United States v. Buff

United States District Court for the Southern District of New York

April 28, 2023, Decided; April 28, 2023, Filed

19-CV-5549 (GBD) (JW)

Reporter
2023 U.S. Dist. LEXIS 75662 *

UNITED STATES OF AMERICA, Plaintiff, -against- CAROLYN BUFF, Defendant.

Prior History: United States v. Buff, 2021 U.S. Dist. LEXIS 85357, 2021 WL 4556751 (S.D.N.Y., May 4, 2021)

Counsel: 2023 U.S. Dist. LEXIS 75662 at 1 Carolyn Buff, Defendant, Pro se.

For United States of America, Plaintiff: Jennifer Ann Jude, LEAD ATTORNEY, United States Attorney's Office SDNY, New York, NY; Stephen Seungkun Cha-Kim, LEAD ATTORNEY, United States Attorney's Office, New York, NY.

Judges: JENNIFER E. WILLIS, United States Magistrate Judge. Honorable George B. Daniels, United States District Judge.

Opinion by: JENNIFER E. WILLIS

Opinion

Report & Recommendation

To the Honorable George B. Daniels, United States District Judge:

On January 3, 2023, this case was referred for a Report and Recommendation on all motions, including the instant motion for summary judgment and cross-motion. Dkt. No. 149. On January 27, 2023, Plaintiff United States of America ("Plaintiff") filed their Motion for Summary Judgment and to Preclude Certain Defenses, Dkt. No. 153 ("Motion" or "Mot."), as well as a memorandum of law in support of their motion, Dkt. No. 154 ("Memo."), a Rule 56.1 Statement of Material Facts, Dkt. No. 155 ("Pl. SMF"), a Declaration from Stephanie Tse, Dkt. No. 156 ("Tse. Decl."), and a Declaration from Stephen Cha-Kim. Dkt. No. 157 ("Kim Decl."). On February 27, 2023, Defendant Carolyn Buff ("Defendant") filed a Response to Plaintiff's Motion, as well as a Cross-Motion,**2023 U.S. Dist. LEXIS 75662 at 2** Dkt. No. 159 ("Opposition" or "Opp."), as well as a supporting Declaration. Dkt. No. 161 ("Buff Decl."). On March 14, 2023, Plaintiff filed a Reply Memorandum of Law in support of their motion, as well as in opposition to Defendant's cross-motion. Dkt. No. 162 ("Pl. Reply"). Finally, on March 20, 2023, Defendant filed a Reply in support of her cross-motion. Dkt. No. 163 ("Def. Reply").

BACKGROUND

This case concerns liability for certain unfiled tax paperwork in connection with foreign bank accounts held by Defendant in the years 2006, 2007, and 2008. Defendant holds dual citizenship from France and the United States. Opp. Ex. A. at 11. Since 1991, Defendant has lived outside of the United States. Id. Defendant held various foreign bank accounts between the years 2006 and 2009 including one account with UBS; four accounts with Barclays Bank; and one account with BNP Paribas. Id. at 12.

The Internal Revenue Service ("IRS") requires the reporting of foreign bank accounts through the filing of a Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts ("FBAR"). 31 U.S.C. § 5314(b); 31 C.F.R. § 1010.306. An individual is required to submit an FBAR if they are: (1) a person subject to the jurisdiction of the United States,**2023 U.S. Dist. LEXIS 75662 at 3** including citizens; (2) who has a financial interest in a bank account in a foreign country; and (3) where the aggregate amount in such account(s) exceeded $10,000 during the calendar year. 31 C.F.R. § 1010.306. The deadline to file the FBAR is on or before June 30th of the following calendar year. Id.

Defendant is a citizen of the United States, who had financial interests in bank accounts in a foreign country with an aggregate amount exceeding $10,000 for the years 2006, 2007, and 2008. Opp. Ex. A at 13-14.

Defendant did not file income tax returns for several years. Id. at 13. In July 2010, Defendant filed her tax returns for 2006, 2007, and 2008. Id. Defendant filed the FBARs for those years on September 21, 2011. Id. Thus, the IRS determined that Defendant had untimely filed FBARs for 2006, 2007, and 2008. Following further analysis of the facts, the IRS concluded that Defendant's violation was non-willful, Id. at 14-15, and assessed penalties in the amount of $30,000.

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> The original penalty assessed was $60,000. However, following the Supreme Court's recent decision in Bittner v. United States, 598 U.S. __ (2023), which found that the Bank Secrecy Act imposes a maximum penalty for non-willful violations of $10,000 per report, not per account, Plaintiff calculated a lower penalty of $30,000. See Dkt. No. 164.

Id. at 11.

This action was commenced on June 13, 2019. At that time, Plaintiff assessed that the FBAR Penalties, along with accrued interest and additional penalties, amount to $64,292.06. Discovery continued in this case for some**2023 U.S. Dist. LEXIS 75662 at 4** time. From March 2022 to October 20, 2022, an ongoing dispute regarding the taking of Defendant's deposition took place. See Order Granting Plaintiff's Motion to Compel dated Oct. 20, 2022, Dkt. No. 126 ("Discovery Order"). Following that, a briefing schedule was set for Plaintiff's motion for summary judgment and to preclude certain defenses, and this decision follows.

DISCUSSION

There are currently before the Court three motions. Each of these will be taken in turn: first, the motion to preclude Plaintiff from raising certain defenses; second, Defendant's cross motion; and third, Plaintiff's motion for summary judgment.

As a general matter, "[i]t is well established that the submissions of a *pro se* litigant must be construed liberally and interpreted to raise the strongest arguments that they *suggest*." Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006) (quotations omitted).

A. Plaintiff's Motion to Preclude Certain Defenses.

Plaintiff's motion to preclude certain defenses stems from the discovery phase of this case, and the on-going dispute at that time over the taking of Defendant's deposition. At the heart of that dispute was the question of whether Defendant's deposition needed to be taken pursuant to the procedures outlined in the**2023 U.S. Dist. LEXIS 75662 at 5** Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Convention"). See Discovery Order. Ultimately, this Court concluded that the Hague Convention did not apply to the deposition and, following the Aerospatiale comity analysis, granted the motion to compel Defendant's deposition. Discovery Order at 14. In that same Order, the Court stated that "it is the opinion of the Court that if Defendant refuses to sit for her deposition she will have waived her right to raise any defenses at the summary judgment stage." Id. at 16. It is from this basis that Plaintiff's motion to preclude follows.

Federal Rule of Civil Procedure ("FRCP") 37 governs depositions, and subpart (b) describes the sanctions available when a party does not obey a discovery order. See Fed. R. Civ. P. 37(b). "[D]istrict courts possess 'wide discretion' in imposing sanctions under Rule 37." Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 135 (2d Cir. 2007) (citing Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1365 (2d Cir. 1991)). A variety of sanctions are available to the Court, but most pertinent to this matter is the second: the Court may "prohibit[] the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters into evidence." Fed. R. Civ. P. 37(b)(2)(A)(ii). A court may "presume from a party's willful failure to answer a discovery request relating to a particular**2023 U.S. Dist. LEXIS 75662 at 6** issue that the facts of that issue are established against the noncompliant party... such a presumption is consistent with due process." S. New Eng. Tel. Co. v. Global NAPs Inc., 624 F.3d 123, 147 (2d Cir. 2010) (citing Ins. Corp. of Ir. v. Compagnie Des Bauxites de Guinee, 456 U.S. 694, 705, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)).

Without limiting the discretion available to the courts in applying Rule 37, this Circuit has identified factors that can be useful in making the sanctions determination: "(1) the willfulness of the noncompliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance; and (4) whether the non-compliant party had been warned of the consequences of noncompliance." S. New Eng. Tel. Co., 624 F.3d at 144.

Plaintiff points to this Court's statement in the Discovery Order that Plaintiff was being "simply obstructionist" in not sitting for her deposition as support for the first factor. Memo. at 11 (citing Discovery Order at 16). As to the second factor, Plaintiff notes that "there is no effective, lesser consequence that would resolve the problem at hand." Id. at 11. Plaintiff also points to the duration of the discovery dispute—several months—as well as the language in the Discovery Order warning Defendant of the consequences of not sitting for her deposition, as further evidence weighing in favor of preclusion. Id.

In Defendant's**2023 U.S. Dist. LEXIS 75662 at 7** Opposition, she opposes preclusion, on the basis that it was never feasible for her to sit for her deposition without resort to the Hague Convention. First, Defendant argues that Plaintiff was incorrect when they argued during the discovery phase that this matter would not fall within the scope of the Hague Convention per the French understanding of that Convention. Opp. at 8. Defendant states that this action for FBAR penalties is clearly a civil matter, as the enforcement phase is carrying forward in a civil action in this Court, and therefore would have been pursuable under the Hague Convention. Id. Defendant has, since the issuance of the Discovery Order, retained French counsel who further supports this understanding of French law. Id. at 9; see also Opp. Ex. B, Decl. of Noëlle Lenoir at 1-2. Second, Defendant contests this Court's treatment of the French Blocking Statute as largely unenforced. Id. at 9-10. Finally, Defendant notes that use of the Hague Convention could have been effectuated within the 16 months that discovery was pending. Id. at 12-13.

Defendant further argues that (i) Plaintiff never argued that the deposition was necessary to their case; (ii) no new evidence**2023 U.S. Dist. LEXIS 75662 at 8** is being introduced; (iii) Plaintiff "has not suggested that it has suffered any prejudice from the absence of the deposition." Id. at 13-14. Defendant also contests whether preclusion of the raising of affirmative defenses is the correct sanction to apply here. Id. at 14.

1. Defendant's willfulness in not sitting for her deposition.

"[A]ll litigants, including *pro ses*, have an obligation to comply with court orders." Minotti v. Lensink, 895 F.2d 100, 103 (2d Cir. 1990). The Discovery Order addressed several issues touching upon whether Defendant's resistance to sitting for her deposition was in good faith. See Discovery Order at 13-14. At that time, the Court concluded that Defendant was not acting in good faith. The Court was of the opinion that Defendant had, effectively, already consented to her deposition for purposes of determining whether a simpler Hague Convention mechanism would apply to this matter. Id. at 14-16. Thus, by not affirmatively providing her consent to Plaintiff's application to proceed via the Hague Convention, Defendant was simply seeking to avoid her deposition. In particular, Defendant's concerns about potentially opening herself up to liability under the Hague Convention would have been completely obviated by**2023 U.S. Dist. LEXIS 75662 at 9** providing her consent. Solidifying this understanding of Defendant's willfulness was a statement made at a hearing regarding her deposition: "I will not make the government's life easier, no." H'ng Tr. dated Sept. 27, 2022 at 17:16-17 (Dkt. No. 128). From this, the Court was further convinced that Defendant was deliberately seeking to slow down and obstruct the resolution of this case by continually contesting the taking of her deposition. Notably, Defendant never said she had a substantive reason not to sit for her deposition; rather, her objections were always procedural. The issuance of the Discovery Order constituted the removal of any more procedural barriers.

"Noncompliance with discovery orders is considered willful when the court's orders have been clear, when the party has understood them, and when the party's noncompliance is not due to factors beyond the party's control." Babadzhanova v. Merck & Co. (In re Fosamax Prods. Liab. Litig.), No. 06-md-1789 (JFK), 2013 U.S. Dist. LEXIS 40502, 2013 WL 1176061, at *2 (S.D.N.Y. Mar. 21, 2013). The Discovery Order in this case was explicitly clear that Defendant was expected to sit for her deposition. There is no indication that Defendant did not understand that. While Defendant argues that noncompliance was due to a factor beyond her control, namely her concerns about prosecution for complying**2023 U.S. Dist. LEXIS 75662 at 10** with the deposition without the protection of the Hague Convention, the Court does not credit this for the reasons stated above, and more fully in the Discovery Order itself.

2. The efficacy of lesser sanctions.

The Court does not see what lesser sanctions would be available at this time. Rule 37 lists several potential sanctions for a failure to cooperate with discovery:

(i) directing that the matters embraced in the order

> or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
> (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
> (iii) striking pleadings in whole or in part;
> (iv) staying further proceedings until the order is obeyed;
> (v) dismissing the action or proceeding in whole or in part;
> (vi) rendering a default judgment against the disobedient party; or
> (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2)(A). These sanctions are effectively listed in order of increasing severity. The sanction sought here falls somewhere between the first two, and consequently least severe,**2023 U.S. Dist. LEXIS 75662 at 11** options. Most straightforwardly, precluding Defendant from raising affirmative defenses falls within the scope of subsection (ii). However, it is worth noting that this sanction was "embraced in the order" and has been stated as the direct subject of the sought-after deposition throughout the pendency of this dispute. This moves it somewhat within the sense of subsection (i). Moreover, there is no sanction fully contemplated by subsection (i) that would address the specific non-compliance at hand. Thus, there is no lesser sanction available to the Court or the Parties under Rule 37, and Defendant has not identified one. See, *e.g.*, Antonmarchi v. Consol. Edison Co. of N.Y., 514 F. App'x 33, 35 (2d Cir. 2013) (stating that the efficacy of lesser sanctions was doubtful as the court had given the non-complying party an opportunity to comply with its orders).

3. The duration of Defendant's noncompliance.

The Case Management Plan was entered on October 12, 2021. Dkt. No. 68. For several months, Plaintiff made no efforts to take Defendant's deposition. When they first brought the issue of Defendant's noncompliance to the Court's attention, Defendant had been residing in a country that was not a signatory to the Hague Convention for over four months. See Pl's. Letter Mot. for Conf. dated Mar. 16, 2022 at 2 (Dkt. No.**2023 U.S. Dist. LEXIS 75662 at 12** 74). On May 9, 2022, Plaintiff indicated that she had moved back to France, which subsequently meant that the Hague Convention was once again applicable. See Letter from Defendant dated May 9, 2022 (Dkt. No. 81). Several other issues then arose. The order compelling Defendant's deposition was entered on October 20, 2022. Thus, it is the Court's position that Defendant was noncompliant starting on the date that Order was entered. Following that Order, the discovery period was extended to December 1, 2022, in order to allow for the taking of the deposition. Dkt. No. 127. Thus, Defendant's period of noncompliance lasted from October 20, 2022, to December 1, 2022. While this period only consisted of 45 days or so, considering the limited scope of the compliance sought — Defendant sitting for her deposition — the Court finds that there was sufficient time for the taking of the deposition, particularly as neither Party asked for more time. Thus, this factor leans in favor of preclusion. See Martin v. City of New York, No. 09-cv-2280 (PKC)(JLC), 2010 U.S. Dist. LEXIS 48258, 2010 WL 1948597, at *2 (S.D.N.Y. May 11, 2010) (finding that a duration of noncompliance with the court's order of approximately one month constituted sufficient noncompliance to support a sanction, especially as the failure to satisfy discovery**2023 U.S. Dist. LEXIS 75662 at 13** obligations had gone on for longer).

4. Whether Defendant was warned of the consequences.

It is undisputed in the eyes of the Court that Defendant was warned of the consequences. The Discovery Order stated that "it is the opinion of the Court that if Defendant refuses to sit for her deposition she will have waived her right to raise any defenses at the summary judgment stage." Discovery Order at 16. This is as clear as a warning gets. This factor leans in favor of preclusion. See Antonmarchi, 514 F. App'x at 35-36 (upholding discovery sanction where the non-complying party was given notice and an opportunity to respond).

As the Court finds that all factors favor preclusion, I recommend that Plaintiff's motion to preclude certain defenses be GRANTED.

B. Defendant's Cross-Motions.

As part of her Opposition to Plaintiff's motions, Defendant raised her own cross-motion pursuant to FRCP 15(d) and 60(b)(3). Under FRCP 15(d), Defendant seeks to amend her pleadings "to add two affirmative defenses in this matter." Opp. at 2. Under FRCP 60(b)(3), Defendant seeks relief from final

judgment based on an alleged "misrepresentation" by Plaintiff. Id. at 7. Each is addressed in turn, below.

1. Amendment of the Answer to add two affirmative defenses.

FRCP 15(d) governs supplemental pleadings.**2023 U.S. Dist. LEXIS 75662 at 14** As Defendant seeks leave to amend her initial pleading, the motion falls under FRCP 15(a)(2) which states that in all cases "a party may amend its pleading only with the opposing party's written consent or with the court's leave." Fed. R. Civ. P. 15(a)(2).

Defendant seeks to amend her answer to add the "reasonable cause" defense available in FBAR cases. Opp. at 3; see also 31 U.S.C. § 5321(a)(5)(B)(ii). Defendant states that her tax returns and FBARs were always collected, analyzed, and filed on her behalf by a certified public accountant who acted as her agent in such matters. Opp. at 3. As such, Defendant wishes to raise the affirmative defense that her failure to file timely FBARs was due to certain actions of an agent, falling within the scope of the reasonable cause defense. Id. Defendant also raised arguments regarding the timeliness of this application, and the lack of prejudice to Plaintiff. Opp. at 3-4.

In their Reply, Plaintiff argues that they would be highly prejudiced if Defendant were allowed to raise this defense at this late hour, and that she has effectively waived the right to do so. Pl. Reply at 3. Plaintiff also argues that Defendant's failure to sit for her deposition should also preclude the raising of affirmative defenses at**2023 U.S. Dist. LEXIS 75662 at 15** the summary judgment stage, as that was expressly stated by the Court as a consequence of her refusal to sit for her deposition. Id. at 4 (citing Discovery Order). Finally, Plaintiff argues that, even on the merits, Defendant has not demonstrated reasonable cause. Id. at 6-8.

As a general matter, as this Court has recommended granting Plaintiff's motion to preclude certain defenses, above, it consequentially follows that this amendment is precluded. Defendant was specifically told that Plaintiff wanted to take her deposition for the purpose of establishing what defenses she might want to raise at summary judgment. See, *e.g.*, Pl's. Letter Mot for Conf. dated Mar. 16, 2022 at 2 (Dkt. No. 74). The Court further stated that if she did not sit for her deposition in compliance with the order to compel then preclusion of the raising of defenses would be the appropriate and likely sanction. See Discovery Order at 16. However, the Court also finds on the merits that leave to amend is not warranted here.

"The court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a). However, courts "retain the discretion to deny [] leave in order to thwart tactics that are dilatory, unfairly prejudicial,**2023 U.S. Dist. LEXIS 75662 at 16** or otherwise abusive.'" Littlejohn v. Artuz, 271 F.3d 360, 363 (2d Cir. 2001); see also Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) (noting as reasons to deny leave, "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment"). "[A]mendment is favored where it would allow the merits of a claim to be fully adjudicated." Stonewell Corp. v. Conestoga Title Ins. Co., Case No. 04-cv-9867 (KMW) (GWG), 2010 U.S. Dist. LEXIS 14690, 2010 WL 647531, at *2 (S.D.N.Y. Feb. 18, 2010) (citing Morin v. Trupin, 835 F. Supp. 126, 129 (S.D.N.Y. 1993)). However, "[w]here it appears that granting leave to amend is unlikely to be productive... it is not an abuse of discretion to deny leave to amend." Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir. 1993).

To begin with, Defendant's amendment demonstrates undue delay. Defendant has known about the reasonable cause defense throughout this action. Most significantly, in the tax judgment attached at Exhibit A to her Opposition, the report states:

> "Though the taxpayer may have been merely negligent, **there is no reasonable cause for her failure to file FBARs for the foreign bank accounts**. The taxpayer acknowledged the ownership of the foreign bank accounts and utilized the accounts for her needs. The taxpayer lived and attended school in the United States and travels to the United States twice annually. The taxpayer's business experience**2023 U.S. Dist. LEXIS 75662 at 17** shows, that with little effort, the taxpayer would likely have been able to determine if her income from her foreign banks was reportable."

Opp. Ex. A. at 15 (emphasis added).

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Defendant states that she received this, among other documents from the IRS, in either December 2020, Opp. at 6, or December 2021. Opp at 6, fn. 3. Assuming the latter date, Defendant still had a full year to submit an amendment raising the reasonable cause defense.

The Court does not cite to this document to determine the merits of Defendant's defense; rather, it is clear to the Court that documents in Defendant's possession long predating this motion note the existence of a reasonable cause defense. Defendant had the information and knowledge to raise that defense in her Answer, or could have amended her Answer at any time during the course of this proceeding. See Mediterranean Shipping Co. (USA) Inc. v. Scanfreight Lines, Inc., No. 98-cv-6852 (KNF), 2000 U.S. Dist. LEXIS 11514, 2000 WL 1159283, at *3 (S.D.N.Y. Aug. 15, 2000) (denying leave to amend an answer made at the summary judgment stage because "defendant ... offered no reason for its delay in seeking to amend its Answer to assert an affirmative defense"). Defendant does not offer a reason for not seeking this amendment earlier; rather, she focuses on the lack of prejudice to Plaintiff. To raise the defense now, after the close of discovery, constitutes an undue delay. Grace v. Rosenstock, 228 F.3d 40, 53-54 (2d Cir. 2000) ("The court also has discretion to deny leave to amend where the motion is made after an inordinate delay, no satisfactory explanation is offered for the delay, and the amendment would prejudice other parties,**2023 U.S. Dist. LEXIS 75662 at 18** or where the belated motion would unduly delay the course of proceedings by, for example, introducing new issues for discovery." (internal quotations omitted)).

Leave to amend would also be unduly prejudicial to Plaintiff. "A proposed amendment is particularly prejudicial where the other party has already completed and served a motion for summary judgment." Classicberry Ltd. v. Musicmaker.com, Inc., No. 01-cv-1756 (HB), 2001 U.S. Dist. LEXIS 21716, 2001 WL 1658241, at *3 (S.D.N.Y. Dec. 26, 2001). Furthermore, Plaintiff anticipated that Defendant would raise these defenses, and sought to take discovery in preparation—namely, Defendant's deposition. Defendant then prevented Plaintiff from taking that discovery. To allow Defendant to raise affirmative defenses after refusing the allow discovery on them during that phase of the case is manifestly prejudicial.

The Court does not find it necessary to rule on whether Defendant's amendment would be futile or not; rather, the extensive delay and prejudice alone weigh strongly against granting the motion for leave to amend to add the affirmative defense of reasonable cause.

2. Relief from judgment due to Plaintiff's alleged misrepresentations.

Defendant also moves pursuant to FRCP 60(b)(3) for relief from final judgment due to alleged misrepresentations made by Plaintiff in their summary judgment**2023 U.S. Dist. LEXIS 75662 at 19** motion, as well as other papers filed in connection with the discovery dispute over Defendant's deposition. See Opp. at 7. Defendant argues that Plaintiff misrepresented this case as a tax matter which would be outside the scope of the Hague Convention, when it is in fact a civil matter which France would have found permissible under that Convention. Id. at 8-9.

FRCP 60(b) provides for grounds for relief from a final judgment, which include among them fraud, misrepresentation, or misconduct by an opposing party. Fed. R. Civ. P. 60(b)(3). FRCP is inapplicable to the current matter because there is no final judgment in this case. Regardless, the Court notes that Defendant's FRCP 60(b) argument could be construed as simply re-litigating the dispute around her deposition. A FRCP 60(b) motion "is a mechanism for extraordinary judicial relief invoked only if the moving party demonstrates exceptional circumstances... A Rule 60 motion may not be used as a substitute for appeal." Castro v. Bank of N.Y. Mellon, 852 F. App'x 25, 28 (2d Cir. 2021). "A party seeking vacatur under Rule 60(b), whether proceeding *pro se* or not, must present highly convincing evidence, show good cause for the failure to act sooner, and show that no undue hardship would be imposed on other parties." Lawtone-Bowles v. U.S. Bank Nat'l Ass'n, No. 19-cv-5786 (PMH), 2021 U.S. Dist. LEXIS 73789, 2021 WL 1518329, at *2 (S.D.N.Y. Apr. 16, 2021) (internal quotations omitted).

The Court will not rule**2023 U.S. Dist. LEXIS 75662 at 20** on the merits of Defendant's FRCP 60(b) motion as it is not applicable at the current stage of this case; rather, as Defendant is *pro se*, the Court notes the above law for her consideration. It is my recommendation that Defendant's cross-motions be denied.

C. Plaintiff's Motion for Summary Judgment.

To prevail on a motion for summary judgment, the movant must "show[ ] 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 movant bears the burden of demonstrating the absence of a question of material fact. In making this determination, the Court must view all facts "in the light most favorable" to the non-moving party. Scott v. Harris, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007); see also Holcomb v. Iona Coll., 521 F.3d 130,

132 (2d Cir. 2008). To survive a summary judgment motion, the opposing party must establish a genuine issue of fact by "citing to particular parts of materials in the record." Fed. R. Civ. P. 56(c)(1); see also Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009). "A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," because "conclusory allegations or denials . . . cannot by themselves create a genuine issue of material fact where none would otherwise exist." Hicks v. Baines, 593 F.3d 159, 166 (2d Cir. 2010) (citation omitted). "If a party fails to properly support**2023 U.S. Dist. LEXIS 75662 at 21** an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may... grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it." Fed. R. Civ. P. 56(e).

Only disputes over "facts that might affect the outcome of the suit under the governing law" will preclude a grant of summary judgment. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In determining whether there are genuine issues of material fact, the Court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." Johnson v. Killian, 680 F.3d 234, 236 (2d Cir. 2012) (citing Terry v. Ashcroft, 336 F.3d 128, 137 (2d Cir. 2003)).

The basic facts underpinning the failure to file the FBAR in a timely manner are not contested by the Parties. Plaintiff alleges that Defendant (1) was a citizen, (2) who held a financial interest in foreign accounts, which (3) contained over $10,000. See SMF at ¶¶ 1; 4. Defendant's Opposition does not contest these facts. See *e.g.*, Opp. at 5-6. These facts are therefore deemed admitted. See Giannullo v. City of New York, 322 F.3d 139, 140 (2d Cir. 2003) ("If the opposing party ... fails to controvert a fact so set forth in the moving party's Rule 56.1 statement that fact will be deemed admitted."). "The [Local Rule 56.1 statement] does not**2023 U.S. Dist. LEXIS 75662 at 22** absolve the party seeking summary judgment of the burden of showing that its is entitled to judgment as a matter of law, and a Local Rule 56.1 statement is not itself a vehicle for making factual assertions that are otherwise unsupported in the record." Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 74 (2d Cir. 2001). However, Plaintiff's statements are supported by the record. See generally Tse Decl. Exs. B, C, and D. Thus, the material facts as to Defendant's responsibility to file FBARs is not in dispute. Furthermore, the fact that Defendant did not file the FBARs in a timely manner is also not in dispute. See SMF ¶ 3; Tse Decl. ¶ 10; Ex. C to Decl. of Stephanie Tse dated Dec. 23, 2020 (Dkt. No. 37).

Defendant's Opposition to the Motion for Summary Judgment relies almost entirely on her affirmative defense of reasonable cause. Opp. at 3. For the reasons noted above, Defendant is precluded from asserting reasonable cause as a defense. However, even on the merits, Defendant's defense fails. Defendant states that for years her taxes were done by an accountant, Opp. at 5, and that "[a]ll matters relevant to the FBARs in this case were handled" by said professional. Opp. at 6. She also notes that the accountant "had trouble obtaining the relevant records for the**2023 U.S. Dist. LEXIS 75662 at 23** Swiss banks at issue" and that she does "not know why he did not report the information available regarding [her] French bank accounts." Id. Defendant also notes in a footnote that during this period she was "living and working in Sierra Leone" with poor communication. Id. at 6, fn. 4.

"Courts have frequently held that "reasonable cause" is established when a taxpayer shows that he reasonably relied on the advice of an accountant or attorney that it was unnecessary to file a return, even when such advice turned out to have been mistaken." United States v. Boyle, 469 U.S. 241, 250, 105 S. Ct. 687, 83 L. Ed. 2d 622 (1985). However, "one does not have to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due." Id. at 251. Defendant did not fail to file her FBARs due to misinformation from her accountant; rather, she simply missed the deadline. This does not constitute reasonable cause. Furthermore, it does not change the analysis that Defendant relied on the services of a professional; an error on the part of her accountant does not absolve her of her own responsibility as a taxpayer to make sure her filings were done properly, including the filing of the FBARs.

For the reasons stated above, I recommend that Plaintiff's motion**2023 U.S. Dist. LEXIS 75662 at 24** for summary judgment be GRANTED.

RECOMMENDATION

I recommend that Plaintiff's motion to preclude certain defenses be **GRANTED**, Defendant's cross-motions be **DENIED**, and Plaintiff's motion for summary judgment be **GRANTED**.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections, and any responses to objections shall be filed with the Clerk of Court and on ECF. Any requests for an extension of time for filing objections must be directed to Judge Daniels. **Failure to file objections within fourteen days will result in a waiver of objections and will preclude appellate review**. See Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); Cephas v. Nash, 328 F.3d 98, 107 (2d Cir. 2003).

SO ORDERED.

DATED: New York, New York

April 28, 2023

/s/ Jennifer E. Willis

JENNIFER E. WILLIS

United States Magistrate Judge

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