In the United States Court of Federal Claims

NOT FOR PUBLICATION
No. 08-116T
(Filed: March 20, 2009)

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WESTERN MANAGEMENT, INC., YVONNE KOVACEVICH and ROBERT KOVACEVICH,	*
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Plaintiffs,	*
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v.	*
	*
THE UNITED STATES,	*
	*
Defendant.	*
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* * * * * * * * * * * * * * * * * * * *	*

Robert E. Kovacevich, Spokane, WA, for plaintiffs.

Carl Wasserman, U.S. Department of Justice, Washington, D.C., with whom were *Acting Assistant Attorney General John A. Dicicco,* and *Chief, Court of Federal Claims Section, Steven I. Frahm*, for defendant.

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO STRIKE DEFENDANT'S COUNTERCLAIM

FIRESTONE, *Judge*.

Pending before the court is the plaintiffs' December 10, 2008 motion to strike the defendant's counterclaim. In the underlying action, the plaintiffs seek recovery of "withholding taxes, withholding tax penalty assessments, Federal Insurance Contributions

Act ("FICA") taxes, hospital insurance taxes (Medicare), penalties, interest, and damages" for taxes allegedly paid by the individual plaintiffs and Western Management, Inc. ("WMI") at various times in 1991, 2003 and 2004. Compl. ¶ A. In the counterclaim, the defendant ("United States" or "government") alleges that the plaintiff corporation, WMI, has not yet satisfied its liabilities for income tax withholding, FICA, Federal Unemployment Tax ("FUTA"), penalties, and interest for the four quarters of 1994 and for the first quarter of 1995. The United States seeks recovery of these taxes, penalties, and interest from WMI as well as from Robert E. Kovacevich and Yvonne Kovacevich as the "alter ego" of WMI. The United States claims that as of March 20, 2008, WMI had a total outstanding liability for the above-noted taxes and penalties in the amount of $86,782.08 plus assessed and statutory interest pursuant to 26 U.S.C. § 6601 (2005). The government notes that the Tax Court, as affirmed by the Ninth Circuit, has determined that WMI is liable for these taxes because WMI failed to properly classify Robert E. Kovacevich as an employee of WMI. W. Mgmt., Inc. v. Comm'r, 85 T.C.M. (CCH) 1442 (2003), aff'd in part, rem'd in part, 176 Fed. Appx. 778 (9th Cir. 2006). In the plaintiffs' motion to strike, which the court will consider as a motion to dismiss, the plaintiffs argue that this court does not have jurisdiction over the subject matter of the government's counterclaim and that the government has failed to state a claim upon which relief may be granted. For the reasons that follow, the motion is **GRANTED-IN-PART** and **DENIED-IN-PART**.

I. Standard of Review

The plaintiffs have moved to dismiss the government's counterclaim for lack of jurisdiction under Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC") and for failure to state a claim under RCFC 12(b)(6). In deciding on a motion to dismiss on either ground, the court is obligated to assume all factual allegations to be true and to draw all reasonable inferences in the counterclaimant's favor. Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995). If the facts are sufficient to "raise a right to relief above the speculative level" such that the plaintiff's claim is "plausible on its face," a complaint will survive a motion to dismiss. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965, 1974 (2007). However, a plaintiff must provide "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action" to show entitlement to relief. Id. at 1965.

II. This Court Has Subject Matter Jurisdiction over the Counterclaim.

The Court of Federal Claims has jurisdiction over set-offs and counterclaims under 28 U.S.C. §§ 1503 (1992) and 2508 (1992). Hinck v. United States, 64 Fed. Cl. 71, 76 (2005), aff'd 446 F.3d 1307 (Fed. Cir. 2006), aff'd, 550 U.S. 501 (2007). Under 28 U.S.C. § 1503, "the Court of Federal Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court." Pursuant to 28 U.S.C. § 2508, if the plaintiff is found to owe money to the government, the government is entitled to a judgment that shall be enforceable in United States District

Court. 28 U.S.C. § 2508 ("The transcript of such judgment [of the Court of Federal Claims], filed in the clerk's office of any district court, shall be entered upon the records and shall be enforceable as other judgments.").

In addition, RCFC 13(a) and (b) provide that a counterclaim must be pled if it arises out of the same subject matter as the complaint (with exceptions not relevant here), but that any claim that is not compulsory may be pled as a counterclaim. Finally, RCFC 13(c) provides that "a counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party."

The plaintiffs' reliance on certain Tax Code provisions that give exclusive jurisdiction to United States District Courts is misplaced. These provisions do not preclude the Court of Federal Claims from exercising jurisdiction over the claims set forth in the government's counterclaim. First, Section 7421(a), 26 U.S.C. § 7421(a) (2000), prohibits suits to restrain the assessment or collection of taxes. The government's counterclaim does not seek to restrain the assessment or collection of taxes, and therefore Section 7421 does not bar the counterclaim. Section 7426, 26 U.S.C. § 7426 (1998), governs suits against the United States for wrongful levy. The counterclaim has nothing whatsoever to do with a wrongful levy, and thus Section 7426 has no relevance to this case.

Accordingly, for the reasons stated above, the government has established that this court has subject matter jurisdiction over the counterclaim.

III. The Government Has Stated a Claim for Relief.

In its counterclaim, the United States seeks to obtain a judgment for the amounts owed by WMI, as determined by the Tax Court, for all four quarters of 1994 and the first quarter of 1995. The government seeks a judgment against Robert E. Kovacevich and his wife, Yvonne Kovacevich, on the theory that they are WMI's alter ego.[1] The plaintiffs argue that all of these claims are time-barred. The plaintiffs also argue that the government has failed to allege any facts to show that Robert and Yvonne Kovacevich are presently or ever were the alter egos of WMI.

For the reasons that follow, the court finds that the claims against the plaintiffs are not time-barred. However, the court agrees with the individual plaintiffs that the counterclaim does not allege sufficient facts to establish a prima facie basis for finding liability under an alter ego theory.

A. The Government's Claims Are Not Time-Barred.

It is generally true that the statute of limitations on a tax assessment is three years from the filing of the return, and the statute of limitations for collection of taxes is ten years from the assessment date. See 26 U.S.C. §§ 6501(a) (2008) & 6502(a) (1999). However, under Section 6503(a), 26 U.S.C. § 6503(a) (2007), both the assessment and

[1]The claim against Mr. Kovacevich's wife appears to arise from the fact that Washington, where the plaintiffs are located, is a community property state.

collection statute of limitations are suspended during the period in which the matter is pending in the Tax Court, until the Tax Court decision becomes final, and for sixty days thereafter.

In this case, the Tax Court decision determining WMI's liabilities for the four quarters of 1994 and the first quarter of 1995 became final on February 23, 2009, when the Ninth Circuit affirmed the Tax Court's calculation, on remand, of the amount by which WMI's tax liabilities should be offset by taxes already paid. W. Mgmt., Inc. v. Comm'r, No. 07-74222, slip op. (9th. Cir. 2009), aff'g 94 T.C.M. (CCH) 127 (2007). Therefore, under Section 6503(a), the limitations period is now just beginning to run on collection against WMI.

The plaintiffs' contention that the period of assessment and collection against the individual plaintiffs, Robert and Yvonne Kovacevich, has passed is based on a fundamental misunderstanding of the nature of the government's claim. In this action, the government does not seek to hold the individual plaintiffs liable for the taxes assessed against WMI, but to hold the individuals liable for payment of the tax liability, based on an alter ego theory. In such circumstances, the government argues, the tax assessment against WMI is effective as an assessment against the individual plaintiff shareholders.

The government's alter ego theory is supported by the Ninth Circuit's decision in Wolfe v. United States, 798 F.2d 1241, 1245 (9th Cir. 1986), amended on denial of reh'g, 806 F.2d 1410 (9th Cir. 1986), cert. denied, 482 U.S. 927 (1987). In Wolfe, the Ninth

Circuit stated, "[U]nder alter ego theory, the assessment against the corporation was effective against [the shareholder] as well." 798 F.2d at 1245 (citation omitted). The Ninth Circuit explained that this view did not undermine the integrity of the corporate form, stating

> It is not necessarily inconsistent to view a corporation as viable for the purpose of assessing a corporation tax, while disregarding it for the purpose of satisfying that assessment. . . . A corporation could have a valid business purpose (giving it separate tax status) and at the same time be so dominated by its owner that it could be disregarded under the alter ego doctrine.

Id. at 1243 (citations omitted).

The Fifth Circuit reached a similar conclusion in Harris v. United States, 764 F.2d 1126, 1128-29 (5th Cir. 1985), when it held that an individual shareholder could be held subject to a tax lien to satisfy the disregarded corporation's unpaid employment tax.[2] Id. at 1128 ("Whether or not [the corporation] was a separate taxable entity is not the same question as whether it was an alter ego for the purpose of piercing the corporate veil." (citation omitted)).

Based on this authority, the court finds that the counterclaim is not time-barred and that the assessment against WMI may properly serve as an assessment against the individual plaintiffs, to the extent the government can establish that the individuals are liable under an alter ego theory.

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[2]In view of this authority, the plaintiffs' contention that the government should be judicially estopped from seeking payment from Robert Kovacevich is not correct. The fact that Mr. Kovacevich was found to be a statutory employee of WMI does not mean that if he abused the corporate form, he cannot be found liable to pay WMI's tax debt under an alter ego theory.

B. The Government Has Failed to Allege Facts to Support Alter Ego Liability for Robert or Yvonne Kovacevich.

Under the standards established by the Supreme Court, a complaint or counterclaim must plead sufficient facts to raise the right to relief above a speculative level. Twombly, 127 S. Ct. at 1965. As applied to this case, the government was required to plead sufficient facts to support its alter ego theory as to give both Robert and Yvonne Kovacevich fair notice of the elements of their potential liability under an alter ego theory, as well as facts to support each plaintiff's potential liability for each element.

Here, the government did not allege any facts in its counterclaim with regard to Robert and Yvonne Kovacevich's alter ego liability. The counterclaim simply states that they are each liable as the alter egos of WMI. The government's failure to identify the elements of alter ego liability with supporting facts is fatal to the portion of the government's counterclaim with regard to the individual plaintiffs.[3]

CONCLUSION

For the reasons set forth above, the motion to strike is **GRANTED-IN-PART** and **DENIED-IN-PART**. Should the government choose, it shall have fourteen days from

[3]In this connection, the court further notes that it agrees with the Ninth Circuit with regard to the law to apply in determining whether the individual plaintiffs can be held liable under an alter ego theory. In Wolfe, the Ninth Circuit determined that the elements of alter ego liability are governed by state law. 798 F.2d at 1244 n.3 ("State law governs the determination of whether there exists an alter ego from whom the government may satisfy the obligation of a taxpayer." (citations omitted)). In Washington state, the test for evaluating whether to disregard the corporate form was set in Morgan v. Burks, 611 P.2d 751 (Wash. 1980).

receipt of this order to amend its counterclaim to address the deficiencies identified above.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge