

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DAVID C. MILCHLING,
Plaintiff,

v.

UNITED STATES,
Defendant.

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Civil No. JFM 07-0237

MEMORANDUM

Plaintiff David C. Milchling (“Milchling”), former officer of Regional Restaurant Equipment Company (“Regional”),¹ sues defendant United States, seeking recovery of approximately \$33,000 in tax penalties, plus interest, which was assessed against him personally based on Regional’s failure to remit employment taxes to the Internal Revenue Service (“IRS”).² The United States has counterclaimed, contending that Milchling is personally liable for the full amount of the employment taxes that were not paid to the government by Regional during four taxable periods in 1997 and 1998. The parties have filed cross-motions for summary judgment. For the reasons stated below, Plaintiff’s motion for summary judgment is denied, Defendant’s cross motion for summary judgment is granted, and Plaintiff will be ordered to pay the United States \$325,544.91,³ plus interest and any other statutory additions accruing from July 28, 2008.

¹ Milchling is appearing pro se.

² The IRS assessed the penalty directly against Milchling through the mechanism of a Trust Fund Recovery Penalty (“TFRP”), which can be assessed for an amount equal to the unpaid taxes.

³ This amount is based upon the TFRP assessed against Milchling by a delegate of the Secretary of the Treasury as well as interest accrued as of July 28, 2008. See Section B for further explanation.

FACTS

Milchling was employed by Regional, an installer of food service equipment, from November 12, 1997 until October 1998. Milchling began as Regional's controller and became CFO in December 1997 or early 1998. In June 1998, Milchling became Project Manager for Regional's Ravens Stadium project. From Regional's incorporation in 1983 until its liquidation in 1998, Roger Meinken was President and sole owner and shareholder. From 1996 through 1998, Bryan⁴ Meinken was Vice President.⁵

Milchling was responsible for payroll for the entire company when he was controller or CFO, as well as when he was Project Manager. Milchling also prepared checks to Regional's creditors. According to Bryan Meinken, Milchling participated in decisions as to which creditors to pay and when to pay them. Milchling prepared Regional's quarterly federal employment tax returns for the four taxable periods at issue in this case.

Milchling was given Regional's monthly bank account statements when they arrived in the mail and would also inquire with the bank about Regional's accounts. He would regularly reconcile the accounts with the checks written on the accounts. He was added to the bank signature card for this purpose, but did not have signature authority on Regional's operating

⁴ On the docket and in some of the government's filings, this individual's name is spelled "Brian," but it appears his name is actually "Bryan." For example, in Exhibit 5 to Defendant's Memorandum, an "Employer's Quarterly Federal Tax Return," he has signed and printed his name as "Bryan Meinken."

⁵ The government filed a third party complaint against Roger Meinken and Bryan Meinken. Neither third-party defendant answered the complaint. Default judgment was granted against both third-party defendants in favor of the United States in the amount of \$314,529.29 on January 24, 2008.

account. Milchling states that he declined the Meinkens' offer of authority to sign checks because he knew the company had a history of nonremittance of withholding taxes predating his employment, and he believed that anyone signing checks would be held responsible for the nonremittance of those liabilities. Milchling was aware through his reconciling of the accounts and checks that none of the checks generated for withholding taxes had been cashed. Milchling did have signature authority on Regional's Ravens Stadium payroll account, which was opened in May 1998 and from which Milchling prepared and signed payroll checks. Milchling had the authority to hire and fire Regional employees and exercised this authority in firing union workers on the Ravens Stadium project, but never in the financial office, which consisted of Milchling and one other individual.

Milchling was aware from the beginning of his employment with Regional that Regional was behind in its payment of withholding taxes and that the company intended to use the money to pay off other creditors before paying the taxes. Specifically, Milchling was aware that money from withholding taxes was instead being paid to Hobart, an important supplier and a source of lucrative rebates for Regional. Milchling also prioritized the payment of employee salaries above payment of the withholding taxes. Milchling believed that after the Ravens Stadium project was completed, Regional would be able to pay the taxes, which he characterizes as a "loan" from the government.

Beginning in July 1998, Milchling voided checks made out for Regional's weekly trust fund taxes because the checks generated by the computer system did not reflect the correct

amount since the Ravens Stadium portion was already being paid out of a different account.⁶ However, Milchling did not make any effort to recalculate the trust fund tax checks to represent the correct amount owed to the government or to ensure that these taxes were being paid from Regional's operating account.

ANALYSIS

A motion for summary judgment will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material fact is one that may affect the outcome of the suit. *Anderson*, 477 U.S. at 248. A party opposing a motion for summary judgment may not rest upon the mere allegations in his pleading, but must set forth specific facts that show there is a genuine issue for trial. *Id.* "When cross-motions for summary judgment are submitted to a district court, each motion must be considered individually, and the facts relevant to each must be viewed in the light most favorable to the non-movant." *Mellen v. Bunting*, 327 F.3d 355, 363 (4th Cir. 2003).

A. Liability Under Section 6672

⁶ Milchling explains in his deposition that the computer would print out checks for all Regional employees as well as a check for the federal employment taxes and whatever state taxes would be due. However, since some of the Regional employees were already being paid from the Ravens Stadium account, Milchling would void the checks printed out for them from the Regional account. He would do so by writing void on the paychecks, rather than voiding the checks on the computer because the computer also calculated the employees' W-2s. Similarly, the computer would generate a weekly check for trust fund taxes that reflected the salary of all Regional employees, regardless of where they were working. Since this amount double-counted some of the employees, Milchling would void this check as well. However, Milchling states that he would not then print a new check for the correct taxable amount due. (Def.'s Mem. Supp. Mot. for Summ. J. ("Def.'s Mem.") Ex. 5, Milchling Dep. 79:6-82:19, Nov. 21, 2008.)

An employer is required by federal law to withhold federal income, social security, and Medicare taxes from employee wages and to pay those taxes to the United States. 26 U.S.C. §§ 3102, 3402, 7501. These funds, which the employer holds in trust for the United States, are typically called “trust fund taxes.” *Slodov v. United States*, 436 U.S. 238, 243 (1978). ““The “trust fund taxes” are for the exclusive use of the Government and are not to be used to pay the employer’s business expenses, including salaries, or for any other purpose.”” *Johnson v. United States*, 203 F. Supp. 2d 416 (D. Md. 2002) (*quoting Gephart v. United States*, 818 F.2d 469, 472 (6th Cir. 1987)).

A corporate employer’s officers and agents who are responsible for collecting and paying trust fund taxes may be held personally liable for the full amount of unpaid payroll taxes under Section 6672:

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, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, 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). The following two requirements must be met in order to find an individual personally liable: “(1) the party assessed must be a person required to collect, truthfully account for, and pay over the tax, referred to as a ‘responsible person’; and (2) the responsible person must have willfully failed to insure that the withholding taxes were paid.” *O’Connor v. United States*, 956 F.2d 48, 50 (4th Cir. 1992). As to the burden of proof, the Fourth Circuit has stated:

The Commissioner’s determination of tax liability is presumptively correct and in cases involving section 6672 liability the courts generally have held that the burden is upon the taxpayer to establish that the Commissioner’s determination was erroneous. This presumption is not limited merely to the amount of the assessment

but requires that the taxpayer demonstrate that he was not a responsible person or that his failure to pay the taxes was not willful.

United States v. Pomponio, 635 F.2d 293, 296 (4th Cir. 1980) (internal citations omitted). The United States has presented a certified record of the TFRP assessment against Milchling. (Def.'s Mem. Ex. 16.) By introducing into evidence these certified copies of the certificates of assessment, the government has established a prima facie case in support of the tax liability charged against Milchling. *Pomponio*, 635 F.2d at 296. It is therefore Milchling's burden to show either that he was not a "responsible person" for Section 6672 purposes, or that his failure to pay the taxes was not willful. Milchling fails to make either of these showings.⁷

1. Responsible Person

"Responsible person" is a broad term that may encompass more than one individual connected with a corporation. *O'Connor*, 956 F.2d at 50. The key factor in determining whether an individual is a "responsible person" is whether the individual "so participated in decisions concerning payment of creditors and disbursement of funds that he effectively had the authority – and hence a duty – to ensure payment of the corporation's payroll taxes." *Plett v. United States*, 185 F.3d 216, 219 (4th Cir. 1999) (internal quotations omitted). Factors indicating whether the individual had the requisite authority include whether the individual:

(1) served as an officer of the company or as a member of its board of directors; (2) controlled the company's payroll; (3) determined which creditors to pay and when to pay them; (4) participated in the day-to-day management of the corporation; (5) possessed the power to write checks; and (6) had the ability to hire and fire employees.

Id. The "responsible person" determination should involve a pragmatic, substance over form

⁷ In fact, Milchling does not present any argument regarding the issue of willfulness.

analysis. *O'Connor*, 956 F.2d at 51.

In arguing that Milchling was a “responsible person” for Regional, the government points to the following evidence:

Milchling (1) was controller and CFO of Regional, (2) had control over Regional’s payroll, (3) had input on which creditors to pay and when to pay them, (4) participated in the day-to-day management of Regional, (5) possessed the power to write checks (and exercised that power), (6) had the authority to hire or fire employees, (7) had access to Regional’s books and records, and (7) [sic] was aware of the outstanding trust fund tax liabilities as they were accruing.

(Def.’s Mem. in Opp’n/Reply to Pl.’s Cross Mot. for Summ. J. (“Def.’s Opp’n”) 2.)

Milchling argues in opposition that he “was merely a titular CFO, working under the constraints of decisions made by his superiors in Regional.” (Pl.’s Mem. Supp. Pl.’s Cross Mot. for Summ. J. (“Pl.’s Mem.”) 12.) However, Milchling presents no evidence that he did not in fact have the responsibilities cited by the government. The government’s evidence demonstrates Milchling’s authority as to each of the factors discussed in *Plett*. It is clear that Milchling is a “responsible person” for purposes of Section 6672.

Milchling next contends that even if he was a “responsible person” for a portion of the period of time at issue in this case, he was not a “responsible person” when Regional began its nonpayment of trust fund taxes in October 1997 (before Milchling was hired in November 1997), and that he was no longer a “responsible person” after he became Project Manager of the Ravens Stadium project in June 1998. (Pl.’s Mem. 12.) However, a “responsible person” need not be responsible for an entire quarter in order to be under a duty to pay over withholding taxes for that period. *See Brown v. United States*, 591 F.2d 1136, 1140 (5th Cir. 1979) (following the Supreme Court’s ruling in *Slodov* and finding a responsible person who assumed control on April 10 under a duty to pay over withholding taxes for the first quarter that were due on April 30).

Although Milchling began his employment with Regional in November of 1997, he was still under a duty to pay over the withholding taxes from October 1997 because they fell within the fourth quarter of 1997.

Milchling's argument that he was not a "responsible person" after he took the position of Project Manager on the Ravens Stadium project also fails. During this period, Milchling maintained his authority over payroll and his other financial duties with Regional. This was also the period during which he began voiding Regional's weekly trust fund tax checks and acquired signature authority on the Ravens Stadium project checking account. He also continued in his duty of preparing Regional's quarterly tax returns.

Milchling's contention that Roger and Bryan Meinken made the decision not to pay over withholding taxes to the government and to use this money for other purposes does not relieve him of his duty as a "responsible person" to pay these taxes: "One who is a responsible person follows the directions of a superior not to pay withholding taxes to the government at his peril." *Gephart*, 818 F.2d at 475.

Milchling has failed to rebut the presumption that he was a "responsible person" for Regional during the taxable periods at issue in this case. Therefore, in order to avoid liability under Section 6672, he must demonstrate that his nonpayment was not willful, which he also fails to do.

2. Willfulness

To determine if a "responsible person" was willful in his or her failure to collect, account for, or remit payroll taxes to the United States, a court must assess "whether the 'responsible person' had knowledge of nonpayment or reckless disregard of whether the payments were being

made.” *Plett*, 185 F.3d at 219 (internal quotations omitted). Willfulness can be established by showing that the “responsible person” intentionally preferred other creditors over the United States, which can, in turn, be established by showing that the “responsible person” “[knew] of or recklessly disregarded the existence of an unpaid deficiency.” *Id.* (quoting *Turpin v. United States*, 970 F.2d 1344, 1347 (4th Cir. 1992)). There is no requirement that the responsible person acted with bad motive or specific intent to defraud the government: “If the [defendant] was aware of the fact that the taxes were unpaid, and, possessing the power and responsibility to pay them, failed to do so, then he is liable for the penalty of section 6672 notwithstanding his lack of malice or wrongful purpose.” *Braden v. United States*, 442 F.2d 342, 344 (6th Cir. 1971).

It is clear from the evidence, including Milchling’s own deposition testimony, that Milchling was aware throughout the period of his employment with Regional that Regional was not paying the withholding taxes which it was required to pay to the government and that Regional was instead paying employee salaries and paying other creditors. Despite Milchling’s knowledge of the Meinkens’ plan to not pay its trust fund taxes for several months, Milchling continued to prepare checks for other creditors. Beginning in July 1998, Milchling also began voiding Regional’s weekly trust fund tax checks. The fact that the portion of Regional’s withholding taxes due for Regional’s Ravens Stadium project, for which Milchling was the Project Manager, were being paid does not shield Milchling from liability for his willful failure to collect, account for, and remit payroll taxes to the United States. Milchling, a “responsible person” for Regional, knew of Regional’s unpaid deficiency. This knowledge is sufficient to prove willfulness, and Milchling has failed to present any evidence in rebuttal.

Because the evidence shows there is no genuine issue of material fact as to Milchling's responsibility and willfulness under Section 6672 for Regional's failure to pay withholding taxes for the taxable periods at issue in this case, the government's summary judgment motion is granted, Milchling's cross motion is denied, and Milchling will be ordered to pay the United States \$325,544.91, plus interest and any other statutory additions accruing from July 28, 2008.

B. Damages

The TFRP assessment against Milchling, as calculated by a delegate of the Secretary of the Treasury is as follows:

Tax Period Ended	Assessment Date	Assessment Amount	Balance Due (as of 7/28/2008)
12/31/1997	6/8/2001	\$35,653.32	
3/31/1998	6/8/2001	\$23,271.23	
6/30/1998	6/8/2001	\$19,385.23	
9/30/1998	6/8/2001	\$19,959.74	
			\$325,544.91

(Def.'s Mem. 7; Def.'s Mem. Ex. 16, 17.) Defendant's Exhibit 17 lists the account balance as of July 28, 2008 as \$200,743.89 and the accrued interest as \$124,801.02, totaling to \$325,544.91.

This amount, plus interest and any other statutory additions accruing from July 28, 2008, less the amount already collected from Milchling towards this total, is recoverable from Milchling.

A separate order effecting the rulings made in this memorandum is being entered
herewith.

Date: July 7, 2009

/s/ _____

J. Frederick Motz
United States District Judge