

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7256
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FOUR PARCELS OF LAND, etc.,

Defendant

DONNELL BAYLOUS
and
BESSIE BAYLOUS,

Claimants-Appellants.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-H89-0201(P))

(February 10, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Donnell and Bessie Baylous appeal a judgment granting civil forfeiture of four parcels of land under 21 U.S.C. §§ 841(a)(1),

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

846, and 881(a)(6) and (7) and (h). We affirm as to one parcel and vacate and remand as to the other three.

I.

The government filed a verified complaint in rem seeking the forfeiture of real property (Parcels 1, 2, 3, and 4). The declaration of Steve Monachello, special agent with the Drug Enforcement Administration ("DEA"), was attached to the complaint. The government alleged that Parcel 1 had been forfeited to the government pursuant to § 881(a)(6) and (7) and (h) because the Baylouses, owners of the property, were distributors of controlled substances who had utilized the property in violation of §§ 841(a)(1) and 846. The government alleged that the Baylouses had acquired all four parcels with proceeds from controlled substance violations. The Baylouses filed a notice of claim and answered the complaint.

The government filed a motion to strike the claim and answer and for summary judgment. The Baylouses filed a motion seeking to amend their claim and for extension of time, to which the government filed a response.

Nearly a year later, the court granted summary judgment, stating that "[t]o date, claimants have wholly failed to respond in any way to Plaintiff's pending dispositive motions." In granting summary judgment, the court stated,

[The Baylouses] were indicted for dealing illegal drugs from their residence located on Parcel 1. Donnell pleaded guilty to that crime and was sentenced appropriately. The felony charge against Bessie was dropped in

exchange for her guilty plea to misdemeanor possession of .5 grams of crack cocaine for which she was fined and put on probation. The evidence before the Court demonstrates that the personal property in and around the home of the claimants is expensive and that there is no debt owed on any of the furnishings. Parcels 2, 3 and 4 were purchased by claimants in 1988, apparently for cash, as there is no evidence that money was borrowed against them.

The Baylouses used primarily cash to conduct their personal business. Neither of them is independently wealthy or have apparent access to such wealth. Donnell never worked until shortly before his arrest when he began hauling pulpwood. Bessie worked Magnatech, Inc. but only earned \$13,000 to \$15,000 per year. The Baylouses owned several vehicles which they paid cash for or were making large monthly payments on.

II.

The Baylouses contend that the district court erred in granting summary judgment because Bessie Baylous's sworn affidavit was sufficient to create genuine issues of material fact and was overlooked by the district court. We review an order granting summary judgment de novo. Abbott v. Equity Group, Inc., 2 F.3d 613, 618-19 (5th Cir. 1993). Summary judgment is proper if the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Campbell v. Sonat Offshore Drilling, 979 F.2d 1115, 1119 (5th Cir. 1992).

Section 881(a)(7) provides for the forfeiture to the United States of real property "used . . . to facilitate the commission of [] a [controlled substance] violation . . . punishable by more than one year's imprisonment"

The government's burden of proof is the same for all

forfeiture actions under section 881. The government bears the initial burden of demonstrating probable cause to believe that the [property] was used to distribute or store illegal drugs 'If un rebutted, a showing of probable cause alone will support a forfeiture.'

United States v. Lot 9, Block 2 of Donnybrook Place, 919 F.2d 994, 997-98 (5th Cir. 1990) (citations omitted).

The Baylouses were indicted for selling illegal drugs from Parcel 1, their residence, and Donnell Baylous pleaded guilty to that crime and was sentenced accordingly. As these facts, sufficient to establish probable cause, were un rebutted, summary judgment was proper as to Parcel 1. Id.; United States v. Little Al, 712 F.2d 133, 136 (5th Cir. 1983).

III.

Section 881(a)(6) provides for the forfeiture of "[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, [and] all proceeds traceable to such an exchange" Monachello's declaration asserted that Parcels 2, 3, and 4¹ represent proceeds derived from the sale and distribution of "crack" cocaine:

c. Parcel No. 2 . . . has no debt against it and apparently was purchased for cash The purchase price cannot be ascertained; however, the assessed value

¹ The government alleges, and the declaration sets forth, that Parcel 1 is subject to seizure because it represents ultimate proceeds derived from the sale of crack cocaine. Since seizure of Parcel 1 is proper pursuant to § 881(a)(7), we do not address whether seizure would be justified pursuant to § 881(a)(6).

for taxing purposes is \$3,200.00.

d. Parcel No. 3 and Parcel No. 4 . . . have no debt against them and apparently were purchased for cash . . . [;] the purchase price cannot be ascertained; however, the assessed value of both parcels for taxing purposes is \$2,500.00.

e. Three (3) reliable CI's, who have assisted DEA/MBN in making 12 to 15 drug arrests, have stated))

(1) That Donnell Baylous and Bessie Y. Baylous use primarily cash funds to make their purchases;

(2) That neither of them have [sic] any independent source of wealth or a [sic] cash funds other than through the sale and distribution of drugs;

(3) That neither comes from wealthy families, nor are they recipients of gifts or legacies that would enhance their financial situation;

(4) Donnell Baylous has never worked until recently when he started pulp-wooding at which he only "makes" about two (2) loads per week;

(5) Bessie Y. Baylous works for Magnatech, Inc., but does not earn enough to pay for life's necessities and acquire and pay for the items of wealth they have accumulated. Her annual salary is approximately \$13,000.00 to \$15,000.00 per year if she works fifty weeks.

(6) In addition to the foregoing property, Donnell Baylous and Bessie Baylous have numerous vehicles, all upon which they paid cash or are making large monthly payments.

Assuming the government met its burden, the burden shifts to the claimant to show by a preponderance of the evidence that the property was acquired with funds from independent sources. United States v. Land, Property Currently Recorded in Name of Neff,

960 F.2d 561, 563 (5th Cir. 1992). Bessie Baylous's affidavit provides the following:

[S]he has held a job at Magnetec for a number of years and Donnell Baylous has worked as a Woodcutter for a number of years and have [sic] supported themselves in the fashion that they have independently of any contraband funds.

Donnell Baylous worked offshore and was injured and received a sizable settlement from said injury which also contributed to their livelihood [sic].

. . . .

[All] their possessions were gained from legal work related activity at Magnetec Universal Manufacturing Company, Offshore, Insurance settlements and or Woodcutting. Additionally Donnell Baylous worked part time at a body shop owned by his brother producing other income.

The affidavit is sufficient to create a material issue of fact as to the source of the funds used to purchase Parcels 2, 3, and 4, precluding summary judgment as to these assets. We have reversed summary judgment, where there was evidence that properties were purchased at least in part with legitimate funds, to allow the claimant to prove what portion of the property was purchased with legitimate funds. United States v. One 1980 Rolls Royce, 905 F.2d 89, 91-92 (5th Cir. 1990).

The government argues that the Baylouses' response to the summary judgment motion was improper because when the district court "granted the three enlargements of time, [it] failed to apply the 'excusable neglect' standard as required by Rule 6(b)." It also argues that the claim and answer were untimely and should have been stricken by the district court if they were not impliedly stricken when the court granted summary judgment. The district

court expressly declined to rule on the motion to strike, stating that "[w]hile recognizing the technical problems with the purported filing of the claim and the answer, it [is] unnecessary to rule on their propriety"

We AFFIRM as to Parcel 1 and VACATE and REMAND as to Parcels 2, 3 and 4. The timeliness of the Baylouses's claim, answer, and response to summary judgment can be considered by the district court on remand. We express no opinion as to the ultimate merits of this case.