



Dated: October 10, 2018
The following is ORDERED:

Jennie D. Latta

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UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
NEAL H. LABOVITZ,
Debtor.

Case No. 18-20429-L
Chapter 13

Neal H. Labovitz,
Plaintiff,
v.
Internal Revenue Service
and Tamika Buford,
Defendants.

Adv. Proc. No. 18-00079

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Before the Court is the motion of the United States for summary judgment for itself and the Internal Revenue Service ("United States" or "IRS") [Dkt. No. 42]. The Motion for Summary Judgment was filed on August 30, 2018 (Dkt. No. 42). On September 4, 2018, the court issued its Order and Notice of Defendant's Motion for Summary Judgment which established October 1, 2018, as the deadline for filing any response to the motion.

This deadline has passed and Plaintiff has not filed a response. Therefore, the matter is ripe for decision.

The complaint alleges that the IRS, through one of its agents, Ms. Buford,¹ issued an attachment and removed funds from the account of the Debtor's non-filing spouse in violation of an order of the court, causing harm to the Debtor and his non-filing spouse, for which the United States and its agent should be held in contempt. The United States asserts that neither allegation is true and that the Court should grant its motion for summary judgment. In support of the motion for summary judgment, the United States offers (1) the declaration of Terrica Buford, an employee of the IRS; (2) IRS Account Transcripts; (3) the affidavit of Danielle Antonetti, legal analyst and record custodian for Fidelity Brokerage Services, LLC and Fidelity Management Trust Co. ("Fidelity"); and (4) Fidelity records for the accounts of the Debtor and his spouse during the time period in question.

JURISDICTION

Personal jurisdiction over the parties named in an action is obtained through service of process effected pursuant to Federal Rule of Civil Procedure 4, made applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7004. No issue has been raised here as to the court's personal jurisdiction over the United States and IRS but the United States states in its motion for summary judgment that the motion does not concern Ms. Buford because the record does not indicate that the Plaintiff ever served Ms. Buford. (Dkt. No. 42, Mtn. For Summary Judgment, note 3.) The court notes that counsel for the

¹ In this proceeding, the Plaintiff names Tamika Buford as an agent of the Internal Revenue Service who allegedly acted in violation of an order of the court. The United States construes this as a misspelling of the full name of IRS Revenue Officer Terrica Buford. Dkt. No. 42, Mtn. For Summary Judgment, note 2.

Plaintiff filed a certificate of service for a summons issued to Ms. Tamika Buford, c/o Internal Revenue Service, 22 North Front Street, Memphis, Tennessee 38103, with a domestic return receipt signed by Kimberly L. Davis at the same address. (Dkt. No. 5). According to the United States, however, the name of the IRS employee associated with the action at issue here is Terrica Buford. Ms. Buford has not made an appearance in this proceeding. The plaintiff has the burden of proving that proper personal service has been effected on individual agents or employees of the United States. *Despain v. Salt Lake Area Metro Gang Unit*, 13 F.3d 1436, 1438 (10th Cir. 1994); *Bolivar v. Director of the FBI*, 846 F. Supp. 163, 166 (D. P.R. 1994). It is not enough that the defendant has notice of the action. *Despain* at 1438. Since the Plaintiff has provided no evidence that he served a corrected summons and copy of the complaint, there is insufficiency of service of process against Ms. Buford and the court lacks personal jurisdiction over her. Lack of personal jurisdiction over the parties to an action requires dismissal of any claims against them. *Bolivar* at 166.

Jurisdiction over the subject matter of a complaint arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). Determination of whether the United States has acted in violation of an order of the court and should thus be held in contempt pursuant to the authority granted at 11 U.S.C. §§ 105(a) and 106(a) is a core proceeding concerning

administration of the bankruptcy estate. See 28 U.S.C. § 157(b)(2)(A); *In re Ocean Warrior, Inc.*, 835 F.3d 1310, (11th Cir. 2016); *In re White-Robinson*, 777 F.3d 792, 795-96 (5th Cir. 2015). Accordingly, the bankruptcy court has authority to consider and decide this motion for summary judgment subject only to appellate review under section 158 of title 11. 28 U.S.C. § 157(b)(1).

FACTUAL BACKGROUND

The following facts are not disputed.

1. On January 19, 2018, Terrica Buford, while employed by the IRS, executed a levy on a brokerage account held at Fidelity in the name of Marilyn Labovitz. (Buford Decl. ¶ 3; Joint Pretrial Stmt., Dkt. No. 20, p. 3).

2. The levy was sent in the Debtor's name. The account was actually owned by the Debtor's wife, Marilyn Labovitz. The attachment was subsequently released based on a representation by the Labovitzs that they would fully pay their federal income tax liabilities. (Joint Pretrial Stmt., Dkt. No. 20, p. 3).

3. Before the IRS received any funds from the levy, the Debtor, Neal Labovitz, filed the instant Chapter 13 bankruptcy proceeding. (Buford Decl. ¶ 4; Joint Pretrial Stmt., Dkt. No. 20, p. 3).

