

In the United States Court of Federal Claims

No. 08-709 T
(Filed: April 22, 2009)

STEVEN J. O'BRIEN, *
 *
 Plaintiff, *
 *
 v. *
 *
 THE UNITED STATES, *
 *
 Defendant. *

ORDER

On March 5, 2009, the court entered an order granting defendant's Motion for Suspension of Proceedings and Enlargement of Time ("motion to suspend proceedings"). In its March 5, 2009 order, the court indicated that it afforded plaintiff ample time to file a response, but none was filed. On March 10, 2009, plaintiff contacted chambers and represented that he did not receive defendant's motion to suspend proceedings until February 27, 2009, seven days after plaintiff's response was due. Thereafter, on March 17, 2009, plaintiff submitted a motion for enlargement of time to respond to defendant's motion to suspend proceedings. Because plaintiff's March 17, 2009 motion did not comply with the Rules of the United States Court of Federal Claims, the court, in an order dated March 24, 2009, directed the Clerk of Court to return the motion to plaintiff as unfiled. Although the court already ruled upon defendant's motion to suspend proceedings, it afforded, in its March 24, 2009 order, plaintiff an opportunity to respond to defendant's motion to suspend proceedings. Plaintiff's response was due by April 1, 2009.

Plaintiff did not file a response by April 1, 2009. Indeed, the Clerk of Court, to date, has not received a response from plaintiff. On March 31, 2009, defendant submitted a Reply in Support of Its Motion for Suspension of Proceedings and Enlargement of Time ("reply" or "Def.'s Reply"), which addressed arguments plaintiff advanced in his response brief. Without receipt of plaintiff's response brief, the Clerk of Court noted as a deficiency that defendant's reply was filed prematurely. On April 21, 2009, the Clerk of Court received a facsimile copy of plaintiff's Objection to Defendant's Motion for Suspension of Proceedings & Enlargement of Time & Motion for Suspension of Collection Suit in Eastern District Court ("response" or "Pl.'s Resp."), dated March 23, 2009, from the United States Department of Justice ("DOJ").¹ In light of the unique circumstances stemming from the time line of events in this case, the court directs

¹ Plaintiff's response was received by the DOJ on March 25, 2009.

the Clerk of Court to file plaintiff's response, received via facsimile from the DOJ on April 21, 2009, as well as defendant's reply, by its leave.

I.

In his response, plaintiff advances three arguments as to why the court should not suspend proceedings before the United States Court of Federal Claims ("Court of Federal Claims") pending resolution of litigation in the United States District Court for the Eastern District of Wisconsin ("district court"). First, plaintiff maintains that (1) "plaintiffs . . . have the option of filing in either the Court of Federal Claims or the Eastern District Court," (2) he chose to file in this court "based on prior case law, which, though persuasive, is not binding upon the Eastern District Court," and (3) he will suffer a substantial hardship by what he characterizes as defendant's request for a "change of forum." Pl.'s Resp. 2. Second, plaintiff asserts that the government "has had more than three years to file a Collection Suit against the parties and clearly has elected to do so only in response to plaintiff's action and now requests even more time." *Id.* In essence, plaintiff invokes a laches defense, stating that the government "'surrendered' its rights to selection of forum and on this basis alone the [government's] Motion is worthy of denial and this Objection upheld." *Id.* at 3. Third, plaintiff challenges the government's contention that the instant case and the case pending before the district court arise out of the same facts and circumstances. Plaintiff claims that "[m]ovement to the Eastern District Court as a co-defendant with . . . others will present an unnecessary and undue hardship to plaintiff. Factual evidence[,] as opposed to 'finger pointing,' . . . will taint the plaintiff and may unfairly color the Court's decision." *Id.* at 4.

The court is not persuaded that plaintiff's reasons justify the court reversing its decision to stay these proceedings. First, as defendant notes, plaintiff has not explained how he would be prejudiced by a suspension of these proceedings pending the final resolution of the case filed by the government in the district court. Moreover, plaintiff has not furnished any case law or other authority in support of his position. Def.'s Reply 2 n.2. The court has proceeded in a manner that is consistent with other decisions of the Court of Federal Claims that presented similar circumstances. *See Walker v. United States*, 43 Fed. Cl. 519 (1999); *Klein v. United States*, 31 Fed. Cl. 614 (1994), *aff'd*, 60 F.3d 839 (Fed. Cir. 1995). In this case, judicial economy outweighs plaintiff's argument that his decision to invoke the forum of the Court of Federal Claims takes precedence over the government's subsequently filed collection suit in district court. *See Klein*, 31 Fed. Cl. at 615-17.

Next, the court rejects plaintiff's contention that the government has surrendered its right to file a lawsuit in the district court. The Internal Revenue Code allows the government three years to make an assessment for unpaid taxes and penalties, 26 U.S.C. § 6501 (2006) ("[T]he amount of any tax imposed by this title shall be assessed within 3 years after the return was filed . . ."), and ten years from the date of the assessment within which to file a collection suit, *id.* § 6502 (providing that an assessment of any tax imposed that has been made within the period of limitation properly applicable thereto "may be collected by levy or by a proceeding in court")

within ten years after the assessment of the tax). Here, the government's actions occurred within the proper statutory periods, and plaintiff's argument is without merit.

Finally, as the government asserts, the three responsible individuals who have been named in the district court litigation were officers in the same company during part or all of the period wherein income and Federal Insurance Contributions Act ("FICA") taxes were withheld but not paid over to the government. Thus, the government notes, "[t]he adjudication of liability for these taxes will depend on the facts and circumstances surrounding the failure to pay them to the United States." Def.'s Reply 4. The court is not persuaded by plaintiff's hypothetical concerns about testimony in the district court litigation that has yet to take place or what allegations he or other parties before the district court will dispute. Indeed, the district court action was filed less than two months ago. See United States v. O'Brien et al., No. 2:09-CV-00209 (E.D. Wisc. filed Feb. 26, 2009).

In short, the court has considered plaintiff's arguments, but ultimately finds them unavailing. Suspension of these proceedings pending the outcome of the district court litigation is justified and warranted, and the court shall not disturb its March 5, 2009 order staying this case.

II.

Turning to plaintiff's motion, the court is unable to provide plaintiff with the relief he seeks: an order "suspending proceedings in the United States District Court for the Eastern District of Wisconsin until such time as proceedings are completed" before the Court of Federal Claims. Pl.'s Resp. 5. The court cannot and will not interfere with the actions of a federal district court. Stamps v. United States, 73 Fed. Cl. 603, 610 (2006). Accordingly, plaintiff's motion is **DENIED**.

IT IS SO ORDERED.

MARGARET M. SWEENEY
Judge