

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number: 21-21199-CIV-MARTINEZ

UNITED STATES OF AMERICA,

Plaintiff,

v.

GERALD VITO, JAMES ELEBY, and
GERALD VITO LLC d/b/a
INCOME TAX SERVICES,

Defendants.

**ORDER FINDING DEFENDANT GERALD VITO, DEFENDANT JAMES ELEBY,
AND KWAME THOMAS IN CONTEMPT**

THIS CAUSE comes before the Court following an Order to Show Cause as to why Defendant Gerald Vito, Defendant James Eleby, and Kwame Thomas should not be held in contempt for failure to comply with the judgment and permanent injunction entered by the Court on December 27, 2021, (ECF No. 12, the “Injunction”). (ECF No. 68). On September 18, 2024, the Court held a hearing on this matter, at which Defendants and Thomas appeared. (ECF No. 73). The Court finds Defendant Gerald Vito, Defendant James Eleby, and Kwame Thomas in **CONTEMPT** for failure to comply with this Court’s Orders as further explained herein.

BACKGROUND

On December 27, 2021, the Court ordered that Defendants were “**PERMANENTLY ENJOINED**” from directly or indirectly “preparing, assisting in the preparation of, or directing the preparation of federal tax returns, amended returns, or other tax-related documents and forms, including any electronically submitted tax returns or tax-related documents, from any entity or person other than themselves.” (ECF No. 12 ¶ 2).

On March 22, 2024, following an investigation of Defendants' post-injunction conduct, the United States moved the Court for an order to show cause as to why Defendants and Thomas should not be held in civil contempt for violating the Injunction. (ECF No. 63). In its motion, the United States alleged that Defendants violated the Injunction by continuing to prepare tax returns and working alongside others to prepare returns for their customers. (*Id.* at 1). The United States further alleged that Thomas knowingly violated the permanent injunction by working alongside Defendant Eleby filing tax returns. (*Id.* at 1–2). As a sanction for these violations, the United States asked the Court to require Defendants to (a) disgorge all fees earned from tax returns they directly or indirectly prepared or assisted in preparing after the injunction, (b) identify all taxpayers for whom they prepared returns after December 27, 2021, (c) produce copies of the tax returns prepared for those taxpayers, as well as all related records, (d) notify all such customers of the injunction, and (e) immediately and permanently vacate the premises at which they prepare tax returns. (*Id.* at 2). As a sanction, the United States asked the Court to require Thomas to disgorge all ill-gotten fees he earned from preparing tax returns in violation of the Injunction since July 7, 2022, the date Thomas learned of the Injunction. (*Id.*)

The Court ordered Defendants and Thomas to show cause as to why they should not be held in contempt. (ECF No. 68). Defendants Gerald Vito and James Eleby did not respond. Thomas responded and argued that the Injunction was vague and ambiguous and, although he ultimately complied, Thomas was unable to comply with the Injunction because he did not read the Injunction in full. (*See* ECF No. 71).

The Court held a hearing on this matter on September 18, 2024. (ECF No. 73). The United States presented eight witnesses and twenty-one Exhibits to prove that Defendants and Thomas violated the Injunction. (*Id.*). Defendant Gerald Vito did not present any evidence. (*Id.*). Defendant

James Eleby called himself as a witness but did not present evidence of compliance. (*Id.*). Kwame Thomas called himself as a witness but did not present evidence of compliance. (*Id.*).

LEGAL STANDARD

“Courts have the inherent power to enforce compliance with their lawful orders by the exercise of contempt powers.” *Campos v. Chavam Enters., Inc.*, No. 15-14370, 2021 WL 1178548, at *2 (S.D. Fla. Feb. 16, 2021) (citing *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1301 (11th Cir. 1991)), *report and recommendation adopted*, 2021 WL 1177485 (S.D. Fla. Mar. 29, 2021). On a contempt motion, the movant bears the initial burden of proving, by clear and convincing evidence, the defendant’s noncompliance. *Ga. Power Co. v. NLRB*, 484 F.3d 1288, 1291 (11th Cir. 2007) This requires proving that “(1) the allegedly violated order was valid and lawful; (2) the order was clear and unambiguous; and (3) the alleged violator had the ability to comply with the order.” *Id.* “To meet the initial burden for a finding of civil contempt, a moving party need only show that defendant failed to comply with the court’s order.” *Van De Velde NV v. Felder*, No. 15-24096, 2017 WL 8895345, at *2 (S.D. Fla. May 25, 2017), *report and recommendation adopted*, 2017 WL 8895340 (S.D. Fla. June 16, 2017) (citing *United States v. Rylander*, 460 U.S. 752, 755 (1983)).

“[T]o avoid contempt, a defendant must show that he or she either did not violate the court order as alleged or that she was ‘excused’ from complying with such order.” *Id.* (citing *Mercer v. Mitchell*, 908 F.2d 763, 768 (11th Cir. 1990)). “To succeed on this defense, however, the respondent must go beyond a mere assertion of inability and satisfy his burden of production on the point by introducing evidence in support of his claim.” *United States v. Hayes*, 722 F.2d 723, 725 (11th Cir. 1984). The Eleventh Circuit “construe[s] this requirement strictly.” *Combs v. Ryan’s Coal Co., Inc.*, 785 F.2d 970, 984 (11th Cir. 1986). Even if the efforts made by a defendant are “substantial,

diligent, or in good faith” the fact that a defendant did not make “all reasonable efforts” to comply with the order, establishes that the defendant has failed to rebut the showing of contempt. *Hayes*, 722 F.2d at 726 (internal quotation marks omitted).

DISCUSSION

1. Defendant Gerald Vito

The United States presented deposition testimony and tax returns of several of Vito’s clients, along with other evidence to prove Vito’s failure to comply with the Injunction. (*See* ECF No. 63). Vito did not respond to the United States’ motion and did not respond to the Court’s order requiring him to show cause as to why he should not be held in contempt. The United States presented additional evidence of Vito’s failure to comply with the Injunction at the hearing on this matter. (*See* ECF Nos. 73 and 76). Vito did not present any contrary evidence and did not provide a closing statement to the Court. Based on the evidence presented by the United States and Vito’s failure to present any evidence to the contrary, the Court finds that Defendant Gerald Vito violated the Injunction. For these violations, the Court finds Defendant Gerald Vito in civil contempt of the Injunction, and that compensatory sanctions are warranted.

2. Defendant James Eleby

The United States presented deposition testimony and tax returns of Eleby’s clients, along with other evidence to prove Eleby’s failure to comply with the Injunction. (*See* ECF No. 63). Eleby did not respond to the United States’ motion and did not respond to this Court’s order requiring him to show cause as to why he should not be held in contempt. The United States presented additional evidence of Eleby’s failure to comply with the Injunction at the hearing, including testimony of a private investigator and an IRS revenue agent. (*See* ECF Nos. 73 and 76). Eleby testified that he did not have a business relationship with K&J Services One, LLC. However,

bank records, text messages, and other evidence presented by the United States proves otherwise. (*See id.*). Eleby failed to present any evidence of his compliance with the Injunction and did not provide a closing statement to the Court.

Based on the evidence presented by the United States and Eleby's failure to present any evidence to the contrary, the Court finds that Defendant James Eleby violated the Injunction. For these violations, the Court finds Defendant James Eleby in civil contempt of the Injunction, and that compensatory sanctions are warranted.

3. Nonparty Contemnor Kwame Thomas

The United States presented deposition testimony, tax returns prepared for Defendant Eleby's former clients, bank records, and other evidence to prove that Thomas acted in concert with Eleby to violate the Injunction. (*See* ECF No. 63). Notably, this evidence includes Defendant Eleby's admission that he acts as a "payroll" service for K&J Services One, LLC (ECF No. 63-7 at 26:14–28:8), a company that Eleby admits he created for Thomas after the Injunction was entered (ECF No. 63-7 at 22:8–22:21) to prepare returns for customers. Despite Thomas's contradictory testimony, Eleby admitted at deposition that he helped Thomas create his new entity, K&J Service One, LLC. (ECF No. 63-7 at 6, 21:17–22:21). In response, Thomas argued that the Court did not have jurisdiction over him and his status as a nonparty contemnor violates his right to due process. (*See* ECF No. 66). The United States presented additional evidence of Thomas's failure to comply with the Injunction at the hearing on this matter. (*See* ECF Nos. 73 and 76). In his closing statement, Thomas argued that the Injunction was vague and ambiguous, and that he ultimately complied with the Injunction. (ECF No. 75). However, the evidence presented by the United States clearly proved that Thomas did not comply with the Injunction. (*See* ECF No. 76). Thomas did not meet his burden, as he must prove that he made "all reasonable efforts" to comply

with the Injunction. *See Hayes*, 722 F.2d at 726. Notably, Thomas did not provide one witness to testify that he—as opposed to Eleby—prepared the tax returns. Nor did he offer any other evidence proving his compliance. The evidence is clear and convincing that Thomas acted as a strawman so that Defendant Eleby could continue preparing returns in violation of the injunction.

Based on the parties' arguments during the hearing, the evidence submitted by the United States, and Thomas's failure to present evidence to the contrary, the Court finds that Kwame Thomas violated the Injunction by working alongside Eleby filing tax returns. For this violation, the Court finds Kwame Thomas in civil contempt of the Injunction, and that compensatory sanctions are warranted.

CONCLUSION

For the reasons stated herein, it is **ORDERED AND ADJUDGED** that:

1. Defendant Gerald Vito and Defendant James Eleby are hereby held in **CONTEMPT** for violating the judgment and permanent injunction entered by the Court on December 27, 2021.
2. Defendant Gerald Vito is ordered to disgorge **\$514,481.95** as a reasonable approximation of the ill-gotten tax return preparation fees obtained in violation of the Injunction.
3. Defendant James Eleby is ordered to disgorge **\$272,700.46** as a reasonable approximation of the ill-gotten tax return preparation fees obtained in violation of the Injunction.
4. Defendant Gerald Vito and Defendant James Eleby shall disclose to the government the identity of all taxpayers for whom they prepared an income tax return for after December 27, 2021.
5. Defendant Gerald Vito and Defendant James Eleby shall produce copies of the tax returns prepared for those taxpayers, as well as any related records.

6. Defendant Gerald Vito and Defendant James Eleby shall notify all such customers of the Injunction and confirm their compliance by filing a declaration or affidavit so attesting.

7. Defendant Gerald Vito and Defendant James Eleby shall immediately and permanently vacate the premises at which they prepare tax returns.

8. Defendant Gerald Vito and Defendant James Eleby are warned that further refusal to comply with this Order and/or the Injunction may result in incarceration. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994) (confinement until compliance appropriate as civil contempt sanction); *S.E.C. v. Dunlop*, 253 F.3d 768, 771 (4th Cir. 2001) (incarceration as civil contempt sanction was within discretion of district court.).

9. Nonparty Contemnor Kwame Thomas and Defendant James Eleby are jointly and severally liable and ordered to disgorge **\$201,607.15** as a reasonable approximation of the ill-gotten tax return preparation fees obtained in violation of the Injunction in 2023.

10. The Court retains jurisdiction over all matters arising from or related to this Order.

11. The Injunction, (ECF No. 12), shall remain in effect.

DONE AND ORDERED in Chambers at Miami, Florida, this 22 day of October, 2024.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies furnished to:
All counsel of record
Gerald Vito, *pro se*
James Eleby, *pro se*
Counsel for Kwame Thomas