STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
WAKE COUNTY	15 CVS 1648
IN RE SOUTHEASTERN EYE CENTER-PENDING MATTERS	**ORDER ON JAMES MARK MCDANIEL'S MOTION TO REMOVE THE COURT'S STAY ON FURTHER LITIGATION AGAINST THE RECEIVER IN HIS OFFICIAL CAPACITY, KEPES NEWCO, LLC/CENTRAL CAROLINA SURGICAL EYE ASSOCIATES, P.A., AND DR. C. RICHARD EPES AND MOTION TO COMPEL DISCLOSURE OF COMMUNICATIONS (ALL MATTERS)**
GUILFORD COUNTY	12 CVS 11322
IN RE SOUTHEASTERN EYE CENTER-JUDGMENTS	

1. **THIS MATTER** is before the Court upon James Mark McDaniel's ("McDaniel") (i) Motion to Remove the Court's Stay on Further Litigation Against the Receiver in His Official Capacity, Kepes Newco, LLC/Central Carolina Surgical Eye Associates, P.A., and Dr. C. Richard Epes (the "Motion to Lift Stay"), and (ii) Motion to Compel Complete Disclosure of the Receiver's and His Attorney's Communication and/or Correspondence to and from the Internal Revenue Service (the "Motion to Compel") (collectively, the "Motions") in the above captioned case.

2. The Court elects, in the exercise of the discretion afforded to it by Business Court Rule ("BCR") 7.4, to rule upon the Motions without a hearing. For the reasons set forth herein, the Court **DENIES** the Motions.

3. McDaniel contends that the United States Internal Revenue Service ("IRS") filed a lien against Central Carolina Surgical Eye Associates, P.A. ("CCSEA") in 2011 for CCSEA's failure to pay its employee withholding taxes (the "2011 Tax").

4. In 2015, the Court placed CCSEA and several related entities into receivership and appointed Gerald A. Jeutter, Jr. (the "Recever") as Receiver over those entities. The Court stayed further lawsuits by claimants or potential claimants against CCSEA and the other entities in receivership and created a formal process by which parties could make claims against the entities in the receivership in lieu of filing additional lawsuits. (*See* Case Management Order 5–8, ECF No. 82 (Wake 15 CVS 1648); ECF No. 13 (Guilford 12 CVS 11322).) Claims were to be submitted to the Receiver. (Case Management Order 5–6.)

5. McDaniel alleges that in late 2016 he received a communication from the IRS informing him that he would be required to pay the 2011 Tax.

6. In early 2017, McDaniel moved the Court to require the Receiver to pay the 2011 Tax, arguing that CCSEA was obligated to pay the 2011 Tax under a certain August 5, 2015 settlement agreement (the "Settlement Agreement") entered into with McDaniel. After reviewing McDaniel's motion and the Settlement Agreement, the Court held that the Settlement Agreement did not obligate the Receiver to assume any of McDaniel's obligations to third parties, including the IRS, or to indemnify McDaniel against any claims made against him by third parties, including claims made by the IRS. (Order James Mark McDaniel, Jr.'s Mot. Enforce Settlement Agreement 6, ECF No. 824 (Wake 15 CVS 1648), ECF No. 381 (Guilford 12 CVS

11322).) The Court further held that the fact the Receiver may have obligations under 31 U.S.C. §3713 to give priority to claims by the United States did not create an enforceable contract right in favor of McDaniel to compel the Receiver to make payments. (Order James Mark McDaniel, Jr.'s Mot. Enforce Settlement Agreement 6.)

7. McDaniel contends that he paid the amount the IRS assessed against him in full, a total of $82,153.23 (the "2011 Payment").

8. McDaniel now seeks full reimbursement for the 2011 Payment, or, in the alternative, contribution for a portion of the amount paid. McDaniel, through his Motion to Lift Stay, thus requests that the Court order the Receiver to reimburse him for the 2011 Payment. In the alternative, McDaniel asks the Court to lift any stay on further litigation against the Receiver in his official capacity and Dr. C. Richard Epes ("Dr. Epes") so that McDaniel might assert a claim against CCSEA, Kepes Newco, LLC ("Kepes"), and Dr. Epes. (McDaniel's Reply Receiver's Response Mot. Lift Stay 7, ECF No. 1067 (Wake 15 CVS 1648), ECF No. 510 (Guilford 12 CVS 11322).) In his subsequently filed Motion to Compel, McDaniel asks the Court to order the Receiver to produce all correspondence between the Receiver and his counsel and the IRS. (Mot. Compel Complete Disclosure Receiver's and His Attorney's Communication and/or Correspondence to and from the Internal Revenue Service 4, ECF No. 1071 (Wake CVS 1648), ECF No. 514 (Guilford 12 CVS 11322).)

9. Responding first to McDaniel's Motion to Lift Stay, the Court will not lift any stay on further litigation relating to these receivership proceedings so that

McDaniel may pursue litigation outside the receivership proceedings. "Attacks on the validity of receiverships by collateral actions are not permissible under North Carolina law." *Joyce Farms, LLC v. Van Vooren Holdings, Inc.*, 232 N.C. App. 591, 597, 756 S.E.2d 355, 359 (2014) (quoting *Hudson v. All Star Mills, Inc.*, 68 N.C. App. 447, 451, 315 S.E.2d 514, 517 (1984)). "[T]he court being one of competent jurisdiction in receivership proceedings, and having acquired jurisdiction of the parties and the subject matter in controversy, it may not be interfered with by any other court of co-ordinate authority[.]" *Id.* (quoting *Hall v. Shippers Express, Inc.*., 234 N.C. 38, 40, 65 S.E.2d 333, 335 (1951)). Thus, "where a receivership court has jurisdiction over a matter the only remedy is through the receivership proceeding." *Lowder ex rel. Doby v. Doby*, 79 N.C. App. 501, 512, 340 S.E.2d 487, 494 (1986) (quoting *Hudson*, 68 N.C. App. at 451, 315 S.E.2d at 517).

10. This Court has subject matter jurisdiction over the parties and claims in these consolidated receivership proceedings. (Case Management Order 5.) McDaniel, by his Motion to Lift Stay, seeks the ability to file a new lawsuit against parties to these proceedings in order to assert his alleged right to repayment of the penalty imposed by the IRS—also a party to these proceedings—due to unpaid tax amounts owed by CCSEA—one of the entities in receivership. The Court concludes that lifting any stay on litigation to allow McDaniel to assert such claims would amount to allowing a collateral attack on these receivership proceedings, a practice our appellate courts have expressly disallowed. *Hall*, 234 N.C. at 40, 65 S.E.2d at 335; *Joyce Farms, LLC*, 232 N.C. App. at 597, 756 S.E.2d at 359; *Lowder ex rel. Doby*, 79

N.C. App. at 512, 340 S.E.2d at 494. If McDaniel wishes to seek relief, his remedy is through these receivership proceedings. *See Lowder ex rel. Doby*, 79 N.C. App. at 512, 340 S.E.2d at 494.

11. McDaniel has not, however, asserted or attempted to assert a claim with the Receiver based upon his contentions relating to the 2011 Payment. McDaniel argues in his briefing that he cannot or should not be required to file such a claim in these proceedings because the deadline for submitting claims to the Receiver has passed and because the Receiver's actions up until this point amount to a constructive rejection of any claim relating to the 2011 Payment. (Br. Supp. James Mark McDaniel's Mot. Remove Court's Stay Further Litig. Against Receiver in His Official Capacity, Kepes Newco, LLC/Cent. Carolina Surgical Eye Assocs., P.A., and Dr. C. Richard Epes 4–5 [hereinafter "McDaniel Br. Supp. Mot. Lift Stay"], ECF No. 1029 (Wake 15 CVS 1648), ECF No. 495 (Guilford 12 CVS 11322).) The Court disagrees with both arguments. First, the mere fact that the deadline for submitting claims in these proceedings has run does not entitle a party to circumvent the court-ordered receivership process. Second, if McDaniel believes some grounds exist to allow a claim relating to the 2011 Payment to proceed, he may submit a claim and argue for such relief in these proceedings. The Receiver may object to any such claim, but McDaniel will have the opportunity to file a written response to such objection explaining his position and requesting a hearing before the Court.

12. For these reasons, the Court will deny McDaniel's Motion to Lift Stay to the extent it requests that the Court lift any stay on litigation related to these receivership proceedings.

13. The Court further declines to order the Receiver to reimburse McDaniel for the 2011 Payment on this record.

14. McDaniel contends that the Receiver, in spite of his obligation under federal law to give priority to claims by the IRS, has failed to pay the 2011 Tax, refused to allow the IRS to amend its submitted claim against CCSEA, and thus caused the IRS to instead seek payment of the 2011 Tax from McDaniel. McDaniel contends this alleged conduct amounts to a violation of federal law and entitles him to reimbursement of the 2011 Payment. The Court disagrees.

15. To begin with, the IRS was free to seek a payment relating to the 2011 Tax from McDaniel instead of CCSEA, and its choice to do so was not a violation of McDaniel's rights. According to the Receiver's counsel, the IRS sought payment from McDaniel under 26 U.S.C. § 6672. McDaniel does not deny this fact. Section 6672(a) provides as follows:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a). Liability under § 6672 attaches when the tax in question is withheld. *Teel v. United States*, 529 F.2d 903, 906 (9th Cir. 1976).

