

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOSHUA HINTZ,

Plaintiff and
Counterclaim Defendant,

v.

OPINION AND ORDER

11-cv-297-slc

UNITED STATES,

Defendant and
Counterclaim Plaintiff.

This is a tax refund action brought pursuant to 28 U.S.C. § 1346(a)(1), in which plaintiff and counterclaim defendant Joshua Hintz alleges that defendant and counterclaim plaintiff United States instituted an improper trust fund recovery penalty assessment against him for failing to pay employment taxes on wages paid to the employees of Trac Inc. for the tax periods ending June 30 and December 31, 2005. Under 26 U.S.C. § 6672, the Internal Revenue Service (IRS) may assess a trust-fund-recovery penalty against any “responsible person” within a corporation who willfully failed to collect, truthfully account for and pay the trust-fund taxes. The United States filed a counterclaim pursuant to 26 U.S.C. §§ 7401-02 to recover the trust fund recovery penalties that Hintz allegedly owes.

Before the court is the government’s unopposed motion for partial summary judgment on the issue of whether Hintz was a responsible person under § 6672. Dkt. 14. It is not requesting summary judgment on the issue whether Hintz acted willfully.

Because Hintz has not responded to the motion, I conclude that the facts proposed by the United States are undisputed to the extent that they are supported by admissible evidence. Fed. R. Civ. P. 56(e)(2); *Doe v. Cunningham*, 30 F.3d 879, 883 (7th Cir. 1994); *Strong v.*

Wisconsin, 544 F. Supp. 2d 748, 759-60 (W.D. Wis. 2008). I am incorporating those facts by reference. *See* dkt. 21.

Because the undisputed facts show that Hintz was a “responsible person” under § 6672, the United States is entitled to summary judgment on that issue. *See* Fed. R. Civ. P. 56(e)(3).

OPINION

I. Summary Judgment Standard

Under Fed. R. Civ. P. 56, summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In ruling on a motion for summary judgment, the admissible evidence presented by the nonmoving party must be believed and all reasonable inferences must be drawn in the nonmovant’s favor. However, a party that bears the burden of proof on a particular issue may not rest on his pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires a trial. *Hunter v. Amin*, 538 F.3d 486, 489 (7th Cir. 2009) (internal quotation omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

II. Relevant Law

The United States requires employers to withhold social security and federal income taxes from their employees’ wages and report and pay them quarterly to the Internal Revenue Service. 26 U.S.C. §§ 3102 and 3402; *Thomas v. United States*, 41 F.3d 1109, 1113 (7th Cir. 1994). “Because the amount of these taxes is ‘held to be a special fund in trust for the United States,’ *see* 26 U.S.C. § 7501, they are often called ‘trust fund taxes.’” *Begier v. IRS*, 496 U.S. 53, 55-56

(1990) (citing *Slodov v. United States*, 436 U.S. 238, 241 (1978)). Employers must report the amount of these taxes on a Form 941 return. See 26 C.F.R. §§ 31.6011(a)-1 and 31.6011(a)-4.

When a corporation fails to pay trust-fund taxes, the IRS may assess a trust-fund-recovery penalty pursuant to 26 U.S.C. § 6672 against each individual who was a responsible person who willfully failed to collect, or truthfully account for and pay the trust-fund taxes over to the United States. *Bowlen v. United States*, 956 F.2d 723, 727 (7th Cir. 1992) (citations omitted). Once the United States shows that a taxpayer has been assessed a § 6672 penalty, the taxpayer has the burden of proving that he was not a responsible person who willfully failed to collect, or truthfully account for and pay the trust-fund taxes. *Ruth v. United States*, 823 F.2d 1091, 1093 (7th Cir. 1987); *Thomas*, 41 F.3d at 1113.

A person is “responsible” if he has “sufficient control of corporate finances that he can allocate corporate funds to pay the corporation’s other debts in preference to the corporation’s withholding tax obligations.” *Bowlen*, 956 F.2d at 728 (citations omitted); *Jefferson v. United States*, 546 F.3d 477, 480 (7th Cir. 2008) (citation omitted). There is no requirement that he “have exclusive control over the disbursement of [corporate] funds or have the final word as to which creditors should be paid.” *Bowlen*, 956 F.2d at 728; *Jefferson*, 546 F.3d at 480. The person merely has to have significant control. *Id.* Factors indicating that a person is responsible include authority to sign corporate checks, owning stock or holding an entrepreneurial stake in the corporation, serving on the board of directors, authority to disburse funds on behalf of the company, the ability to take out loans on behalf of the company, the ability to hire and fire employees and holding a corporate office. *Thomas*, 41 F.3d at 1114; *U.S. v. Kim*, 111 F.3d 1351, 1362 (7th Cir. 1997); *U.S. IRS v. Charlton*, 2 F.3d 237, 240 (7th Cir. 1993); *Bowlen*, 956 F.2d at

728. One person's liability under § 6672 does not reduce the responsibility of another responsible person. *Thomas*, 41 F.3d at 1114. Also, delegating one's duty to pay the taxes does not relieve a responsible person from liability. *Id.*

Here, the undisputed material facts show that Hintz rose through the ranks of his father's trucking company, Trac Inc., in Menomonie, Wisconsin. By 2002, Hintz was vice president and oversaw the accounting department. He remained in that position until 2005. As vice president, Hintz hired staff, reviewed Trac's financial statements, had check writing authority, decided which creditors to pay and had significant responsibility regarding the taxes at issue in this case. He also had the authority to open bank accounts in Trac's name, borrow money on behalf and in the name of Trac and endorse, assign, transfer, mortgage or pledge Trac's property as security.

During the second and fourth quarters of 2005, Hintz signed at least two checks on one of Trac's bank accounts. He executed signature cards for one account that was opened in October 2005 and for three other accounts that were opened in August 2006. For all of these accounts, Hintz signed a corporate authorization, which gave him the authority to deposit Trac's funds in the accounts, execute checks and other instruments on behalf of Trac, give instructions and enter into agreements relating to the accounts and apply for and receive letters of credit and borrow on behalf of Trac. Hintz signed Trac's Form 941 tax return for the fourth quarter of 2005 and also signed that return on March 29, 2006 in his capacity as vice president of Trac.¹ He also signed a written authorization as vice president on January 27, 2006, permitting a

¹ Although there is some evidence in the record that Hintz ended his tenure as vice president at the end of February 2005, Hintz did not propose any facts to this effect or dispute the government's evidence to the contrary.

creditor to debit Trac's checking account monthly for equipment lease payments. Hintz continued to sign checks on behalf of Trac in 2006.

In his tenure at Trac, Hintz also served as secretary (beginning in 2002), finance director, treasurer and a board of director (February 2003 through February 2006). He executed a number of documents dated between December 1, 2002 and July 1, 2006, certifying that he was the vice president and secretary of Trac. In his capacity as finance director, he performed the same duties as he did as vice president.

Given these facts, the only reasonable inference that a jury could draw is that Hintz had sufficient control over Trac's financial matters to allocate funds to pay the corporation's other debts in lieu of its tax obligations during the second and fourth quarters of 2005. Accordingly, I find that Hintz qualifies as a "responsible person" under § 6672. This finding entitles the United States to summary judgment on that issue.

ORDER

IT IS ORDERED that defendant and counterclaim plaintiff United States's motion for partial summary judgment, dkt. 14, is GRANTED. This case will proceed to trial on the remaining issues in this lawsuit.

Entered this 2nd day of July, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge