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United States District Court, C.D. California.

UNITED STATES of America
v.
Fariba Ely COHEN

Case No. CV 17-1652-MWF (JCx)
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Proceedings (In Chambers): ORDER RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [57]

The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

***1** Before the Court is Plaintiff United States of America's Motion for Summary Judgment (the "Motion"), filed on November 15, 2019. (Docket No. 57). On November 25, 2019, Defendant Fariba Cohen filed an Opposition. (Docket No. 58). On December 2, 2019, Plaintiff filed a Reply. (Docket No. 59).

The Court has read and considered the papers filed in connection with the motions, and held a hearing on December 16, 2019.

For the reasons discussed below, the Motion is **DENIED**. Plaintiff has demonstrated that it brought the action within the required 2-year statute of limitations. However, the Court cannot conclude as a matter of law that Defendant's FBAR violation was willful. As indicated at the hearing, there is conflicting evidence on several facts. But even if Plaintiff were correct that the disputes about discrete facts don't really exist, ***willfulness*** itself would remain the disputed fact that a jury must find or not.

I. BACKGROUND

Plaintiff commenced this action against Defendant on March 1, 2017. (*See generally* Complaint ("Compl.") (Docket No. 1)). The following facts are based on the evidence, as viewed in the light most favorable to Defendant as the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (On a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his [or her, or its] favor.").

Unless otherwise indicated, all of the facts discussed below are undisputed.

A. Legal Background

On an annual basis, residents and citizens of the United States are required to report to the Commissioner of the IRS certain activity with foreign financial agencies for each year in which the activity occurs. *See* 31 U.S.C.

§ 5314(a); 31 C.F.R. § 1010.350(a). One such activity is "having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country." 31 C.F.R. § 1010.350(a). The form that needs to be completed for this annual reporting requirement is the Report of FBAR.

Civil penalties can be assessed against an individual who, whether willfully or non-willfully, fails to comply with these reporting requirements. § 5321(a)(5)(A). For willful violations, the penalty assessed is the greater of $100,000 or 50% of the balance in the foreign financial account at the time of the violation. § 5321(a)(5)(C)(i). There is no reasonable cause exception for willful violations. § 5321(a)(5)(C)(ii). An FBAR penalty must be assessed within six years from the due date of the FBAR report. § 5321(b)(1). After an assessment, the government may then bring a civil action to recover the FBAR penalty at any time before the end of the two-year period beginning on the date the penalty was assessed. § 5321(b)(2)(A).

B. Factual Background

1. Defendant Fariba Cohen

Defendant is a United States citizen, and was a United States citizen from January 1, 2008 to June 30, 2009. (*Id.* ¶¶ 163-164). Defendant married Saeed Cohen on November 19, 1989. (*Id.* ¶ 212).

***2** Defendant holds an associate's degree in biology. (Defendant's Statement of Genuine Disputes of Material Fact ("SGD") (Docket No. 58-1) ¶ 122). Since 1987, she has been self-employed, selling insurance policies as a licensed insurance agent affiliated with State Farm Insurance. (*Id.* ¶ 123). She sold homeowners insurance, commercial insurance, and life insurance. (*Id.* ¶¶ 124-16).

In approximately 2002, Defendant suggested to Saeed Cohen that they retain attorney Fred Mashian. (*Id.* ¶ 25). Initially, Mashian assisted Defendant and Saeed Cohen with estate planning. (*Id.* ¶ 26). Mashian subsequently helped Defendant and Saeed Cohen open various foreign accounts. (*Id.* ¶¶ 20-35, 44-46). Defendant met with Mashian on multiple occasions. (*Id.* ¶ 28).

2. Foreign Accounts

It is undisputed that Defendant's signature appears on various documents that establish foreign accounts in Israel, Switzerland, and Luxembourg. (*Id.* ¶ 43). On multiple occasions, Defendant and Saeed Cohen met with representatives of foreign banks in which they held foreign bank accounts. (*Id.* ¶ 47). In these meetings, Defendant and Saeed Cohen were presented with bank account opening documents or other account-related documents, and were shown or given bank statements that showed the balances in their foreign bank accounts. (*Id.* ¶¶ 48-49).

The parties dispute whether Defendant actually signed all the documents that contain her signature. (*See generally* SGD). Defendant previously testified that she signed the documents with her signature. (*Id.* at 2). However, Defendant asserts that she had been unaware that Saeed Cohen signed Defendant's

signature for her at the time of the previous testimony. (*Id.*). Therefore, when she saw a signature that looked like hers, she previously assumed that she signed it. (*Id.*). She later discovered, however, that Saeed Cohen signed her name on various official documents. (*Id.*).

a. Bank Leumi Account

Defendant and Saeed Cohen met with Farideh Zakaryaie of Bank Leumi in Beverly Hills to sign documents. (*Id.* ¶ 53). Plaintiff contends that Defendant signed documents to open an account with Leumi Bank (Luxembourg) with an account number ending in 6002. (*Id.* ¶ 54). Plaintiff further contends that Defendant went to Bank Leumi to have her signature guaranteed, and the bank guaranteed Defendant's signature. (*Id.* ¶¶ 55, 56). Defendant disputes both assertions, stating that she is unsure if she signed these documents. (*Id.*).

Defendant had individual signature authority over the Bank Leumi (Luxembourg) account when it was created. (*Id.* ¶ 61). On or about the time the Bank Leumi (Luxembourg) account was opened, Defendant saw a bank statement that showed that the account had a balance of between $1,300,000 and $1,500,000. (*Id.* ¶ 69). Defendant does not dispute that she saw the bank statement. (*Id.*). However, she asserts that she thought this account was for a domestic Bank Leumi account where Saeed Cohen's businesses had accounts and a line of credit. (*Id.*).

During the year 2008, Defendant had signature authority for a foreign bank account with Leumi Bank – Luxembourg S.A. with an account number ending in 6002. (*Id.* ¶ 62). The account had a maximum value of $14,123,172 during the year 2008. (*Id.* ¶ 167). As of June 30, 2009, the Leumi Bank account had a balance of $6,199,395. (*Id.* ¶ 174).

b. Other Foreign Bank Accounts

Mashian also helped Defendant and Saeed Cohen form two entities: (1) L&C Lighting Technology Ltd. ("L&C"), a Samoan company, and (2) Liform Lite Industrial Co. Ltd. ("Liform"), a British Virgin Islands company. (*Id.* ¶ 29). On November 12, 2004, Mashian explained the documents related to L&C and Liform to Defendant. (*Id.* ¶ 32). On the same day, Defendant read and signed various documents related to L&C in the Liform in the presence of Mashian. (*Id.* ¶¶ 34, 35).

***3** The documents creating L&C and Liform placed one-half of the stock in the name of Defendant, and one-half of the stock in the name of Saeed Cohen. (*Id.* ¶ 36). They also established Defendant and Saeed Cohen as directors, and authorized the opening of foreign accounts in the names of the entities. (*Id.* ¶ 36). Defendant was named as the Director of L&C and was appointed as the Secretary of L&C. (*Id.* ¶¶ 37-40). Defendant and Saeed Cohen both signed a Resolution of Directors of L&C that resolved that "[T]he Company open an account at Union Bancaire Privee, Geneva Branch" under the name L&C. (*Id.* ¶ 72).

During the year 2008, Defendant had signature authority for a foreign bank account with Union Bancaire Privee with an account number

ending in 4169. (*Id.* ¶ 78). During the year 2008, the Union Bancaire Privee account had a maximum value of $2,336,889. (*Id.* ¶ 81).

During the year 2008, Defendant also had a foreign bank account with Israel Discount Bank, which was assigned a code name. (*Id.* ¶¶ 86, 87). The account in the Israel Discount Bank had a maximum value of $1,093,373 in the year 2008. (*Id.* ¶ 88). During the same year, Defendant had signature authority for a foreign bank account with RBS Coutts A.G., which had a maximum value of $2,839,899. (*Id.* ¶ 93).

c. Defendant's Knowledge

The parties largely agree that Defendant was involved in opening the foreign accounts, although Defendant disputes that she herself signed all the paperwork with her signature.

The parties dispute whether Defendant's attorney Mashian discussed the reporting requirements, including the FBAR filing, with Defendant. (*Id.* ¶ 46). Plaintiff contends that Mashian discussed the requirements with both Defendant and Saeed Cohen. (*Id.*). In contrast, Defendant asserts that Mashian discussed the requirements only with Saeed Cohen. (*Id.*). The parties also dispute when Saeed Cohen told Defendant that there was $2.8 million in overseas accounts, one with $1,300,000 and another with $1,500,000. (*Id.* ¶ 71). Plaintiff asserts that Saeed Cohen told her at least before 2005; Defendant asserts that she is not sure when this conversation occurred. (*Id.*).

The parties also dispute what happened when a Swiss banker named Kourosh Aynehchi came to Defendant and Saeed Cohen's residence in 2007. (*Id.* ¶ 94). It is undisputed that Aynehchi brought $100,000 in cash, and Defendant was present at her home at the time. (*Id.* ¶ 95). Plaintiff contends that Defendant received and counted $100,000 in cash from Aynehchi and signed a handwritten receipt for the cash authorizing the transfer of an equivalent dollar amount out of one of their Swiss accounts to an unrelated party's account. (*Id.* ¶ 96). Defendant, however, asserts that she only served them tea and cookies while also helping her daughter with her homework. (*Id.*). She asserts that it was Saeed Cohen who counted the cash and conducted the meeting with the banker. (*Id.*).

C. Joint Income Tax Returns

For tax years 2003 through 2008, Defendant and Saeed Cohen filed joint federal income tax returns. (*Id.* ¶ 97). These joint income tax returns were prepared by Hamid Fani, CPA. (*Id.* ¶ 98). Saeed Cohen obtained the completed income tax returns from their accountant Hamid Fani, and once the tax returns were signed, faxed the signature page(s) to the accountant. (*Id.* ¶¶ 99-100).

Defendant had access to Hamid Fani and knew how to contact him. (*Id.* ¶¶ 101, 102). Hamid Fani also was in direct contact with Defendant on multiple occasions. (*Id.* ¶ 103). If Defendant had requested a copy of her tax return from Hamid Fani at any time, he would have given it to her. (*Id.* ¶ 104).

***4** Defendant provided information regarding her income and expenses related to selling State Farm insurance to Saeed Cohen, who then provided it to Hamid Fani. (*Id.* ¶ 127). Defendant reported gross receipts ranging from

$91,021 to $132,624 between the years 2003 and 2008. (*Id.* ¶¶ 131-136).

For tax years 2003 through 2008, Defendant's joint Individual Income Tax Returns (Form 1040) included Schedule B – Interest and Ordinary Dividends. (*Id.* ¶ 111). For the same tax years, Schedule B on Defendant's joint Individual Income Tax Returns included ordinary dividends from State Farm. (*Id.* ¶ 112). For the same tax years, Defendant's joint Individual Income Tax Returns (Form 1040) also reported interest income on Schedule B from domestic banks, such as Pacific Crest Bank and Wells Fargo. (*Id.* ¶¶ 204-209).

However, for tax years 2003 through 2008, Defendant's joint income tax returns omitted foreign-earned income. (*Id.* ¶ 153). Specifically, these tax returns included a question: "At any time during [the relevant year,] did you have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank, securities account, or other financial account?" (*Id.* ¶ 113; Plaintiff's Reply to Statement of Genuine Disputes of Material Fact ("RSGD") at 10). In response, the "No" box was checked. (SGD ¶ 113).

For tax years 2003 through 2008, Defendant and Saeed Cohen underreported their income and tax liabilities on average $6,379,427 per year, or 71% of their income. (*Id.* ¶¶ 150, 160). The underreported income was deposited into several foreign accounts for which Defendant Saeed Cohen jointly had authority. (*Id.* ¶ 161).

The jurat on the U.S. Individual Income Tax Return (Form 1040) for tax years 2003 through 2008 contains the following statement: "Under penalties of injury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. (*Id.* ¶ 137). Defendant signed the tax returns for 2003 and 2004, but did not sign the returns for the 2005–2008 tax years. (*Id.* ¶¶ 100, 138).

D. FBAR Penalty

For tax year 2008, Defendant was required to file a Report of Foreign Bank and Financial Accounts ("FBAR") on June 30, 2009. (*Id.* ¶ 172). For tax year 2008, Defendant did not timely file an FBAR. (*Id.*).

On October 27, 2008, Defendant filed a petition for dissolution of marriage. (*Id.* ¶ 175). On February 26, 2010, Defendant and Saeed Cohen separated. (*Id.* ¶ 179).

On June 1, 2011, Saeed Cohen filed amended income tax returns for tax years 2003 through 2008, and FBARs for those years as required by the Internal Revenue Services' ("IRS") Offshore Voluntary Disclosure Initiative ("OVDI"). (*Id.* ¶ 180). Based on the amended returns for tax years 2003 through 2008, Saeed Cohen paid the IRS $18,791,495 in tax, $6,319,932 in interest, and an accuracy-related 20% penalty of $3,758,299. (*Id.* ¶ 181).

On September 10, 2011, Defendant filed delinquent FBARs for tax years 2006 through 2008 that disclosed that she owned or had signature authority for various foreign bank accounts, including an account with Leumi Bank – Luxembourg S.A., with an account number ending in 6002. (*Id.* ¶ 182).

On March 5, 2015, the IRS assessed an FBAR penalty in the amount of $1,549,849 against Defendant for her willful failure to report her interest in a foreign financial account as required by 31 U.S.C. § 5314 for tax year 2008. (*Id.* ¶ 187). On March 5, 2015, notice and demand for payment was sent to Defendant for tax year 2008. (*Id.* ¶ 188). Defendant has not paid the FBAR and late payment penalties assessed against her for calendar year 2008. (*Id.* ¶ 190).

***5** Plaintiff asserts that, as of September 27, 2016, Defendant was liable to the United States for $1,719,865.32, which is comprised of the FBAR penalty, interest, and late payment penalties for tax year 2008. (*Id.* ¶ 192).

II. EVIDENTIARY OBJECTIONS

Along with the Opposition, Defendant makes a number of evidentiary objections to the evidence Plaintiff relies on in support of its Motion. (*See generally* SGD). Defendant primarily objects to the admission of Saeed Cohen's declarations, which were filed in a bankruptcy proceeding. (SGD at 2).

None of the objections is convincing. Many of the objections are garden variety evidentiary objections based on lack of foundation and hearsay. While these objections may be cognizable at trial, on a motion for summary judgment, the Court is concerned only with the ***admissibility*** of the relevant ***facts*** at trial, and not the ***form*** of these facts as presented in the Opposition. *See Burch v. Regents of Univ. of Cal.*, 433 F. Supp. 2d 1110, 1119-20 (E.D. Cal. 2006) (making this distinction between facts and evidence, Fed. R. Civ. P. 56(e), and overruling objections that evidence was irrelevant, speculative and/or argumentative). "If the contents of the evidence could be presented in an admissible form at trial, those contents may be considered on summary judgment even if the evidence itself is hearsay." *O'Banion v. Select Portfolio Servs., Inc.*, No. 1:09-CV-00249-EJL, 2012 WL 4793442, at *5 (D. Idaho Aug. 22, 2012) (citing *Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003)). There is no reason to think that a proper foundation would not be provided at trial, or that any hearsay declarants would not be able to testify at trial. Moreover, to the extent that Defendant is objecting to the admissibility of Saeed Cohen's declarations because Saeed Cohen no longer remembers all the details contained within the declarations, the declarations are still likely to be admissible under the recorded recollection hearsay exception. *See* Fed. R. Evid. 803(5).

Therefore, to the extent the Court relies upon evidence to which Defendant objects, the objections are **OVERRULED**. To the extent the Court does not, the objections are **DENIED *as moot***.

III. LEGAL STANDARD

In deciding a motion for summary judgment under Federal Rule of Civil Procedure 56, the Court applies *Anderson, Celotex*, and their Ninth Circuit progeny. *Anderson*, 477 U.S. 242; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

The Ninth Circuit has defined the shifting burden of proof governing motions for summary judgment where the non-moving party bears the burden of proof at trial:

> The moving party initially bears the burden of proving the absence of a genuine issue of material fact. Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence. The non-moving party must do more than show there is some "metaphysical doubt" as to the material facts at issue. In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor.

Coomes v. Edmonds Sch. Dist. No. 15, 816 F.3d 1255, 1259 n.2 (9th Cir. 2016) (quoting *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010)). "A motion for summary judgment may not be defeated, however, by evidence that is 'merely colorable' or 'is not significantly probative.' " *Anderson*, 477 U.S. at 249-50.

***6** "When the party moving for summary judgment would bear the burden of proof at trial, 'it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.' " *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (quoting *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992)).

IV. DISCUSSION

Here, Plaintiff brings a civil action against Defendant to recover a civil penalty for Defendant's allegedly willful violation of the FBAR for the 2008 calendar year. The parties do not dispute that Defendant had foreign bank accounts under her name during 2008 and that Defendant failed to comply with the FBAR reporting requirements. (*See* Opp. at 7). However, Defendant argues that there are two genuine issues of material fact: (1) whether Plaintiff filed this suit after the expiration of the two-year period; and (2) whether Defendant's violation of the FBAR filing requirement was willful.

A. Two-Year Period

Defendant first argues that Plaintiff did not file this action within two years of the FBAR penalty assessment. (Opp. at 10-13). Specifically, Defendant argues that the IRS assessed the FBAR penalty on May 22, 2014, but did not file the Complaint until March 1, 2017, which was 283 days after the two-year period had expired. (*Id.* at 11).

