UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60694
Summary Calendar

IN THE MATTER OF: JAMES R. SNYDER, JR.,

Debtor.

JAMES R. SNYDER, JR.,

Appellant,

versus

INTERNAL REVENUE SERVICE,

Appellee.

Appeal from the United States District Court for the
Southern District of Texas
(CA 93 321)

(August 31, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.*

GARWOOD, Circuit Judge:

Appellant James R. Snyder, Jr. (Snyder), a debtor in Chapter 11 bankruptcy proceedings, appeals the district court's judgment affirming the bankruptcy court's denial of his motion to reconsider

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the award of summary judgment for the Internal Revenue Service (the Service) on its claim against him for unpaid federal employment taxes. We affirm.

Facts and Proceedings Below

This controversy stems from the nonpayment of federal taxes withheld from the wages of employees of Phoenix Masonry, Inc. (Phoenix) and Phoenix Masonry of Texas, Inc. (Phoenix-Texas), two corporations of which Snyder was at all times chief executive officer as well as sole director and sole shareholder. On December 28, 1987, pursuant to Internal Revenue Code (I.R.C.) § 6672, the Service assessed liability against Snyder, as a responsible officer of Phoenix, for unpaid withheld payroll taxes amounting to $173,375.68 and on October 17, 1988, as a responsible officer of Phoenix-Texas, for unpaid withheld payroll taxes in the amount of $96,051.65.[1]

On December 12, 1988, Snyder, through counsel, filed a voluntary petition for reorganization of his personal finances under Chapter 11 of the Bankruptcy Code.[2] On May 3, 1988, the

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[1] Snyder was assessed liability for the nonpayment of withheld taxes at Phoenix during the third and fourth quarters of 1981, the first and fourth quarters of 1982, the third and fourth quarters of 1985, and the first and second quarters of 1986. Liability for Phoenix-Texas was assessed for the second quarter of 1985, the first and third quarters of 1986, and the first quarter of 1987.

[2] On May 14, 1986, Snyder filed a petition on behalf of Phoenix for reorganization under Chapter 11. Under Snyder's management, Phoenix continued operations for a time as debtor-in-possession, but its reorganization was converted to a Chapter 7 liquidation on January 20, 1987. Phoenix-Texas had also been delinquent in the payment of its federal payroll taxes; in or around June 1987, it was dissolved.

Service submitted a proof of claim in the amount of $291,949, to which Snyder filed an objection and an amended objection. On August 6, 1990, the Service filed an amended proof of claim in the total amount of $285,512, to which Snyder filed second and third amended objections. The Service's proof of claim and amended proof of claim included the employment tax liabilities assessed against Snyder under I.R.C. § 6672 as well as an unliquidated claim for Snyder's personal income tax liability for 1986, estimated at $4,000.

On January 14, 1992, the Service filed a motion for summary judgment, with supporting memorandum, on its amended proof of claim. On February 3, 1992, the bankruptcy court held a hearing on the motion, at which Snyder stated, "What we would really like would be to postpone the entire matter until we can get all our discovery, but I'm not asking that right now. I'm only asking for two additional weeks to reply to the summary judgment motion." The bankruptcy court granted Snyder's request for a two-week extension on the deadline for filing a brief in opposition to the Service's motion. Snyder made no other request for a continuance before filing his brief, nor did he ever formally request discovery. Snyder submitted his brief on February 20, 1992. On Monday, June 29, 1992, the bankruptcy court granted the Service's motion for summary judgment, thereby allowing the claim.

Sixteen days later, on Wednesday, July 15, 1992, Snyder served and filed in the bankruptcy court a "motion to reconsider" its order granting the Service's motion for summary judgment, expressly relying on 11 U.S.C. § 502(j) (providing for the reconsideration of

an allowed or disallowed claim "for cause"). In his section 502(j) motion, Snyder essentially reiterated those contentions raised in his original brief. In addition to these contentions, however, Snyder asserted that the Service's motion for summary judgment did not address that portion of the proof of claim concerning his estimated personal income tax liability for 1986. On April 13, 1993, the bankruptcy court denied Snyder's motion for reconsideration because of his failure "to allege sufficient cause for reconsideration." Snyder thereafter noticed an appeal to the district court.

In the district court, Snyder reurged the contentions raised in the bankruptcy court, but conceded that the Service was entitled to summary judgment on the issue whether Snyder was a person responsible for the nonpayment of withheld payroll taxes. In response, the Service argued, among other things, that the district court did not have jurisdiction over the merits of the order granting summary judgment, but conceded the novel point raised in Snyder's motion for rehearing, that the proof of claim should be reduced by the $4,000 estimated as personal income tax liability for 1986. The Service pointed out, however, that the actual summary judgment award did not include this $4,000 sum. After briefing and a hearing, the district court issued its "order on appeal of denial of motion to reconsider," in which it affirmed the bankruptcy court's denial of the motion to reconsider but ordered that the proof of claim be amended to reflect the Service's concession regarding the personal income tax liability. Snyder then filed the instant appeal.

Discussion

We first consider the scope of our jurisdiction in this appeal. The Service contends that Snyder failed to timely appeal the bankruptcy court's award of summary judgment and that the only appealable order is that of the bankruptcy court denying Snyder's section 502(j) motion for reconsideration. We agree. Although 28 U.S.C. § 158(a) gives the district court jurisdiction to hear appeals "from final judgments, orders, and decrees" of the bankruptcy court, here the only timely appeal was that from the order of the bankruptcy court denying Synder's motion for reconsideration. Any appeal from the order granting the Service's motion for summary judgment was untimely. The "[f]ailure to file a timely notice [of appeal from the bankruptcy court] deprives the district court of jurisdiction to consider the appeal." *Solomon v. Smith*, 41 F.3d 1024, 1026 (5th Cir. 1995); *see Budinich v. Becton Dickinson and Company*, 108 S.Ct. 1717, 1722 (1988); *Pryor v. Postal Service*, 769 F.2d 281, 285 (5th Cir. 1985) (describing adherence to time limitations on filing notices of appeal as "mandatory and jurisdictional").

Under Fed. R. Bankr. P. 8001, an appeal from a final judgment, order, or decree of a bankruptcy court must be brought by filing a notice of appeal within the time prescribed by Fed. R. Bankr. P. 8002. Rule 8002 provides that a notice of appeal "shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from." Here, the bankruptcy court's order granting the Service summary judgment was entered June 29, 1992; Synder's notice of appeal was filed April 23, 1993,

almost ten months later. Although the ten-day period for filing a notice of appeal may be tolled by a section 502(j) motion for reconsideration that is itself filed within the ten-day period, *Abraham v. Aguilar*, 861 F.2d 873, 874 (5th Cir. 1988), in this case such a motion was not filed within ten days from the entry of summary judgment,[3] and a late-filed motion may not toll what has already expired. *See Whitemere Development Corp. v. Cherry Hill*, 786 F.2d 185, 187 (3d Cir. 1986). Thus, Snyder's motion, filed sixteen days after the entry of summary judgment, did not operate to toll the time within which he could have filed a timely notice of appeal from the summary judgment. His failure to timely file deprived the district court of jurisdiction over this aspect of the appeal, *Solomon*, 41 F.3d at 1026, and our jurisdiction under 11 U.S.C. § 158(d) is no broader than that possessed by the district court sitting on appeal below, *In re Abdallah*, 778 F.2d 75, 77 (1st Cir. 1985), *cert. denied*, 106 S.Ct. 1973 (1986).

Snyder does not dispute that he failed to timely appeal the summary judgment; indeed, he does not dispute that this failure operates as a jurisdictional bar. Instead, he argues that the district court, although styling its decision as one affirming the

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[3] Under Fed. Bankr. R. 9006(a), the first day of this period is excluded from the ten-day calculation, and the last day is included, unless it falls on a Saturday, Sunday, or legal holiday. Ever since the 1989 amendments to Rule 9006(a), intervening holidays and weekends are included in the calculation unless the prescribed time is less than eight days. *Id.* Here the tenth day fell on Thursday, July 9, 1992 (if intervening holidays, Saturdays, and Sundays were excluded, the tenth day would have fallen on Tuesday, July 14, 1992); the motion to reconsider was not served or filed until Wednesday, July 15, 1992.

denial of his motion to reconsider, actually acted beyond this jurisdictional limit, as evidenced by its modification of the proof of claim in accordance with the Service's concession of error. This argument begs the question. Even assuming the district court implicitly determined that it had jurisdiction over an appeal from the order of the bankruptcy court granting summary judgment, that does not mean the district court *in fact* had such jurisdiction and does not alter our own *de novo* determination on the issue.

Snyder goes on to argue that the Service's concession that the proof of claim erroneously included a $4,000 liability means that the Service "necessarily" conceded to the district court's exercise of jurisdiction over the entire appeal and that, in any event, the Service has not cross-appealed the jurisdictional question. These arguments are totally without merit. The district court purported to rule on the denial of the motion to reconsider, and the appellee seeks only affirmance of the judgment below. Moreover, parties cannot cure otherwise defective federal subject matter jurisdiction simply by conceding to it or by waiving the defect; this Court has a duty to police, *sua sponte*, the scope of its own limited jurisdiction. *Vincent v. Consolidated Operating Co.*, 17 F.3d 782, 785 (5th Cir. 1994); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1207 n.16 (5th Cir. 1992); *see also Silver Star Enterprises, Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 n.6 (5th Cir. 1994) ("[W]e also have the obligation to satisfy ourselves of the jurisdiction of the district court."). Our review is properly confined to the denial of the motion to reconsider. *See Pryor*, 769 F.2d at 285-86.

This Court has held that the bankruptcy court has broad,

virtually plenary discretion to determine, in response to a section 502(j) motion, whether to reconsider "for cause" either the allowance or disallowance of proofs of claim. *Matter of Colley*, 814 F.2d 1008 (5th Cir.), *cert. denied*, 108 S.Ct. 234 (1987). To demonstrate cause under 502(j), the movant must allege one of the following bases for reconsideration under Fed. R. Civ. P. 60(b):

> "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . ., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment." *Id.*

Snyder has not alleged fraud, newly discovered evidence,[4] mistake, neglect, or any other matter capable of justifying reconsideration under Rule 60(b); his only claimed basis for reconsideration was "to point out to the Court that the Court had not specifically commented" on all the issues raised in his brief filed in opposition to the motion for summary judgment. As in *Colley*, Snyder's motion for reconsideration was essentially "a rehash of his original objections" to the proof of claim. 814 F.2d at 1010.

To the extent that Snyder's motion went beyond his original

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[4] Although Snyder did not allege the existence of any newly discovered evidence that could not have been discovered earlier, he did state in a brief filed several months after his motion for reconsideration that "[t]he Court should order a rehearing on . . . any points to be raised by newly discovered documents once they are acquired." Clearly, however, a rehearing is not justified under Rule 60(b) merely because of the possibility that new, though unspecified, evidence may be acquired.

objections, he has failed to explain why these new matters could not have been raised earlier, in his opposing brief, and why, if they could not have been, he did not seek a further extension of time to file his response to the Service's motion. Although Snyder complains generally that he should have been allowed an opportunity for discovery before summary judgment was awarded, he never formally requested discovery, specifically stated that he did not request a continuance for further discovery, and failed to allege specific, material facts that he believed would be adduced through discovery.[5] In short, Snyder has not adequately raised any basis for reconsideration under Rule 60(b). We hold, therefore, that the bankruptcy court was well within its broad discretion not to reconsider its order granting summary judgment.

Our conclusion that the bankruptcy court did not abuse its discretion in denying Snyder's 502(j) motion is reinforced by the questionable merits of his case. To obtain summary judgment, the Service had only to establish as a matter of law that Snyder was a person responsible for the collection, accounting for, and payment of the withheld taxes, that he acted willfully in failing to pay them over, and that the proof of claim represents an amount equal

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[5] On appeal, the only evidence Snyder identifies as undiscovered but material relates to what he considers the liability of the bank that dishonored his overdrawn checks to the Service. As stated below, however, whatever potential liability the bank may have for the nonpayment of the withheld taxes is independent of Snyder's and certainly cannot relieve him of his own obligations under section 6672. This evidence is thus not material to the issues decided on summary judgment. *See Ginsberg 1985 Real Estate Partnership v. Cadle Company*, 39 F.3d 528, 531 (5th Cir. 1994) (an issue is material for summary judgment purposes if "its resolution in favor of one party might affect the outcome of the lawsuit under governing law").

to the taxes that Snyder owed as result of this willful failure. *See* I.R.C. § 6672; *Howard v. United States*, 711 F.2d 729, 733 (5th Cir. 1983). Although the first issue--whether Snyder is a responsible person under section 6672--is uncontested, the second and third issues are.

With regard to the issue of willfulness, Snyder has consistently focused on what he considers the liability of Citizens Bank (the bank), now known as Society Bank, for those employment taxes withheld but unpaid by Phoenix during 1985 and 1986.[6] Essentially, Snyder contends that because the bank dishonored only those checks that would have satisfied his delinquent employment tax liability during this time, his acts should not be considered willful. However, whatever liability the bank may have regarding the unpaid taxes is independent of Snyder's and cannot relieve him of his obligations under section 6672. *See McDonald v. United States*, 939 F.2d 916, 919 (11th Cir. 1991); *Williams v. United States*, 931 F.2d 805, 810-11 (11th Cir. 1991). Snyder admitted that he paid other creditors before satisfying his obligation to pay over to the Service the withheld taxes, and this concession

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[6] Given the undisputed fact that Snyder was a responsible person under section 6672, the burden shifted to him to prove a "lack of willfulness." *Mazo v. United States*, 591 F.2d 1151, 1155 (5th Cir.), *cert. denied*, 100 S.Ct. 82 (1979). Snyder presented no summary judgment evidence indicating a lack of willfulness for any period at Phoenix-Texas. The only evidence or argument presented by Snyder concerning willfulness with regard to Phoenix's tax liability is limited to the years 1985 and 1986; no mention is made of those taxes withheld but unpaid during 1981 and 1982. *See supra* note 1.

sufficiently establishes willfulness.[7] *Turnbull v. United States*, 929 F.2d 173, 179 (5th Cir. 1991); *Howard*, 711 F.2d at 735 ("[E]vidence that the responsible person had knowledge of payments to other creditors after he was aware of the failure to pay withholding tax is sufficient for summary judgment on the question of willfulness."); *see Williams*, 931 F.2d at 810.

Regarding the third issue, the amount of the proof of claim, Snyder argues that the Service erroneously refused to deduct from his employment (FICA) tax liability a $49,000 "voluntary payment" he made in June 1986. This amount, however, was collected by levy from one of Phoenix's creditors, and as such it constitutes an *in*voluntary payment. *Interfirst Bank Dallas, N.A. v. United States*, 769 F.2d 299, 305 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 1458 (1986). A taxpayer is simply not free to designate the application of an involuntary credit. *See Lindon v. United States*, 448 F.2d 509, 513 (5th Cir. 1971), *cert. denied*, 92 S.Ct. 1769 (1972). Snyder nevertheless argues that the money should be treated as a voluntary payment because, allegedly, the Service attempted to "refund" this money but did not because he "told the Service to keep the check" as a credit for his liability for some of Phoenix's unpaid employment taxes. Although Snyder suggests that this money would otherwise have gone to him or Phoenix, it is clear that the reason the Service was considering releasing the funds was to satisfy certain lien creditors. Snyder told the

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[7] In response to the Service's requests for admissions, Snyder admitted that he "authorized or allowed payments to be made to corporate creditors other than the [Service] after [he] became aware of the failure to pay withholding taxes."

Service to keep the $49,000 only because he learned that the bank, because of its alleged superior security interest, would not allow the money to go to these claimants. None of this money thus belonged to him as a "refund," and he had no right to take it back or otherwise to direct its flow. Snyder cannot voluntarily pay what is not his to give. Because this amount was not voluntarily paid to the Service, Snyder had no right to choose how it would be applied to his tax liabilities.[8]

Conclusion

For the foregoing reasons, we affirm the judgment of the district court affirming the bankruptcy court's denial of Snyder's motion for reconsideration.

AFFIRMED

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[8] Snyder also contends that the proof of claim is excessive because it includes amounts over that claimed as delinquent in Phoenix's Chapter 7 bankruptcy proceedings. In the bankruptcy court, the Service explained that the amount claimed here is larger because the proof of claim submitted in Phoenix's bankruptcy proceedings did not include delinquent employment taxes for the years 1981 and 1982. These amounts were not included because the tax returns for those years had not been filed as of the date of Phoenix's bankruptcy petition. The only summary judgment evidence in the record supports the Service, and Snyder has produced no evidence to the contrary.