UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. PHILIP COLASUONNO, Defendant.	Case No. 21 Civ. 10877 (JCM)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
86 Chambers St., 3rd Floor
New York, New York 10007
Telephone: 212-637-2810
Facsimile: 212-637-2786
Attorney for Defendants

ANTHONY J. SUN
Assistant United States Attorney
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Rules

PRELIMINARY STATEMENT

The United States of America (the "Government"), by its attorney, Damian Williams, United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in opposition to Defendant Philip Colasuonno's ("Defendant") motion for judgment on the pleadings, brought pursuant to Federal Rule of Civil Procedure 12(c). Defendant's motion is premised on a misapprehension of applicable law and should be denied. First, pursuant to 26 U.S.C. § 6503(h)(2), the statute of limitations for bringing this collection action was tolled by Defendant's prior bankruptcy proceeding, and this action is thus timely. Second, the Internal Revenue Service's ("IRS") filing of a Notice of Federal Tax Lien ("NFTL") during Defendant's bankruptcy proceeding does not affect the tolling of the limitations period.

For these reasons, Defendant's motion should be denied.

BACKGROUND[1]

Defendant filed a voluntary bankruptcy petition pursuant to Chapter 7 of the Bankruptcy Code (Title 11 of the United States Code) in the United States Bankruptcy Court for the Southern District of New York on July 24, 2009. *See* Petition, Dkt. No. 1, *In re Colasuonno*, No. 09-23330-rdd (Bankr. S.D.N.Y.). While the automatic stay of collection actions against the Defendant pursuant to 11 U.S.C. § 362 was in effect, the IRS assessed certain taxes against him on April 21, 2011. Shortly thereafter, the IRS issued an NFTL dated May 26, 2011, which it filed with the Westchester County Clerk on June 8, 2011.[2] IRS took no action to collect on the assessed taxes

[1] The court must accept as true all non-conclusory facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff. *See Ashcroft v. Iqbal*, 556 U.S. 662, 663–64 (2009).

[2] The NFTL was attached to Defendant's motion papers as Exhibit A, but it is outside of the pleadings and is beyond the scope of a 12(c) motion. *See In re Johns-Manville Corp.*, Nos. 82-11656 (CGM), 17-01186 (CGM), 2019 Bankr. LEXIS 3818 (Bankr. S.D.N.Y. Mar. 28, 2019) ("'[i]f, on a motion under Rule 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment . . .'") (quoting

while the NFTL was in effect, and neither Defendant nor any other party to the bankruptcy ever argued before the bankruptcy court that the automatic stay precluded IRS's filing of the NFTL. The Bankruptcy Court entered a discharge in Defendant's bankruptcy on July 20, 2011. *See id.*, Dkt. No. 70. This collection action was commenced on December 20, 2021, which falls within the applicable statute of limitations prescribed by 26 U.S.C. § 6502(a)(1) and extended by 26 U.S.C. § 6503(h)(2), as explained below.

LEGAL STANDARD

The legal standard for a Rule 12(c) motion is the same for a Rule 12(b)(6) motion to dismiss. *See Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 922 (2d Cir. 2010). A complaint survives a 12(b)(6) motion to dismiss if the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When considering a 12(b) or 12(c) motion, the court must accept as true all non-conclusory facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff. *See Iqbal*, 556 U.S. at 663–64.

ARGUMENT

Defendant's motion should be denied because the Government's action is timely, given the six-month extension of the relevant statute of limitations for bankruptcy proceedings in 26 U.S.C. § 6503(h)(2). Additionally, the IRS's filing of an NFTL during Defendant's bankruptcy does not affect the tolling of the statute of limitations, even if it had violated the automatic stay.

Fed. R. Civ. P. 12(d)). In any event, as explained in this memorandum of law, the NFTL is of no consequence to the statute of limitations.

I. THE IRS MAY ASSESS TAXES WITHOUT VIOLATING THE AUTOMATIC STAY, BUT CANNOT BRING A CIVIL ACTION TO REDUCE THE ASSESMENT TO JUDGMENT WHILE THE STAY IS IN PLACE

The Bankruptcy Code imposes an automatic stay that prohibits ordinary creditors from filing "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6); *see also In re Crawford*, 476 B.R. 83, 86 (S.D.N.Y. 2012) (automatic stay "is effective immediately upon the filing of a petition for relief under the Code" and bars "creditors from all 'act[s] to obtain possession of the property of the estate'" (quoting 11 U.S.C. § 362(a)(3))). However, the IRS may assess taxes against debtors in bankruptcy even while the automatic stay is in place. 11 U.S.C. § 362(b)(9)(D) (stay does not prevent the IRS from "the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment");[3] *see also In re Killmer*, 513 B.R. 41, 48–49 (Bankr. S.D.N.Y. 2014) ("Section 362(b)(9) excepts government units noticing and assessing tax deficiencies from the automatic stay."); *In re Payack*, No. 20-60345, 2020 WL 9211311, at *3 (Bankr. N.D.N.Y. Nov. 12, 2020) (§ 362(b)(9)(D) "expressly allows a taxing authority to make an assessment" without violating the automatic stay). Thus, the IRS's assessment against Defendant on April 21, 2011, did not violate the automatic stay.

Although the IRS may assess taxes, it may not take action to collect on the assessment, such as by filing suit to reduce the assessment to judgment. *See In re Payack*, 2020 WL 9211311, *3; *In re Haight*, 52 B.R. 104, 105 (Bankr. S.D.N.Y. 1985) (§ 362(a)(6) extends to stay "any act to collect a prepetition claim against the debtor"). Thus, the pendency of Defendant's bankruptcy

[3] However, the statute specifies that "any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor." 11 U.S.C. § 362(b)(9)(D).

case prevented the IRS from collecting the assessed taxes until the discharge was entered on July 20, 2011. *See* 11 U.S.C. § 362(c)(2)(C) (in Chapter 7 bankruptcy proceedings, the automatic stay continues until discharge is entered).

II. BECAUSE THE STATUTE OF LIMITATIONS WAS TOLLED DURING THE BANKRUPTCY PROCEEDING, THIS ACTION WAS TIMELY

The Government filed its collection action within the statute of limitations, which expired January 20, 2022. The relevant statute of limitations runs for ten years after the assessment of the tax. 26 U.S.C. § 6502(a)(1) (establishing that a "tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun . . . within 10 years after the assessment of the tax"). This limitations period is tolled, however, during bankruptcy proceedings and for 6 months thereafter:

> The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or collection shall, in a case under title 11 of the United States Code [the Bankruptcy Code], be suspended for the period during which the Secretary [of Treasury] is prohibited by reason of such case from making the assessment or from collecting and . . . for collection, 6 months thereafter.

Id. § 6503(h)(2); *see also Rocanova v. United States*, 955 F. Supp. 27, 28 (S.D.N.Y. 1996) (bankruptcy filing "tolled the statute of limitations on collection of the outstanding tax liabilities for the duration of the bankruptcy proceeding, plus six months"); *United States v. Griffin*, No. 19CV4821ERKPK, 2020 WL 6993893, at *2 (E.D.N.Y. Sept. 15, 2020) ("Plaintiff had ten years and six months from the date Defendant was discharged from bankruptcy"); *United States v. Trupin*, No. CIV. 305CV1570AHN, 2006 WL 2792886, at *1 (D. Conn. July 19, 2006) (statute of limitations is "'suspended for the period during which the Secretary is prohibited' from collecting . . . [and] for six (6) months thereafter" (quoting 26 U.S.C. § 6503(h)(2))).

Therefore, the Government had ten years and six months to bring this action from when the discharge was entered in Defendant's Chapter 7 proceeding on July 20, 2011—*i.e.*, until

January 20, 2022. The Government timely commenced this action on December 20, 2021, within the applicable limitations period.

III. THE IRS'S FILING OF THE NOTICE OF FEDERAL TAX LIEN DURING DEFENDANT'S BANKRUPTCY DOES NOT AFFECT THE TOLLING OF THE STATUTE OF LIMITATIONS

Defendant asserts that the IRS violated the bankruptcy automatic stay when it filed the Notice of Federal Tax Lien against him on June 8, 2011, and that this violation prohibits the tolling of the statute of limitation. *See* Def.'s Mem. of Law, at 4. As an initial matter, an NFTL does not affect the rights of a tax debtor vis-à-vis the IRS; it affects only the priority of the government's lien, created by 26 U.S.C. § 6321, relative to certain other creditors. *See* 26 U.S.C. § 6323. Whether the automatic stay precludes the IRS from filing an NFTL against a debtor during his bankruptcy proceedings has no bearing on whether a bankruptcy proceeding tolls the statute of limitations for bringing a collection action such as this one. The relevant statute tolls the limitations period for the time "during which the Secretary is prohibited" from bringing a collection action. 26 U.S.C. § 6503(h)(2). This tolling provision makes no exception if the IRS files an NFTL during the bankruptcy, or allegedly violates the automatic stay. Indeed, even if the IRS should not have filed the lien due to the automatic stay, Defendant did not raise this issue during his bankruptcy proceeding, nor does it not appear that the filing of the NFTL "impact[ed] the bankruptcy estate," as he now incorrectly claims. Def.'s Mem. of Law, at 3; *cf. In re Colasuonno*, No. 09-23330-rdd (no docket entries related to NFTL filed in June 2011 or any prosecution of a stay violation for the same).

In any event, a debtor's only remedy for an alleged violation of the automatic stay is to seek damages in the bankruptcy case pursuant to 11 U.S.C. § 362(k).[4] *See In re Griffin*, 415 B.R.

[4] Even if Defendant could show damages from an erroneously-filed NFTL, such a claim would now be untimely. *See In re Terrace Housing Associates, Ltd.*, 577 B.R. 459, 463 (Bankr. E.D. Pa.

64, 71 (Bankr. N.D.N.Y. 2009) (statute provides "for the recovery of actual damages by an individual injured by any willful violation of the automatic stay"); *see also In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1105 (2d Cir. 1990) (recovery of actual damages "protects debtors' estates from incurring potentially unnecessary legal expenses in prosecuting stay violations"). There is thus no merit to Defendant's argument that the IRS's filing of the NFTL in supposed violation of the automatic stay means that the limitations period for bringing this action was not tolled by 26 U.S.C. § 6503(h)(2).

CONCLUSION

For the foregoing reasons, the Court should deny Defendant's Motion.

Dated: New York, New York
July 22, 2022

Respectfully submitted,

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
Attorney for the United States of America

By: s/ Anthony J. Sun
ANTHONY J. SUN
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: 212-637-2810
anthony.sun@usdoj.gov

2017) (applying laches doctrine to debtor's automatic stay violation motion that was filed two years after alleged violation). Here, the supposed stay violation took place in 2011, over 10 years ago.