The Court already examined and rejected this argument in a previous order. (Docket No. 42). As the Court previously noted, the IRS assessed two penalties against Defendant, each for the same amount of $1,549,849. (*Id.* at 7). The first penalty was assessed on May 22, 2014; second penalty was assessed on March 5, 2015. (*Id.*). Because Plaintiff brought this action on March 1, 2017 seeking to reduce only the second assessment, the Court concluded that the action was not barred by the statute of limitations. (*Id.* at 1, 12-13).

For the same reasons stated in this previous order, the Court concludes that Plaintiff has filed this action within two years of the FBAR penalty assessment at issue.

B. Willfulness

Therefore, the only dispute in this matter is whether Defendant's failure to timely file an FBAR disclosing her foreign accounts was willful.

As an initial matter, the parties dispute the meaning of willfulness.

Section 5321(a)(5) does not define willfulness. The United States Supreme Court has explained that the term " 'willfully' is a 'word of many meanings whose construction is often dependent on the context in which it appears, ... and where willfulness is a statutory condition of civil liability, [the courts] have generally taken it to cover not only knowing violations of a standard, but reckless ones as well." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007) (citation omitted) (collecting cases).

Following this guidance, several courts have held that "willfulness" under 31 U.S.C. § 5321 includes reckless disregard of a statutory duty. *See e.g., Norman v. United States*, 942 F.3d 1111, 1115 (Fed. Cir. 2019) ("we hold, as did the Court of Federal Claims, that willfulness in the context of § 5321(a)(5)(C) includes recklessness."); *Bedrosian v. United States of Am., Dep't of the Treasury, Internal Revenue Serv.*, 912 F.3d 144, 152 (3d Cir. 2018) ("We thus join our District Court colleague in holding that the usual civil standard of willfulness applies for civil penalties under the FBAR statute."); *United States v. Williams*, 489 F. App'x 655, 660 (4th Cir. 2012) ("[The defendant's] undisputed actions establish reckless conduct, which satisfies the proof requirement under § 5314."); *United States v. Bohanec*, 263 F. Supp. 3d 881, 889 (C.D. Cal. 2016) (applying recklessness standard for a willful FBAR violation). The parties have not provided, and the Court is not aware of, any cases holding that "willfulness" under section 5321 does ***not*** include recklessness.

***7** In light of this authority, the Court concludes that the term "willfulness" includes recklessness. Moreover, the parties do not dispute, and the Court agrees, that the term "willfulness" in this context covers "willful blindness." (Mot. at 17; Opp. at 14). Accordingly, the Court determines that Plaintiff can establish willfulness under § 5321(a)(5)(C) by demonstrating that Defendant's violation of the FBAR reporting requirement was reckless or willfully blind.

1. Recklessness

In the sphere of civil liability, a person acts reckless by engaging in a conduct that violates "an objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Safeco*, 551 U.S. at 68; *see also Bedrosian*, 912 F.3d at 153 (applying *Safeco* standard in a FBAR context). Although the parties did not provide any Ninth Circuit cases applying this standard in an FBAR violation context, the Fourth Circuit has held that "a person 'recklessly' fails to comply with an IRS filing

requirement when he or she '(1) clearly ought to have known that (2) there was a grave risk that [the filing requirement was not being met] and if (3) he [or she] was in a position to find out for certain very easily.' " *Bedrosian*, 912 F.3d at 153.

Plaintiff identifies Defendant's substantial conduct that allegedly demonstrates that her failure to file the FBAR report was reckless. (*See* Mot. at 19-21; Reply at 5-7). For example, Plaintiff argues that Defendant knew she had numerous foreign bank accounts including the Leumi Bank account because she signed various paperwork setting up the account. (Mot. at 22). Plaintiff also argues that Defendant knew about the FBAR filing requirement because her attorney told her about it when he helped her form L&C and because she had signed multiple tax returns, which referred to the FBAR form TD F 90-22.1. (*Id.* at 23). Because Defendant was a citizen with signature authority for multiple foreign bank accounts with balances of over $10,000, Plaintiff argues that Defendant ought to have known that there was a grave risk that the FBAR filing requirement was not being met. (*Id.*). She was also in a position to find out very easily, such as asking her then-husband Saeed Cohen, her accountant Fani, or her attorney Mashian. (*Id.*). Plaintiff argues that Defendant's failure to do so was reckless and the FBAR penalty for willful failure to comply is appropriate. (*Id.*).

