

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
 :
 v. :
 :
 JACK MCALLISTER : NO. 95-430-03

MEMORANDUM AND ORDER

HUTTON, J.

December 7, 1998

Presently before the Court are the Government's Motion to Release 826 Pine Avenue (Docket No. 61) and Petitioner Genevieve Carson's Motion for Summary Judgment (Docket No. 47). For the reasons stated below, the Government's motion is **GRANTED** and the Petitioner's motion is **DENIED**.

I. BACKGROUND

The instant motions involve a property located on 826 Pine Avenue in Niagara Falls, New York. The property includes an office building with tenants. In October 1987, Genevieve Carson sold the property to Jack McAllister. In return, McAllister gave Carson a note in the amount of \$175,000.

Several years after the sale of the property, the Government charged McAllister with transportation of marijuana. McAllister pled guilty. On March 15, 1996, the Court entered a preliminary order of forfeiture forfeiting McAllister's interest in

the property. Carson filed a Verified Petition contesting the forfeiture of her interest in the property.

The Government attempted to negotiate a settlement with Carson under which the Government would pay Carson for her interest in the property upon entry of a final forfeiture order. Meanwhile, the United States Customs Service seized the property. The United States Customs Service also began collecting the rents from the tenants in the property. As of November 1, 1996, the United States Customs Service has spent more than \$42,000 in maintaining, repairing, and paying outstanding bills. This expenditure includes \$19,552 spent in repairing the roof and over \$17,000 in paying utility, insurance, and tax bills past due and currently owing.

Eventually, the Government decided that the equity in the property, valued at around \$198,000, was not sufficient to cover the costs involved in maintaining the property. These costs included approximately \$100,000 in repairs for building code violations. Moreover, a problem developed with the heating system in the building.

The Government now moves to release the property back to McAllister. In response, Carson filed a summary judgment motion. In her motion, Carson seeks a judgment that her interest in the property is valid pursuant to the facts set forth in her Verified Petition. Carson also seeks attorneys's and costs under the Equal Access to Justice Act (EAJA).

II. DISCUSSION

A. Motion to Release Forfeited Property

The Government asks this Court to release the property from forfeiture back to McAllister. Carson and McAllister do not object to this motion. However, Carson asks the Court to hold the motion in abeyance until the Government has paid for major repairs and outstanding tax bills.

This Court finds that release of the property back to McAllister is proper. However, the Court denies Carson's request to hold the motion in abeyance until the Government makes major repairs and pays the tax bills. Carson cites no authority for the Court to make such a determination. Moreover, even if this Court had such authority, the Court is satisfied that the Government spent the money it collected from the rents on the property. Therefore, the Court releases the property to McAllister and finds that the rents collected by the Government during this period should be applied to reimburse the Government for costs and repairs in maintaining the property.

B. Motion for Summary Judgment

1. Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

2. Verification Petition

In her summary judgment motion, and pursuant to the facts set forth in her Verified Petition, Carson asks this Court to find that her first mortgage in the property is valid and enforceable as a matter of law. The Government did not respond to her Verified Petition. This Court finds that this part of Carson's motion is moot. Carson filed her Verified Petition with this Court to establish her interest in the forfeited property. Because the Court has released the property back to McAllister and the Government has decided not to request an order of final forfeiture on the property, her motion is moot.

3. EAJA

Finally, Carson seeks costs and attorneys' fees associated with her negotiations with the Government under the EAJA. The Government did not respond to this motion.¹ The EAJA provides:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court

¹ While it is unclear why the Government did not respond to Carson's motion for attorneys' fees, the Court will nonetheless attempt to elicit the Government's position from their motion to release the property and from Carson's motion.

finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (1994). In order for Carson to prevail under the EAJA, the Court must find that: (1) the claimant is a prevailing party; (2) the Government's position was not substantially justified; and (3) no special circumstances exist to make an award just. See United States v. Eleven Vehicles, 937 F. Supp. 1143, 1150 (E.D. Pa. 1996).

a. Civil Action

Before the Court addresses these findings under the EAJA, it must first determine if a petition under § 853(n) to establish a third party's interest in a criminal forfeiture proceeding prosecuted under 21 U.S.C. § 853 is a civil action entitling a prevailing party to fees and costs under the EAJA. Carson argues that such a petition ancillary to a criminal forfeiture proceeding is a civil action for purposes of the EAJA. As support, Carson points to United States v. Douglas, 55 F.3d 584 (11th Cir. 1995).

