profoundly inequitable under these circumstances.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Compel Plaintiff to Return $4500 Paid Under Duress (ECF No. 93) is DENIED.

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
December 10, 2012