IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1635

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LOUIE HEERWAGEN, III, ET AL.,

Defendants,

LOUIE M. HEERWAGEN, III and
W. PHILLIP HEFLEY,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas
(3:90-CV-0254-G)

(May 19, 1993)

Before POLITZ, Chief Judge, KING, and DUHÉ, Circuit Judges.

PER CURIAM:*

Louie M. Heerwagen, III, and W. Phillip Hefley, defendants below, appeal from the district court's entry of summary judgment in favor of the Government in a "100% penalty" tax case. See 26

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

U.S.C. § 6672. Heerwagen also appeals from the district court's denial of his cross-motion for summary judgment.

Because we believe that the district court erred in granting summary judgment for the Government against both Heerwagen and Hefley, we reverse. Because we believe that the district court further erred by denying Heerwagen's cross-motion for summary judgment, we render judgment for Heerwagen. Finally, we believe that the doctrine of law of the case obviates the need for further proceedings against Hefley. Thus, we remand to the district court to dismiss the Government's action against him.

I.

Heerwagen and Hefley were stockholders and held positions as officers and board members of at least ten corporations that did business as vocational schools in Texas, Missouri, Arizona, and Oklahoma. Although these corporations were separate legal entities, their financial records and checkbooks were maintained at a central location. From this corporate center, a CPA and his staff handled the accounting functions for all of the companies, including the preparation of payroll checks and employment tax returns. The corporate center was located at various times in Phoenix, Arizona, St. Joseph, Missouri, and Dallas, Texas. Heerwagen resided in Corpus Christi, Texas; Hefley resided in Phoenix.

When the corporations failed to pay over employees' withholding taxes owed to the government, the Internal Revenue Service ("IRS") made 100% penalty assessments against Heerwagen,

Hefley, and other corporate officers, pursuant to 26 U.S.C. § 6672(a).[1] The assessments against Heerwagen and Hefley each totaled $249,010.38 and covered the unpaid withholding taxes of eleven corporations for tax periods beginning the fourth quarter of 1985 and ending the third quarter of 1987. On February 5, 1990, the Government filed a complaint in the district court to reduce the assessments to a judgment.[2]

Heerwagen answered, denying that he had ever been assessed the 100% penalty. He also denied that he was a "responsible person" for purposes of § 6672 liability and further claimed that, even if he were a responsible person, he did not act willfully in failing to pay over the taxes. Heerwagen also disputed the accuracy of the Government's figures and asserted that payments in excess of $300,000 made by Heerwagen pursuant to an agreement with the IRS had not been properly credited. In Hefley's answer, he denied that he ever had the effective ability to pay over the taxes withheld and asserted that he was ill and

---

[1] Section 6672(a) provides, in pertinent part:

> (a) General Rule. 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 . . . shall . . . 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).

[2] The complaint also named Rene L. Heerwagen, Jeffrey T. Hefley, W. Pauline Hefley, John S. Buglovsky, Billy J. Maxwell, and Stanley L. Shaven. Those parties either settled with the Government or have been dismissed.

unable to participate in the affairs of the corporations during and after the third quarter of 1987. Hefley also challenged the amount of taxes allegedly owed and asserted that no proper determination of deficiency had been made.

On March 22, 1991, the Government moved for summary judgment against Heerwagen, Hefley, and two other defendants on the ground that undisputed evidence established that the defendants were "responsible persons" who had "willfully" failed to pay over withholding taxes to the United States. Thus, the Government argued, Heerwagen and Hefley were liable, as a matter of law, under § 6672. In support of its motion, the Government offered deposition excerpts and copies of various documents, primarily copies of checks written by Heerwagen. All the documents were unauthenticated and were merely accompanied by an unnotarized "declaration" by the Government's attorney in the case, Jon Fisher, averring that the documents were part of "the administrative file maintained by the IRS regarding this case," that the file was maintained in the ordinary course of business, and that Fisher was the custodian of the file.

Heerwagen objected to the summary judgment evidence offered by the Government on the grounds that the exhibits attached to Fisher's "declaration" were unauthenticated and constituted inadmissible hearsay. Heerwagen also filed a response to the Government's motion for summary judgment, controverting the Government's "undisputed" facts, and additionally filed a cross-motion for summary judgment. Heerwagen's response and cross-

motion were supported by affidavits and deposition excerpts. Although Hefley did not object to the competency of the exhibits offered by the Government in its summary judgment motion, he did oppose the summary judgment motion in a response supported by affidavits. Hefley did not file a cross-motion for summary judgment.