16. An assessment under § 6672 is considered a penalty that constitutes "a totally independent liability from that of the corporation." *Id.*; *Moore v. United States*, 465 F.2d 514, 517 (5th Cir. 1972) ("The penalty imposed by section 6672 is distinct from and not in substitution of the liability for taxes owed by the employer."). The appointment of a receiver for a corporation does not excuse an officer of the corporation from this penalty with respect to those taxes which accrued before the receiver's appointment. *Lencyk v. Internal Revenue Serv.*, 384 F. Supp. 2d 1028, 1036 (W.D. Tex. 2005); *see Teel*, 529 F.2d at 906.

17. Thus, regardless of the Receiver's obligations under federal law, under § 6672, the IRS "need not have attempted to collect from the employer," i.e., CCSEA, "before assessing a responsible person," i.e., McDaniel. *Datlof v. United States*, 370 F.2d 655, 656 (3d Cir. 1966). The penalty assessed against McDaniel is distinct from any liability of CCSEA. *See Moore*, 465 F.2d at 517.

18. Furthermore, the evidence upon which McDaniel rests his contentions that the Receiver refused to properly pay a claim or caused the IRS to pursue McDaniel does not demonstrate a refusal by the Receiver to follow the Court-approved process for submitting claims. Instead, the evidence shows that when the IRS inquired of the Receiver in 2017 concerning the possibility of amending its claim against CCSEA in these proceedings, counsel for the Receiver informed the IRS that the deadline for filing claims had passed. (Receiver's Surreply Opposing Mot. Lift Stay Ex. I, ECF No. 1077 (Wake 15 CVS 1648), ECF No. 518 (Guilford 12 CVS 11322).) This fact was true—the deadline for claims was October 31, 2015. (Case Management Order 6.) If

the IRS took issue with the Receiver's position or believed that it should be permitted to amend its claim, it was free to raise those contentions with the Court. The IRS never did so. Instead, it pursued McDaniel under § 6672, as was its right. *See Datlof*, 370 F.2d at 656. McDaniel's contentions that the Receiver caused the IRS to pursue McDaniel for the 2011 Tax or improperly forced the IRS's hand are thus incorrect. The IRS determines how it pursues its rights in these proceedings, not the Receiver or McDaniel. Accordingly, the Court cannot conclude on the present record that any violation of federal law has transpired or that the Receiver's conduct provides McDaniel with any right to payment.

19. McDaniel also appears to argue that he is entitled to payment from the Receiver under North Carolina's enactment of the Uniform Contribution Among Tort-Feasors Act or under 42 U.S.C. § 1983. The Court disagrees.

20. First, North Carolina's enactment of the Uniform Contribution Among Tort-Feasors Act applies to joint tort-feasors; the Act does not provide McDaniel with the right to seek reimbursement for any portion of a federal tax penalty. *See* N.C.G.S. § 1B-1(b).

21. Second, § 1983 is not a source of substantive rights, but a vehicle for remedying a violation of rights otherwise conferred by the United States Constitution and certain federal statutes. *See Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). For the reasons stated herein, the Court cannot conclude on the current record that any right conferred on McDaniel by federal law has been violated. Consequently,

neither N.C.G.S. § 1B-1 or 42 U.S.C. § 1983 provide a basis for the Court to award McDaniel relief.[1]

22. McDaniel's also appears to contend that he is entitled to relief because the Receiver or his counsel have made false statements to this Court concerning CCSEA's assets and have behaved in a vindictive and retaliatory manner by avoiding the payment of the 2011 Tax in order to cause the IRS to seek payment from McDaniel. Particularly, McDaniel contends that counsel for the Receiver made a false representation to the Court when he stated in a previous hearing that CCSEA had no funds available to pay the IRS and that the IRS would be first in line to receive a payment when such funds became available. (McDaniel Br. Supp. Mot. Lift Stay 3.) McDaniel asserts this representation is false because the Receiver has paid certain amounts to creditors in these proceedings from the assets of Kepes. McDaniel argues that Kepes has assumed the debts of CCSEA pursuant to this Court's orders, that the evidence submitted clearly shows that Kepes has assets available to pay creditors, and that the Receiver has thus been untruthful in representing that there are no assets available to pay the IRS's claim against CCSEA. The Court disagrees with this argument as well.

