

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

1:07-cv-0352

ROBERT L. SCHULZ;
WE THE PEOPLE FOUNDATION FOR
CONSTITUTIONAL EDUCATION, INC.; and
WE THE PEOPLE CONGRESS, INC.,

Defendants.

THOMAS J. McAVOY
Senior United States District Judge

DECISION and ORDER

By Decision and Order dated August 9, 2007, familiarity with which is presumed, the Court granted the motion of the United States seeking an injunction that, among other things, obligated Defendants to produce to counsel for the United States a list identifying by name, address, e-mail address, telephone number, and Social Security number, all persons and entities who have been provided Defendants' tax preparation materials, forms, and other materials containing false information and otherwise likely to cause others to violate the tax laws of the United States (hereinafter referred to as "Paragraph C" of the injunction issued on August 9, 2007). United States v. Schulz, 529 F.Supp.2d 341 (N.D.N.Y. 2007). The United States of America now moves to enforce the injunction entered in this case and to hold Defendants in contempt.

Defendants may be held in civil contempt only if the United States establishes: (1) that the order that has not been complied with was clear and unambiguous, (2) the proof of non-compliance is clear and convincing, and (3) Defendants have not been reasonably diligent and energetic in attempting to comply. Chao v. Gotham Registry, Inc., 514 F.3d 280, 291 (2d Cir. 2008); see also United States of America v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, 899 F.2d 143, 146 (2d Cir. 1990). Plaintiff need not show that Defendants' conduct was willful. Chao, 514 F.3d at 291.

Whether the Order is Clear and Unambiguous

The August 9, 2007 Order is clear and unambiguous. Defendants were, and are, obligated to provide the United States with the name, address, e-mail address, telephone number, and Social Security number of all persons and entities to whom Defendants' supplied their tax preparation materials, forms, and other materials, as discussed in the Court's prior Decision and Order. In their responsive papers, Defendants do not claim the order to be unclear or unambiguous. Accordingly, this element is satisfied.

Whether Proof of Noncompliance is Clear and Convincing

The proof of noncompliance is clear and convincing. The government maintains that it has not received the required information. Defendants do not deny the government's claim or otherwise create a triable issue of fact concerning their compliance. Accordingly, this element also has been satisfied.

Whether Defendants Have Been Reasonably Diligent and Energetic in Attempting to Comply

The last issue is whether Defendants have been reasonably diligent and energetic in attempting to comply. Defendants maintain that they are not obligated to comply because they have filed for rehearing *en banc* before the United States Court of Appeals for the Second Circuit, “no Mandate has been issued by the Clerk at the Second Circuit,” “a court of appeals’ judgment or order is not final until issuance of the Mandate,” “the obligation of the parties become fixed only when the Mandate issues,” “the court of appeals retains jurisdiction over the case until it [the mandate] issues, . . . the district court cannot proceed in interim,” Dkt. No. 51, “[t]he Second Circuit’s stay pending appeal, issued September 20, 2007, is inextricably intertwined with the appeal,” “[t]he appeal is pending,” and “[t]here is a stay pending.” Dkt. No. 53.

Defendants’ arguments are without merit. “[W]hile an appeal of an order or judgment is pending, the court retains jurisdiction to implement or enforce the order or judgment.” In re Prudential Lines, Inc., 170 B.R. 222, 243 (S.D.N.Y. 1994); Suffolk Parents of Handicapped Adults v. Pataki, 1996 WL 285423, at *2 (E.D.N.Y. 1990); C.H. Sanders Co, Inc. v. BHAP Housing Development Fund Co., Inc., 750 F. Supp. 67, 69 (E.D.N.Y. 1990). “[T]he mere pendency of an appeal does not, in itself, disturb the finality of a judgment. . . . [T]he district court has jurisdiction to act to enforce its judgment so long as the judgment has not been stayed or superceded. . . . [A] district court . . . does retain jurisdiction to enforce the judgment.” N.L.R.B. v. Cincinnati Bronze, Inc., 829 F.2d 585, 588 (6th Cir. 1987); see also In re Padilla, 222 F.3d 1184, 1190 (9th Cir. 2000) (“Absent a stay or supersedeas, the trial court also retains jurisdiction to implement or enforce the judgment or order but may not alter or

expand upon the judgment.”); In re Grand Jury Subpoena Duces Tecum, 85 F.3d 372, 375-76 (8th Cir. 1996); Nicol v. Gulf Fleet Supply Vessels, Inc., 743 F.2d 298, 299 n.2 (5th Cir. 1984). “Where . . . the district court is attempting to supervise its judgment and enforce its order through civil contempt proceedings, pendency of appeal does not deprive it of jurisdiction for these purposes.” Cincinnati Bronze, Inc., 829 F.2d at 588.

Here, on August 23, 2007, this Court denied Defendants’ motion to stay enforcement of the injunction pending appeal. By Order dated August 30, 2007, the Second Circuit Court of Appeals denied Defendants’ motion to stay the full injunction, and instead granted their motion only with respect to Paragraph C. United States v. Schulz, 517 F.3d 606, 607 n.2 (2d Cir. 2008). Thus, Paragraph C initially was stayed. On February 22, 2008, the Second Circuit Court of Appeals issued its decision affirming this Court’s August 9, 2007 Decision and Order. United States v. Schulz, 517 F.3d 606 (2d Cir. 2008). Significantly, the Second Circuit “vacate[d] the stay [it] previously imposed with respect to Paragraph C of the injunction, which directs defendants to provide to the government the names and contact information of the individuals who have received the tax materials.” The Second Circuit held that:

Requiring defendants to provide the identity and contact information of the recipients of the tax materials enables the government to monitor the defendants’ obligation under the injunction to provide a copy of the district court’s order to recipients of the tax materials. Moreover, the district court found that the defendants’ illegal actions were harming the government, which was not receiving required tax payments and was forced to expend resources to collect the unpaid taxes. Id. at 353. Requiring defendants to provide the identity and contact information of the recipients of the tax materials enables the government to monitor whether the recipients of defendants’ materials are violating the tax laws. Thus, we find no abuse of discretion with respect to the district court’s imposition of the reporting requirements in Paragraph C of the injunction.

Id. at 608.

In the concluding paragraph of its Opinion, the Second Circuit clearly and succinctly stated that “we **AFFIRM** the district court’s judgment and **VACATE** the partial stay on the court’s injunction.” Id. Accordingly, contrary to Defendants’ contention, there is no stay of Paragraph C of the Injunction and any pending appeal or motion for rehearing *en banc* does not divest this Court of jurisdiction to rule on the pending motion for contempt.

Similarly, the fact that the mandate has not yet issued is irrelevant. Just as the Second Circuit’s August 30, 2007 order granting the stay as to Paragraph C was effective on August 30 (and not only upon issuance of a mandate), the Circuit’s February 22, 2008 Order vacating the stay was effective on February 22. When the Court of Appeals wishes to stay the effective date of the its until issuance of the mandate, it does so explicitly. See e.g. United States v. Pepin, 514 F.3d 193, 209 (2d Cir. 2008) (expressly stating that “[t]he order of this Court staying the trial is vacated effective upon issuance of the mandate.”); Chase Manhattan Bank, N.A., v. Turner & Newall, PLC, 964 F.2d 159, 166 (2d Cir. 1992) (“Pending issuance of the mandate, we stay the order, effective forthwith.”); U. S. ex rel. Oliver v. Vincent, 498 F.2d 340, 346 (2d Cir. 1974) (“Effective upon the filing of the mandate the stay heretofore granted is vacated and the order of the district court is affirmed.”). There is nothing suggesting that the effectiveness of the order of the Court of Appeals depends upon issuance of the mandate. “The effect of the mandate is to bring the proceedings in a case on appeal . . . to a close and to remove it from the jurisdiction of . . . [the Court of Appeals], returning it to the forum from whence it came.” Ostrer v. United States, 584 F.2d 594 (2d Cir. 1978). Thus, the mandate has the effect of divesting the Court of Appeals of jurisdiction and returning jurisdiction to the District Court. Id. As noted, however, this Court never lost

jurisdiction to enforce its prior order. Absent indication to the contrary from the Second Circuit Court of Appeals, the issuance (or non-issuance) of the mandate is irrelevant to the effective date of its orders. Accordingly, the order vacating the stay was effective February 22, 2008, and this Court has the power to enforce the injunction.

Most significant, however, is the fact that on April 7, 2008, Defendants filed a motion with the Second Circuit Court of Appeals expressly requesting a “stay of that part of the Court’s February 22, 2008 Order which vacated the stay the Court previously imposed with respect to Paragraph C of the District Court’s Injunction. . . .” By Order dated April 24, 2008, the Second Circuit denied that motion. Defendants, therefore, are on notice that the Court of Appeals would not stay its February 22, 2008 Order.¹ The filing of a petition for rehearing before the Circuit Court of Appeals did not serve to stay the February 22, 2008 Order.

For the foregoing reasons, the Court finds that Defendants have no justifiable basis for failing to comply with Paragraph C and that they have not been reasonably diligent and energetic in attempting to comply. To the contrary, Defendants have pointed their efforts toward non-compliance. The Court, therefore, finds that the United States has satisfied its burden and that Defendants are in contempt.

“Contempt sanctions may serve either or both of two purposes: ‘to coerce the contemnor into future compliance with the court’s order or to compensate the complainant for losses resulting from the contemnor’s past noncompliance.’” International B’hood of

¹ The Court recognizes that the motion to stay was denied only four days before the date of this Order.

Teamsters, 899 F.2d at 149, (quoting New York State National Organ. for Women v. Terry, 886 F.2d 1339, 1352 (2d Cir. 1989)).

Compensatory sanctions should reimburse the injured party for its actual damages. . . .When imposing coercive sanctions, a court should consider (1) the character and magnitude of the harm threatened by the continued contumacy, (2) the probable effectiveness of the sanction in bringing about compliance, and (3) the contemnor's financial resources and the consequent seriousness of the sanction's burden. . . . The ultimate consideration is whether the coercive sanction—here, a fine—is reasonable in relation to the facts. That determination is left to the informed discretion of the district court.

Terry, 886 F.2d at 1353.

At this point, coercive contempt sanctions are warranted. Considering: (1) Defendants' failure to comply since the Second Circuit's February 22, 2008 decision; (2) the Second Circuit's April 24, 2008 denial of Defendants' motion to stay enforcement of Paragraph C; (3) Schulz's September 4, 2007 declaration wherein he states that he would be in a position to comply with most of the requirements of Paragraph C by September 6, 2007, thereby demonstrating that he should be in a position to quickly comply with Paragraph C; (4) the gravity of the harm caused by non-compliance, as set forth in the Court's August 9, 2007 Decision and Order and noted by the Second Circuit in its opinion dated February 22, 2008, including exposing persons and entities to criminal liability for failure to comply with the tax laws, causing insufficient payments to be made to the United States Treasury, and causing the United States to continue to expend time and resources in investigating Defendants and collecting taxes;² (5) the lack of any information concerning Defendants' financial resources;

² As noted in the August 9, 2007 Decision and Order, although the exact cost of Defendants' conduct appears to be unknown, the IRS estimates that it spends \$1,607 in processing substitutes for returns for non-filers and, therefore, "[t]he estimated cost to the U.S. Treasury attributable to filing substitutes for returns for the 2991 unfiled returns [attributable to Defendants' customers] equals
(continued...)

and (6) the fact that only a severe sanction is likely to encourage Defendants to come into compliance, the Court finds that coercive sanctions in the amount of \$2,000.00 per day,³ plus costs incurred by the United States in filing the instant motion are appropriate.

Accordingly, it is hereby ORDERED that:

1. Defendants are in contempt;
2. Unless Defendants fully comply with Paragraph C of this Court's August 9, 2007 Decision and Order on or before 4:00 p.m. on Monday, May 5, 2008, they will be sanctioned in the amount of \$2,000 per day, retroactive to the date of this Order. Stated otherwise, the Court is affording Defendants a grace period of seven days from today's date to comply with Paragraph C without being subjected to a \$2,000 per day sanction. If, however, Defendants do not comply with Paragraph C by 4:00 p.m. on Monday, May 5, 2008, sanctions will accrue at the amount of \$2,000 per day commencing on the date of this Order;
3. Regardless of the date Defendants comply with Paragraph C, they shall pay to the United States its costs incurred in connection with filing and prosecuting the instant motion. The United States shall promptly file an affidavit detailing its costs in this regard;
4. In the event Defendants fail to comply with Paragraph C on or before 4:00 p.m. on May 12, 2008, the United States may move on an expedited basis seeking

²(...continued)
\$4,806,537[.]”

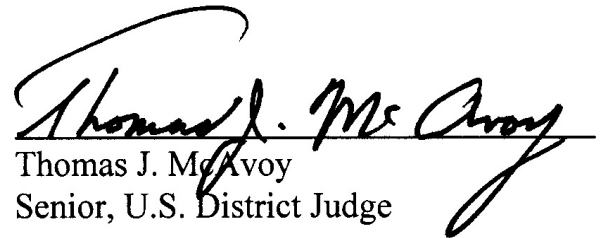
³ Defendants have not specifically opposed the amount of sanctions requested by the United States.

additional coercive sanctions, compensatory contempt sanctions, and coercive incarceration;

5. On or before 4:00 p.m. on Monday, May 5, 2008, Defendants shall file with the Court, and serve on the United States, a declaration describing their compliance with Paragraph C.

IT IS SO ORDERED.

Dated: April 28, 2008


Thomas J. McAvoy
Senior, U.S. District Judge