On September 10, 1991, the district court granted in part and denied in part the Government's motion for summary judgment. The court held that the undisputed summary judgment evidence established that both Heerwagen and Hefley were responsible persons during each of the periods for which taxes were not paid over. The court also found that Heerwagen had willfully failed to pay over the delinquent taxes in the third quarter of 1987 and that Hefley had willfully failed to pay over taxes in the second and third quarters of 1987. The court concluded, however, that a fact issue existed with respect to the willfulness of their actions in prior quarters.

The Government thereafter moved to amend the district court's order, arguing that the court should have found that Heerwagen and Hefley acted willfully with respect to all of the quarters at issue. Relying upon Mazo v. United States,[3] the Government asserted that, where a responsible person learns that withholding taxes for prior quarters have not been paid and yet continues to pay other creditors, he has acted willfully with

[3] 591 F.2d 1151 (5th Cir.), cert. denied sub nom. Lattimore v. United States, 444 U.S. 842 (1979); see also Barnett v. IRS, ___ F.2d ___, 1993 WL 107967 at *7 (5th Cir. 1993) (same).

respect to the taxes due for all prior quarters. The district court agreed, amended its order, and entered judgment against both Heerwagen and Hefley in the amount of $249,101.38 -- which represented the total amount of unpaid withholding taxes that had accrued over all the quarters at issue. Hefley filed a motion for relief from judgment, which was denied. After the Government's claims against the other defendants were finally resolved, Hefley filed a motion for certification that the district court's order and judgment be declared final for purposes of appeal. On October 22, 1991, the district court certified the judgment as final. This appeal by Heerwagen and Hefley ensued.

II.

The Internal Revenue Code requires employers to withhold from employees' wages federal income taxes and social security contributions. 26 U.S.C. §§ 3102 & 3402. The employer holds these funds "in trust" for the United States. 26 U.S.C. § 7501(a). When a corporate employer fails to pay over the trust funds, § 6672(a) of the Code imposes a penalty equal to the entire amount of the unpaid taxes on "any person" required to collect, account for, or pay over the withheld taxes, who "willfully" fails to do so. Liability for the penalty is established if a party is a "responsible person" who "willfully" failed to pay over the withheld taxes. Barnett v. IRS, ___ F.2d ___, 1993 WL 107967 at *2-3 (5th Cir. 1993); Raba v. United States, 977 F.2d 941, 943 (5th Cir. 1992); Turnbull v. United

States, 929 F.2d 173, 178 (5th Cir. 1991). In the instant case, the Government filed a § 6672 action against various alleged "responsible persons," including Heerwagen and Hefley, who held leadership positions within a corporate network that managed numerous commercial vocational schools.

a) Who had the burden of proof?

Before proceeding any further with a discussion of the legal issues in this case, we must clarify an important threshold question that neither the parties nor the district court have adequately addressed heretofore -- namely, the placement of the burden of proof. In § 6672 cases, the burden of proof is initially placed on the Government, which, after all, is seeking to collect a penalty from a taxpayer. See Barnett, 1993 WL 107967 at *3 (citing Morgan v. United States, 937 F.2d 281, 285 (5th Cir. 1991)). However, the Government may shift the burden to the taxpayer by offering into the record a certified copy of the assessment. Once an assessment is offered into evidence, the taxpayer has the burden of proving either that he was not a "responsible person" or that he did not act willfully. Id. The rules governing burden-of-proof in § 6672 cases apply equally in cases (such as the instant one) in which the Government initiates the action by filing a suit to convert the assessment into a judgment, and in "refund" cases in which the taxpayer sues in federal district court. See Oliver v. United States, 921 F.2d 916, 919 (9th Cir. 1990); see generally Annotation, *Construction, Application, and Effect, with Respect to Withholding, Social*

Security, and Unemployment Compensation Taxes, of Statutes Imposing Penalties for Tax Evasion or Default, 22 A.L.R.3d 8, § 12, at 207-17 (& supp.) (collecting numerous cases).

In the present case, it is undisputed that the summary judgment record does not contain a copy of a § 6672 assessment against either Heerwagen or Hefley.[4] Rather than offering a copy of a § 6627 assessment, the Government offered a copy of the original tax assessments filed against the various vocational school corporations which Heerwagen and Hefley managed. The latter assessments did not shift the burden to the defendants. Because copies of the § 6627 assessments against Heerwagen and Hefley were not offered as a part of the summary judgment record, the burden of proof remained with the Government.

b) Was summary judgment against Heerwagen and Hefley thus proper?

The district court granted the Government's motion for summary against Heerwagen and Hefley based on the faulty assumption that the two defendants had the burden of proof. This, of course, was an error that tainted the district court's entire summary judgment analysis. Affirmance of the district court's entry of summary judgment is still possible, but only if there are other grounds apparent in the record that independently support summary judgment in view of the Government's burden of proof. See Guthrie v. Tifco Industries, 941 F.2d 374, 379 (5th

[4] A copy of the § 6672 assessment against Hefley was offered in the Government's response to a Rule 60 post-judgment motion filed by Hefley. However, in rendering summary judgment, the district court did not have before it a copy of the assessments against Heerwagen or Hefley.

