

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

DENNIS W. JACOBSON,

Plaintiff,

v.

COMMISSIONER OF INTERNAL REVENUE,

Defendant.

ORDER

05-C-134-C

Unrepresented plaintiff Dennis Jacobson filed this civil action against the Commissioner of the Internal Revenue Service in his official capacity for monetary and injunctive relief. Plaintiff claims that defendant (1) filed a lien against plaintiff's property without first sending him deficiency notices for the years 1993, 1994, 1995 and 1996; (2) levied upon certain property without respecting plaintiff's right to abate or rescind notices of deficiency for the years 1997, 1998 and 2000; and (3) failed to provide plaintiff with a hearing at which to challenge his tax liabilities.

I issued an order dated March 16, 2005, reviewing the court's jurisdiction to hear plaintiff's claims pursuant to Fed. R. Civ. P. 12(h)(3). In that order, I concluded that the doctrine of sovereign immunity barred plaintiff's third claim but that his first two claims

might be permissible under either 28 U.S.C. § 2410(a)(1), which provides for a quiet title action against the United States, or the Federal Taxpayer Bill of Rights, 26 U.S.C. § 7433, which provides for a civil cause of action for money damages for claims that an officer of the IRS intentionally or negligently failed to comply with the federal tax code or regulations promulgated thereunder. However, I concluded that plaintiff's second claim is barred by the Anti-Injunction Act and accordingly, dismissed both the second and third claims for lack of jurisdiction. In addition, I provided plaintiff with a memo outlining the two methods he could use to serve his complaint on defendant: serving defendant with summons formally or seeking a waiver of service of summons.

On May 5, 2005, plaintiff filed certified mail receipts addressed to Mark Everson, the Commissioner of the Internal Revenue Service, Alberto Gonzales, the United States Attorney General, and Stephen Sinnott, the acting United States Attorney in this district. I assume that plaintiff mailed a copy of his complaint and a waiver of service form. On May 6, he submitted to the court four copies of an amended complaint with formal service of summons forms attached to three. The amended complaint appears to contain virtually the same set of allegations that plaintiff made in his original complaint, however, the caption names Mark Everson as defendant in his individual rather than official capacity.

Fed. R. Civ. P. 15 (a) provides that “[a] party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served.” Because defendant

had not yet served an answer at the time plaintiff filed his amended complaint, plaintiff does not need to obtain permission from the court to amend. In addition, he does not need to serve the defendant with another summons. However, he does need to mail his amended complaint to defendant directly. In fact, plaintiff must send defendant a copy of *every* paper or document that he files with the court. Once plaintiff learns the name of the lawyer that will be representing the defendant, he should serve the lawyer directly rather than defendant. In the future, the court will disregard documents plaintiff submits that do not show on the court's copy that plaintiff has sent a copy to defendant or to defendant's attorney. Accordingly, I am returning to plaintiff all but one of the copies of his amended complaint so that he can mail a copy to defendant by regular mail. As a courtesy, plaintiff should also send a copy to acting United States Attorney Stephen Sinnott, at 660 W. Washington Ave, Madison, WI, 53703.

Before plaintiff serves his amended complaint on the defendant, he should consider the potentially serious ramifications of suing Mark Everson in his personal rather than official capacity. I suspect that plaintiff is under the impression that suing Everson in his personal capacity is an easy way to get around sovereign immunity. Although Mark Everson is not entitled to sovereign immunity as a private individual, plaintiff almost certainly has no claim against Everson in his individual capacity. Private citizens can sue federal officials in their individual capacities for constitutional violations under Bivens v. Six Unknown

Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). However, only plaintiff's third claim even conceivably relates to his constitutional rights. Even assuming that plaintiff's third claim invokes his constitutional right to due process, liability under Bivens must be based on an individual defendant's personal involvement in the deprivation of plaintiff's constitutional rights. Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994). It is extremely improbable that the Commissioner of the Internal Revenue Service had a personal hand in filing a lien against plaintiff's property without providing him a hearing at which he could protest his tax liability.

Although I will not decide now whether plaintiff has stated a viable individual capacity claim, he should know that because of his decision to sue Everson in his individual rather than official capacity, it is unlikely that his claims would withstand a motion to dismiss for failure to state a claim on which relief can be granted should defendant file such a motion. If he has the means, plaintiff might consider conferring with an attorney about the wisdom of this tactic. If plaintiff determines that he wishes to withdraw his amended complaint, he should file a motion to this effect. I would be inclined to grant such a motion so long as it is filed in a timely manner.

ORDER

IT IS ORDERED that the three additional copies of the amended complaint

submitted to the court by plaintiff Dennis Jacobson are to be returned to him for service on defendant, with a courtesy copy sent to acting United States Attorney Stephen Sinnott unless plaintiff decides to move to withdraw the amended complaint, in which case he should act promptly.

Entered this 31st day of May, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge