

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
DOUGLAS ADELBERT DEVENS, SR.,	)	CASE NO. 04-34939 HCD
	)	CHAPTER 7
	)	
DEBTOR.	)	
	)	
	)	
DOUGLAS ADELBERT DEVENS, SR.	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 05-3029
	)	
UNITED STATES OF AMERICA,	)	
	)	
DEFENDANT.	)	

Appearances:

James K. Tamke, Esq., attorney for debtor, 115 South Lafayette Boulevard, Suite 512, South Bend, Indiana 46601; and

Robin W. Morlock, Esq., Assistant U.S. Attorney, 5400 Federal Plaza, Suite 1500, Hammond, Indiana 46320.

AMENDED MEMORANDUM OF DECISION

At South Bend, Indiana, on September 23, 2005.

Before the court are the “Complaint to Determine Dischargeability of Federal Income Taxes and to Determine Extent and Validity of Federal Tax Lien(s),” filed on April 18, 2005, by the debtor Douglas Adelbert Devens, Sr. (“debtor”), and the Motion for Summary Judgment filed on June 10, 2005, by the United States of America (“U.S.”) on behalf of the Internal Revenue Service (“IRS”). The U.S. filed an Answer to the debtor’s Complaint and then sought summary judgment. The debtor did not respond to the Motion for Summary Judgment. For the reasons that follow, the court grants the U.S.’s Motion for Summary Judgment.

### Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

### Background

According to the undisputed underlying facts, the debtor, Dr. Douglas Devens, and his wife, Dianne Devens, owned real estate in Saline, which is located in Washtenaw County, Michigan, prior to October 5, 1998. On or about that date, the debtor quit-claimed his interest in the Saline real estate to his wife.

The debtor did not pay all his federal income taxes due for the tax years 1996 through 2001, and the unpaid taxes were assessed against the debtor each year. In addition, for the tax periods from 1997 through 2001, the debtor also was assessed the Trust Fund Recovery Tax due to unpaid employment withholding taxes by a corporation for which he was a responsible person. The IRS filed tax liens in Elkhart County, Indiana, and in Washtenaw County, Michigan, to secure the unpaid taxes. On November 14, 2002, the IRS filed a nominee tax lien in Washtenaw County in the names of Dianne Devens and Christy Avery as nominees of the debtor.<sup>1</sup>

The debtor filed a chapter 13 bankruptcy petition on September 15, 2004. On October 20, 2004, the IRS filed a claim, asserting a secured claim of \$287,724.52, a priority claim of \$5,877.44, and a general unsecured

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<sup>1</sup> The IRS uses a nominee lien to proceed “‘against an alter ego or nominee of a delinquent taxpayer for the purposes of satisfying the taxpayer’s obligations.’” *Macklin v. U.S.*, 300 F.3d 814, 818 n.2 (7th Cir. 2002) (quoting *United States v. Letscher*, 83 F.Supp.2d 367, 375 (S.D.N.Y. 1999)).

claim of \$173.77. On Schedule A, the debtor listed real estate located in Saline, Michigan, and stated that he quit-claimed his interest to his wife on or about October 5, 1998, and that his interest was \$0. On Schedule D, he listed federal income taxes for the tax years 1996 through 2000 in the amount of \$170,000. The debtor converted his case to chapter 7 on January 18, 2005, and the court granted him a discharge on April 25, 2005.

On April 18, 2005, the debtor filed his complaint against the United States, asserting two causes of action. The first sought a determination that certain taxes were dischargeable under 11 U.S.C. § 523(a)(1).<sup>2</sup> The second sought to determine the validity and extent of the IRS tax liens, including the nominee lien. It recognized that, even though the tax liabilities were discharged upon receipt of his chapter 7 discharge, the liens for those liabilities were not discharged. The debtor asserted that the value of the IRS lien was limited to his assets on the date of the bankruptcy petition and was worth \$4,565 under 11 U.S.C. § 506(a).<sup>3</sup> *See* R. 1 at 4. The debtor also asked the court to determine whether the nominee tax lien was valid.

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<sup>2</sup> Section 523(a)(1) provides:

§ 523(a) A discharge . . . does not discharge an individual debtor from any debt –

(1) for a tax or a customs duty —

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required –

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.

11 U.S.C. § 523(a)(1).

<sup>3</sup> The debtor calculated the value of the lien in the following manner: “Value of Plaintiff’s property = \$15,865; Less: Value of purchase money lien of Capital One Auto Finance (vehicle) = \$11,000, and Value of purchase money lien of Staples (computer) = \$300; and therefore the value of Defendant’s interest in the bankruptcy estate’s interest is \$4,565 (15865 – 11000 – 300).” R. 1 at 4.

The U.S., in its Answer, admitted the first cause of action but denied that the court had jurisdiction over the second cause of action and denied that it was a core proceeding. *See* R. 5. On June 23, the court approved an Agreed Order resolving the first cause of action of the debtor's complaint. *See* R. 14. The debtor and the U.S. agreed that the debtor's liability for his 1996 through 2000 federal income taxes was not excepted from discharge under § 523(a)(1) but was discharged by the granting of the debtor's discharge under § 727. *See id.* at 1. However, they also stipulated that the IRS's perfected federal tax liens for those income tax periods attached to all property of the debtor, including the property of his bankruptcy estate "to the extent of that property in which the Debtor and/or his bankruptcy estate had interests on the date of the filing of the petition initiating this Chapter 7 case." *Id.* at 2. Under *Dewsnup v. Timm*, 502 U.S. 410, 112 S. Ct. 773, 116 L.Ed.2d 903 (1992), the parties agreed, the IRS's lien interests in the debtor's property passed through his bankruptcy and were unaffected by those proceedings or by his chapter 7 discharge. *See id.* at 2.

The U.S.'s Motion for Summary Judgment and accompanying Memorandum addressed the second cause of action in the debtor's complaint, which sought to fix the value of the IRS tax lien at \$4,565. The U.S. asserted that the debtor "is attempting to strip the liens of the IRS through the act of valuation." R. 11 at 5. Relying on *Dewsnup*, it argued that the chapter 7 debtor could not use § 506(a) to reduce the IRS lien to its value on the date of the petition. As a result, the complaint fails to state a claim for which relief can be given. The U.S. also argued that the bankruptcy court had no subject matter jurisdiction over the debtor's attempt to avoid the nominee tax lien on the Saline real estate. It explained that, because the debtor, who had quit-claimed his interest in that property in 1998, had no property interest in the Saline real estate, it is not property of the estate and therefore there is no subject matter jurisdiction. The U.S. asks the court to dismiss the second cause of action of the debtor's complaint and to grant judgment to the U.S.

## Discussion

In this case, the U.S., on behalf of the IRS, filed a motion for summary judgment, and the debtor did not respond. *See* N.D. Ind. L.B.R. B-7007-1 (requiring opposing party's response to motion within 30 days after service of the motion). The debtor's failure to respond is deemed a waiver of the opportunity to do so. *See id.* The debtor also failed to respond to the IRS's Statement of Material Facts by filing a Statement of Genuine Issues. *See* N.D. Ind. L.B.R. B-7056-1.

A court renders summary judgment when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Tegtmeier v. Midwest Operating Eng'rs Pension Trust Fund*, 390 F.3d 1040, 1045 (7th Cir. 2004). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *See Celotex*, 477 U.S. at 323. If the moving party satisfies its initial burden, then the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The court neither weighs the evidence nor assesses the credibility of witnesses. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

Because the debtor failed to file a response to the U.S.'s summary judgment motion and failed to oppose the motion by filing a "Statement of Genuine Issues," under the local rules the court deems to be admitted all the material facts set forth by the U.S. and properly supported by evidence. *See* N.D. Ind. L.B.R. B-7056-1 ("In determining the motion for summary judgment, the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that

such facts are controverted in the ‘Statement of Genuine Issues’ filed in opposition to the motion.”); *see also Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 922 (7th Cir. 1994) (upholding strict enforcement of local rules, sustaining entry of summary judgment when nonmovant, by failing to submit factual statement, conceded movant’s version of facts). The court determines, therefore, that there are no triable issues remaining in this adversary proceeding.

The court therefore turns to whether the U.S., as the moving party, is entitled to judgment as a matter of law. It begins with the undisputed matters of law. Clearly settled legal principles were presented by the plaintiff and defendant in mutual collaboration. In their Agreed Order, the parties stipulated that, although the underlying taxes were discharged in the debtor’s bankruptcy, the liens and *in rem* claims they represent survived the bankruptcy discharge. The parties also agreed that, under *Dewsnup*, liens pass through bankruptcy unaffected. This court now finds that, since *Dewsnup*, courts have relied on its holding to determine that a chapter 7 debtor may not strip down or “bifurcate the IRS’ claim into valued unsecured and secured portions.” *In re Thomas*, 260 B.R. 884, 885 (Bankr. M.D. Fla. 2001). Indeed, “any lien of the IRS passes through the Chapter 7 case, and no authority exists to permit the Debtor[] to restrict the lien to the value of the [Debtor’s] property as of the date that [he] filed [his] bankruptcy petition.” *In re Stone*, \_\_\_ B.R. \_\_\_, 2005 WL 2083297, at \*3 (Bankr. M.D. Fla. July 22, 2005); *see also In re Carpenter*, 2003 WL 1908944, at \*1 (Bankr. M.D. Fla. March 14, 2003) (finding that *Dewsnup* “has since been extended to include nonconsensual federal tax liens”). The court concludes that this debtor’s IRS tax liens cannot be stripped down under § 506(a). Consequently, the debtor’s complaint, which attempted to strip down the IRS’s claim, fails to state a claim for which relief can be given.

In addition, the parties agree that the Saline real estate that the debtor quit-claimed to his wife in 1998 is no longer property of his bankruptcy estate. Accordingly, this court has no subject matter jurisdiction over the nominee tax lien on that property. *See In re Fedpak Systems, Inc.*, 80 F.3d 207, 214-15 (7th Cir. 1995) (concluding that, when property is not property of the bankruptcy estate, the bankruptcy court has no jurisdiction to determine the rights to that property).

Because the U.S., as the moving party, has succeeded in its burden of proof and the debtor, as the nonmoving party, has failed to make a sufficient showing of a genuine issue for trial, the court must render summary judgment for the U.S. The court also determines that the “Motion for Ruling on Motion for Summary Judgment,” having accomplished its purpose, is now moot.

Conclusion

Based upon the record before it, the court finds that there is no genuine issue as to any material fact and that the defendant United States of America, on behalf of the IRS, is entitled to judgment as a matter of law. Accordingly, the U.S.’s Motion for Summary Judgment is granted, and the second cause of action of the debtor’s Complaint is dismissed for want of jurisdiction. The U.S.’s Motion for Ruling on Motion for Summary Judgment is denied as moot.

SO ORDERED.

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/s/ Harry C. Dees, Jr.  
HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT