IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-14093-GG

In re: EDUARDO GONZALEZ,
Pursuant to 28 U.S.C. 1782 For Judicial Assistance in
Obtaining Evidence for Use in Foreign International Proceedings,

Petitioner-Appellee,

versus

VERFRUCO FOODS, INC.,

Respondent-Appellant,

VICTOR SEBASTIAN MAURICIO, et al.,

Respondents.

Appeal from the United States District Court
for the Southern District of Florida

Before: ROSENBAUM, NEWSOM, and BRANCH, Circuit Judges.

BY THE COURT:

In November 2020, the district court granted Eduardo Gonzalez's 28 U.S.C. § 1782 application to obtain documentary and testimonial evidence for use in contemplated foreign proceedings in Mexico. In appeal no. 21-12922, Verfruco Foods, Inc. ("Verfruco") appeals from that order and the district court's affirmance of the magistrate judge's order denying Verfruco's motions to vacate the § 1782 grant and to quash subpoenas entered pursuant to that order. That appeal remains pending. In the meantime, a magistrate judge partially granted Gonzalez's motion to compel forensic examination and impose sanctions against Verfruco.

On November 18, 2021, the magistrate judge found that Verfruco was unwilling to conduct a complete search of its computer system and devices for documents responsive to Gonzalez's discovery request. The magistrate judge granted Gonzalez's request to appoint a neutral third-party expert to access and independently review the two email servers at issue. The magistrate judge deferred ruling on the request for contempt sanctions and permitted further briefing on that issue. Verfruco has not challenged the November 18 order in the district court and, instead, seeks to directly appeal that decision to this Court.

Gonzalez moves to dismiss this appeal for lack of jurisdiction. He argues that the November 18 discovery order is not final and that a magistrate judge decision is not directly appealable to this Court. Verfruco responds that the magistrate judge decision was effectively an injunction and that we have jurisdiction to review injunctions entered by magistrate judges. Alternatively, Verfruco asks us to treat the appeal as a mandamus petition because, it argues, the magistrate judge lacked the authority to enter an injunction.

To be appealable, an order must either be final or fall into a specific class of interlocutory orders that are made appealable by statute or jurisprudential exception. *See* 28 U.S.C. §§ 1291, 1292; *CSX Transp., Inc. v. City of Garden City*, 235 F.3d 1325, 1327 (11th Cir. 2000). However, when a magistrate is proceeding under the supervision of a district court, pursuant to 28 U.S.C. § 636(b), its actions "are not final orders and may not be appealed until rendered final by a district court." *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1066-67 (11th Cir. 1982); *see also* 28 U.S.C. § 636(b); *Glover v. Ala. Bd. of Corr.*, 660 F.2d 120, 122 (5th Cir. 1981) ("Only a district court can make a magistrate's decision final, and therefore appealable."). "Magistrates are allowed to perform inherently judicial acts only because they act under the supervision of an Article III judge." *Donovan*, 693 F.2d at 1066 (quotation marks omitted). The district court may

designate a magistrate judge to hear and determine most pretrial matters pending before the court but not a motion for injunctive relief or various dispositive motions. *See* 28 U.S.C. § 636(b)(1)(A). The district court may also designate a magistrate judge to conduct hearings and submit proposed findings of fact and recommendations for the disposition of any motion excepted by subparagraph (A). 28 U.S.C. § 636(b)(1)(B). A magistrate judge may also be assigned "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3).

Here, the parties did not consent to the magistrate judge proceeding under § 636(c). Instead, the case was referred to the magistrate judge for a ruling on all pre-trial, non-dispositive matters and a report and recommendation on all dispositive matters, which means that the magistrate judge was proceeding under § 636(b). Because Verfruco has not challenged the magistrate judge's November 18 order in the district court, the order has not been rendered final, and we lack jurisdiction to directly review it. *See Donovan*, 693 F.2d at 1066-67; *see also* 28 U.S.C. § 636(b)-(c). In dismissing this appeal, we do not reach Gonzalez's other arguments that the November 18 order would not have been final and appealable under § 1291 even if the district court had reviewed the magistrate judge's decision. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (recognizing that there is no mandatory sequencing of jurisdictional issues and a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits); *see also Rouse Constr. Int'l, Inc. v. Rouse Constr. Corp.*, 680 F.2d 743, 745-46 (11th Cir. 1982) (explaining that discovery orders, particularly postjudgment orders granting motions to compel discovery in aid of the judgment, are not generally final and, therefore, not immediately appealable; *but see Furstenberg Fin. SAS v. Litai Assets LLC*, 877 F.3d

1031, 1033-34 (11th Cir. 2017) (discussing finality of discovery orders in proceedings brought under § 1782).

Relying on *Int'l Cosms. Exch., Inc. v. Gapardis Health & Beauty, Inc.*, 303 F.3d 1242 (11th Cir. 2002), Verfruco asserts that we have jurisdiction to review magistrate judge injunctions. However, in that case, we explained that the parties had consented to the jurisdiction of a magistrate judge under § 636(c), so the fact that the order was issued by a magistrate did not affect its appealability. *See Int'l Cosms. Exch.*, 303 F.3d at 1244 n.1; *see also* 28 U.S.C. § 636(c)(3). This is because, when the parties consent to a magistrate judge entering judgment under § 636(c), an aggrieved party may appeal directly to a court of appeals. 28 U.S.C. § 636(c)(3). Moreover, none of the cases that we relied upon in *International Cosmetics* suggest that a magistrate judge's decision when proceeding under § 636(b) would be immediately and directly appealable to a court of appeals under 28 U.S.C. § 1292(a)(1). Accordingly, we need not reach whether the November 18 order was effectively an injunction, because, even if it were, the "district court retains general supervisory power to review any action taken by a federal magistrate," and Verfruco must first challenge the magistrate judge's November 18 order in the district court. *Donovan*, 693 F.2d at 1066; *see* 28 U.S.C. §§ 636; *see also Alabama v. United States Army Corps of Eng'rs*, 424 F.3d 1117, 1128 (11th Cir. 2005) (discussing when an order is appealable under 28 U.S.C. § 1292(a)(1)).

As for Verfruco's alternative request, we decline to construe its counseled appeal as a mandamus petition. In any event, construing it as such would be futile because Verfruco has the adequate alternative remedy of raising its argument that the magistrate judge exceeded its authority to the district court. *See Mallard v. United States Dist. Court*, 490 U.S. 296, 309 (1989); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1004 (11th Cir. 1997).

Accordingly, Gonzalez's motion to dismiss this appeal is GRANTED, and this appeal is DISMISSED for lack of jurisdiction. All pending motions are DENIED AS MOOT.