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United States District Court,
N.D. Texas, Fort Worth Division.

UNITED STATES of America, Plaintiff,
v.
Dennis L. MIGA, Defendant.

Civil Action No. 4:19-cv-01015-P
|
Signed 05/27/2021

Attorneys and Law Firms

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ORDER DENYING SUMMARY-JUDGMENT MOTIONS

Mark T. Pittman, UNITED STATES DISTRICT JUDGE

***1** The Bank Secrecy Act requires United States citizens to report their interests in foreign bank accounts and penalizes any failure to report. 31 U.S.C. §§ 3514, 3521. The penalty's amount depends on the failure's culpability: a "willful" failure increases the penalty from a maximum of $10,000 to as much as 50% of the unreported account's balance. *Id.* at § 3521(a)(5). In 2008 and 2009, Defendant Dennis L. Miga failed to report three foreign bank accounts, and the government alleged his failure was willful. The penalty amounts to 50% of the accounts' balances—$3.25 million.

Now before the Court are the parties' cross motions for summary judgment. Miga argues that this fine violates the Eighth Amendment's prohibition against excessive fines. Def.'s MSJ Resp., ECF No. 49. The government argues that the undisputed evidence shows that it is entitled to judgement as a matter of law. Pl.'s MSJ, ECF No. 40. After considering both motions, the related briefs and evidence, and the applicable law, the Court will deny both motions.

BACKGROUND

In 2003, defendant Dennis L. Miga, a United States citizen, traveled to the British Virgin Islands (BVI) and created a BVI entity named Bridgeport Group, Inc. Gov't MSJ App'x at 352, 366, ECF No. 46-1. Bridgeport, which Miga controlled, opened a bank account with VP Bank Limited. *Id.* at 366. In 2008, the account had a high balance of $10,599,804. *Id.* at 20. On June 30, 2009, the date Miga's 2008 Report of a Foreign Bank and Financial Accounts (FBAR) was due, the account had a balance of $3,683,839.24. *Id.* at 2. In 2009, the account's high balance was $9,515,092. *Id.* at 24. On June 30, 2010, the account's balance was $2,799,455.99. *Id.* at 30.

In 2009, Miga controlled a Costa Rica entity named La Vida Esta Llena de Suenos LLC, which opened an account in Costa Rica with Banco Nacional. *Id.* at 274, 367, 398–403. In 2009, the account had a high balance of $17,956. *Id.* at 24.

For the years 2008 and 2009, Miga failed to timely file his FBARs. Gov't MSJ App'x at 368, 377. He tardily informed the IRS, and on December 20, 2017, the IRS assessed penalties against Miga in the following amounts—which represent enhanced penalties due to Miga's allegedly "willful" violations:

- 2008 VP Bank – $1,841,920. *Id.* at 29.
- 2009 VP Bank – $1,399,723. *Id.* at 30.
- 2009 BN Bank – $10,000. *Id.* at 30.

Miga did not pay these penalties, causing government to file suit against him to reduce them to a judgment.

BANK SECRECY ACT

"The 1970 Currency and Foreign Transactions Reporting Act, known as the Bank Secrecy Act (BSA), 'regulates offshore banking and contains a number of recordkeeping and inspection provisions.' " *U.S. v. Flume*, 390 F. Supp. 3d 847, 853 (S.D. Tex. 2019) (quoting *U.S. v. Under Seal*, 737 F.3d 330, 333 (4th Cir. 2013)). One of those recordkeeping provisions requires United States citizens to file a report disclosing any relations with a foreign financial agency. 31 U.S.C. § 5314; 31 C.F.R. § 1010.350. The regulations provide that these reports (known as FBARs) "shall be filed with the [Financial Crimes Enforcement Network] on or before June 30 of each calendar year with respect to foreign financial accounts exceeding $10,000 maintained during the previous calendar year." 31 C.F.R. § 1010.306(c).

2** The penalty for failure to timely file a FBAR depends upon the violator's culpability. 31 U.S.C. § 5321(a)(5). Generally, the penalty shall not exceed $10,000. *Id.* at § 5321(a)(5)(B)(i). But, "[i]n the case of any person ***willfully violating" the reporting requirement, "the maximum penalty ... shall be increased to the greater of $100,000 or 50 percent" of "the balance in the account at the time of the violation." *Id.* at §§ 5321(a)(C)(i), 5321(D)(ii) (emphasis added).

ANALYSIS

This order answers two questions. *First*, do these penalties violate the Eighth Amendment's prohibition against excessive fines? The Court concludes that the penalties do not qualify as a "fine" because they are not connected to a criminal offense and because their purpose is remedial. Moreover, since the penalties do not exceed statutory limits, they would not be excessive anyway. Accordingly, Miga's summary-judgment motion will be denied.

Second, does the government's summary-judgment evidence leave no issue of fact whether Miga's failure to file the FBARs was willful? Viewed through the summary-judgment standard, the Court must answer no. Accordingly, there is a fact issue on Miga's culpability, and the government's summary-judgment motion will be denied.

A. Miga's Eighth Amendment defense is denied.

The Eight Amendment states as follows: "Excessive bail shall not be required, nor

excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Miga argues that the government's penalties constitute "fines" and that they are "excessive." The Court disagrees on both counts.

First, the FBAR penalties do not constitute "fines." Under the Eighth Amendment, a fine must constitute punishment for an offense. *U.S. v. Bajakajian*, 524 U.S. 321, 327–28 (1998). But the government never alleged Miga committed a criminal offense. *See U.S. v. Toth*, 15-cv-13367-ADB, 2020 WL 5549111 (D. Mass. Sept. 16, 2020) (holding that the Eighth Amendment applies to "civil fines and forfeiture orders only when they are connected to an underlying criminal offense"). And while this fact alone knocks out Miga's argument, in addition, the FBAR's purpose is not punitive —it's remedial. *See U.S. v. Schwarzbaum*, No. 18-cv-81147-BLOOM, 2020 WL 2526500, at *5 (S.D. Fla. May 18, 2020) ("The purpose of the FBAR is to identify person who may be using foreign financial accounts to circumvent United State law and to identify or trace funds used for illicit purpose or to identify unreported income maintained or generated abroad."). The FBARs serve a tax function, and the "remedial character of sanctions imposing additions to a tax" is well established. *Helvering v. Mitchell*, 303 U.S. 391, 401 (1938). For these reasons, this Court holds that penalties under 31 U.S.C. § 5321(a) do not constitute "fines" as used in the Eight Amendment. *See also Schwarzbaum*, 2020 WL 2526500 (holding same); *and Toth*, 2020 WL 5549111 (same).

Second, even if Miga's penalty were an Eight Amendment "fine," it would not be "excessive." In reaching this conclusion, the Court relies on *Newell Recycling Co., Inc. v. E.P.A.*, 231 F.3d 204 (5th Cir. 2000). There, the Fifth Circuit held that, "if a fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eight Amendment." *Id.* at 210. Here, the relevant statute prescribes a penalty of 50 percent of "the balance in the account at the time of the violation." 31 U.S.C. §§ 5321(a)(C)(i), 5321(D)(ii). It is undisputed the government correctly halved the correct numbers. Accordingly, the penalty would not be excessive even if it were a fine. *See also Toth*, 2020 WL 554911, at *8 (holding $2.17 million FBAR penalty not excessive).

***3** Therefore Miga's motion is **DENIED**.

B. The government's motion for summary judgment that Miga willfully failed to file FBARS is denied.

The government argues that there are no genuine issues of material fact on any element of its claim, and that the Court should therefore enter judgment as a matter of law. To be entitled to judgment under 31 U.S.C. § 3514, the government must prove the following seven elements:

1. The defendant is a United States citizen;
2. The defendant had a financial interest in or signatory authority over the account at issue;
3. The account balance exceeded $10,000;
4. The account was in a foreign country;

5. The defendant failed to disclose the account;

6. The failure was willful; and

7. The amount of the proposed penalty is proper.

Flume, 390 F. Supp. 3d at 853–54. The Court finds that there is no genuine issue of fact regarding the first five elements, and Miga does not seem to disagree. Since the seventh element, the proper amount, is directly tied to Miga's state of mind, this case's outcome hinges on the sixth element—whether the failure was willful.

Under § 3521, a defendant "willfully violates the reporting requirement 'when he either knowingly or recklessly fails to file' and FBAR." *Flume*, 390 F. Supp. 3d at 854; *accord U.S. v. Horowitz*, 978 F.3d 80, 87–88 (4th Cir. 2020) (quoting *Bedrosian v. U.S.*, 912 F.3d 144, 152 (3rd Cir. 2018)). Miga argues that only *knowing* violations are willful, but the Court feels bound by *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68 (2007). In that case, the Supreme Court explained that, under the common law, the term "willful" had an established meaning in the civil context. *Id.* at 56–57. The "common law usage ... treated actions in 'reckless disregard' of the law as 'willful' violations." *Id.* at 57. Relying on this reasoning, the Court held that, "where willfulness is a statutory condition of *civil liability*," the word is "generally taken ... to cover *not only knowing violations of a standard, but reckless ones as well.*" *Id.* (emphasis added). While no Fifth Circuit opinion has analyzed this issue, "every federal court that has considered the willfulness standard for civil FBAR reporting violations has found the proper standard under § 3521 is the one used in other civil contexts—that is, a defendant has willfully violated 31 U.S.C. § 5314 when he or she either knowingly or recklessly fails to file a FBAR." *U.S. v. DeMauro*, 483 F. Supp. 3d 68, 81 (D. N.H. 2020) (cleaned up). Miga's arguments for a contrary result were covered in *Safeco* and the numerous other opinions applying *Safeco*'s reasoning to the FBAR requirement. *See e.g., Horowitz*, 978 F.3d at 87–88 (analyzing counter arguments and holding reckless standard applied). For the reasons stated in *Hororwitz* and the numerous other district court opinions, this Court holds that § 5321's willful standard encompasses both knowing and reckless violations.

A defendant recklessly violates the FBAR filing requirements in two ways. *First*, when he "(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 was in a position to find out for certain very easily." *Flume*, 390 F. Supp. 3d at 854 (quoting *U.S. v. Vespe*, 868 F.2d 1328, 13335 (3rd Cir. 1989)). *Second*, reckless failures to file the FBAR include those made through willful blindness, "where a defendant consciously chooses to avoid learning about reporting requirements." *Id.*

***4** However, even under the reckless standard, the Court is not convinced that Miga's violations were willful as a matter of law. The summary-judgment standard of review compels this result. When viewing summary-judgment evidence, the Court must view the evidence in the light most favorable to Miga. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 255 (1986). Viewing the evidence through this lens, the Court must then "must be satisfied that no reasonable trier of fact could find for the nonmoving party...." *Norwegian Bulk Transp. A/S v. Int'l Marine Terminals Partnership*, 520 F.3d 409, 411–12 (5th Cir. 2008) (cleaned up). Upon review of the summary judgment evidence and briefing, the Court is not satisfied that no reasonable trier of fact could find for Miga. As a result, the Court finds that the government's summary-judgment motion should be and hereby is **DENIED.**

CONCLUSION

For these reasons, the Court concludes that, as a matter of law, the government's proposed penalty does not implicate the Eighth Amendment. Accordingly, Miga's motion for summary judgment is **DENIED**. Further, the Court concludes that, viewing the summary-judgment evidence through the appropriate standard, there is a genuine issue of material fact whether Miga's violation was willful. Accordingly, the government's summary-judgment motion is **DENIED**.

SO ORDERED on this **27th day** of **May, 2021.**

All Citations

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