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

EDWARD KABAKJIAN AND NANCY B. KABAKJIAN	:	**CIVIL ACTION**
v.	:	
UNITED STATES OF AMERICA, JACK P. PARMER, LUANN PARMER, WILLIAM SNIDER AND NANCY SNIDER	:	**NO. 97-5906**

M E M O R A N D U M

WALDMAN, J. **December 22, 1998**

Presently before the court are the Motion of defendant United States to Dismiss Count I of the Complaint and plaintiffs' Motion for Partial Summary Judgment in this taxpayer suit.[1]

Plaintiffs allege that the seizure and sale of their property in 1996 by the IRS was invalid because notice was provided in a procedurally defective manner. The IRS seized the subject property and sold it to defendants William and Nancy Snider and their son-in-law and daughter, defendants Jack and LuAnn Parmer, to satisfy plaintiffs' unpaid tax obligations for 1987, 1988 and 1989. The Parmers took possession of the residence and, according to plaintiffs, thus owe "rent" for each month they have resided there.

Plaintiffs do not contest the validity of the underlying tax debts. They assert that the seizure and sale are invalid because the IRS failed to follow the notice provisions of

[1] The government has also filed a Motion to Strike Jury Demand as to All Counts which plaintiffs have not opposed.

26 U.S.C. § 6335(a) & (b) when the agency provided notice of the seizure and sale by certified mail rather than personal delivery. Plaintiffs do not contest that they received actual notice.[2]

In Count I plaintiffs assert a claim against all defendants to quiet title on the theory that the failure to comply with the pertinent notice requirements voided the seizure and subsequent sale of the property. It is on this claim that plaintiffs seek summary judgment.[3] In Count II plaintiffs assert

---

[2] Reciting the language of the statute, plaintiffs also alleged that the IRS failed to comply with virtually all of the procedural requirements of § 6335, e.g., that the property be described with reasonable certainty, that a fair market value be determined, that notice of the sale be posted at the nearest post office and that the sale be conducted in the county in which the property was seized between ten and forty days of the time of public notice. Based on uncontroverted averments and unquestioned documents in the summary judgment record, these allegations appear to be unsupportable. In any event, whether with an eye on Fed. R. Civ. P. 11(b)(3) or otherwise, in their submission in opposition to the motion to dismiss, as well as that in support of their motion for summary judgment, plaintiffs rely exclusively on the failure of the IRS personally to deliver notice of the seizure and sale.

[3] In addition to the pleadings, the summary judgment record includes declarations of plaintiffs and the IRS agent responsible for the seizure and sale who avers and documents compliance with all of the applicable provisions of § 6335 except the requirement of notification by personal delivery, several responses to requests for admissions, copies of the notices of seizure and sale with a detailed legal description of the property and certified mail receipts, a verified notice of publication of the sale, copies of official IRS records of the seizure and sale including a minimum bid worksheet with a calculation of the fair market and forced sale value of the property, a copy of the original deed, a copy of the individual defendants' bid and the deed they received from the IRS. The certified mail receipt of the notice of sale is dated almost a month prior to the sale. It also appears that the sale generated a surplus which was applied by the IRS to other outstanding tax liabilities of plaintiffs.

a claim against the government under 26 U.S.C. § 7433 to recover damages for the allegedly unauthorized confiscation. In Count III plaintiffs assert a claim against the government under 26 U.S.C. § 7432 for damages from the failure of the IRS to release tax liens on their property.[4]

The government seeks dismissal of Count I for lack of subject matter jurisdiction in the absence of a waiver of sovereign immunity. Plaintiffs respond that Congress waived immunity for quiet title actions in 28 U.S.C. § 2410(a), which provides in relevant part:

> [T]he United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter--
> (1) to quiet title to, . . .
>
> real or personal property on which the United States has or claims a mortgage or other lien.

