

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

REAL PROPERTY LOCATED AT
7199 GRANT ROAD, ARPIN,
WOOD COUNTY, WISCONSIN, WITH
ALL APPURTENANCES AND IMPROVEMENTS
THEREON,

Defendant.

ORDER

05-C-0731-C

On August 15, 2006, this court denied claimant Allen L. Oleson's motion for appointment of counsel to represent him in this proceeding for forfeiture of his residence. Now the United States Attorney has written to the court to suggest that 18 U.S.C. § 983(b)(2)(A) provides for the appointment of counsel for an indigent claimant who is contesting forfeiture of his primary residence. In the light of this letter, I will reconsider the August 15 order denying claimant's motion for appointment of counsel.

Section 983(b)(2)(A) reads as follows:

If a person with standing to contest the forfeiture of property in a judicial civil

forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the property subject to forfeiture is real property that is being used by the person as a primary residence, the court, at the request of the person, shall insure that the person is represented by an attorney for the Legal Services Corporation with respect to the claim.

The statute goes on to provide that the Legal Services Corporation shall submit a statement of reasonable attorney fees and costs to the court, 18 U.S.C. § 983(b)(2)(B)(i), and that the court shall enter a judgment in favor of the corporation for its fees and costs and “treat the judgment as payable under section 2465 of title 28 of the United States Code, regardless of the outcome of the case.” § 983(b)(2)(B)(ii). The purpose of the statute is straightforward; obviously, Congress wanted to provide some protections to indigent persons facing the loss of their primary residences. Its working is a lot less straightforward. Does it require appointment in every case, regardless of the apparent merit or lack of merit of the claimant’s defense? The statute’s wording and the use of “shall” suggests that it does, but the legislative history is to the contrary.

In a hearing on the bill held in 1996, congressional representatives E.E. (Bo) Edwards III, David Smith and Richard Troberman commented that the bill provides that “a federal court *may* appoint counsel to represent an individual filing a claim in a civil forfeiture proceeding who is financially unable to obtain representation.” (Emphasis added.) Civil Asset Forfeiture Reform Act, Hearing before the House Committee on the Judiciary, 104th Cong., 2d Sess. (1996). They added that in making the determination whether to appoint

counsel, “the court shall take into account the claimant’s standing to contest the forfeiture and whether the claim appears to be made in good faith or to be frivolous.” Id.

Despite the general judicial antipathy to legislative history, I am inclined to adopt these comments, if only because they offer the most sensible reading of the legislation. It would be hard to justify appointment of counsel for a litigant whose defenses are frivolous, particularly when it is difficult to determine how such counsel is to be paid. (The statute provides for the entry of a judgment payable under 28 U.S.C. § 2465, *regardless of the outcome of the case*; § 2465 requires payment of attorney fees by the government if the claimant prevails. Does the wording of § 983(b)(2)B(ii) overrule the clear language of § 2465 so that the government is liable for the attorney fees even if the claimant loses? The provision for entry of a judgment indicates that the court itself is not liable for the fees of the losing claimant; no entry of judgment would be necessary or even appropriate if it were. This leaves the government as the only obvious suspect when it comes to paying the judgment.)

I can set aside both of these questions until claimant Oleson advises the court both that he is financially unable to retain counsel to represent him in this case and that the defendant property is his primary residence. I am enclosing a financial form to assist him in providing the information necessary to allow the court to determine his financial circumstances with more precision than was possible earlier, when his motion for appointment of counsel was denied.

Claimant Oleson should not expect to have counsel appointed to represent him simply because he is financially eligible for appointed counsel and he can show that the defendant property is his primary residence. It will still be necessary to determine whether claimant has any non-frivolous defenses, that is, whether he has any basis for showing that he is an innocent owner or that he was not conducting any illegal operations within the property. In this regard, it would be helpful if claimant were to advise the court on what grounds he thinks he can contest the government's action for forfeiture of the defendant property.

ORDER

IT IS ORDERED that claimant Allen Oleson may have until September 25, 2006, in which to file a financial affidavit, a statement under oath that the defendant property is his primary residence (if in fact it is) and any grounds he has for believing that he can contest the forfeiture of the property. Briefing on the motion for summary judgment is suspended pending a determination whether to appoint counsel to represent claimant.

Entered this 14th day of September, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge

