U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

August 28, 2012

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Fane Lozman v. The City of Riviera Beach, Florida
S. Ct. No. 11-626

Dear Mr. Suter:

On August 14, 2012, the Court directed the parties, and invited the Solicitor General, to file simultaneous letter briefs in the above-captioned case addressing the following question:

> The *res* in this putative *in rem* admiralty proceeding was sold at a judicial auction in execution of the district court's judgment on a maritime lien and a maritime trespass claim, Petn. App. 9a-10a, and subsequently destroyed, Petr. Br. 10-11. Does either the judicial auction or the subsequent destruction of the *res* render this case moot?

In response to the Court's question, it is the position of the United States that the case has not been rendered moot by either the auction or the destruction of the original *res* in the proceeding, because respondent posted a $25,000 bond in the district court, which ensures that petitioner could still receive meaningful relief (from respondent) if petitioner were ultimately to prevail in the case.

1. An Article III case may become moot, or no longer "fit for federal-court adjudication," when the parties do not "retain a stake in the outcome" of the case, "not only at the outset of litigation, but throughout its course." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028, 2033 (2011) (internal quotation marks omitted). In *Camreta*, the case before this Court had become moot because the party on whose behalf the respondent had brought suit could no longer "be affected by the Court of Appeals' ruling." *Id.* at 2034; see also, *e.g.*, *Calderon* v. *Moore*, 518 U.S. 149, 150 (1996) (per curiam) ("an appeal should * * * be dismissed as moot when * * * a court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant") (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)).

In the context of *in rem* proceedings, the same principle was recognized long ago in Chief Justice Marshall's observation that a federal court's jurisdiction might lapse if "the

thing" at issue was "los[t]," such that it could neither "be delivered to the libellants, nor restored to the claimants," and any judgment the court issued would be "useless." *United States* v. *The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612) (Marshall, Circuit Justice); see also *Republic Nat'l Bank* v. *United States*, 506 U.S. 80, 87 (1992) (noting that, "if a defendant ship stealthily absconds from port and leaves the plaintiff with no *res* from which to collect, a court might determine that a judgment might be useless") (internal quotation marks and citation omitted); *id.* at 89 (opinion of Blackmun, J.) (characterizing "the 'useless judgment' exception * * * to appellate *in rem* jurisdiction" as "another way" of viewing the question of mootness).

Yet, as Chief Justice Marshall also recognized, that reason for divesting the court of jurisdiction "will not apply to any case where the judgment will have any effect whatever," such as, for example, when "the parties have * * * substituted other property to abide the fate of the suit." *The Little Charles*, 26 F. Cas. at 982. Thus, although the initiation of an *in rem* proceeding ordinarily requires a valid seizure of the *res* that is the subject of the proceeding, see *Republic Nat'l Bank*, 506 U.S. at 84-85, a party may secure the release of the *res* by furnishing something else that can be substituted for it. Accordingly, Supplemental Admiralty Rule E(5)(a) to the Federal Rules of Civil Procedure expressly provides that the property at issue in an *in rem* admiralty proceeding may be released "on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court."

Such a security often takes the form of a bond, the effect of which "is to take the place of the vessel [or other *res*] which has been seized and released." 2 Thomas A. Russell, *Benedict on Admiralty* § 63, at 5-11 (7th ed. rev. 2010); see *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19, 38 (1960) (Whittaker, J., dissenting) ("This Court has from an early day consistently held that a bond, given to prevent the arrest or to procure the release of a vessel, is substituted for and stands as the vessel in the custody of the court.") (emphasis omitted); *United States* v. *Ames*, 99 U.S. 35, 42 (1879) (explaining that the bond given for the release of cargo "became the substitute for the property; and the remedy of the libellants, in case they prevailed in the suit *in rem* for condemnation, was transferred from the property to the bond or stipulation accepted by the court as the substitute for the property seized"); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 10 (1827) (Story, J.) (describing it as "the known course of the Admiralty" that a stipulation taken "for the property subjected to legal process and condemnation * * * is deemed a mere substitute for the thing itself," making "the stipulators liable to the exercise of all those authorities on the part of the Court, which it could properly exercise, if the thing itself were still in its custody"); Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 9-89, at 799 (2d ed. 1975) ("With respect to a lien in suit the effect of release is to transfer the lien from the ship to the fund represented by the bond or stipulation."). Cf. 28 U.S.C. 1355(c) (in a civil forfeiture action that has been appealed, "removal of the property by the prevailing party shall not deprive the court of jurisdiction"; the court may "preserve the right of the appealing party to the full value of the property at issue" by granting a stay or requiring the prevailing party to post a bond).

2. In this case, respondent filed a putative *in rem* proceeding in admiralty against petitioner's floating home on April 20, 2009. J.A. 4-10 (complaint). The structure, which respondent alleged to be a "vessel," was arrested that day by the United States Marshal and towed away. Pet. App. 8a. Three days later, the district court refused to order that the alleged vessel be returned but ordered respondent to post, within one week, "a $25,000 bond to secure [petitioner's] value in the vessel." D. Ct. Doc. No. 20 ¶¶ 1, 4, at 1-2 (Apr. 23, 2009). Respondent filed a copy of its "Security Bond" on the deadline, D. Ct. Doc. No. 26 (Apr. 30, 2009), and later filed the original with the court, D. Ct. Doc. No. 46 (May 15, 2009). In doing so, respondent and its surety promised "to pay into the registry of the Court, or as otherwise directed by Court order, all damages, costs, and interest that may be adjudged and found due to [petitioner] in an amount up to and not exceeding the sum of $25,000 in the event final judgment (after appeal, if any) is entered against [respondent]." *Id.* ¶ 4. By its terms, the "obligation" reflected in the bond "remain[s] in full force and effect" until respondent "fulfils" that obligation or until "final judgment is entered for [respondent] and against the Defendant Vessel." *Id.* ¶ 5. In January 2010, the district court entered judgment in respondent's favor, ordered that the "[d]efendant vessel" be "condemned and sold at a U.S. Marshal sale" to satisfy the judgment, and authorized respondent to "bid on its judgment or any part thereof, in lieu of cash at the public sale." D. Ct. Doc. No. 159 ¶¶ 1-3, at 1 (Jan. 6, 2010); see D. Ct. Doc. No. 186 (Feb. 26, 2010) (order amending judgment).

The auction was conducted on February 9, 2010, and respondent prevailed on a bid of $4100. See D. Ct. Doc. No. 176 ¶¶ 1, 4, at 1 (Feb. 16, 2010); D. Ct. Doc. No. 190 (Mar. 10, 2010) (bill of sale). Petitioner filed a notice of appeal, D. Ct. Doc. No. 173 (Feb. 11, 2010), and he filed "emergency motions" in both the district court and the court of appeals to stay judicial confirmation of the sale, see D. Ct. Doc. No. 171 (Feb. 10, 2010); Pet. C.A. Emergency Mot. To Stay Sale & Confirmation of Sale of the Floating Residential Structure and Motion To Stay Enforcement of D. Ct.'s Jan. 6, 2010 Order & Judgment (Feb. 22, 2010). Respondent opposed both of those motions, and both of them were denied. See D. Ct. Doc. No. 185 (Feb. 24, 2010); C.A. Docket entry (Mar. 2, 2010). The district court clerk confirmed the sale, D. Ct. Doc. No. 188 (Feb. 26, 2010), and respondent, after taking possession of petitioner's floating home, ultimately destroyed it, see Resp. Br. 13 n.9.

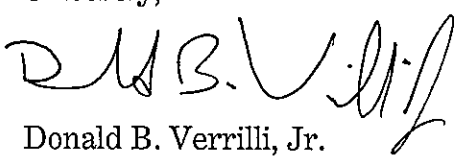
3. Neither the sale of petitioner's floating home at judicial auction, nor its subsequent destruction by respondent, deprived the courts below (or this Court) of continuing jurisdiction over the dispute between petitioner and respondent. As described above, more than nine months before the auction, respondent had filed a surety bond in the district court that pledged to pay up to $25,000 to petitioner "in the event final judgment (after appeal, if any) is entered against [respondent]." D. Ct. Doc. No. 46 ¶ 4. The bond was meant to protect petitioner's interest in the property, even if that interest could not be established until after an appeal. See S.D. Fla. Adm. & Mar. R. E(8)(a)(i) and (ii) (addressing release of property under Supplemental Admiralty Rule E(5); providing that a "stipulation, bond, or other security" that serves as "a precondition to release" must be conditioned "to pay the amount of any final judgment entered by [the District] Court *or any appellate Court*, with interest") (emphasis added). Therefore, consistent with the cases discussed above, the bond

provides a continuing basis for whatever *in rem* jurisdiction was appropriate at the outset of the suit.