23. The Court's July 14, 2015 Order that McDaniel references ordered that claims of creditors of certain receivership entities against Dr. Epes and his wife which

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[1] McDaniel also appears to assert that North Carolina's enactment of the Uniform Contribution Among Tort-Feasors Act and 42 U.S.C. § 1983 support his request that the Court permit him to file new lawsuits against the entities in the receivership or Dr. Epes. After due consideration, the Court concludes that neither statute provides cause to lift any stay on litigation ordered in connection with these receivership proceedings.

existed at the time the entities were placed into receivership would be deemed claims against Kepes and another, related entity, DRE Newco, LLC ("DRE"). (Order Approving Settlement Agreement and Appointing Receiver for Kepes Newco, LLC and Dre Newco, LLC and Restraining Order 7–8, ECF No. 117 (Wake 15 CVS 1648), ECF No. 26 (Guilford 12 CVS 11322) ("Claims of creditors of the Corporate Defendants and the Related Entities *against the Epeses* which existed at the time each of those entities were placed into receivership shall be deemed claims against KEPES Newco, LLC and/or DRE Newco, LLP, as is appropriate[.]" (emphasis added)).) Kepes and DRE were organized for the purpose of assuming and paying the debts of Dr. Epes and his wife. (*See* Order Approving Settlement Agreement and Appointing Receiver for Kepes Newco, LLC and Dre Newco, LLC and Restraining Order 3.) The Court did not order that all creditors' claims against CCSEA would become obligations of Kepes or that the Receiver would be obligated to use the assets of Kepes to pay claims asserted against CCSEA.

24. McDaniel also contends that two additional checks show the Receiver using Kepes assets to pay CCSEA's debts to Old Battleground Properties, Inc. and Nivison Family Investments, LLC (together, the "Nivison Parties"). The Receiver represents that these checks were payments that were authorized by this Court's April 28, 2016 Order Approving Nivison Settlement and Related Transactions Including Release of CEA Sale Proceeds and that Kepes promised to make as part of an agreement settling claims brought by the Nivison Parties against multiple entities and individuals—including claims asserted against Dr. Epes and his wife. (*See* Order Approving

Nivison Settlement and Related Transactions Including Release of CEA Sale Proceeds 8–9, ECF No. 471 (Wake 15 CVS 1648), ECF No. 142 (Guilford 12 CVS 11322).) McDaniel does not dispute this fact. The Court therefore concludes that the two checks McDaniel references do not constitute evidence of any improper conduct on the part of the Receiver.

25. Thus, the Court concludes—after reviewing the evidence discussed above as well as the other evidence submitted in connection with McDaniel's Motions—that McDaniel's contentions that the Receiver or his counsel have misled or made false representations to the Court are not supported by the evidence before the Court. Thus, to the extent these allegations of false representations are material to McDaniel's Motions, they do not provide the Court with a basis to grant McDaniel relief.

26. For these reasons, the Court will deny McDaniel's Motion to Lift Stay to the extent it requests that the Court order the Receiver to reimburse McDaniel for the 2011 Payment.

27. Finally, the Court addresses McDaniel's Motion to Compel. McDaniel moves the Court to compel the Receiver and his counsel to produce their correspondence with the IRS concerning CCSEA or any other component or aspect of these receivership proceedings.

28. The Receiver argues that McDaniel's Motion to Compel is improper on a number of grounds, including that McDaniel has not served a request for inspection or production of the documents in question under Rule 34 of the North Carolina Rules

of Civil Procedure ("Rules of Civil Procedure"), that the Receiver has not failed to respond to any such request for production, and that the prerequisites for a motion to compel under Rule 37 have thus not been satisfied. Based upon the record before it, the Court agrees. The Court also notes that McDaniel's Motion to Compel violates BCR 10.9. Parties must comply with BCR 10.9 before filing a motion related to discovery. BCR 10.9(b)(1). For these reasons, the Court denies the Motion to Compel.

29. The Receiver also seeks his expenses incurred in defending against the Motion to Compel under Rule 37(a)(4) of the Rules of Civil Procedure. As an initial matter, although McDaniel captioned his motion as a motion to compel, McDaniel has not identified the Rule of Civil Procedure under which his Motion to Compel is made. "While failure to give the number of the rule under which a motion is made is not necessarily fatal, the grounds for the motion and the relief sought must be consistent with the Rules of Civil Procedure." *Gallbronner v. Mason*, 101 N.C. App. 362, 366, 399 S.E.2d 139, 141 (1991). Because it appears to have been McDaniel's intent, the Court opts to interpret McDaniel's Motion to Compel as a motion for an order compelling discovery under Rule 37(a). The Court thus considers the Receiver's request for expenses under Rule 37(a)(4).

30. Although McDaniel's numerous procedural defaults in connection with his Motion to Compel cause the Court concern and, if replicated, may be the basis for Court action or sanction hereafter, in light of McDaniel's status as a *pro se* litigant in these proceedings, the Court concludes, in the exercise of its discretion, that awarding the Receiver expenses related to the Motion to Compel under Rule 37(a)(4) would not

be just under the circumstances. The Court will therefore deny the Receiver's request.

31. **WHEREFORE**, the Court, in the exercise of its discretion and for the reasons stated herein, hereby **DENIES** McDaniel's Motion to Lift Stay and Motion to Compel and **DENIES** the Receiver's request for expenses under Rule 37(a)(4).

SO ORDERED, this the 15th day of August, 2019.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge