2022 WL 706949
United States District Court, E.D. Virginia, Alexandria Division.

UNITED STATES of America, Plaintiff,
v.
Constantin KOTZEV, et al., Defendants.

Civil Action No. 1:18-cv-1409
|
Signed 03/09/2022

Attorneys and Law Firms

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ORDER

T.S. Ellis, III, United States District Judge

***1** This matter is before the Court, post-judgment, on Defendants' motion for a stay of judgment pending appeal (Dkt. 118). Plaintiff filed this action to enforce a judgment lien against Defendant Kotzev,[1] contending that Defendant Kotzev's 2013 transfer of real properties at 3800 Fairfax Drive in Arlington, Virginia (the "Real Properties") to his niece and nephew (Defendants George and Angelika Chyla) should be set aside as fradulent. On January 24, 2022, the Court granted Plaintiff's motion for summary judgment, finding that the undisputed factual record with respect to transfer of the Real Properties satisfied the elements of both constructive and actual fraud, and authorized Plaintiff to foreclose upon the Real Properties. *See* Dkts. 112–15. Defendants' motion for a stay seeks to bar Plaintiff from enforcing the judgment, and proceeding with foreclosure, before resolution of Defendants' appeal. The parties have briefed the motion, and oral argument is unnecessary, as the briefs adequately set forth the parties' positions and additional argument would not aid disposition of the motion.

In assessing whether to grant a stay pending appeal, a district court must consider four relevant factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009) (citation omitted). Under the first factor, the movant must demonstrate more than a "mere possibility of relief." *Id.* (quotation marks omitted). In this regard, Defendants contend that they are likely to succeed on appeal owing to two purported errors in the Court's summary judgment analysis, namely: (1) the conclusion that Defendant Kotzev's FBAR-related liabilities accrued at the time he failed to file the required forms and (2) the conclusion

that, under Virginia law, a private, unrecorded contract between Defendant Kotzev and the Chyla Defendants is void against subsequent lien creditors.

Put simply, Defendants have failed to make a "strong showing" of more than the "mere possibility of relief" on appeal. *Id.* As Plaintiff points out, Defendants have largely repackaged arguments already considered and rejected by the Court. And Defendants have advanced no compelling arguments to warrant reconsideration of the summary judgment analysis presented in the January 24, 2022 Memorandum Opinion.

First, Defendants contend that, contrary to the conclusion reached in the Memorandum Opinion, "courts have recognized [that] the plain language of Titles 26 and 31 establish that FBAR liabilities do not arise at the time when the FBAR is due, but rather upon a later assessment." Dkt. 118 at 2. However, the only decision that Defendants cite for this proposition is an unpublished, distinguishable district court opinion. *See United States v. Kaufman*, No. 18-CV-787, 2022 WL 19334 (D. Conn. Jan. 3, 2022). But the court in *Kaufman* did not hold that the principal liability for an FBAR violation accrues at the time of assessment. Instead, the court merely stated that the *interest* on an FBAR penalty begins to run when an individual receives notice on the penalty pursuant to 31 U.S.C. § 3717(a), a catch-all provision which governs interest on debts to the United States. *See id.* at *2.

***2** Rather than citing any authorities directly on point, Defendants rely heavily on distinctions between tax debts and FBAR penalties, contending that the Court "erroneously conflat[ed]" the two types of liability. *Id.* It is true that, although the authority of the Internal Revenue Service ("IRS") to impose FBAR penalties is closely linked to collection of taxes, different sections of the U.S. Code with different provisions govern FBAR penalties and tax liabilities. *Compare Bedrosian v. Internal Revenue Serv.*, 912 F.3d 144, 151 (3d Cir. 2018) ("[T]he FBAR statute is part of the IRS's machinery for the collection of federal taxes."), *with Mendu v. United States*, 153 Fed. Cl. 357, 365–66 (Fed. Cl. 2021) (discussing differences between the FBAR penalty provisions in Title 31 and the tax collection provisions in Title 26). However, the conclusion that liability for failure to file an FBAR form accrues on the date that the FBAR is due does not depend upon complete overlap of the statutory provisions governing tax liabilities and FBAR penalties.

As noted in the January 24, 2022 Memorandum Opinion, courts have routinely held that tax debt accrues on the date that a tax return is due, not upon later assessment of the outstanding debt. *See In re Mallo*, 774 F.3d 1313, 1326 (10th Cir. 2014); *United States v. Ellett*, 527 F.3d 38, 40 (2d Cir. 2008). Decisions in that "separate but analogous context" confirm that liability for an FBAR penalty accrues on the date the form is due, because FBAR penalties are comparable to tax liabilities in several important respects. *See United States v. Park*, 389 F. Supp. 3d 561, 575 (N.D. Ill. 2019). First, as with a tax return, the obligation to file an FBAR is automatic: the taxpayer must file "without assessment or notice or demand from" the IRS. *See Ellett*, 527 F.3d at 40 (citing 26 U.S.C. § 6151(a)). Second, the IRS's "right

to payment" through imposition of a penalty accrues as soon as the taxpayer is required to, but does not, file an FBAR.[2] *See Mallo*, 774 F.3d at 1326. Third, "the IRS 'assessment' refers to little more than the calculation" of the total sum of the tax debt owed or the penalty imposed. *See id.*; 31 U.S.C. § 5321(a)(5)(B) (outlining the monetary penalty that may be imposed for failure to file an FBAR). Finally, a similar risk applies in each context: namely, that the individual subject to a tax liability or FBAR penalty will seek to transfer assets solely to avoid the reach of the IRS after inception of an IRS investigation but before formal assessment of the liability or penalty. Accordingly, there is sound reason to conclude that liability for failure to file an FBAR form accrues at the time an individual is required to file the FBAR, and Defendant has failed to make a "strong showing" to the contrary.[3] *Nken*, 556 U.S. at 434.

***3** To continue, Defendants also challenge the Court's conclusion that Defendant Kotzev transferred the Real Properties in 2013 for *de minimus* consideration. As observed in the January 24, 2022 Memorandum Opinion, Defendant Kotzev transferred the Real Properties in December 2013 through "Deed[s] of Gift" for the negligible sum of $10.00. Defendants attempt to conjure valuable consideration from beyond the four corners of the 2013 deeds, pointing to a May 2000 contract in which Defendant Kotzev agreed to transfer the Real Properties to the Chyla Defendants in exchange for a promise of old age care. However, that contract was never recorded in the land records of Fairfax County, nor was it referenced or incorporated into the recorded 2013 deeds.

Va. Code § 55.1-407(A)(l) states, in plain terms, that every "contract in writing ... shall be void as to all ... lien creditors, until and except from the time [the contract] is recorded in the county or city in which the property subject to such contract ... is located." Here, there is no dispute that: (i) the May 2000 agreement is a written contract, (ii) the United States became a lien creditor of Defendant Kotzev as of April 2018, and (iii) the May 2000 contract was never recorded in the Fairfax County land records.[4] Accordingly, the May 2000 contract is clearly void with respect to the United States as a lien creditor. Defendants offer no authority or persuasive argument for the proposition that a party may rely on the terms of a void contract to transform a gift transfer into an exchange for valuable consideration. Thus, Defendants have adduced no reason to reconsider the conclusion that, under Virginia law and for the purpose of this claim by a lien creditor, Defendant Kotzev transferred the Real Properties for *de minimus* consideration in gift deeds.

In sum, Defendants have failed to make a "strong showing that [they are] likely to succeed on the merits." *Nken*, 556 U.S. at 434. Failure to make that showing is fatal to a motion for a stay pending appeal. *See Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970) (a party seeking a stay "*must* show [ ] that he will likely prevail on the merits of the appeal") (emphasis added); *Arnold v. Garlock, Inc.*, 278 F.3d 426, 441 (5th Cir. 2001) (determination that a movant has failed to show a likelihood of success "is sufficient to deny the stay pending appeal"); *SawariMedia, LLC v. Whilmer*, 963 F.3d 595, 596 (6th Cir. 2020) (a court may not

grant a stay where the party has failed to show a likelihood of success).

In any event, it is also for from clear that the other relevant factors support Defendants' request for a stay. For instance, with respect to the irreparable harm requirement, Defendants contend in cursory fashion that execution of the judgement will harm Defendant Kotzev by leaving him without a home. But Defendant Kotzev does not explain why that is so, particularly in light of the fact that so much of the argument presented by Defendants in this matter turns on the Chyla Defendants' apparent promise to care for Defendant Kotzev. Additionally, irreparable harm does not exist where the movant's harm may be compensated by monetary damages, which arc undoubtedly available to remedy erroneous foreclosure of property. *See Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.* 17 F.3d 691, 694 (4th Cir. 1994). A stay could also create a risk of harm to Plaintiff's interest in the Real Properties, given the possibility of physical damage and depreciation. Finally, under the public interest factor, there is undoubtedly a strong public interest in favor of the United States's prompt collection of outstanding debts. This action stems from a judgment for FBAR penalties entered against Defendant Kotzev nearly five years ago; further delay is unwarranted.

***4** Accordingly, for reasons stated in this Order,

It is hereby **ORDERED** that Defendant's motion for a stay of judgment pending appeal is **DENIED.**

It is further **ORDERED** that the Hearing currently scheduled for March 11, 2022 at 10:00 a.m. is **VACATED.**

All Citations

Slip Copy, 2022 WL 706949, 129 A.F.T.R.2d 2022-1023

Footnotes

1 The United States' lien arose as a result of substantial penalties imposed against Defendant Kotzev pursuant to 31 U.S.C. § 5321(a)(5) for failure to file mandatory Foreign Bank and Financial Accounts Reports ("FBARs"). The relevant factual background is set forth in the Court's January 24, 2022 Memorandum Opinion. *See* Dkt. 112.

2 Defendants point out that imposition of FBAR penalties is discretionary. *See* 31 U.S.C. § 5321(a)(5) ("The Secretary of the Treasury *may* impose a civil money penalty" on any person who fails to file an FBAR) (emphasis added). However, the fact that the Secretary may or may not chose to seek payment through imposition of a penalty does not alter the fact that the right to seek payment arises automatically upon failure to file the FBAR.

3 Additionally, even assuming *arguendo* that Defendants are correct that FBAR liabilities do not accrue until assessment by the IRS, judgment for Plaintiff would still be appropriate. To be sure, the accrual date of Kotzev's FBAR liabilities was important to the Court's analysis of constructive fradulent transfer, which requires that the transferor's debt preexisted the transfer. *Hudson v. Hudson*, 249 Va. 335, 340 (1995) (citing Va. Code § 55.1-401). However, the date of accrual had only marginal impact on the actual fradulent transfer analysis, supporting just one of several "badges of fraud" (namely, the date on which Defendant Kotzev became insolvent), and Plaintiff would still prevail under that theory. *C.F. Trust v. Peterson*, No. 97-cv-2003, 1999 WL 33456231, at *7 (E.D. Va. Jan. 8, 1999). Accordingly, to succeed on the merits on appeal, Defendants must do more than demonstrate that the Court erred with respect to the FBAR date of accrual.

4 Defendants point out that the December 2013 gift deeds were recorded before the United States became a lien creditor. Although true, that fact is irrelevant. The important point is that the May 2000 agreement was *never* recorded, and is therefore void with respect to the United States as a lien creditor. Put simply, the purpose of Virginia's recordation statute is to give "notice to purchasers and encumbrancers who acquire or seek to acquire some interest or right in property." *Shaheen v. Cty. Of Mathews*, 265 Va. 462, 477 (2003). It follows, then, that Defendants cannot defeat a claim by a creditor by invoking the terms of a private agreement of which the creditor could not have possibly had any form of notice.

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