

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3247
Summary Calendar

JAY J. KARMAZIN,

Plaintiff-Appellee,

versus

JAMES L. WHEELER, Administrator of the
Succession of Lizetta Harris Wheeler,

Defendant-Third-Party-Appellant,

versus

INTERNAL REVENUE SERVICE,

Third-Party-Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana
(90-CV-5039-N)

(February 25, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

Jay J. Karmazin filed an action in Louisiana state court against James L. Wheeler seeking to quiet title to property that

*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Karmazin had purchased at a tax auction. Wheeler, in responding, filed a third-party complaint against the United States. The government removed the action to federal court pursuant to 28 U.S.C. §§ 1444 and 1441(a). The government and Karmazin then filed separate motions for summary judgment. The district court granted the government's motion, holding that because Wheeler had not brought his action against the government within the statutorily required time period, the United States had not waived its sovereign immunity. The district court also granted Karmazin's motion for summary judgment, holding that Wheeler's defenses to Karmazin's action--all based on the contention that the levy was deficient--was indefensible. Wheeler appeals.

I

On May 30, 1990, the IRS sold property to Jay J. Karmazin at a tax auction. The sale was made in partial satisfaction of the tax liability of Thomas B. and Lizette H. Wheeler. James L. Wheeler, the administrator of the succession of Lizette, his mother, subsequently attempted to sell the property for \$100.00 in return for the cancellation of a debt of his in the amount of \$5,800.00. On September 21, 1990, Karmazin filed an action in Louisiana state court to quiet his title to the property.

On November 19, 1990, Wheeler answered the complaint, filed a counterclaim, and filed a third-party complaint against the United States. Wheeler alleged that Karmazin's title was defective because of procedural irregularities with the liens, seizure, and

sale of the property. Wheeler argued that the levy was untimely and thus the seizure and sale of the property to Karmazin was not lawful, that the levy was ineffective because it had not been recorded in the proper state office, and that the IRS improperly seized Lizette Wheeler's separate property for payment of taxes owed by her husband.

On December 27, 1990, the government removed the case to federal district court pursuant to 28 U.S.C. §§ 1444 and 1441(a). On September 6, 1991, the government filed a motion for summary judgment, arguing that the proper levy and tax sale resulted in Karmazin gaining title to the property; the government also argued that it had not waived sovereign immunity in this case. On October 31, 1991, Karmazin also filed a motion for summary judgment, arguing that the levy and tax sale were proper.

On February 13, 1992, the district court granted both motions and granted summary judgment to the government and Karmazin. The district court concluded that Wheeler could not maintain his action against the government because the United States had not waived its sovereign immunity. The district court determined Wheeler's challenge to the levy was cognizable only under the Internal Revenue Code, 26 U.S.C. § 7426(a)(1),¹ but that an action under §

¹26 U.S.C. § 7426(a)(1) 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

7426 was barred by the nine-month statute of limitations as provided in 26 U.S.C. § 6532(c)(1).² The district court concluded that since the statute of limitations on the suit against the government had run and the statute of limitations is part of the sovereign's consent to be sued, the district court was without jurisdiction to entertain the case. The district court also ruled on Karmazin's motion for summary judgment and concluded that because all of Wheeler's defenses to Karmazin's action were based on the contention that the levy was deficient, summary judgment should also be granted to Karmazin.

II

A

On appeal, Wheeler concedes that the case was properly removed because the government was a party. Wheeler argues, however, that no statutory jurisdictional basis ever existed for the removed claim against the government. Wheeler argues that once the district court determined that it lacked subject matter jurisdiction over Wheeler's third-party claim against the government, the district court should not have ruled upon the merits of the state law claim but instead should have remanded the case to state court. In addition, Wheeler argues that questions of

of the United States."

²26 U.S.C. § 6532(c)(1) provides that "no suit or proceeding under § 7426 shall be begun after the expiration of 9 months from the date of the levy or agreement giving rise to such action."

fact existed preventing the district court from properly granting Karmazin's motion for summary judgment.

B

Karmazin and the government argue that the district court did not abuse its discretion by ruling on the motion for summary judgment instead of remanding the case to state court. Karmazin and the government argue that once an action has been properly removed from state court, it is within the district court's discretion whether to remand the state claims. Furthermore, Karmazin and the government argue that the district court did not err in granting Karmazin's motion for summary judgment.

III

A

A federal district court has discretion to remand a properly removed case to state court when all federal law claims have been eliminated and only state law claims remain. Jones v. Roadway Express, Inc., 936 F.2d 789, 792 (5th Cir. 1991). The decision to retain or remand is within the discretion of the district court, and we reverse the decision of the district court only if it was clearly an abuse of discretion. See Camejo v. Ocean Drilling & Exploration, 838 F.2d 1374, 1378 (5th Cir. 1988). In deciding whether to retain state law claims, the district court should consider the values of judicial economy, convenience, fairness, and comity. Brown v. Southwestern Bell Tel. Co., 901 F.2d 1250, 1255 (5th Cir. 1990).

B

Wheeler concedes that removal of the case from state court was appropriate at the time it occurred because the government was a party. Wheeler argues, however, that no jurisdictional basis ever existed for the claim against the government because there had been no waiver of sovereign immunity because his action was untimely. Wheeler therefore argues that the district court should have dismissed his action against the government and remanded the remaining case to state court.

Whether subject matter jurisdiction exists is determined at the time the petition for removal was filed. Addison v. Gulf Coast Contracting Serv., Inc., 744 F.2d 494, 499 (5th Cir. 1984). Wheeler fails to distinguish between a statutory grant of subject matter jurisdiction and a waiver of sovereign immunity. See Arford v. United States, 934 F.2d 229, 231 (9th Cir. 1991) ("In an action against the United States, in addition to statutory authority granting subject matter jurisdiction, there must be a waiver of sovereign immunity"). Subject matter jurisdiction must have existed on the face of the complaint at the time the government removed the case to federal court. The district court did have subject matter jurisdiction over the removed action pursuant to § 7426(a)(1); however, the action was not maintainable because it was not filed within the nine-month time requirement of § 6532(c)(1). While § 7426(a)(1) grants subject matter jurisdiction over the non-taxpayer's suit to recover his property, § 6532(c)(1) requires that

such suit be filed within nine months from the date of the levy. United Sand and Gravel Contractors, Inc. v. United States, 624 F.2d 733, 735 (5th Cir. 1980). Consequently, the district court did have subject matter over the action at the time the government sought removal; however, the action simply could not be maintained because Wheeler did not bring it within the required time period.

C

Wheeler argues, however, that the district court was required to remand the remaining state law claims to state court after it granted the government's motion for summary judgment because his action was untimely. Wheeler is incorrect. A balancing of the relevant factors shows that the district court did not abuse its discretion in deciding to retain the state law claims. The state court action to quiet title turned upon whether the federal tax sale of Wheeler's property was valid. All of the factors used to determine whether to remand or retain state law claims--judicial economy, convenience, fairness, and comity--weigh in favor of the district court retaining the claims. As such, the district court did not abuse its discretion in retaining the state law claims.

IV

On appeal Wheeler also argues that the district court erred in granting summary judgment. Apparently Wheeler is challenging the summary judgment in favor Karmazin; Wheeler, however, does no more in his brief than recite the standard this court applies when

reviewing motions for summary judgments. Wheeler does not state any material fact that is disputed; indeed, Wheeler fails to state any reason at all why the district court erred in granting Karmazin's motions for summary judgment. "We review a district court's grant of summary judgment de novo, resolving any disputed issues in favor of the non-movant, to determine whether the record, as it exists, shows that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Palmer v. Fayard Moving and Transp. Corp., 930 F.2d 437, 438 (5th Cir. 1991). The burden is on Wheeler, the non-moving party, to present specific facts showing that there is a genuine issue for trial. Montgomery v. United States, 933 F.2d 348, 350 (5th Cir. 1991). This Wheeler has failed to do. Accordingly, we conclude that the district court did not err in granting Karmazin's motion for summary judgment.

V

For the reasons set forth above, we conclude that the district court did not abuse its discretion in retaining the state law claims after all federal claims had been resolved. Furthermore, the district court did not err in granting Karmazin's motion for summary judgment. Accordingly, the decision of the district court is

A F F I R M E D.