In the United States Court of Federal Claims

No. 10-192T

(Filed: June 13, 2013)

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SALEM FINANCIAL, INC.,	*
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Plaintiff,	*
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v.	*
	*
UNITED STATES,	*
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Defendant.	*
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ORDER REGARDING
TESTIMONY OF RAYMOND J. RUBLE

This case involves the determination of the appropriate tax treatment of a complex transaction known as STARS, which stands for "Structured Trust Advantaged Repackaged Securities." The Court conducted a four-week trial that concluded on April 2, 2013, and the parties presently are engaged in post-trial briefing. On May 9, 2013, Plaintiff filed a motion to reopen the trial record to obtain the substantive testimony of Mr. Raymond J. Ruble. Defendant opposed this motion on May 23, 2013 and Plaintiff filed a reply on June 10, 2013. Also at issue is Plaintiff's February 16, 2013 motion in limine to preclude Defendant from seeking an adverse inference due to Mr. Ruble's assertion of his Fifth Amendment privilege not to testify during his deposition. Defendant opposed that motion on March 7, 2013, and Plaintiff replied on March 20, 2013, but the Court deferred ruling on the adverse inference question until after trial.

Based upon evidence received at trial, the Court is aware that Mr. Ruble formerly was a partner in the law firm of Sidley, Austin, Brown & Wood LLP ("Sidley Austin") and oversaw the preparation of the law firm's tax opinion to BB&T Bank regarding the STARS transaction. Mr. Ruble later was charged and convicted of federal tax evasion for his participation in creating and promoting unlawful tax shelters (although not the STARS transaction), and he currently is incarcerated in a federal penitentiary in Lewisburg, Pennsylvania. By leave of the Court under Rule 30(a)(2)(B), the Government took his deposition in this case on December 12, 2012 at the Lewisburg penitentiary, and

in response to every question except one asking for his name, Mr. Ruble asserted his Fifth Amendment right not to testify. Plaintiff asserts in its motion to reopen that, as of April 2013, a ten-year statute of limitations has run as to any additional charges that could be brought against Mr. Ruble, and that he might now agree to provide substantive testimony. Plaintiff proposes that the Court authorize a procedure under which Mr. Ruble would provide written answers to the questions posed to him at his deposition.

Defendant opposes Plaintiff's motion, contending that Mr. Ruble may not agree with Plaintiff's view of the statute of limitations issue, and may still decide to assert his Fifth Amendment right not to testify. Even if Mr. Ruble does agree to testify, Defendant states that there would be little benefit from his crafting written answers to deposition questions, presumably with the aid of counsel. Defendant argues that the Court already has an ample trial record with testimony and relevant documents of the complete STARS transaction, and that Mr. Ruble at this stage could not add anything meaningful to assist the Court's resolution of the case. In Defendant's assessment, Mr. Ruble's testimony either would be cumulative to the testimony of other witnesses that Plaintiff has called, or would be helpful only to Defendant if he admitted wrongdoing in creating the STARS transaction.

With this introduction, the Court will address below both Plaintiff's motion to reopen the trial record, and Plaintiff's motion in limine to preclude any adverse inference resulting from Mr. Ruble's assertion of the Fifth Amendment privilege. The Court deems oral argument unnecessary.

I. Motion to Reopen the Trial Record

Defendant rightly observes that the Court's determination whether to reopen the record to admit further evidence rests within the sound discretion of the trial judge. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331 (1971). In considering whether to reopen, "fairness is the key criterion," but the Court specifically should consider "the probative value of the evidence sought to be introduced, the proponent's explanation for failing to offer the evidence earlier, and the likelihood of undue prejudice." Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148, 1160 (1st Cir. 1996); see also Rivera-Flores v. Puerto Rico Tel. Co., 64 F.3d 742, 746 (1st Cir. 1995) (same).

Regarding Plaintiff's contention that a ten-year statute of limitations has now run, it is unclear whether Mr. Ruble and his counsel would see the statute of limitations issue in the same way as Plaintiff sees it. Without some express grant of immunity, a person in Mr. Ruble's position might well decide that a safer route is to continue assertion of the Fifth Amendment privilege. Plaintiff states that the Government should offer immunity to Mr. Ruble to obtain his testimony, but nothing requires the United States to take that step. If the Court were to allow time for Mr. Ruble to consider all of his options, the current post-trial briefing process would need to be interrupted, and the outcome may

well be the same as it was on December 12, 2012 for Mr. Ruble's deposition. The use of time for this exercise is not an attractive option to the Court.

Even if Mr. Ruble agreed to testify, the Court does not see a significant benefit in having Mr. Ruble provide written answers to deposition questions already posed to him on December 12, 2012. In all likelihood, Mr. Ruble would carefully craft his written answers with the aid of his counsel. This procedure does not appear to be especially helpful. See Zito v. Leasecomm Corp., 233 F.R.D. 395, 397 (S.D.N.Y. 2006) ("Written questions are rarely an adequate substitute for oral depositions both because it is difficult to pose follow-up questions and because the involvement of counsel in the drafting process prevents the spontaneity of direct interrogation."). Moreover, Mr. Ruble either would confirm the propriety of the STARS transaction, in which case his testimony would be cumulative to the testimony of other witnesses called by Plaintiff, or he would admit wrongdoing in creating the STARS transaction, in which case his testimony would be helpful to Defendant. The fact that Defendant does not particularly want or need Mr. Ruble's testimony at this stage is telling. Def.'s Opp. Br. 4 (expressing skepticism about the reliability of Mr. Ruble's possible testimony, noting that "[h]e is, after all, a convicted felon because he promoted tax shelters.").

Further, the Court notes the manner in which Plaintiff handled the presentation of Sidley Austin witnesses at trial. Plaintiff included four Sidley Austin witnesses on its witness list, Messrs. Craig Chapman, Thomas Humphreys, Graeme Harrower, and Anthony Tuths. Mr. Chapman, the engagement partner for BB&T Bank, testified for nearly a day, and provided extensive testimony about Sidley Austin's involvement in the STARS transaction. Plaintiff offered brief deposition excerpts for Mr. Harrower, who resides in England, but did not call Mr. Humphreys or Mr. Tuths to testify. Plaintiff's counsel must have concluded that the full Sidley Austin evidence had been presented, and that Mr. Humphreys and Mr. Tuths were not needed to provide additional law firm-based testimony.

Considering all of the relevant factors, the Court does not hold Plaintiff at fault for failing to offer this evidence sooner. However, the Court questions the probative value of Mr. Ruble's testimony at this late stage, and does not see any undue prejudice to either party from the lack of Mr. Ruble's testimony. Blinzler, 81 F.3d at 1160. Accordingly, the Court DENIES Plaintiff's motion to reopen the trial record.

II. Request for Adverse Inference

In determining whether to apply an adverse inference against Plaintiff due to Mr. Ruble's refusal to testify, the leading authority is LiButti v. United States, 107 F.3d 110 (2d Cir. 1997), aff'd in part, rev'd in part on other grounds, 178 F.3d 114 (2d Cir. 1999). In that case, the court focused on the question of whether the invocation of the privilege was motivated by a desire to protect the party, or was purely for personal reasons. The

court established four criteria in analyzing why a non-party witness would refuse to testify: (1) the nature of the relevant relationships; (2) the degree of control of the party over the non-party witness; (3) the compatibility of the interests of the party and the non-party witness in the outcome of the litigation; and (4) the role of the non-party witness in the litigation. Id. at 123-24.

Examining these factors here, Mr. Ruble was never an officer or employee of BB&T Bank. Plaintiff's only relationship with Mr. Ruble was through the Sidley Austin law firm in 2002 and 2003, when Plaintiff obtained Mr. Ruble's professional services in connection with the STARS transaction. Mr. Ruble was instrumental, along with other Sidley Austin lawyers, in preparing a tax opinion letter on which Plaintiff relies in defending against possible IRS penalties from the STARS transaction. The BB&T relationship with Mr. Ruble ended in 2003, and Plaintiff states that it has no potential for resuming. Since 2003, Mr. Ruble has been convicted, disbarred, and is unlikely to practice law again when he is released from prison.

Plaintiff does not control Mr. Ruble's testimony. Plaintiff simply engaged Mr. Ruble's law firm to advise and provide an opinion on a proposed financing transaction. Plaintiff has no ability to control or guide Mr. Ruble's testimony in response to questioning in this litigation. Mr. Ruble's exercise of his Fifth Amendment privilege does not enhance any interest of Plaintiff in this case, and must be regarded as advancing his own unrelated personal interest. Insofar as the Court can determine, Mr. Ruble has no interest or incentive to affect the outcome of this litigation. Mr. Ruble presumably would not assert the Fifth Amendment privilege for the purpose of either bolstering or detracting from Plaintiff's case. Mr. Ruble seemingly has no reason to testify at all, as his professional reputation and legal career have been irreparably damaged.

Finally, the Court does not regard Mr. Ruble as a key figure in this litigation, particularly in light of all the other evidence that the parties have presented. Other Sidley Austin lawyers were involved in the tax opinion preparation, and one of them, Mr. Chapman, testified extensively at trial. Many of the key persons from other organizations who interacted with Mr. Ruble also have testified. The Court has many documents in evidence involving Mr. Ruble. Given all of these circumstances, application of the LiButti factors does not lead to a finding of an adverse inference against Plaintiff. The record overwhelmingly indicates that Mr. Ruble's assertion of the Fifth Amendment privilege was for personal reasons, not because of a desire to protect Plaintiff. Accordingly, Plaintiff's motion to preclude the application of an adverse inference is GRANTED.

IT IS SO ORDERED.

s/Thomas C. Wheeler
THOMAS C. WHEELER
Judge