

RLW

FRIDAY  
FEB. 26, 1988  
9:30 A.M.  
MOTION

CIVIL ACTION NO. 87-0708-R  
SOUTHWORTH MECHANICAL CORPORATION, INC.

v.  
COMMISSIONER, INTERNAL REVENUE SERVICE  
VIRGINIA DEPARTMENT OF TAXATION  
KAT ELECTRICAL MECHANICAL CO., INC.  
GENERAL ELECTRIC COMPANY

COUNSEL:

FOR THE PLAINTIFF:

~~ANDREW J. ELLIS, JR.~~  
PAUL M. BLACK

FOR THE DEFT., COMM., I.R.S.:

G. WINGATE GRANT  
GERARD J. MENE

FOR THE DEFT., VA DEPT. OF  
TAXATION:

MARION S. COOPER

FOR DEFT., KAT ELECTRICAL  
MECHANICAL CO., INC.:

D. MALCOLM GLENN

FOR DEFT., GENERAL ELECTRIC CO.:

JAMES T. MOORE, III

BENCHMEMO: SOUTHWORTH MECHANICAL v. UNITED STATES OF AMERICA, et al., 87-0708-R; motion for summary judgment; Feb. 26

ATTORNEYS: Plaintiff: Andrew Ellis & Paul Black (Mays & Valentine)  
Defendants: Win Grant & Gerard Meade for the U.S. (Meade is special tax counsel for Dept. of Justice.)  
James Moore (Little, Parsley) for Gen. Electric  
Malcolm Glenn for KAT Electric  
Marion Cooper, Assist. A.G. for Va.

Judge, this interpleader matter is before you on cross motions for summary judgment by the United States and General Electric pursuant to Fed. R. Civ. P. 56(b). I believe you should grant the United States' motion and deny General Electric's motion.

#### Facts

Plaintiff Southworth Mechanical Corporation (SMC), KAT Electircal and General Electric completed some electrical work on the Belvidere Toll Plaza. SMC was the general contractor for the project, and owes KAT Electrical \$21,300 for services from that project.

KAT apparently filed but failed to pay unemployment and social security withholding taxes. The IRS filed a Notice of Federal Tax Lien for these taxes--\$19,894--on September 25 with the State Corporation Commission. The IRS served notices of the lien on SMC and demanded payment from the funds it holds for KAT. General Electric claims that it is entitled to \$7,347.40 that SMC holds. Additionally, KAT sued SMC for the \$21,300 in state court.

SMC filed a bill of interpleader in state court and the federal government removed the action.

United States' claim

The Government asserts that there are no genuine issues of material fact, and it is entitled to judgment as a matter of law. Under 26 U.S.C. §6321 (IRS Code 1986), a tax lien arises on all of a taxpayer's property on the date of assessment if not paid. It arises without recordation. Therefore, as of June 29 and August 10, 1987, the dates of assessment, the United States had a lien interest in the accounts receivable of KAT.

To enforce the lien, the U.S. can foreclose through a civil action, 26 U.S.C. §7403(a), or can use an administrative levy under §6332(a). The Government chose the latter in this instance. The IRS must give the holder of the taxpayer's property notice of the lien. Once the IRS gives notice, the property comes into the constructive possession of the Government. United States v. National Bank of Commerce, 472 U.S. 713, 720 (1985). If SMC had honored the levy, it would have been discharged from further obligations or liability. Because SMC refused to honor the levy, it liable to Government for its refusal. §6332(c)(1).

Next, the Government contends that its lien has priority over General Electrics claim. Once the Government filed its lien with the SCC on September 25, there are only ten other classes of liens that can defeat the IRS's lien. General Electric has not claimed that its claim falls within one of these "superpriorities" under IRS Code §6323. (Having no great fondness for the tax code, I have not pursued it further.)

### General Electric's Claim

General Electric claims there are genuine issues of material fact in dispute. It notes that KAT Electric was not incorporated until July 31, 1986. General Electric asserts that the tax levies cover the time period of June 30, 1986 to December 1986, and therefore predate KAT's incorporation by a month. Richard Texler, KAT's sole stock holder, may be liable for some of these tax liabilities, asserts General Electric.

As the Government points out, this argument fails because General Electric cannot contest the underlying tax assessment in this action. The United States has waived its sovereign immunity in this case pursuant to 28 U.S.C. §2410. This section allows the U.S. to be named in an interpleader action where the U.S. has claimed a lien in the disputed property. The Sixth Circuit has noted: "A suit under 28 U.S.C. §2410 is proper only to contest the procedural regularity of a lien; it may not be used to challenge the underlying tax liability." Pollack v. United States, 819 F.2d 144 (6th Circuit 1987).

Secondly, General Electric argues that the \$21,300 held by SMC does not belong to KAT. It contends that SMC holds the funds paid to it under the contract with the turnpike authority in trust for materialman and suppliers and those of its subcontractors. Although a mechanics lien cannot be filed against public property (the toll plaza), the court should exercise its equitable powers to impose a constructive trust upon the funds held by SMC, suggests General Electric.

In a similar dispute where the Government asserted that a tax lien was superior to various mechanics' liens, an Eastern District of Virginia court rejected the trust theory. Glen Construction Company, Inc. v. Bank of Vienna, 410 F.Supp. 402, 406 (1976). General Electric's argument rests on Va. Code §43-13, and the Virginia Supreme Court refused to find that this section imposed a trust upon the funds. Overstreet v. Commonwealth, 193 Va. 104, 67 S.E.2d 875 (1951). (Section 43-13 states that a contractor who receives payment for his work but retains the funds with intent to defraud his subcontractors is guilty of a misdemeanor.) Although the law often recognizes society's interest in protecting materialmen and laborers, elevating their claims above those of the Government would be inappropriate in this case.

The constructive trust argument is the foundation of General Electric's summary judgment motion as well. Consequently, I believe their motion for summary judgment should be DENIED. The Government's motion for summary judgment should be GRANTED. Under the applicable statutes, the IRS's tax lien arose on the date of assessment, it filed the requisite notices, and gave SMC the proper notice of levy.

SMC should be order to pay out \$19,894 which includes penalties and interest to the IRS for KAT's Employer's Annual Federal Unemployment Tax Return for the year 1986, Form 940, and Employer's Quaterly Federal Tax Return for the periods 8609 and 8612, Form 941.

That leaves about \$1,400 left in the fund to be distributed to either worthy creditors or KAT. Neither KAT nor the Virginia Department of Taxation filed motions in this matter. Therefore, General Electric's motion could be considered unopposed and the remaining funds should be issued to them. I don't believe, however, that General Electric has demonstrated that as a matter of law, they are entitled to relief.

JLW

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SOUTHWORTH MECHANICAL )  
CORPORATION )  
Plaintiff, )  
v. ) Civil Action No. 87-0708-R  
LAWRENCE E. GIBBS, )  
COMMISSIONER, INTERNAL REVENUE )  
SERVICE, et al. )  
Defendants. )

ORDER

This matter is before the Court on the United States' and General Electric Company's motions for summary judgment pursuant to Fed. R. Civ. P. 56(b).

The funds which are the subject matter of this interpleader dispute have not been paid into the registry of this Court. The Court therefore lacks jurisdiction over the res which would allow it to authoritatively settle this dispute. Consequently the Court takes the defendants' motions under advisement.

If the funds are not deposited into the registry of this Court within ten (10) business days of this order, the case will be dismissed or remanded.

Let the Clerk send a copy of this order to all counsel of record.

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DATE

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UNITED STATES DISTRICT JUDGE