

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

STEVEN SMITH	:	CIVIL ACTION
	:	NO. 07-1475
v.	:	
	:	
NORTH AMERICAN SPECIALTY	:	CIVIL ACTION
INSURANCE CO., et al.	:	NO. 07-1502

MEMORANDUM

Bartle, C.J.

May 21, 2007

Plaintiff, Steven Smith, initially filed this action on March 12, 2007 against defendants North American Specialty Insurance Company ("North American") and the Internal Revenue Service ("IRS") in the Court of Common Pleas of Philadelphia County. Both defendants timely removed the action to this court.¹ The IRS has now filed a motion to dismiss the complaint under Rule 12(b)(6) for failure to state a claim for relief. The IRS maintains that the action is out of time.

For present purposes, we take as true all well-pleaded facts in the complaint. Cal. Pub. Employees' Ret. Sys. v. Chubb Corp., 394 F.3d 126, 143 (3d Cir. 2004). Plaintiff had an agreement with Safeguard Lighting Systems, Inc. ("Safeguard") to advise and assist Safeguard in adjusting an insurance claim with

1. Each defendant separately removed plaintiff's state court action to this court. The Clerk's Office gave each Notice of Removal a different civil action number when, in fact, there is only one civil action. We have consolidated the cases for all purposes and will deem them to be one action.

its insurer North American for water damage to its property on December 28, 2000. As security for plaintiff's fee, Safeguard assigned him "the insurance claim and the proceeds thereof and any monies arising therefrom as well as any additional claims and monies which may become due in connection with the insurance claim" Plaintiff seeks to recover his fee of \$40,000 from the defendants.

In a previous lawsuit in this court, Safeguard had sued North American for breach of contract for failure to pay what Safeguard alleged was due under an insurance policy for the water damage it had suffered. The lawsuit was ultimately settled for \$500,000, and we dismissed the action under Local Civil Rule 41.1(b) on February 4, 2005. Safeguard, however, never received any of the proceeds of the settlement. Instead, North American paid the money shortly thereafter to the IRS in satisfaction of an IRS levy against Safeguard for back taxes. Unhappy with this turn of events, Safeguard moved to vacate the court's order dismissing that action. It contended that the parties had not had a meeting of the minds with respect to the settlement. We found that a meeting of the minds had occurred and denied the motion to vacate the dismissal. The Court of Appeals affirmed. Safeguard Lighting Systems, Inc. v. North American Specialty Ins. Co., 2005 WL 1311671 (E.D. Pa. 2005), aff'd 2007 WL 186765 (3d Cir. 2007).

The United States and its agencies, of course, are immune from suit for money damages unless immunity has been

waived. Department of Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999) (citation omitted). The IRS contends, and we agree, that plaintiff's sole remedy is against the United States under 26 U.S.C. § 7426(a)(1) which provides:

If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

26 U.S.C. § 7426(a)(1).

There is a limitations period for filing actions under § 7426. Congress has provided in 26 U.S.C. § 6532(c)(1) and (2):

(1) General rule.--Except as provided by paragraph (2), no suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy or agreement giving rise to such action.

(2) Period when claim is filed.--If a request is made for the return of property described in section 6343(b), the 9-month period prescribed in paragraph (1) shall be extended for a period of 12 months from the date of filing of such request or for a period of 6 months from the date of mailing by registered or certified mail by the Secretary to the person making such request of a notice of disallowance of the part of the request to which the action relates, whichever is shorter.

26 U.S.C. § 6532(c)(1) and (2). Our Court of Appeals has held in Becton Dickinson & Co. v. Wolckenjauer, 215 F.3d 340 (3d Cir. 2000), that these provisions are jurisdictional and that

principles of equitable tolling do not apply. Thus, we will treat the pending motion to dismiss as one pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure rather than pursuant to Rule 12(b)(6).

It is undisputed that the IRS levy in this case took place on February 8, 2005. This lawsuit, which was originally filed on March 12, 2007, was clearly not begun within nine months of the levy as required as required under § 6532(c)(1).

Nor has plaintiff met the test of § 6532(c)(2). We read that section to require a request for return of property to be made within the nine-month period after the levy took place. Plaintiff maintains that the request was made in a March 8, 2002 letter which an attorney for Safeguard sent to the IRS setting forth a purported agreement by the IRS to receive any insurance money recovered and to pay a fee to Smith. The IRS never responded. The March 8, 2002 letter cannot be deemed a request for return of property as contemplated by § 6532(c)(2). Without considering any other deficiencies, the letter was sent almost three years before any property was levied upon by the IRS, and thus any request was outside the allowable statutory period. We do not see how any request can have validity under these circumstances.

Accordingly, because plaintiff's action against the United States is time barred, it will be dismissed for lack of jurisdiction.

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ORDER

AND NOW, this 21st day of May, 2007, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the United States is SUBSTITUTED in place of the Internal Revenue Service as a defendant in this action; and

(2) the motion of the United States to dismiss this action as to it is GRANTED for lack of subject matter jurisdiction.

BY THE COURT:

/s/ Harvey Bartle III

C.J.