In response, Defendant asserts that there is a dispute of fact as to whether she actually signed all the documents with her signature. (Opp. at 33). Defendant also asserts that she did not know Bank Leumi (Luxembourg) account was a foreign bank account when she saw the bank balance that exceeded $10,000; instead, she thought it was another account based in Beverly Hills. (*Id.* at 34). She further asserts that she did not know how much money was in the foreign bank accounts. (*Id.* at 23). Defendant also disputes that Mashian explained the FBAR requirements to her. (*Id.* at 16). Additionally, Defendant asserts that she did not have the opportunity to review or sign the tax returns for the 2008 year. (*Id.* at 19-20).

Based on this record, the Court cannot determine ***as a matter of law*** that Defendant recklessly violated the FBAR requirement. The parties have put forth conflicting evidence. For example, while there is evidence suggesting that Defendant was involved in opening the Bank Leumi account, there is a dispute of fact as to whether Defendant was not aware that Bank Leumi was a foreign bank account. While Defendant's signature is on paperwork related to the foreign bank accounts, including the Bank Leumi account, there is also a dispute of fact as to whether Defendant herself signed all the paperwork or whether Saeed Cohen signed some of them on Defendant's behalf. There is also a factual dispute as to whether Defendant could have easily accessed the 2008 tax return; while Defendant appears to have interacted directly with Fani on several occasions, she also asserts that Saeed Cohen controlled her ability to interact with Fani, and that she never reviewed or signed the 2008 tax return.

***8** In essence, for the Court to determine whether Plaintiff acted recklessly, it would have to make a credibility determination of Defendant's testimony. Of course, on a motion for summary judgment, the Court cannot make

such credibility determinations. *See Banks v. Hayward*, 216 F.3d 1082, 1082 (9th Cir. 2000) ("Moreover, in evaluating a motion for summary judgment, the court may not make credibility determinations or weigh conflicting evidence.").

The Court is not ruling on the merits of Defendant's contention or determining the credibility of her declaration. Rather, the Court concludes that, based on the conflicting evidence, there is a genuine dispute of material facts and that Plaintiff is not entitled to judgment as a matter of law.

2. Willful Blindness

"Willfulness" includes willful blindness. *See Williams*, 489 F. App'x at 658-59; *Bohanec*, 263 F. Supp. 3d at 890. "[W]illful blindness may be inferred where a defendant was subjectively aware of a high probability of the existence of a tax liability, and purposefully avoided learning the facts point to such liability." *Williams*, 489 F. App'x at 658 (internal quotation marks and citation omitted). Failure to read a tax return before signing it may constitute a conscious effort to avoid learning about reporting requirements. *Id.* at 659.

Here, Plaintiff argues that Defendant engaged in willful blindness. (Mot. at 24). Plaintiff emphasizes that Defendant went to college and ran a successful business selling insurance. (*Id.*) Plaintiff contends that Defendant has long been included in the family finances and she was involved in setting up various foreign bank accounts and entities. (*Id.*). She also had signature authority for numerous foreign bank accounts which had significant account balances. (*Id.* at 25). Plaintiff argues that the only way that Defendant could have avoided learning of the FBAR requirements was to make a conscious effort to avoid learning of them. (*Id.*).

In response, Defendant argues that there is a genuine issue of material fact as to whether she even had an opportunity to learn about the FBAR filing requirements. (Opp. at 21). She asserts that Saeed Cohen controlled her ability to interact with Fani, and Fani interacted almost exclusively with Saeed Cohen about the information on tax returns. (Opp. at 20). Because Saeed Cohen controlled all the finances and was abusive during her marriage, Defendant appears to argue that there is a genuine issue of material fact as to whether she had the opportunity to learn about the existence of a tax liability.

For similar reasons as above, the Court cannot determine as a matter of law that Defendant engaged in willful blindness. There is conflicting evidence as to how much access Defendant had to her finances and her accountant Fani, and the Court would need to engage in credibility determinations to ascertain whether she was engaging in willfully blind conduct. Therefore, the Court cannot determine there is no genuine dispute as to any material fact and that Plaintiff is entitled to judgment as a matter of law.

In criminal law, willful blindness is viewed as a means of proving actual knowledge, and therefore represents a higher standard than recklessness. Because there are factual disputes about recklessness, it is hardly surprising

that there are factual disputes about willful blindness.

Accordingly, the Motion is **DENIED.**

IT IS SO ORDERED.

All Citations

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