18-1049

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RICHARD J. KWASNY, an individual,
Defendant-Appellant,
v.
R. ALEXANDER ACOSTA, Secretary, United States Department of Labor,
Plaintiff-Appellee.

On Appeal from the United States District Court for the
Eastern District of Pennsylvania
Case No. 14-cv-04286
The Honorable Judge Eduardo C. Robreno

BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT OF JURISDICTION

The district court had jurisdiction over the underlying action under 29 U.S.C. § 1132(e). Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction to review the district court's final judgment entered on December 11, 2017.

STATEMENT OF RELATED CASES

This case was previously before this Court, Case No. 16-1872. In the prior appeal, this Court affirmed the district court's determination that Mr. Kwasny had violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et. seq., by directing employee 401(k) contributions into his firm's general assets. This Court remanded for the district court to determine whether the judgment against Mr. Kwasny should be offset by a previous Pennsylvania state court judgment entered against him for the same misdirected employee contributions. Sec'y of Labor v. Kwasny, 853 F.3d 87 (3d Cir. 2017).

STATEMENT OF THE ISSUE

As restated by the U.S. Secretary of Labor ("Secretary"), the issue presented is: whether the District Court properly ordered an offset to the amount of its judgment only upon proof of payment towards the Pennsylvania state court judgment.

STATEMENT OF THE CASE

I. FACTUAL HISTORY

Defendant Richard Kwasny was a managing partner of the now-dissolved law

firm, Kwasny & Reilly, P.C. (the "Firm"). J.A. 6a.[1] The Firm sponsored an ERISA-covered pension plan for its employees, the Firm's 401(k) Profit- Sharing Plan (the "Plan"). J.A. 6a, 7a. Mr. Kwasny was named a trustee and fiduciary of the Plan. J.A. 7a. The Firm's employees contributed a portion of their pay to the Plan through payroll deductions. Id. Between September 7, 2007, and November 13, 2009, employee contributions in the amount of $40,416.30 were deducted from the pay of the Firm's employees, but those contributions were never forwarded to the Plan. Id. Instead, at the direction of Mr. Kwasny, the employee contributions were comingled with the general assets of the Firm. Id. Mr. Kwasny directed those contributions to benefit the Firm and himself. J.A. 10a.

II. PROCEDURAL HISTORY

A. Private State Court Action and Judgment

On October 12, 2011, Larry Haft, a former employee of the Firm, filed a complaint in the Court of Common Pleas of Bucks County, Pennsylvania (the "State Court"), against Mr. Kwasny seeking, among other things, unpaid wages and payroll deductions that were never forwarded to the Plan under both state law and ERISA. J.A. 37a-44a. On November 23, 2011, the State Court issued a default judgment in the amount of $80,435.85 against Mr. Kwasny (the "State Court Default Judgment"). J.A. 45a. On August 29, 2012, the State Court also entered an order in the amount of

[1] "J.A." refers to the Joint Appendix.

$32,677.15 for punitive damages against Mr. Kwasny "to be added to the amount of the default judgment already entered." SA-1 (emphasis added).[23] The punitive damage award order specifically stated that Mr. Kwasny could move for reconsideration only if he provides complete discovery responses to Mr. Haft and pays Mr. Haft $1000.00. Id.

B. The Secretary's Action

On July 16, 2014, the Secretary filed a complaint against Mr. Kwasny in the United States District Court for the Eastern District of Pennsylvania ("the District Court") seeking, among other things, a judgment that Mr. Kwasny violated his fiduciary duties to the Plan under ERISA, as well as the restoration of losses to the Plan resulting from Mr. Kwasny's fiduciary breaches. SA-6-12. On February 8, 2016, the District Court granted the Secretary's motion for summary judgment, finding that Mr. Kwasny violated his fiduciary duties to the Plan, ERISA sections 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B), and committed self-dealing and transactions prohibited by ERISA when he directed employee contributions to the Plan to be commingled with the Firm's general assets to pay Firm

[2] "SA" refers to the Supplemental Appendix.