In Douglas, a third party claimant filed a petition opposing criminal forfeiture of certain properties. See id. at 585. The claimant argued that the properties were not forfeitable under the criminal forfeiture statute. See id. at 586. The court agreed and granted summary judgment for the claimant. See id. The claimant then moved for attorneys' fees pursuant to the EAJA. See id.

The Douglas court held that a third party claimant's proceeding ancillary to a criminal forfeiture prosecution is a "civil action" within the meaning of the EAJA. See id. at 585. The court found that the "[f]ailure to apply the EAJA to § 853(n) proceedings would contravene Congress's desire to instill governmental accountability and to level the playing field in economic disputes between the government and its citizens." Id. at 587. Moreover, the court pointed to the legislative history of the statute authorizing hearings on third party's claims to forfeited property, 21 U.S.C. § 853(n), which suggested that Congress viewed these proceedings as generally civil. See id. at 586 & n.9 (citing H.R. Rep. No. 1030, 98th Cong., 2d Sess. 206-07 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3389-90 ("[O]nce the indictment or information is filed, a third party is not to commence a civil suit against the United States; instead the third party should avail himself of the ancillary hearing procedure [I]t is anticipated that the new hearing procedure should provide for more expedited consideration of third party claims than would the filing of separate civil suits.")).

This Court agrees with the analysis employed by the court in Douglas and finds that the petition filed by Carson pursuant to § 853(n) in this case was a civil action within the meaning of the EAJA. In enacting § 853(n) and authorizing a hearing ancillary to a criminal forfeiture to determine the rights of a third party in

forfeited property, Congress apparently intended to avoid the separate filing of a civil action to establish these rights. Moreover, the application of the EAJA to § 853(n) is consistent with Congress' intent to penalize unreasonable behavior on the part of the government. While this Court never held a hearing to resolve whether Carson had an interest in the property because the Government decided to release the forfeited property, Carson's petition is nevertheless the initiation of a proceeding under § 853(n). Therefore, the Court holds that Carson's petition was a civil action within the meaning of the EAJA.²

b. Prevailing Party

Because the Court concluded that a third party hearing ancillary to a criminal forfeiture is a civil action within the meaning of the EAJA, this Court must next determine if Carson was a prevailing party under the EAJA. "In EAJA cases, the court must first determine if the applicant is a prevailing party by evaluating the degree of success obtained." Commissioner v. Jean, 496 U.S. 154, 160 (1990). Furthermore, the Third Circuit has stated that "no conclusive weight should be given to the form of the judgment; rather, to determine prevailing party status [the

² While the Court is hesitant to even consider a motion for summary judgment by Carson on a criminal docket, the Douglas court appeared to reject the argument that summary judgment motions cannot be brought in criminal cases. See id. In any event, this Court will consider Carson's motion as a petition for fees under the EAJA and considers the merits of her argument.

courts] 'look to the substance of the litigation's outcome.'" Dunn v. United States, 842 F.2d 1420, 1433 (3d Cir. 1988) (quoting Ross v. Horn, 598 F.2d 1312, 1322 (3d Cir. 1979)). Thus, the Third Circuit formulated a test for determining if party was prevailing under the EAJA. See id. The Third Circuit stated:

The test for prevailing party status is essentially a twofold inquiry. Although framed in various ways, the first part of the test is whether plaintiff [or the party seeking attorneys' fees] achieved some of the benefit sought by the party bringing suit. The second part of the prevailing party test is that of causation, i.e., whether the litigation constituted a material contributing factor in bringing about the events that resulted in the obtaining of the desired relief. Thus, the plaintiff's lawsuit need not be the sole cause of defendant's action. Moreover, a district court must apply the most expansive definition of causation. The district court must determine whether the plaintiff's lawsuit is causally linked to the relief obtained, i.e., whether it changed the defendant's conduct or the action to be undertaken.

Id. (citations and internal quotations omitted).

Under this analysis, the Court finds that Carson was a prevailing party under the EAJA. Carson filed a petition to establish her interest in the forfeited property. The Government did not contest this petition, but rather undertook a series of negotiations with Carson in an attempt to settle the matter. Now that this Court released the property back to McAllister, it is clear that Carson maintains her interest in the property.

Therefore, the Court finds that she is a prevailing party within the meaning of the EAJA.

c. Substantial Justification

Next, this Court must determine whether the Government had substantial justification for their actions. "Substantial justification under the EAJA has been defined by the Supreme Court as 'justified in substance or in the main--that is, justified to a degree that could satisfy a reasonable person.' Alternatively phrased, [the Government's position] is substantially justified if it has a reasonable basis in both law and fact." Hanover Potato Prods., Inc. v. Shalala, 989 F.2d 123, 128 (3d Cir. 1993) (quoting Pierce v. Underwood, 487 U.S. 552, 565 (1988)). The burden of demonstrating substantial justification for its position rests squarely on the government agency. See id. For the Government to meet its burden, it must show: (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory it propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. See id. (modifying the Third Circuit's three-part test after the Supreme Court's holding in Pierce).

Moreover, under the EAJA, the position of the Government includes not only the position taken in the litigation, but the agency position that made the litigation necessary in the first place. See id. Thus, the agency's litigation and prelitigation positions must meet the modified three-part test or the Government's position is not substantially justified. See id.

In this case, the agency position may be viewed as the Government's decision to institute the forfeiture proceeding. The litigation position involves analysis of the Government's actions after its initiation of the forfeiture proceeding.

(1) Agency Position

Here, the Court finds that the Government had substantial justification for its agency position. It is clear that the Government had probable cause when instituting the forfeiture proceeding. McAllister plead guilty to transporting marijuana from Canada to the United States. Indeed, Carson does not present any facts that the Government lacked substantial justification in its agency position.

(2) Litigation Position

However, Carson argues that the Government's litigation posture displayed a pattern of delay from the outset of this proceeding. Carson states that the Government failed to respond on a timely basis to claimant's verified petition. Carson also details the numerous and frustrating attempts to settle the matter with the Government. This includes unreturned phone calls, failure to exchange information, and unhelpful responses from Government attorneys. Finally, Carson argues the Government failed to provide heat to the tenants in the forfeited building. This prompted Carson to file a Temporary Restraining Order (TRO) to provide heat

to the tenants.³ These actions on the part of the Government, Carson contends, demonstrates that the Government lacked a substantial justification in their litigation position.

This Court disagrees and finds that the Government had substantial justification in its litigation position. While the Government may have given Carson the run around in her attempt to assert her interest in the forfeited property, the Court finds that these facts do not suggest the Government lacked substantial justification in its actions. The Government made attempts to compensate Carson for her interest in the forfeited property. Eventually, at some point in the negotiations, the Government made the decision to release the property back to McAllister because it was too expensive to maintain. The Government understandably withdrew its settlement offer on the property and filed the motion to release the property. These events took place over a period of a couple months. This can hardly be termed an unreasonable delay that warrants a finding that the Government lacked substantial justification in its litigation position. See, e.g., United States v. \$12,248 U.S. Currency, 957 F.2d 1513, 1519 (9th Cir. 1991) (holding that Government was not substantially justified in its litigation position, despite court's finding of probable cause for initial seizure, where Government conducted a poor investigation of claim, failed to verify claimant's story, unreasonably delayed

³ The TRO was denied as moot.

pursuing and processing litigation of forfeiture claim for thirteen months, and where court ultimately found at trial which occurred four years after initial seizure that seized property had independent source and had not been used illegally); United States v. One 1985 Chevrolet Corvette, 914 F.2d 804, 809 (6th Cir, 1990) (holding that district court did not err in finding probable cause for forfeiture where "[t]he government's position in initiating the forfeiture proceeding was substantially justified, and nothing that occurred during the trial required the government to abandon the proceeding").

d. Conclusion

Because the Government had a reasonable basis for bringing the forfeiture proceeding, a reasonable basis for the legal theory it propounded, and took a reasonable position in its settlement negotiations with Carson, the Court finds that its litigation position was substantially justified. Therefore, the Court holds that the claimants are not entitled to an award of attorneys' fees under the EAJA.

An appropriate Order follows.

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O R D E R

AND NOW, this 7th day of December, 1998, upon consideration of the Government's Motion and the Petitioner's Motion for Summary Judgment, IT IS HEREBY ORDERED that the Government's Motion is **GRANTED** and the Petitioner's Motion is **DENIED**.

IT IS FURTHER ORDERED THAT:

(1) The United States' interest in 826 Pine Avenue, Niagara Falls, New York is released to Jack McAllister; and

(2) The rents collected by the United States Customs Service from tenants at 826 Pine Avenue, Niagara Falls, New York are applied to reimburse the United States Customs Service for costs and repairs in maintaining the property.

BY THE COURT:

HERBERT J. HUTTON, J.