

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8126
(Summary Calendar)

WILLIAM C. KELLY,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
ET AL.,

Defendants,

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(SA-91-CV-85)

(December 30, 1993)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant William C. Kelly appeals the district

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court's grant of summary judgment in favor of Defendant-Appellee United States of America (the government) in a district court case arising from implementation of collection procedures of the Internal Revenue Service (IRS). The summary judgment was grounded in the court's conclusion that the IRS had complied with the provisions of 26 U.S.C. § 6335(b) regarding Service of the Notice of Sale to Kelly of the pending sale of his property to satisfy tax delinquencies. Based on facts found or conceded, we hold that, as a matter of law, the government's compliance with the commands of Kelly's authorized agent satisfies the notice requirements of §6335 (b). We therefore affirm.

I

FACTS AND PROCEEDINGS

Kelly owned a mobile home and land in Boerne, Kendall County, Texas. On August 6, 1990, the IRS sold the mobile home and land, and issued a certificate of sale of the seized property. On appeal, Kelly does not challenge the tax liability which served as the basis of the IRS seizure of his property. Rather, he argues that the IRS did not properly comply with the notice requirement that is an absolute prerequisite to the seizure and sale of his property.

As a result of the seizure, Kelly filed a pro se complaint against the government seeking, inter alia, to have the seizure and sale overturned. Kelly subsequently obtained the services of an attorney, after which an amended complaint was filed on Kelly's behalf. In it, Kelly sought to have the tax lien, levy and seizure

voided; to be declared the owner of the property entitled to quiet and peaceful possession thereof; and to enjoin permanently the government and the purchaser of Kelly's property from asserting any claims to it. The government filed a motion to dismiss all claims except the quiet title action and moved for summary judgment on that claim. After Kelly responded to this motion, the magistrate judge issued his report and recommendation to grant summary judgment in favor of the defendants on the quiet title action and to dismiss the remaining actions for failure to state a claim on which relief could be granted. Kelly objected to this recommendation, but the district court adopted it; and Kelly timely appealed.

II

ANALYSIS

On appeal, Kelly challenges only the district court's grant of summary judgment in favor of the defendants in the quiet title action. Review of the district court's grant of summary judgment is de novo. Weyant v. Acceptance Ins. Co., 917 F.2d 209, 212 (5th Cir. 1990).

The instant case presents the issue whether, as a matter of law, the IRS complied with 26 U.S.C. § 6335(b) in giving notice of sale to Kelly. Section 6335 provides in pertinent part:

[N]otice of sale] in writing shall be given by the Secretary to the owner of the property, . . . or shall be left at his usual place of abode or business if he has such within the Internal Revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address.

In Reece v. Scoggins, 506 F.2d 967, 971 (5th Cir. 1975), we held that "the § 6335 notice requirements are designed to protect the taxpayer by giving him an opportunity to be present at the tax sale and bid on the property . . . the language of this section is clear and mandatory; absent literal compliance with its provisions, the government sale of land cannot stand." Id. at 971 (emphasis added). In Reece, the taxpayer admitted receiving actual notice of the sale. Id. at 969. We noted there that, although "the IRS agent went to Reece's home, he did not deliver written notice or leave it. . . . The mailing of notice, even if done in a timely fashion, satisfies this statute only if the taxpayer has no dwelling or place of business within the revenue district." Id. at 971.

The instant record reveals that on June 18, 1990 six days after IRS officers visited Kelly's home and taped a copy of the Notice of Seizure to his front door and also mailed a copy of the Notice of Seizure by certified mail to Kelly at the wrong post office box number (969 rather than 696) Kelly executed a power of attorney and Declaration of Representative appointing C. W. Dickey as Kelly's attorney-in-fact to represent him before the IRS. There is no dispute that Kelly was neither personally served nor was a copy of the Notice of Sale left at his usual abode or place of business. But neither is there any question that Kelly's agent, Dickey, told the IRS that Kelly was "out working" and thus to mail

the Notice of Sale.¹ The IRS followed these instructions and mailed notice by certified mail to both Kelly and Dickey; the evidence further shows that Kelly and Dickey actually received the Notice of Sale by certified mail.

The government argues that--as the agent of Kelly--Dickey's direction to the IRS agent to mail the notice constituted a waiver of the right to personal or domiciliary service under §6335 (b). We agree. The power of attorney authorized Dickey to perform "any and all acts that the principal(s) can perform with respect to the [instant] tax matters." Clearly, Kelly himself could have waived the right to personal or domiciliary service in favor of service by mail. Just as clearly, the power of attorney authorized his agent to do so.

III

CONCLUSION

The procedures here employed by the IRS for furnishing notice to the taxpayer were not in "literal compliance" with the provisions of § 6335(b)SOprovisions which we know from Reece are "clear and mandatory." Nevertheless, Dickey was duly authorized to act for Kelly and bind him in connection with this matter. Dickey's authorization to the IRS to deviate from the procedure

¹While possibly not of great materiality, the district court clearly erred in finding that Kelly's "tax representative told the Internal Revenue Service [that Kelly] could not be readily located as he had left town looking for work." In its appellate brief, the government concedes such error: "[T]he taxpayer is correct that the Government and the magistrate, in justifying the use of service by mail misconstrued 'out working' to read 'out of town working,' . . ."

specified in § 6335(b)--to use mail service in lieu of personal or domiciliary service--bound Kelly. Clearly implicit in those instructions was the requirement that the IRS comply literally with the alternative mailing provisions of § 6335(b)S0which just as clearly the IRS did. Kelly cannot now be heard to complain that such compliance was deficient.

For the foregoing reasons, the judgment of the district court is
AFFIRMED.