

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
VS.)	No. 01-1037
)	
JAMES DONALD WILSON, d/b/a)	
THE MEDICINE CABINET)	
)	
Defendant.)	

ORDER GRANTING THE UNITED STATES'
MOTION FOR SUMMARY JUDGMENT

On February 2, 2001, Plaintiff, the United States of America, filed this action seeking civil penalties pursuant to the Controlled Substances Act. Defendant, James Donald Wilson, filed a timely answer denying liability. On December 6, 2001, Plaintiff filed a motion for summary judgment. Defendant has not responded to Plaintiff's motion for summary judgment or to the statement of undisputed facts contained therein. For the reasons set forth below, Plaintiff's motion is GRANTED.

Facts

Defendant is a Tennessee licensed pharmacist doing business as The Medicine Cabinet. On June 26, 1997, investigators with the Tennessee Board of Pharmacy and the Tennessee Bureau of Investigation conducted a controlled drug audit of The Medicine

Cabinet. See Lott Dec., ¶ 2-5, Beauregard Dec., ¶ 3. During this audit Defendant provided investigators with records of his controlled drug inventories. See Beauregard Dec., ¶ 8. These documents indicate that Defendant conducted controlled drug inventories on January 31, 1996, and September 7, 1993. See Plaintiff's Exhibits 76-86. After reviewing the appropriate documentation and manually counting various controlled drugs in Defendant's inventory, the investigators found that Defendant had overages or shortages of five controlled drugs. See Beauregard Dec., ¶¶ 10, 12.

Defendant also provided investigators with sixty-two invoices for controlled drugs. None of these invoices contained a date of receipt on them. See Plaintiff's Exhibits 1-62. Further, Investigators found one prescription for Demerol dated April 23, 1997, which did not state a specific dosage. See Beauregard Dec., ¶ 13; Plaintiff's Exhibit 93. Dr. Tim Hayden signed this prescription for Demerol for the stated purpose of office use. See id. At this audit Defendant did not produce a DEA form 222 for this transaction. See id.

On June 12, 1998, investigators executed a search warrant at The Medicine Cabinet. During this search, investigators found documents which indicate that Defendant conducted another controlled substances inventory on May 7, 1998. See Lott Dec., ¶ 9; Plaintiff's Exhibits 87-92. Investigators also seized thirteen controlled drug invoices which did not indicate the date of receipt by Defendant. See Lott Dec., ¶ 10-11; Plaintiff's Exhibits 63-75. Investigators also seized fourteen other controlled drug invoices which did contain a proper date of receipt on them. See Lott Dec., ¶ 9; Plaintiff's Exhibits 94-107.

Summary Judgment Standard

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. To prevail on a motion for summary judgment, the moving party has the burden of showing the "absence of a genuine issue of material fact as to an essential element of the nonmovant's case." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989). The moving party may support the motion with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

"If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter. Anderson, 477 U.S. at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is . . . `whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" Street, 886 F.2d at 1479 (quoting Anderson, 477 U.S. at 251-52). Doubts

as to the existence of a genuine issue for trial are resolved against the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).

If a party does not respond to a motion for summary judgment, the Federal Rules of Civil Procedure provide that "summary judgment, if appropriate, shall be entered against him." Fed. R. Civ. P. 56(e). The fact that Plaintiff did not respond does not require granting Defendant's motion. However, if the allegations of the complaint are contravened by Defendant's affidavits and Defendant is entitled to judgment as a matter of law on those facts, then summary judgment is appropriate. Wilson v. City of Zanesville, 954 F.2d 349, 351 (6th Cir. 1992).

The Controlled Substances Act

Under the Comprehensive Drug Abuse and Control Act of 1970, providers of medicine are required to make, keep, and furnish various records concerning the sale, purchase, and storage of regulated drugs. See 21 U.S.C. § 801 et. seq. Records required to be kept under this act must be maintained for two years. See 21 U.S.C. § 830; 21 C.F.R. § 1304.04.

By adopting the Comprehensive Drug Abuse and Control Act of 1970, Congress provided strict record keeping requirements in an effort to prevent the diversion of legitimate medicinal drugs into illegal channels. See United States v. Green Drugs, 905 F.2d 695, 698 (3rd Cir. 1990). To enforce the strict record keeping requirements of the Controlled Substances Act, Congress provided civil liability for "refus[ing] or negligently fail[ing] to

make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required . . .” See 21 U.S.C. § 842 (a)(5); see also 21 U.S.C. § 482 (a)(10) (providing civil liability for “negligently to fail to keep a record or make a report under section 830 of this title”). In 1998, Congress adjusted the maximum penalty for failing to comply with the record keeping requirements of 21 U.S.C. § 801 et. seq. from \$25,000 to \$10,000 per violation. See Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277 § 117(3)(A) (1998).

Among the record keeping requirements of registrants is the requirement to maintain “accurate and complete records, reflecting the numbers of controlled substances on hand, at any given time.” United States v. Little, 59 F.Supp.2d 177, 186 (D. Mass. 1999)(citing 21 U.S.C. § 827(a)(3)). Discrepancies between the actual amount of controlled substances on hand and the amount of controlled substances indicated within the registrant’s records amount to a violation of 21 U.S.C. § 827 (a)(3).

Plaintiff’s count one alleges that Defendant failed to keep accurate and complete records of controlled substances. In Plaintiff’s motion for summary judgment, Plaintiff provided evidence that Defendant had overages and shortages of Hydrocodone, Lorcet, Lortab, Vicodin, and Tussionex.¹ Since Defendant has failed to refute this evidence, the court finds Plaintiff’s motion for summary judgment appropriate as to Plaintiff’s count one.

¹ More specifically, Plaintiff has provided evidence of overages or shortages of six forms of Hydrocodone, one form of Lorcet, two forms of Lortab, two forms of Vicodin, and one form of Tussionex for a total of 12 overages or shortages. See Beauregard Dec. ¶ 12.

Accordingly, Plaintiff is granted summary judgment on count one.

Registrants are also required to conduct inventories of all controlled substances every two years. See 21 U.S.C. § 827 (a)(1). Plaintiff's count two alleges that Defendant failed to conduct inventories every two years as required by 21 U.S.C. § 827 (a)(1). Plaintiff has presented evidence that Defendant conducted inventories May 7, 1998, January 31, 1996, and September 7, 1993. This evidence establishes that Defendant, on at least two occasions, failed to conduct an inventory as required by 21 U.S.C. § 827 (a)(1). Defendant has not responded to this evidence or presented any contrary evidence. Accordantly, Plaintiff's motion for summary judgment as to count three is granted.

Twenty-one C.F.R. § 1306.04 (b) provides that “[a] prescription may not be issued in order for an individual practitioner to obtain controlled substances for supplying the individual practitioner for the purpose of general dispensing to patients.” 21 C.F.R. § 1306.04 (b). For such a transaction to legally occur, registrants must complete a Drug Enforcement Administration form 222. See 21 C.F.R. § 1305.03 (requiring a form 222 for “for each distribution² of a Schedule I or II controlled substance . . .”).

Plaintiff's count two alleges that Defendant distributed a controlled substance to a physician for office use without obtaining the Drug Enforcement Administration form 222. In support of its motion for summary judgment, Plaintiff submitted evidence that on April

² The term “distribute” means to deliver a controlled substance to one other than an ultimate user. See 21 U.S.C. § 802 (10).

23, 1997, Dr. Tim Hayden completed a prescription for Demerol. See Plaintiff's Exhibit 93. On the prescription form where the patient's name is typically inserted, Dr. Hayden wrote "office use." See id. The amount filled on this prescription is unknown. On June 26, 1997, Defendant did not produce a Drug Enforcement Administration form 222 to investigators. See Beauregard Dec., ¶ 13. Defendant has not produced any evidence that this form exist. Accordingly, the court finds that Plaintiff is entitled to summary judgment on count two.

Registrants are also required to record the date "controlled substances are actually received, imported, distributed, exported, or otherwise transferred" 21 C.F.R. § 1304.21. Plaintiff's count four alleges that Defendant, on seventy-five occasions, failed to record the date of receipt on controlled substances invoices. In support of its motion for summary judgment, Plaintiff produced seventy-five invoices of controlled substances that fail to indicate the date of receipt. See Plaintiff's Exhibits 1-75. This uncontested evidence establishes a violation of 21 C.F.R. § 1304.21. Accordingly, Plaintiff's motion for summary judgment as to count four is granted.

Conclusion

Plaintiff has produced evidence on all four counts which entitle it to judgment as a matter of law. Defendant has failed to refute this evidence as required by Fed. R. Civ. P. 56(e). Accordingly, Plaintiff's motion for summary judgment is GRANTED.

Plaintiff is ordered to file a memo in support of its position on penalties within twenty (20) days of the filing of this order. Plaintiff is directed to address both the number of violations in each count and the amount of penalty sought per violation. Defendant will be given twenty (20) days to respond to Plaintiff's memo in support of its position on penalties. IT IS SO ORDERED.

JAMES D. TODD
UNITED STATES DISTRICT JUDGE

DATE