Cir. 1991) (citing Meza v. General Battery Corp., 908 F.2d 1262, 1274 (5th Cir. 1990)). Therefore, we must review the summary judgment record and determine whether the Government proved that there were no genuine material issues of fact and that judgment was appropriate as a matter of law. See FED. R. CIV. P. 56(c).[5]

Our de novo review of the record reveals that summary judgment would be inappropriate for two reasons. First, the Government's case is based entirely on incompetent summary judgment evidence. In support of its summary judgment motion, the Government offered deposition excerpts and copies of various documents, including cancelled checks allegedly signed by Heerwagen, corporate resolutions, bank guarantees, tax returns, letters and memos, and checking account signature cards allegedly bearing the signatures of Heerwagen and Hefley. The documents were simply accompanied by an unnotarized "declaration" by the Government's attorney, Jon Fisher, averring that the documents were part of "the administrative file maintained by the IRS regarding this case," that the file was maintained in the ordinary course of business, and that he was the custodian of the file. The declaration did not even aver that the copies were "true and correct."

---

[5] In reviewing a grant of summary judgment, this Court applies the same standard as the district court. That is, the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits, must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Dorsett v. Board of Trustees for State Colleges and Universities, 940 F.2d 121, 123 (5th Cir. 1991); Fed. R. Civ. Pro. 56(c).

It is undisputed that all of these documents are unauthenticated.[6] As such, they are incompetent summary judgment evidence.[7] Likewise, the deposition excerpts are incompetent evidence. Although Rule 56 expressly contemplates the use of deposition testimony in support of a motion for summary judgment, the rule specifically refers to "depositions . . . on file." The deposition excerpts upon which the Government relies were not properly made part of the record.[8] Nor were the deposition excerpts even signed or certified.

On appeal, both Heerwagen and Hefley challenge the competency of the Government's summary judgment evidence. At oral argument, counsel for the Government twice conceded that the Government's evidence was incompetent and that summary judgment was thus improper. In its brief, however, the Government argues that only Heerwagen objected to the competency of the evidence in

---

[6] During oral argument on appeal, counsel for the Government conceded this.

[7] It is well-established that unauthenticated documents cannot be considered in support of a motion for summary judgment. See Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1550-51 (9th Cir. 1990) (to be considered by the court, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence at trial).

[8] Under the local rules for the Northern District of Texas, deposition transcripts are not initially filed with the Clerk. See Local Rule 2.2(a). However, if any portion of a deposition is necessary to support a pretrial motion which might result in a final order, that portion must be filed with the Clerk at the same time the motion is filed. Id. at 2.2(d). The Government's attempt to satisfy this requirement by attaching unsigned, uncertified copies of deposition excerpts to Fisher's "declaration" was inadequate.

the court below. Hefley, who acted pro se, failed to object to the district court's reliance upon Fisher's declaration and the attached exhibits. Citing Auto Drive-Away Co. v. ICC, 360 F.2d 446, 448-49 (5th Cir. 1966), the Government thus argues that Hefley has waived his right to challenge the competency of this evidence on appeal.

Whether Hefley waived his right to challenge the competency of the Government's summary judgment evidence on appeal is debatable,[9] but we need not decide whether or not summary judgment against Hefley was inappropriate on the above ground. Instead, we reverse the district court's grant of summary judgment against Hefley and Heerwagen on an alternative ground. In the proceeding below, Hefley and Heerwagen offered competent summary judgment evidence -- in the form of a Heerwagen's affidavit -- supporting their claim that the IRS had entered into an agreement with them regarding the payment of the withholding taxes. In particular, Heerwagen and Hefley have alleged that an IRS agent named Tito Sabana contacted Heerwagen about the vocational schools' delinquent payment of roughly $300,000 in

[9] We recognize that Auto Drive-Away holds that failure to object to the competency of summary judgment evidence in the district court waives the right to object to such evidence on appeal, see id. at 360 F.2d at 448-49, but we also note that, at least in the criminal context, we have held that the trial objection of one co-defendant preserves error for another co-defendant on appeal if the two defendants assert an identical claim, see United States v. Bernal, 814 F.2d 175, 182 & n.14 (5th Cir. 1987). We also note that Hefley appeared pro se below. Because we hold that there is an alternate ground for reversing the district court's grant of summary judgment against Hefley, we need not decide whether Bernal applies in the civil context.