4. The Plaintiff filed two motions on January 18, 2018 – the date he filed his petition – seeking to prevent the United States from levying on the Fidelity funds. (Bankr. Dkt. Nos. 5-6).

5. On January 22, 2018, the United States filed objections to both motions and the motions and objections were set for hearing on January 25, 2018. (Bankr. Dkt. Nos. 13, 14, 18, and 19).

6. Prior to January 25, 2018, the parties agreed to continue the hearings to March 1, 2018.

7. The United States and the Debtor filed a Consent Order on or about February 1, 2018, wherein the parties agreed that “[t]he Internal Revenue Service shall not continue any collection or enforcement efforts of any monies owed to it during the pendency of said motion.” (Consent Order . . . , Bankr. Dkt. No. 25, p. 2). It also provided that “[t]he Internal Revenue Service agrees to suspend collection efforts until the Court has the hearing in regards to this matter.” (*Id.*).

8. On or about February 15, 2018, an employee from Fidelity contacted Buford to inform her that the levy issued prior to the filing of this bankruptcy did not contain the correct Social Security number for Marilyn Labovitz. (Buford Decl. ¶ 5; Joint Pretrial Stmt., Dkt. No. 20, p. 3).

9. That same day, Buford issued a corrected levy that reflected the correct Social Security number for Marilyn Labovitz. (Buford Decl. ¶ 6; Joint Pretrial Stmt., Dkt. No. 20, p. 3).

10. Buford took no steps to enforce the levy, directly or indirectly, formally or informally, from February 1, 2018, to March 6, 2018. (Buford Decl. ¶ 7; Joint Pretrial Stmt., Dkt. No. 20, p. 3).

11. The Court held a hearing on the matters that were the subject of the Consent Order on March 1, 2018. (Bankr. Dkt. Nos. 5-6).

12. On March 6, 2018, the Court issued two orders denying the relief sought by the Debtor in his two motions, which were the subject of the Consent Order that prevented the IRS from continuing collection efforts against the Debtor. (Bankr. Dkt. Nos. 40-41).

13. From February 1 (i.e., the date of the Consent Order), until March 6, 2018 (i.e., the date the Court ultimately disposed of the two motions filed on January 18 by the Debtor), the IRS received no funds from the Debtor's Fidelity account, and the IRS took no action to enforce the IRS levy. (Buford Decl. ¶ 8; Ex. 1; Mtn. for Summary Judgment, Ex. 2, Dkt. No. 42).

SUMMARY JUDGMENT STANDARD

In order to grant a motion for summary judgment, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). “Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.” *Pazdzierz v. First American Title Ins. Co. (In re Pazdzierz)*, 718 F.3d 582, 586 (6th Cir. 2013), quoting *Mazur v. Young*, 507 F.3d 1013, 1016 (6th Cir. 2007). When judgment is appropriate as a matter of law, whether or not a motion for summary judgment is opposed, this requirement is met. Fed. R. Bankr. Proc. 7056(a). On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986) (“[T]he burden on the moving party may be discharged by ‘showing’ . . . that there is an absence of evidence to support the non-moving party’s case.”). If that initial burden is not met, the opposing party is under no obligation to offer evidence in support of its opposition. See, *Investors Credit Corp. v. Batie (In re Batie)*, 995 F. 2d 85, 90 (6th Cir. 1993); *In re Rogstad*, 126 F.3d 1224, 1227 (9th Cir. 1997);

Hibernia Nat'l. Bank v. Administracion Cent. Sociedad Anonima, 776 F.2d 1277, 1279 (5th Cir. 1985). Indeed, the court may *sua sponte* grant summary judgment for the non-movant, “so long as the losing party [movant] was on notice that she had to come forward with all her evidence.” *Celotex Corp. v. Catrett*, 477 U.S. at 326, 106 S. Ct. at 91. See also, *Grand Rapids Plastics, Inc. v. Lakian*, 188 F.3d 401, 407 (6th Cir. 1999), *cert. den.* 529 U.S. 1037, 120 S. Ct. 1531 (2000) (District court did not err in granting *sua sponte* summary judgment motion in favor of defendant on grounds that action was barred by applicable statute of limitations when plaintiff was put on notice by other parties’ motions for summary judgment that, “it had to come forward with evidence showing that the statute of limitations did not bar its . . . claims.”).

On the other hand, if the movant makes that initial showing, the burden shifts to the non-movant to “go beyond the pleadings and by . . . affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Celotex Corp.*, 477 U.S. at 324; Fed. R. Bankr P. 7056(c). According to the Court of Appeals for the Sixth Circuit, “[T]o survive summary judgment, the [non-movant] must present affirmative evidence sufficient to show a genuine issue for trial. *Anderson*, 477 U.S. at 249, 106 S. Ct. 2505. Therefore, ‘[i]f evidence is merely colorable, or is not significantly probative, summary judgment may be granted.’ *Id.* at 249-50, 106 S. Ct. 2505.” *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 475-76 (6th Cir. 2010).

DISCUSSION

The basic proposition in contempt proceedings is that all orders and judgments of the courts must be complied with promptly. *Franklin Credit Mgmt. Corp. v. Cook*, 551

B.R. 613, 621 (M.D. Tenn. 2016) (citations omitted). “The purpose of civil contempt is ‘to compel or coerce obedience to a court order or to compensate a party for another’s noncompliance with a court order.’” *Id.*, citing *In re Martin*, 474 B.R. 789 (B.A.P. 6th Cir. 2012). Bankruptcy courts have both inherent and statutory authority to enforce their orders through civil contempt proceedings. *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)* 103 F.3d 472 (6th Cir. 1996); *In re Royal Manor Mgmt., Inc.*, 525 B.R. 338, 368 (B.A.P. 6th Cir. 2015), *aff’d*, 652 F. App’x 330 (6th Cir. 2016). The statutory authority is found in Code section 105 which provides that:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a). Pursuant to Bankruptcy Code section 106(a), the court’s statutory authority under section 105 extends to governmental units. *Hardy v. IRS*, 97 F.3d 1384, 1389-90 (11th Cir. 1996).

The party seeking an order of contempt must establish by clear and convincing evidence that: “the alleged contemnor had knowledge of the order which he is said to have violated; (2) the alleged contemnor did in fact violate the order; and (3) the order violated [was] specific and definite.” *Franklin Credit Mgmt. Corp. v. Cook*, 551 B.R. at 621, citing, *In re Magack*, 247 B.R. 406, 410 (Bankr. N.D. Ohio 1999). The only element at issue in this proceeding is whether the Defendants in fact violated the Consent Order entered on February 1, 2018.

In pertinent part, the complaint alleges that the Defendants violated the Consent Order as follows:

5. The defendant Tamika [sic] Buford intentionally and willfully reissued the attachment while the said Court Order was in effect, thus acting in contempt of this Court's Order.

6. The Internal Revenue Service removed funds from the wife's/co-debtor, Fidelity account during the time period for appeal of the Court's ruling on the requests for relief.

7. Irreparable harm has occurred to the co-debtor and the debtor by and through the actions of the [sic] Tamika [sic] Buford, as acting agent for the Internal Revenue Service by causing the said plaintiff to use funds designated for retirement expenses and [causing] said plaintiff and his co-debtor to incur additional Federal Income Taxes.

(Complaint, Dkt. No. 1, p. 2). The Plaintiff has provided no evidence to support these allegations. The only evidence before the court is that submitted by the United States in support of its motion for summary judgment. With respect to the allegation that Ms. Buford acted in contempt of the Consent Order by willfully and intentionally reissuing the attachment while it was in effect, the United States submitted the declaration of Terrica Buford made under penalty of perjury in which she states that during the pendency of the Consent Order she was notified by an employee at Fidelity that the levy issued in January contained an incorrect Social Security number for Mrs. Labovitz. In response to the notification, on February 15, Ms. Buford issued a corrected levy but took no steps to enforce the levy from February 1, 2018, to March 6, 2018. Further, according to Ms. Buford, the IRS has received no funds from the Fidelity account since the date it first issued the levy as evidenced by true and correct copies of the IRS Account Transcripts for the accounts of the Plaintiff and his wife and dated May 22, 2018, and attached as an exhibit to her Declaration. These Account Transcripts show that no payments or credits have been applied to the Accounts since before the Debtor's petition was filed on January 18, 2018.

The complaint next alleges that the IRS removed funds from Mrs. Labovitz's account during the time period for appeal of the Court's ruling on the requests for relief which caused irreparable harm to the Plaintiff and his wife. The orders on the motions that were the subject of the Consent Order were entered March 6, 2018. The deadline for filing notices of appeal of those orders was March 20, 2018. Fed. R. Bankr. P. 8002(a)(1). The United States has submitted copies of the Plaintiff's Fidelity account statements for February and March 2018, and of the Plaintiff's wife's separate Fidelity account statements for the same time period. The account statements are authenticated by the declaration of Danielle Antonetti, legal analyst and custodian of records for Fidelity, made under penalty of perjury. There are no entries in the account statements showing remittance of funds to the IRS or a freeze on the accounts during either month.

Taking the evidence in the light most favorable to the Plaintiff, it is clear that during the pendency of the Consent Order, Ms. Buford issued a corrected levy, not as a collection or enforcement effort, but for the purpose of correcting important information on a previously issued levy, and that the IRS exercised no control over or withdrawal of funds from the accounts. There is no evidence to support the Plaintiff's allegations that the United States, IRS, or Ms. Buford acted in contempt of the Consent Order and thus, no genuine issue of material fact exists for trial in this proceeding. For this reason, the motion for summary judgment may be granted as to the United States and IRS and could be granted as to Ms. Buford were she properly before the court.

CONCLUSION

For the foregoing reasons, the Motion for Summary Judgment is **GRANTED** for the United States and IRS and the complaint is **DISMISSED** as to Ms. Buford for lack of personal jurisdiction.

cc: Debtor/Plaintiff
Attorney for Debtor/Plaintiff
Defendants
Attorney(s) for Defendants
Chapter 13 Trustee