[3] The State Court's September 23, 2015 judgment states that the total judgment against Mr. Kwasny and in favor of Mr. Haft is $113,113.000 or the sum of $32,677.15 for punitive damages added to the default judgment of $80,435.85. SA-4. The court order in the record is unsigned. Id. As the District Court noted, the only signed State Court order that Mr. Kwasny provided is the August 29, 2012 order. SA-33.

expenses, including his own salary, ERISA sections 406(a)(1)(D) & (b)(1), 29 U.S.C. §§ 1106(a)(1)(D) & (b)(1). SA-21. As a result, the District Court ordered Mr. Kwasny to pay $40,416.30 in restitution to the Plan comprised of withheld employee contributions and $9798.85 in pre-judgment interest, for a total of $50,215.15 ("District Court Judgment"). J.A. 22a; SA-35. Additionally, while recognizing that the 2012 punitive damages judgment in the State Court action may have arisen from the same set of facts as the Secretary's claims, the District Court rejected Mr. Kwasny's argument that the Secretary's claims were precluded by private litigation under res judicata or issue preclusion. SA-30-32. In doing so, the District Court explained that the Secretary "has strong independent interests" in protecting the integrity of the nation's pension system and the general welfare of the nation and is not in privity with private litigants, like Mr. Haft. Id.

The District Court also refused to allow the amount of the State Court Default Judgment to offset the monetary relief provided in the District Court Judgment. SA-33. The District Court reasoned that the State Court's punitive damages award order arises from Mr. Kwasny's failure to comply with a prior order of the State Court and not from Mr. Haft's "underlying claims regarding his withheld Plan contributions." Id.

On appeal, this Court affirmed the District Court's findings that Mr. Kwasny violated ERISA by diverting employee contributions into his Firm's general assets

and using those contributions for Firm expenses, including his own salary. J.A. 7a-11a. Moreover, this Court affirmed the District Court's conclusion that neither res judicata nor issue preclusion applies, so the State Court Default Judgment does not preclude the Secretary from bringing suit against Mr. Kwasny to seek restitution of employee contributions. J.A. 11a-12a. Nonetheless, this Court noted that while the State Court's August 29, 2012 order awarded punitive damages in the amount of $32,677.15, the State Court also entered a default judgment against Mr. Kwasny in the amount of $80,435.85 in its November 28, 2011 order. J.A. 16a. This Court noted that the District Court only rejected any offsets to the amount of the judgment based on the punitive damages award but did not determine whether any offsets should apply based on the default judgment. Id. Therefore, this Court remanded the case for an assessment as to whether the amount of the District Court Judgment should be offset by the State Court Default Judgment. Id.

On remand, the Secretary asserted that Mr. Kwasny's position that the District Court Judgment should be reduced by the amount of the State Court Default Judgment, not by how much was actually recovered, rests on a fundamental misunderstanding of the law. J.A. 52a. The Secretary argued that he clearly has the power to seek a monetary judgment for a plan where the plan has not been made whole by prior judgments or settlements. J.A. 53a-54a. The Secretary asserted that because Mr. Kwasny had not produced any evidence that any amount was actually

paid to the Plan or Mr. Haft, the State Court Default Judgment that Mr. Haft obtained should not be used to offset the recovery previously ordered by the District Court. Id. Accordingly, the Secretary concluded that only "[u]pon proof of the payment of the [State Court Default] Judgment – proof that has been repeatedly requested but never provided – the Secretary will credit this amount against the judgment entered by [the District] Court." J.A. 52a.

On December 11, 2017, the District Court entered an order in favor of the Secretary and found that no reduction in the amount of the District Court Judgment was warranted. J.A. 2a-4a. The District Court clarified the District Court Judgment to reflect that "it is concurrent with the November 23, 2011 judgment entered by the Bucks County Court." J.A. 2a. Next, the District Court ordered that upon proof of payment by Mr. Kwasny of any amount of the State Court Default Judgment, the Secretary shall immediately credit that amount against the concurrent District Court Judgment to reduce the amount owed. Id.

SUMMARY OF THE ARGUMENT

In the previous appeal, this Court remanded on a single, narrow issue: whether the amount of the District Court Judgment should be offset by a concurrent State Court Default Judgment. This Court has already ruled that Mr. Kwasny is liable for his ERISA violations and the principles of res judicata and issue preclusion do not bar the Secretary's action in this case.

The District Court correctly determined that its February 8, 2016 order is concurrent with the State Court Default Judgment and properly ordered the Secretary to credit the amount that Mr. Kwasny pays on the State Court Default Judgment towards the amount of the District Court Judgment. The District Court's order contains clear language that prevents the Secretary from obtaining a duplicative recovery without affecting the private plaintiff's right to recover damages through the State Court Default Judgment. The District Court properly rejected Mr. Kwasny's arguments that the mere existence of a State Court Default Judgment requires an offset against the District Court Judgment based on a risk of double recovery. The District Court clearly prevented the risk xof double recovery, so Mr. Kwasny's objection to the concurrent judgments is baseless.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED ANY REDUCTION OF THE AMOUNT OF THE DISTRICT COURT JUDGMENT ABSENT PROOF OF PAYMENT TOWARDS THE STATE COURT DEFAULT JUDGMENT.

A. STANDARD OF REVIEW

When an appellant challenges a district court's legal conclusions, the standard of review is de novo. In re PWS Holding Corp., 228 F.3d 224, 235 (3d Cir. 2000). De novo review, however, does not extend to any factual or legal matter expressly or necessarily resolved in the previous appeal in this case in Sec'y of Labor v. Kwasny, 853 F.3d 87 (3d Cir. 2017), J.A. 5a-16a; the law-of-the-case doctrine

governs the same issues of fact or law at all subsequent stages of this case. See, e.g., Arizona v. California, 460 U.S. 605, 618 (1983).

B. MR. KWASNY'S OBJECTIONS THAT THE OFFSET IS EITHER BARRED BY THE STATE COURT DEFAULT JUDGMENT OR CONSTITUTES DOUBLE RECOVERY ARE MERITLESS.

Mr. Kwasny raises two issues in his appeal of the District Court Judgment. First, Mr. Kwasny argues that the District Court Judgment is barred by the State Court Default Judgment based on cases involving claim preclusion or res judicata. See Appellant Br. 8-9. Second, Mr. Kwasny argues that the District Court Judgment must be reduced by the amount of the State Court Default Judgment because the presence of concurrent judgments constitutes impermissible double recovery. See Appellant Br. 9, 14-15.

1. The District Court Properly Rejected Mr. Kwasny's Argument That A Plan Participant's State Court Default Judgment Against Mr. Kwasny Requires An Offset Against The District Court Judgment.

Mr. Kwasny asserts that the Secretary is precluded from enforcing the District Court Judgment where the State Court Default Judgment exists because this Court must give "full faith and credit" to the State Court Default Judgment. Appellant Br. 13. Mr. Kwasny's reliance on "full faith and credit" is merely an argument based on res judicata and claims preclusion. See Baker by Thomas v. Gen. Motors Corp., 522 U.S. 222, 234 (1998). In essence, Mr. Kwasny objects to the fact that the State Court and District Court issued concurrent judgments that are both effective, but this Court

has already determined that the District Court had properly issued a concurrent judgment after rejecting Mr. Kwasny's evocation of res judicata or claim preclusion as barring the Secretary's claims for relief. J.A. 11a-12a. This Court already recognized that the Secretary's authority includes the power to seek monetary judgment for a Plan where the Plan has not been made whole by prior judgments or settlement. Kwasny, 853 F.3d at 95 n.44. The only question on remand was the propriety of an offset against the District Court Judgment, not whether the State Court Default Judgment barred a concurrent judgment. J.A. 16a.

In this regard, Mr. Kwasny's repeated citations to cases involving res judicata or claim preclusion are completely inapposite and foreclosed by the law of the case. See AL Tech Specialty Steel Corp. v. Allegheny Int'l Credit Corp., 104 F.3d 601, 605 (3d Cir. 1997) ("Under the law of the case doctrine, an appellate court should generally decline to reconsider a question that was decided in a prior appeal."). As stated by this Court in the previous appeal, it has been well-established that the Secretary has the authority to bring an action and seek relief for claims, regardless of the existence of concurrent actions by private plaintiffs. Kwasny, 853 F.3d at 95 (finding that the Secretary is not in privity with private litigants and is therefore not bound by the results of private litigation); accord Herman v. S.C. Nat. Bank, 140 F.3d 1413, 1424 (11th Cir. 1998) ("Every circuit addressing the issue has held that the Secretary is not bound by prior private litigation when the Secretary files an

independent action to address ERISA violations."); Sec'y Labor v. Fitzsimmons, 805 F.2d 682, 697 (7th Cir. 1986) (en banc) ("The Secretary of Labor's interest in an ERISA action is . . . clearly separate and distinct from the private plaintiffs' interests and thus cannot be barred by the doctrine of res judicata."); Donovan v. Cunningham, 716 F.2d 1455, 1462 (5th Cir. 1983) (same) (internal citations omitted). Accordingly, this Court has already rejected Mr. Kwasny's argument that the State Court Default Judgment has any preclusive effect on the District Court's ability to grant full relief in this case.

2. The District Court Correctly Ordered The Secretary To Credit The Amount That Mr. Kwasny Pays Towards The State Court Default Judgment In Offsetting The Amount Of The District Court Judgment.

Mr. Kwasny's second objection is that the District Court Judgment should be reduced because the State Court Default Judgment and the District Court Judgment arise from the same operative facts and seek identical relief and would result in double recovery. Appellant Br. 9. Mr. Kwasny argues that the District Court has not imposed sufficient restrictions to prevent double recovery. Appellant Br. 16-17. This is incorrect. Throughout this case, the Secretary has consistently acknowledged that he does not seek double recovery for the Plan. J.A. 52a. Accordingly, the District Court's December 11, 2017 order contains a specific restriction on the amount that the Secretary recovers under the District Court Judgment. The order clearly states that once Mr. Kwasny provides proof of payment of an amount towards

the State Court Default Judgment, "the Secretary shall immediately credit that amount against the concurrent [District Court Judgment] in this case, reducing the amount owed to the Secretary." J.A. 2a. Courts have adopted this method to resolve the double recovery problem in concurrent cases. See S.E.C. v. Palmisano, 135 F.3d 860, 863-64 (2d Cir. 1998) (concurrent criminal and civil judgments); Beck v. Levering, 947 F.2d 639, 642 (2d Cir. 1991); see also Kwasny, 853 F.3d at 95 n.44 (referencing Beck).

Regardless, in response, Mr. Kwasny cites cases raising the risk of double recovery but in situations where a plaintiff actually attempts to recover duplicate damages under both a federal claim and a state claim without any offsets between the claims. See Appellant Br. 8 (citing U.S. Indus., Inc. v. Touche Ross & Co., 854 F.2d 1223, 1259–60 (10th Cir. 1988)). His cited cases about double recovery all acknowledge the validity of having two concurrent judgments that apply to identical facts or offer identical relief; a problem only occurs when a plaintiff seeks recovery of duplicative damages, not when concurrent judgments are issued. For example, Mr. Kwasny cites U.S. Industries, which relied on a basic principle in tort law that "[a] payment by any person made in compensation of a claim for a harm for which others are liable as tortfeasers diminishes the claim against the tortfeaser, at least to the extent of the payment made." 854 F.2d at 1261 (quoting Restatement of Torts that Restatement (Second) of Torts § 885(3) (1977)) (emphasis added). The Tenth

Circuit thus only reduced the judgment by an amount already paid or recovered in a prior settlement. U.S. Industries, 854 F.2d at 1262. U.S. Industries points out that "reduc[ing] the judgment by the amount of the duplication, [ ] thereby prevent[s] double recovery." Id. at 1259-60 (internal quotations and citations omitted). Mr. Kwasny cites to other authorities that repeat the same principles. See Appellant Br. 10-11.

Consistent with U.S. Industries, the District Court's use of an offset here prevents the Secretary from a double recovery by reducing its own judgment "to the extent of the payment made" on the State Court Default Judgment. When there are concurrent judgments, courts must still ensure the "plaintiff [ ] receive[s] full satisfaction of its claims" and any "partial satisfaction would merely reduce the total" judgment. Fed. Sav. & Loan Ins. Corp. v. Reeves, 816 F.2d 130, 137 (4th Cir. 1987). As the District Court correctly concluded, reductions are applied to concurrent judgments only when judgments are actually satisfied or paid.

The Second Circuit in Beck aligned with these principles in an ERISA case where the private plaintiffs and the Secretary sought recovery on concurrent judgments. In Beck, the Second Circuit held that when there are concurrent monetary judgments by private plaintiffs and the Secretary under ERISA, a party is "not subject to double recovery because the judgment merely decreases the amounts recouped by the Plans by the sums recovered by the private plaintiffs." 947 F.2d at

642 (emphasis added). Mr. Kwasny seeks to distinguish this case from Beck by stating that both of the actions in Beck were filed and adjudicated in the same federal court, whereas in this case, concurrent judgments exist in a state court and a federal court. Appellant Br. 13. Therefore, he argues that because the District Court does not have authority over any part of the State Court Default Judgment and cannot otherwise alter, amend, discharge, modify or place restrictions upon the State Court Default Judgment, the only remedy to ensure that double recovery does not exist is to reduce the District Court Judgment by the amount of the State Court Default Judgment. Appellant Br. 18. Mr. Kwasny mischaracterizes the District Court's order. In its decision, the District Court did not amend or place any restrictions on the State Court Default Judgment; it only amended its own judgment based on the amount that Mr. Kwasny proves he paid towards the State Court Default Judgment. The District Court's order does not impede either plaintiff in the concurrent cases from collecting on their judgments, and which judgment gets paid first is entirely at Mr. Kwasny's discretion. Mr. Kwasny can pay the State Court Default Judgment first and then move to reduce the District Court Judgment. Mr. Kwasny's false distinction is without merit; Beck directly applies to this case.

Lastly, relying on Perez v. Bruister, 823 F.3d 250 (5th Cir. 2016), Mr. Kwasny asserts that this Court should consolidate the concurrent judgments into a single judgment, but his reasoning is misplaced. Appellant Br. 13-14. As Mr. Kwasny

acknowledges, Bruister involved two identical judgments entered in two different cases by the same court after the cases were already consolidated. The Fifth Circuit modified the concurrent judgments into a single judgment and in doing so, it did state that "modifying the concurrent judgments in each consolidated case into a single judgment" was "to alleviate any misconception and avert double recovery." Id. at 276. Nonetheless, the Fifth Circuit also explained in its reasoning to consolidate the judgments that the district court did not specify that "recovery under one offsets the amount owed under the other." Id. As discussed, the District Court's December 11, 2017 order clearly states that the District Court Judgment will be offset by the amount that Mr. Kwasny pays towards the State Court Default Judgment. J.A. 2a.

In any event, Mr. Kwasny has never evinced any intent to pay either judgment, and it is undisputed that Mr. Kwasny has not presented any evidence to show proof of payment towards the State Court Default Judgment. The Secretary maintains its position that once Mr. Kwasny does, the Secretary will credit the amount that he pays towards the State Court Default Judgment and offset that amount for the District Court Judgment. The District Court placed these restrictions in its order to prevent double recovery; this Court has no reason to modify any part of the District Court's December 11, 2017 order.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court

affirm the District Court's December 11, 2017 order in its determination that the State Court Default Judgment against Mr. Kwasny is concurrent with the District Court Judgment, and that upon proof of payment of the State Court Default Judgment, the Secretary shall reduce that amount against the District Court Judgment.

DATED: May 7, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Third Circuit Rule, I hereby certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 3565 words. This word count was provided by the Microsoft Word 2016 software program with which the brief was produced.

DATED: May 7, 2018

CHRISTINE D. HAN

CERTIFICATION PURSUANT TO LAR 31.1

I certify that the digital version and hard copies of the Secretary's Brief are identical. I further certify that a virus scan was performed on the Brief using McAfee, and that no viruses were detected.

Dated: May 7, 2018

CHRISTINE D. HAN

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF System.

DATED: May 7, 2018

CHRISTINE D. HAN