The government counters that this provision is inapplicable to the instant dispute because the government had sold the subject property and had no lien at the time this action was initiated.[5]

The weight of authority is that a plaintiff may not initiate a quiet title action against the government after it has

---

[4] Plaintiffs actually cite 26 U.S.C. § 7431 which addresses unauthorized disclosure of tax records. As plaintiffs seek damages for failure to release tax liens, the court assumes their claim is predicated on § 7432.

[5] This action was commenced nineteen months after the subject property was sold and thirteen months after title was transferred by deed, well past the 180 day redemption period provided in 26 U.S.C.§ 6337(b)(1).

sold the subject property to a third party and no longer has or claims a lien or mortgage on it. See Koehler v. United States, 153 F.3d 263, 267 (5th Cir. 1998) (no jurisdiction under § 2410(a) where at time taxpayer files suit the government had sold property and issued deed to purchasers and thus no longer claimed interest in the property); Dahn v. United States, 127 F.3d 1249, 1252 n.1 (10th Cir. 1997) (quiet title claim asserted when government no longer had lien was barred ab initio); Hughes v. United States, 953 F.2d 531, 538 (9th Cir. 1991) (court lacks jurisdiction under § 2410 where at time action was commenced government had sold property and did not claim lien or mortgage on it); MacElvain v. United States, 867 F. Supp. 996, 1002-03 (M.D. Ala. 1994) (same); Bay Savings Bank v. IRS, 837 F. Supp. 150, 153 (E.D. Va. 1993) (same). Some courts, however, have exercised jurisdiction although the subject property had been sold to a third party. See Popp v. Eberlein, 409 F.2d 309, 312 (7th Cir.) ("Although beset by serious doubt, we agree that the district court had jurisdiction" under § 2410 to adjudicate claim to set aside tax sale of property on ground price was "unconscionably low" because bidding was discouraged by false statements of successful bidder), cert. denied, 296 U.S. 909 (1969); Freedom Mission Church v. Green Bay Packaging, Inc., 816 F. Supp. 513, 514 (E.D. Ark. 1993) (relying on Popp); Little River Farms, Inc. v. United States, 328 F. Supp. 476, 478 (N.D.

Ga. 1971) (relying on Popp).

Plaintiffs suggest that the Third Circuit resolved this issue to their benefit in Aqua Bar & Lounge, Inc. v. United States Department of Treasury, 539 F.2d 935, 939 (3d Cir. 1976), a case in which a taxpayer was allowed to pursue a claim contesting a seizure and sale of a liquor license by the IRS. A concurring Judge did read the majority opinion in Aqua Bar as generally permitting a post-sale quiet title action under § 2410(a), a result which that Judge viewed as contrary to the express language of the statute. See Aqua Bar, 539 F.2d at 940-41 (Garth, J. concurring).[6] Because the court is convinced that Judge Garth was correct in his reading of the statute, the court is reluctant to read the majority opinion in Aqua Bar as broadly as he appears to have done.

As viewed by the majority, the threshold question in Aqua Bar was whether "this suit may be treated as an action to quiet title to property on which the United States has a lien." Id. at 937. The majority answered in the affirmative because title to the license remained with the plaintiff and the buyer had not obtained possession of it. Id. Indeed, the plaintiff had initiated suit to enjoin a transfer of the license.

---

[6] Judge Garth concurred in the result because he then viewed § 6335 itself as providing "an implied waiver of immunity." Id. at 940. This view, reasonably articulated at the time, has been superseded by the Supreme Court's subsequent rejection of the concept of implied waiver of sovereign immunity.

In the case of a state liquor license, transfer is critical. Unlike realty or personalty, a liquor license is a privilege conferred by the state to engage at a particular premises in a profitable regulated commercial activity.[7] Depending upon the fitness of the proposed transferee, the premises where the license would be utilized and the nature of the proposed transferee's pecuniary interest in the business, the PLCB may decline to approve a transfer. See 21 West Lancaster Corp., 790 F.2d at 358 n.3 ("the right to sell a license is not absolute since the state Liquor Control Board may deny a transfer"); 1412 Spruce, Inc., 474 A.2d at 283 (Liquor Code does not contemplate sale of license at discretion of possessor). Until the state approves a transfer and retitles the license, virtually nothing tangible has been conveyed and the license effectively remains a putative asset of the taxpayer. It thus appears that at the time litigation in Aqua Bar was commenced the

[7] While subject to a federal tax lien as it has pecuniary value for its holder, a liquor license was not considered property under Pennsylvania law at the time of Aqua Bar. See 21 West Lancaster Corp. v. Main Line Restaurant, Inc., 790 F.2d 354, 358-59 (3d Cir. 1986); 1412 Spruce, Inc. v. Pennsylvania Liquor Control Board, 474 A.2d 280, 283 (Pa. 1984). Eleven years after the Aqua Bar decision the legislature provided that although still a "privilege" as between the state and a licensee, a liquor license is "property" as between a licensee and third parties and thus subject to a security interest or other lien. See 47 Pa. C.S.A. § 4-468(d) (July 1, 1987).

IRS retained a lien on the taxpayer's license.[8]

In view of the subsequent pronouncements of the United States Supreme Court regarding waivers of sovereign immunity, the resolution of this issue appears to this court to be relatively clear cut.

"A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text and will not be implied. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." Lane v. Pena, 116 S. Ct. 2092, 2096 (1996) (citations omitted). See also United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992) (waiver "not to be enlarged beyond what the language requires"). Section 2410(a) clearly provides that the United States may be sued when it has a mortgage or other lien on the subject property but is silent with regard to governmental immunity in quiet title actions when the government no longer has such an interest. Because a waiver of immunity must be strictly construed and cannot be enlarged beyond what the language requires, it would appear to follow that § 2410(a) must be limited to actions involving property "on which

[8] Plaintiff also cites three cases which are inapposite. The first is Yannicelli v. Nash, 354 F. Supp. 143 (D.N.J. 1973). In that case the money in question had become "part of the United States Treasury." Id. at 149. The second is United States v. Coson, 286 F.2d 453 (9th Cir. 1961). In that case the government had a lien on and had not sold the subject property when the action was commenced. Id. at 457. The third is United States v. Conry, 1973 WL 700 (N.D. Cal. Dec. 28, 1973). In that case the property in question had been purchased by the government.

the United States has or claims a mortgage or other lien."

Plaintiffs suggest that the United States continues to have a lien on the property on the theory that title was never conveyed to the purchasers pursuant to 26 U.S.C. § 6339(b)(2) due to the failure of the IRS to follow the notice requirements of § 6335. Plaintiffs rely on the holding in Reece v. Scoggins, 506 F.2d 967, 971 (5th cir. 1975) that absent literal compliance with the notice provisions of § 6335(a) & (b), a tax sale of property must be set aside and cases quoting Reece to that effect, principally Goodwin v. United States, 935 F.2d 1061, 1065 (9th Cir. 1991).

In Goodwin, the property at issue had not been sold to a third party at the time the action was initiated. Indeed, the plaintiff in Goodwin sought to restrain the sale for failure to comply with § 6335. Id. at 1063. The government was not a party to the Reece case before the circuit court. There was thus no question of sovereign immunity in Reece or Goodwin.

The Fifth Circuit has held subsequent to Reece that the courts lack jurisdiction to entertain a quiet title action where the government claims no interest in the property despite a failure strictly to comply with § 6335, as has the Ninth Circuit subsequent to Goodwin. See Koehler, 153 F.3d at 267 (no jurisdiction to consider merits of plaintiff's claim that tax sale was invalid because notice of sale was provided by mail where at time of suit property had been sold to third party and government no longer claimed interest in it); Powelson v. United

States, 979 F.2d 141, 145 (9th Cir. 1992) (because government claimed no interest in property at time quiet title action was filed, there is no jurisdiction under § 2410(a) despite failure to comply with § 6335), cert. denied, 507 U.S. 1029 (1993).[9]

Interestingly, virtually none of the courts stating that strict compliance with § 6335 is required addressed the import of § 6339(b)(2) which provides that all interests in and title to the delinquent taxpayer's property are effectively conveyed if the IRS proceeded in a manner "substantially in accordance with the provisions of law."[10]

---

[9] Plaintiffs alternatively contend that because the purchasers did not record the deed before plaintiffs filed a lis pendens, the government retained an interest in the property at the time plaintiffs asserted their claim. They have not, however, refuted the government's assertion that the filing of a notice of lis pendens with the Clerk of this court at the time suit was commenced does not satisfy the filing requirements of state law with which a party must comply even when bringing an action in federal court. See 28 U.S.C. § 1964. The recording of a deed by a purchaser is unrelated to whether the government asserts a lien and has waived its immunity. Otherwise, a purchaser who is dilatory in recording his deed could effectively deprive the sovereign of immunity. This is something it is most doubtful Congress intended.

[10] Plaintiffs submit a slip opinion in Bartel v. United States, Civ. No. 96-1022 (D. Kan. Sept. 29, 1997), unreported on West Law, in which the court did address the impact of § 6339(b)(2) on a failure to comply with the notice requirements of § 6335. The court in Bartel concluded that "under the facts of this case" the IRS did not satisfy the "substantially in accordance" standard of § 6339 (b)(2). While the court does not completely agree with the analysis in Bartel, it notes that the IRS in that case took no steps directly to notify the taxpayer. Plaintiffs in Bartel only learned of the sale of their property from a newspaper advertisement and moved to set the sale aside within seven days of the redemption period.

The failure to provide notice to the delinquent taxpayer of a seizure and sale would constitute a substantial defect. The provision for personal delivery of a notice to a taxpayer resident in the revenue district, however, is not a substantive end in and of itself. The requirement no doubt reflects a judgment that personal delivery best ensures actual notice and thus should be employed when geographically practicable. See Olson v. United States, 1990 WL 132474, *3 (W.D. Pa. July 5, 1990) (noting reason for hand delivery requirement is to ensure actual notice and characterizing use of certified mail as "technical failure").[11]

The IRS or any government agency should make every effort literally to comply with all procedural as well as substantive legal requirements. Where notice is provided and actually received by certified mail, however, the purpose of the notification requirement has been satisfied and the government has arguably proceeded in a manner "substantially in accordance" with that requirement.

---

[11] In Reece, the case generally cited for a "strict compliance" approach to § 6335, the taxpayer received virtually no notice. He received notice by mail of the sale of his property on the day of the sale. Of nineteen other cases cited by plaintiffs for the proposition that failure strictly to comply with § 6335 per se invalidates a tax sale, seventeen do not in fact involve invalidation of a tax sale for failure to notify a taxpayer in the prescribed manner when he received actual prior notice. The other two are Powelson which, as noted, despite its "strict compliance" language held there was no waiver of sovereign immunity and an unreported District of Arizona case which, although unnoted or overlooked, was reversed on appeal.

Even accepting that literal compliance with the notice provisions of § 6335 is always required, a quiet title action may not be filed under § 2410(a) after the property has been sold and transferred to a third party and the United States no longer has or claims a lien or mortgage on it. Thus, the government's motion to dismiss will be granted.

Where a plaintiff with actual prior notice has failed to act promptly to contest a sale, courts also have refused to void the sale on equitable grounds despite the failure of the IRS literally to comply with the notice provisions. See Kaggen v. IRS, 71 F.3d 1018, 1021-22 (2d Cir. 1995) (upholding seizure of bank accounts although IRS failed to provide notice as required by § 6335(a) where taxpayer had actual notice from bank statements); McCoy v. United States, 1992 WL 210090, *10-11 (N.D. Tex. July 17, 1992) (refusing to void sale of ranch where plaintiff received actual prior notice of seizure and sale by certified mail);[12] Van Skiver v. United States, 751 F. Supp. 1522, 1525-26 (D. Kan. 1990) (plaintiffs cannot invalidate sale of property for failure of IRS personally to serve notice of sale where they received actual notice by certified mail a week prior to sale and failed to act during 180 day redemption period), aff'd, 952 F.2d 1241 (10th Cir. 1991), cert. denied, 506 U.S. 828

[12] The court in McCoy, sitting in the Fifth Circuit, clearly did not read the "strict compliance" language in Reece to preclude consideration of equitable factors.