Indeed, when respondent opposed petitioner's attempts to prevent the sale from being confirmed, its position on mootness was consistent with the foregoing. In the court of appeals, respondent explained that "Sale Will Not Moot This Appeal," because "'*[t]he proceeds from the judicial sale of a vessel, or security furnished in lieu thereof, are deemed a jurisdictional substitute for the vessel itself.*'" Resp. C.A. Response in Opp. to Pet. Emergency Mot. To Stay Sale & Confirmation of Sale 16-17 (Feb. 24, 2010) (quoting *Isbrandtsen Marine Servs.* v. *M/V Inagua Tania*, 93 F.3d 728, 734 (11th Cir. 1996), in turn quoting *American Bank of Wage Claims* v. *Registry of the D. Ct. of Guam*, 431 F.2d 1215 (9th Cir. 1970)) (emphasis supplied by Eleventh Circuit). Although respondent acknowledged that there were no cash proceeds from the auction (because it had used a credit bid), it further explained that "it previously submitted a bond in the amount of $25,000.00 which remains in the registry of the District Court" and "may serve as substitute security" for petitioner's home, and, as a result, permitting the sale "will therefore not moot this appeal." *Id.* at 17. (In both the court of appeals and the district court, respondent also explained that petitioner would not suffer irreparable injury if the sale were confirmed because he could be adequately compensated by a monetary award, rather than the return of his floating home. *Id.* at 14; D. Ct. Doc. No. 176 ¶ 24, at 8 (Feb. 16, 2010).)

If petitioner prevails in this Court and ultimately succeeds in having the judgment in respondent's favor vacated, it is true that he could no longer expect to receive the relief that he contemplated before the sale and destruction of his floating home. See D. Ct. Doc. No. 181 ¶ 3, at 2-3 (Feb. 22, 2010) (reply brief supporting emergency motion to deny confirmation of sale, stating that petitioner "fully expects that his floating residential structure will be restored to the condition that it was in prior to its improper arrest and returned, at [respondent's] expense, to [respondent's] marina"). Nevertheless, it is well established that "[t]he available remedy * * * does not need to be 'fully satisfactory' to avoid mootness." *Calderon*, 518 U.S. at 150 (quoting *Church of Scientology* v. *United States*, 506 U.S. 9, 13 (1992)). In light of respondent's $25,000 bond—which was intended "to secure [petitioner's] value in the vessel," D. Ct. Doc. No. 20 ¶ 4, at 2, and which is a substitute for the released *res*—this case is not moot because it is not "impossible for a court to grant any effectual relief whatever" to petitioner if he ultimately prevails. *Knox* v. *Service Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (internal quotation marks and citation omitted).

Sincerely,



Donald B. Verrilli, Jr.
Solicitor General
SupremeCtBriefs@usdoj.gov

cc: See Attached Service List

11-0626
LOZMAN, FANE
CITY OF RIVIERA BEACH, FLORIDA

KERRI L. BARSH
GREENBERG TRAURIG
333 AVENUE OF THE
AMERICAS, 44TH FLOOR
MIAMI, FL 33131

ROBERT B. BIRTHISEL
HAMILTON, MILLER & BIRTHISEL, LLP
100 S. ASHLEY DR.,
SUITE 1210
TAMPA, FL 33602
813-223-1900
RBIRTHISEL@HAMILTONMILLERLAW.COM

PATRICK J. BONNER
FREEHILL HOGAN & MAHAR
80 PINE STREET
NEW YORK, NY 10005
212-425-1900

ROBERT TAYLOR BOWLING
COBB COLE
150 MAGNOLIA AVENUE
DAYTONA BEACH, FL 32114

ERIN GLENN BUSBY
411 HIGHLAND STREET
HOUSTON, TX 77009
713-868-4233

CHARLES G. DE LEO
FOWLER WHITE BURNETT, P.A.
1395 BRICKELL AVENUE
14TH FLOOR
MIAMI, FL 33131
305-789-9200
CDELEO@FOWLER-WHITE.COM

11-0626
LOZMAN, FANE
CITY OF RIVIERA BEACH, FLORIDA

JEFFREY L. FISHER
STANFORD LAW SCHOOL
SUPREME COURT LITIGATION CLINIC
559 NATHAN ABBOTT WAY
STANFORD, CA 94305
650-724-7081
JLFISHER@LAW.STANFORD.EDU

DAVID C. FREDERICK
KELLOGG, HUBER, HANSEN, TODD
EVANS & FIGEL, P.L.L.C.
1615 M STREET, N.W.
SUITE 400
WASHINGTON, DC 20036
202-326-7900
DFREDERICK@KHHTE.COM

EDWARD M. MULLINS
ASTIGARRAGA DAVIS MULLINS
& GROSSMAN, LLP
701 BRICKELL AVENUE,
16TH FLOOR
MIAMI, FL 33131

FRANCIS X. NOLAN, III
VEDDER PRICE P.C.
1633 BROADWAY
47TH FLOOR
NEW YORK, NY 10019
212-407-7700
FNOLAN@VEDDERPRICE.COM

PAMELY A. RYAN
CITY ATTORNEY
CITY OF RIVERA BEACH
600 WEST BLUE HERON BLVD.
RIVIERA BEACH, FL 33404
561-845-4069

MICHAEL E. STURLEY
LYNN E. BLAIS
727 EAST DEAN KEETON STREET
AUSTIN, TN 78705
512-232-1350