

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

NANCY CHOATE,)	
)	
Plaintiff,)	
)	
VS.)	No. 01-1288-T
)	
)	
BARBARA TUBBS; TRACY TUBBS and)	
the UNITED STATES OF AMERICA,)	
)	
Defendants.)	

ORDER ON MOTION FOR SUMMARY JUDGMENT

This interpleader action was filed by the plaintiff, Nancy Choate, in the Chancery Court of Madison County, Tennessee, seeking a determination as to the appropriate disposition of certain funds held in escrow. The named defendants were Tracy Tubbs and Barbara Tubbs; the Internal Revenue Service was identified only as an interested party. The United States, on behalf of the IRS, which claims an interest in the funds based on federal tax liens against Tracy Tubbs, removed the action to this Court and was subsequently granted leave to intervene. An amended complaint was filed on January 2, 2002, including the United States as a defendant in interest. Before the Court is a motion for summary judgment on behalf of the United States. Tracy Tubbs and Barbara Tubbs have filed

separate responses to the motion.¹

Motions for summary judgment are governed by Fed. R. Civ. P. 56. If no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Fed. R. Civ. P. 56(c). The moving party may support the motion for summary judgment 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 must go beyond the pleadings and “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); see also Celotex Corp., 477 U.S. at 323.

“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). However, the court’s function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter but only to determine whether there is a genuine issue for trial. Id. 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

¹ Both Barbara Tubbs and Tracy Tubbs assert that the motion for summary judgment should be denied because it does not comply with Local Rule 7.2(d)(2). The rule states that in motions for summary judgment, the material facts should be set out, in the accompanying memorandum, by serial numbering. However, the rule does not state that failure to comply with that provision alone is grounds for denial of the motion.

so one-sided that one party must prevail as a matter of law.’” Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989) (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).

The escrowed funds that are the subject of this action were paid into the registry of the Madison County Chancery Court upon the filing of the original interpleader complaint. Following removal of the case those funds, in the amount of \$226,942.21, were transferred into the registry of this Court. The funds represent the proceeds of an annuity owned by John Allen Tubbs, who died on June 18, 2000. Defendant Tracy Tubbs, the son of John Allen Tubbs, is the designated beneficiary of the annuity. Defendant Barbara Tubbs, widow of John Allen Tubbs and stepmother of Tracy Tubbs, is the contingent beneficiary. According to the IRS, there are currently, and were at the time of John Allen Tubbs’ death, several tax liens outstanding against Tracy Tubbs. Therefore, the IRS claims an interest in the proceeds of the annuity pursuant to 26 U.S.C. § 6321.

On February 26, 2001, Tracy Tubbs disclaimed, in writing, his interest in any of the annuity proceeds, pursuant to Tenn. Code Ann. § 31-1-103(a)(7). Pursuant to the state statute, if a beneficiary of an annuity contract disclaims his interest in the proceeds within nine months after the death of the decedent, the interest then passes as if the beneficiary had pre-deceased the decedent. § 31-1-103(c). In this case, under the statute, the annuity proceeds would pass to Barbara Tubbs, the contingent beneficiary, as if Tracy Tubbs had

died prior to his father. In the amended interpleader complaint, it is alleged that the escrow agreement entered into by Tracy Tubbs and Barbara Tubbs provides that the debts of John Allen Tubbs would be paid from the proceeds of the annuity, and any remaining balance would be distributed in accordance with the terms of the decedent's will. (Am. Compl. ¶ 8.)²

Under § 6321, a federal tax lien attaches to “all property and rights to property, whether real or personal, belonging to” a delinquent taxpayer, including property subsequently acquired by the taxpayer. See United States v. McDermott, 507 U.S. 447, 448 (1993); United States v. Dishman Indep. Oil, Inc., 46 F.3d 523, 525 (6th Cir. 1995). The United States asserts that tax liens have been filed against Tracy Tubbs for 1992 through 1998 income taxes; employment taxes (Form 941) for portions of 1996, 1997 and 1998; and unemployment taxes (Form 940) for 1997, and that these liens were recorded in 1994, 1995, 1998 and 2000. The United States maintains that the liens attached to the entire value of the annuity at the time of John Allen Tubbs' death, and that the liens are not defeated by Tracy Tubbs' disclaimer of his interest in the proceeds.

This case is governed by the decision of the United States Supreme Court in Drye v. United States, 528 U.S. 49 (1999). In Drye, the Court confirmed that, while the inquiry has two parts, the determination of whether certain property or rights to property may be subject to a federal tax lien is ultimately a question of federal law rather than state law:

² The record does not contain a copy of the actual escrow agreement. The original complaint, which is attached to the Notice of Removal, and the amended complaint both briefly describe the escrow agreement and state that a copy is attached. Tracy Tubbs' response to the motion for summary judgment also purports to have a copy of the escrow agreement attached. However, no such copy is actually attached to any of those documents.

As restated in [United States v.] National Bank of Commerce: “The question whether a state-law right constitutes ‘property’ or ‘rights to property’ is a matter of federal law.” 472 U.S. at 727, 105 S. Ct. 2919. We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer’s state-delineated rights qualify as “property” or “rights to property” within the compass of the federal tax lien legislation.

Drye, 528 U.S. at 58.

In Drye, the delinquent taxpayer’s mother died, leaving him the sole heir to her estate under Arkansas law. Arkansas had a statute that is similar to Tenn. Code Ann. § 31-1-103, allowing an heir to disclaim his inheritance. See Ark. Code Ann. §§ 28-2-101, -107 (1987). Drye executed a timely written disclaimer of all interest in his mother’s estate, which then passed to his daughter. The Supreme Court held, notwithstanding the disclaimer, that Drye possessed property or rights to property to which an IRS lien could attach:

The Eighth Circuit, with fidelity to the relevant Code provisions and our case law, determined first what rights state law accorded Drye in his mother’s estate. It is beyond debate, the Court of Appeals observed, that under Arkansas law Drye had, at his mother’s death, a valuable, transferable, legally protected right to the property at issue. . . .

Drye emphasizes his undoubted right under Arkansas law to disclaim the inheritance, a right that is indeed personal and not marketable. But Arkansas law primarily gave Drye a right of considerable value—the right either to inherit or to channel the inheritance to a close family member (the next lineal descendant). That right simply cannot be written off as a mere “personal right . . . to accept or reject [a] gift.”

In pressing the analogy to a rejected gift, Drye overlooks this crucial distinction. A donee who declines an *inter vivos* gift generally restores the status quo *ante*, leaving the donor to do with the gift what she will. The disclaiming heir or devisee, in contrast, does not restore the status quo, for the decedent cannot be revived. Thus the heir inevitably exercises dominion over the property. He determines who will receive the property—himself if he does not disclaim, a known other if he does. This power to channel the estate’s

assets warrants the conclusion that Drye held “property” or a “righ[t] to property” subject to the Government’s liens.

In sum, in determining whether a federal taxpayer’s state-law rights constitute “property” or “rights to property,” “[t]he important consideration is the breadth of the control the [taxpayer] could exercise over the property.” Drye had the unqualified right to receive the entire value of his mother’s estate . . . or to channel that value to his daughter. The control rein he held under state law, we hold, rendered the inheritance “property” or “rights to property” belonging to him within the meaning of § 6321, and hence subject to the federal tax liens that sparked this controversy.

528 U.S. at 59-61 (citations omitted).

Tracy Tubbs does not dispute that Drye is controlling. However, he argues that “a careful reading” of the decision shows that it requires the opposite outcome in this case. Specifically, Tubbs relies upon the “crucial distinction” mentioned by the Supreme Court between disclaimer of an *inter vivos* gift and a disclaimer by an heir or devisee. Tubbs contends that his disclaimer of the annuity proceeds paved the way for his father’s wishes, as evidenced by the terms of his last will and testament, to be carried out. Thus, he claims that this case is more like the disclaimer of an *inter vivos* gift which restores the status quo, leaving the donor to do with the property what he will.

The Court does not find this argument persuasive. While it is asserted that John Allen Tubbs intended the annuity proceeds to be used to pay the debts of his estate, the fact remains that he failed to execute a change of beneficiary for the annuity prior to his death. As the Supreme Court pointed out, when the donor is deceased, the status quo cannot be restored. As the beneficiary named in the annuity contract, Tracy Tubbs had a right to the

entire amount of the proceeds, and could use those proceeds as he saw fit. Tubbs implies that he had no other option but to disclaim the funds. However, the fact that Tracy Tubbs may have voluntarily, or under threat of other litigation, agreed to carry out the alleged intent of his father is irrelevant. While the option of taking the proceeds and facing possible litigation may have been unpalatable, it clearly was an option. In the words of the Supreme Court, Tracy Tubbs held the “control rein” to the annuity proceeds. He exercised control over the proceeds by determining who would receive the property, himself or a known other.

Barbara Tubbs attempts to distinguish Drye on the grounds that the taxpayer in that case deliberately sought to avoid the IRS tax liens by executing the disclaimer. She argues that in this case, the disclaimer was made only for the purpose of entering into a family agreement to carry out the decedent’s wishes. However, there is nothing in Drye clearly supporting the assertion that the taxpayer intentionally sought to avoid the IRS tax liens. Even if such a motive could be inferred in Drye,³ the Supreme Court does not suggest that its holding is at all based on Drye’s reasons for the disclaimer. Therefore, Tracy Tubbs’ motives for disclaiming the annuity proceeds have no bearing on whether he possessed a right to property that is subject to the IRS tax liens.

As Drye is controlling in this case, the Court concludes that, at the time of his father’s death, Tracy Tubbs had a beneficial interest in the annuity proceeds which constituted a right

³ In setting out the facts of the case, the Supreme Court stated that when the estate passed to Drye’s daughter following his disclaimer, she set up a spendthrift trust with herself and her parents as beneficiaries, which under Arkansas law is shielded from the beneficiaries’ creditors. When negotiating with the IRS, Drye revealed his beneficial interest in the trust. 528 U.S. at 53-54.

to property. Therefore, the United States is entitled to judgment as a matter of law on the issue of whether valid federal tax liens filed against Tracy Tubbs attached to the annuity proceeds pursuant to 26 U.S.C. § 6321.

In the motion for summary judgment, the United States asserts that the amount owed, including penalties and interest as of February 4, 2002, was \$187,821.65. On February 25, 2003, the United States filed a notice stating that the updated balance was \$197,779.50, including interest calculated through January 29, 2003. However, as evidence of this assertion, the United States has submitted only various computer printouts and computer-generated notice-of-lien forms. The United States has offered no supporting affidavits and no explanation of how the printouts and notice-of-lien forms correlate. Furthermore, while certain official IRS documents have been held self-authenticating, see United States v. Burdine, 205 F. Supp. 2d 1175, 1178 (W.D. Wash. 2002), computer forms such as those offered by the United States in this case are not self-authenticating under the Federal Rules of Evidence. See Fed. R. Evid. 902.

With his response to the motion for summary judgment, Tracy Tubbs has submitted a copy of a letter dated April 16, 2002, that was sent to Tubbs' counsel by Jason S. Zarin, the attorney of record for the United States in this case. In the letter, Mr. Zarin states:

Enclosed as per your requests are the balances due (with breakdowns into penalties and interest) on the employment and income tax liabilities owed by Tracy Tubbs. The balances are calculated as of February 4, 2002. Please note that the Service is asserting that only \$155,767.45 of these liabilities are secured by the federal tax liens.

(T. Tubbs Mem., Ex. A.) As stated, in the motion for summary judgment, the United States asserts that the balance owed as of February 4, 2002 was \$187,821.65. Yet, Mr. Zarin's letter indicates that the balance actually covered by valid federal tax liens on that date was only \$155,767.45. The United States has made no attempt to explain this discrepancy.⁴ Therefore, the Court finds that there is a genuine dispute regarding the amount of Tracy Tubbs' tax liability.

For the foregoing reasons, the motion for summary judgment is GRANTED on the issue of whether the escrowed annuity proceeds are subject to valid federal tax liens filed against Tracy Tubbs. However, as there are material facts in dispute regarding the amount of tax liability, the motion is DENIED on that issue.

IT IS SO ORDERED.

JAMES D. TODD
UNITED STATES DISTRICT JUDGE

⁴ On each of the computer-generated notice-of-lien forms is the following statement: "With respect to each assessment below, unless notice of lien is refiled by the date in column (e), this notice shall constitute the certificate of release of lien as defined in IRC 6325 (a)." Each assessment has a corresponding date of ten years and one month within which the notice of lien must be refiled in order to remain effective. Thus, if the notice of lien is not refiled by the specified date, the original notice acts as a "certificate of release," unless it is revoked. 26 U.S.C. § 6325(a), (f). As to the assessments made against Tracy Tubbs on November 18, 1991, and June 1, 1992, the period for refileing has expired. The United States has offered no evidence that the notice of lien for those assessments was refiled within the required time frame.

DATE