(1992); Olson, 1990 WL 132474 at *3 (plaintiff cannot sustain claim to quiet title despite failure of IRS to comply with notice requirements of § 6335 in selling his property where he received actual prior notice by certified mail and failed to act within redemption period); Howard v. Adle, 538 F. Supp. 504, 508-09 (E.D. Mich. 1982) (plaintiffs with actual prior notice of sale of property who failed to act within redemption period cannot set sale aside).[13] See also Koehler, 153 F.3d at 267 n.7 ("we fail to see any inequities" where taxpayer had actual prior notice of sale and did not seek to enjoin it or to obtain property during redemption period).

Defendants have asserted laches and estoppel. It is not at all clear from the summary judgment record, as uncontroverted or otherwise viewed most favorably to the non-movants, that the individual defendants will be unable to show a lack of due diligence by plaintiffs in initiating their action and prejudice to themselves sufficient to preclude a claim to

---

[13] Some of these courts looked for guidance to the equitable principles of the state in which the subject property was located. Under Pennsylvania law, a party is barred by laches from sustaining a claim to quiet title when by failing to exercise due diligence in initiating his claim he has prejudiced an innocent third party who has acquired an interest in the property. See Wilson v. King of Prussia Enterprises, Inc. 221 A.2d 123, 126 (Pa. 1966) (laches applies where "the complaining party is guilty of want of due diligence in failing to institute his action to another's prejudice"); Dorsch v. Jankins, 365 A.2d 861, 864 (Pa. Super. 1976) (same).

quiet title.[14] Thus, plaintiffs' motion for summary judgment will be denied.

Plaintiffs state that they "do not oppose the United States' motion to strike jury demand," and they have no right to a jury trial on the claims asserted. See 28 U.S.C. § 2402; Lehman v. Nakshian, 453 U.S. 156, 160, 162 n.9 (1981). See also Retirement Care Associates, Inc. v. United States, 3 F. Supp.2d 1434, 1445 (N.D. Ga. 1998) (§ 7433 claim); Weber v. United States, 1993 WL 327811, *2 (S.D. Ohio May 28, 1993) (§ 7432 claim).[15]

The government's motions will be granted and plaintiffs' motion will be denied in an appropriate order which will be entered with this memorandum.

---

[14] It also appears that plaintiffs may have acquiesced in the use of the surplus by the IRS to satisfy their other tax obligations and thus may have ratified the sale. See McCoy, 1992 WL 210090 at *10.

[15] Plaintiffs' supplemental claim against the individual defendants is an equitable one for which a jury trial is also not provided. See Brenckle v. Arblaster, 466 A.2d 1075, 1077 (Pa. Super. 1983); Gold v. Summit Township, 660 A.2d 215, 217 n.3 (Pa. Cmwlth. 1995).

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

EDWARD KABAKJIAN AND NANCY B. KABAKJIAN	:	**CIVIL ACTION**
v.	:	
UNITED STATES OF AMERICA, JACK P. PARMER, LUANN PARMER, WILLIAM SNIDER AND NANCY SNIDER	:	**NO. 97-5906**

O R D E R

AND NOW, this day of December, 1998, upon consideration of the Motions of defendant United States to Dismiss Count I of the Complaint (Doc. #21, Part 1) and to Strike Jury Demand as to All Counts (Doc. #21, Part 2) and plaintiffs' Motion for Partial Summary Judgment (Doc. #9), consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that defendants' Motions are **GRANTED** and plaintiffs' Motion is **DENIED**.

BY THE COURT:

_____
JAY C. WALDMAN, J.