withholding taxes. According to Heerwagen's affidavit, Sabana and Heerwagen agreed that the latter would liquidate certain assets in order to pay the taxes. Heerwagen alleges that he ultimately paid the IRS $308,192.56, which was earmarked for the payment of the withholding taxes -- an amount, he claims, that he believed was the vocational schools' total liability. Between the time of Sabana's demand and the payment of $308,192.56, according to Heerwagen, the vocational schools spent no more than $3,000 toward other financial obligations. We observe that, had such an agreement in fact been made, Heerwagen and Hefley would not be liable under § 6672 for the allegedly unpaid withholding taxes at issue here.[10]

The Government offered no competent summary judgment evidence that conclusively disproved the existence of such an agreement. Indeed, the Government even failed to offer an affidavit from IRS Agent Tito Sabana that controverted Heerwagen's affidavit. Because the Government has the burden of proving Heerwagen and Hefley's § 6627 liability, we believe that Heerwagen's affidavit by itself precludes summary judgment.

---

[10] In one of our early § 6672 cases, we implicitly recognized that if the IRS and a § 6672 violator enter into an agreement whereby monies that are paid over to the IRS are earmarked for payment of specific delinquent withholding taxes -- even when other taxes are due as well -- the taxpayer is shielded from § 6672 liability regarding the specific earmarked taxes. See Hewitt v. United States, 377 F.2d 921, 925-26 (5th Cir. 1967). Ordinarily, of course, "[i]n the absence of any [such] agreement, . . . the Internal Revenue Service ha[s] the right to apply the funds as they s[ee] fit" toward the payment of any other taxes owed by a taxpayer. Id. at 925.

c) Was the district court's refusal to grant Heerwagen's counter-motion for summary judgment proper?

As noted, Heerwagen not only filed a response to the Government's motion for summary judgment, but also filed a counter-motion seeking summary judgment against the Government. The district court denied Heerwagen's motion in the same order granting summary judgment for the Government.

Disposition of this claim requires little analysis. As we held above, the Government failed to offer any competent summary judgment evidence in support of its motion against Heerwagen -- which the Government readily conceded at oral argument. In the proceedings below, Heerwagen specifically objected to the competency of the Government's summary judgment evidence. Because the burden of the proof remained with the Government at the time that the district court both entered summary judgment for the Government and denied Heerwagen's cross-motion, we are constrained to hold under well-established precedent that the district court erred in denying Heerwagen's cross-motion.[11] Simply put, the Government failed to offer any competent summary evidence supporting any elements of its § 6672 action against Heerwagen. This total failure requires that we reverse the district court and render summary judgment for Heerwagen on his cross-motion. See Washington v. Armstrong World Industries, Inc., 839 F.2d 1121, 1122-23 (5th Cir. 1988) ("A complete failure

[11] As discussed above, the burden remained with the Government because a copy of the § 6672 assessment was never offered into the record prior to the district court's order addressing the parties' respective summary judgment motions.

of proof on an essential element renders all other facts immaterial because there is no longer a genuine issue of material fact. . . . Rule 56(c) requires the district court to enter summary judgment if the evidence favoring the non-moving party is not sufficient . . . to enter a verdict in his favor."); see also Fontenot v. Upjohn Co., 780 F.2d 1190, 1194-97 (5th Cir. 1986). The non-movant, in this case the Government, may not establish a genuine issue of material fact by resting on bare allegations made in the pleadings, but must produce sufficient evidence to demonstrate that a genuine issue of material fact exists. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). This simply was not done.

d) Are further proceedings against Hefley appropriate?

Because we believe that summary judgment for Heerwagen is appropriate, we must additionally determine whether the lower court proceedings in this case should go any further. We conclude that a remand for additional proceedings against the only remaining defendant, Hefley, would be improper because the entry of summary judgment for Heerwagen ipso facto terminates the Government's litigation against Hefley as well. In granting Heerwagen's cross-motion, we have adjudicated a dispositive factual matter in this case that redounds to the benefit of Hefley -- namely, that the § 6672 "trust fund" taxes presently sought by the Government were in fact paid by Heerwagen, on behalf of the various vocational school corporations, in his agreement with IRS Agent Sabana to earmark the $308,000 paid over

for payment of the trust fund taxes.[12] The doctrine of law of the case thus requires that the Government's litigation against Hefley be dismissed.

III.

Accordingly, we REVERSE the district court's entry of summary judgment for the Government against Heerwagen and Hefley, and further REVERSE the district court's denial of Heerwagen's cross-motion for summary judgment. We REMAND to the district court with orders to enter judgment for Heerwagen and to dismiss the Government's action against Hefley.

[12] We note that the Government has sought less than $250,000 from Heerwagen and Hefley.