

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No.: WMN 05 CV 1297
)	
JOHN BAPTIST KOTMAIR, et al.,)	
)	
Defendants.)	

**MEMORANDUM FOR THE UNITED STATES OPPOSING DEFENDANTS’ MOTION
TO EXTEND OR REINSTITUTE STAY PENDING APPEAL**

For the reasons set forth below, the United States opposes Defendants’ motion to extend or reinstitute this Court’s stay of the enforcement of the permanent injunction. This Court is without jurisdiction or authority to grant such a stay, and even if it had jurisdiction or authority, the circumstances in this case do not warrant any further stay of the injunction’s enforcement.

BACKGROUND

This Court entered an Order of Permanent Injunction against Defendants on November 29, 2006 to stop their “fraudulent promotion” of tax schemes based on legal theories that have “been consistently rejected by the courts.” (Dkt. No. 70). Subsequently, Defendants moved to stay enforcement of the injunction while Defendants pursued an appeal (Dkt No. 78). Although the Court said it was confident that the United States “is unquestionably entitled to judgment,” the Court was less sure “[a]s to the precise permissible scope of the injunctive relief.” (Dkt. No. 83). Accordingly, this Court granted Defendants’ motion on February 22, 2007 (Dkt. No. 83), and Defendants took an appeal to the Fourth Circuit.

On appeal, the Fourth Circuit evaluated this Court's "orders granting summary judgment in favor of the United States and issuing a permanent injunction against them based on their activities in promoting a tax evasion scheme, and denying their motions for a new trial and for modification of the injunction." United States v. Kotmair, No. 07-1156, slip op. at 2 (4th Cir. July 26, 2007). In its per curiam opinion, the Fourth Circuit found no reversible error and affirmed this Court's judgment without alteration. Thereafter, Defendants moved the Fourth Circuit for a rehearing en banc and also moved the court to stay the issuance of its mandate. The Fourth Circuit denied both motions, id., slip op. (Oct. 1, 2007); id. slip op. (Nov. 30, 2007), and issued its mandate to this Court on November 30, 2007 (Dkt. No. 91). Defendants now move this Court to stay enforcement of the permanent injunction while they petition the Supreme Court for certiorari.

ARGUMENT

This Court should not grant Defendants' motion for two reasons. First, this Court lacks jurisdiction or authority to stay its judgment in light of the Fourth Circuit's mandate. Second, even if this Court possessed the authority or the jurisdiction to grant another stay of the injunction, the circumstances no longer warrant protecting the Defendants from this Court's judgment.

I. This Court is without power to extend or reinstate the stay.

This Court lacks jurisdiction or authority to grant the stay requested for three reasons. First, the Fourth Circuit in issuing its mandate deprived this Court of jurisdiction to stay enforcement of the injunctive relief affirmed on appeal. Second, by statute, this Court is without authority to grant a further stay of the injunction; only the Fourth Circuit or the Supreme Court

may now grant the relief Defendants seek. Third, the mandate rule precludes Defendants from challenging in this Court an issue the Fourth Circuit has already resolved in this litigation, including whether injunctive relief should be stayed pending an appeal to the Supreme Court.

A. The Fourth Circuit's mandate has deprived this Court of jurisdiction to stay the relief affirmed on appeal

Generally, a district court's jurisdiction to alter its judgment terminates upon an appeal to a higher court. See Griggs v. Provident Cons. Discount Co., 459 U.S. 56, 58 (1982) (“The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”). Rule 62(c) of the Federal Rules of Civil Procedure creates an exception and allows a district court to “suspend, modify, restore or grant an injunction” in a case previously before that court while an appeal of the court's decision in that case is pending. Fed. R. Civ. P. 62(c).

This extension of the district court's jurisdiction is limited in duration, however, and ends upon the court of appeals issuing its mandate. Rakovich v. Wade, 834 F.2d 673, 674 (7th Cir. 1987) (“[T]he district court's power to grant a stay of its judgment pending appeal . . . is vested in the district court by virtue of its original jurisdiction over the case and continues to reside in the district court until such time as the court of appeals issues its mandate”); Gander v. FMC Corp., 733 F. Supp. 1346, 1346 (E.D. Mo. 1990). In a case with a nearly identical procedural posture, the district court found that following the court of appeals' affirmance and mandate, the stay the district court had granted for the pendency of the appeal expired, and the district court recovered jurisdiction sufficient only to enforce the judgment affirmed on appeal. Brinkman v. Dep't of Corr. of State of Kan., 857 F. Supp. 775, 777 (D. Kan. 1994) (“With the issuance of the

mandate, the prior stay dissolved and this court regained jurisdiction of the case for the purpose of enforcing the judgment.”); see also, Gander, 733 F. Supp. at 1346. Thus, the stay this Court entered to allow Defendants to appeal to the Fourth Circuit has expired, and this Court has jurisdiction of this case only to give force to the judgment previously granted and affirmed. Accordingly, this Court should find it is without authority to grant Defendants’ motion.

B. 28 U.S.C. § 2101(f) deprives this Court of authority to grant a stay.

By statute, Congress has deprived this Court of the authority to stay injunctive relief pending an appeal to the Supreme Court. 28 U.S.C. § 2101(f) (2006). This statute provides that parties appealing “a final judgment or decree” to the Supreme Court may seek a stay of that judgment or decree while the appeal is pending. 28 U.S.C. § 2101(f). This relief may be granted, however, “by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court.” Id. Although the statute does not facially deprive the district court of authority to grant a stay pending appeal to the Supreme Court, “the great weight of recent, reasoned authority has concluded that § 2101(f) does not permit a district court to exercise jurisdiction to stay a circuit court’s final judgment pending filing or resolution of a *certiorari* petition.” United States v. Lentz, 352 F. Supp. 2d 718, 726 (E.D. Va. 2005). As the Lentz court suggested, numerous courts have found that § 2101(f) does not allow a district court to stay judgment pending appeal to the Supreme Court. See, e.g., Harris v. City of Virginia Beach, 923 F. Supp. 869, 872-73 (E.D. Va. 1996), rev’d on other grounds, 110 F.3d 59 (4th Cir. 1997); Hovater v. Equifax Servs. Inc., 699 F. Supp. 392, 393 (N.D. Ala. 1987); Kozman v. Trans World Airlines, Inc., 145 F. Supp. 140, 141 (S.D.N.Y. 1956) (“The language in both the statute and Supreme Court rule which govern applications of this nature indicates that the Court of Appeals is the

forum in which relief should be sought, not the district court.”); see also, Lentz, 352 F. Supp.2d at 726 n.17 (gathering cases). Accordingly, this Court should find it lacks authority to grant the Defendants’ motion.

C. *The Fourth Circuit decided that a stay of the judgment pending appeal to the Supreme Court is not appropriate; to decide otherwise violates the mandate rule.*

The Fourth Circuit has observed that “[f]ew legal precepts are as firmly established as the doctrine that the mandate of a higher court is ‘controlling as to matters within its compass.’” United States v. Bell, 5 F.3d 64, 66 (4th Cir. 1993) (quoting Sprague v. Ticonic Nat’l Bank, 307 U.S. 161, 168 (1939)). This so-called “mandate rule” prevents parties from relitigating before the district court issues resolved by the higher court, including those the appealing party failed to raise on appeal. S. Atl. Ltd. Partnership of Tenn. v. Riese, 356 F.3d 576, 583-84 (4th Cir. 2004). The lower court is obliged to give effect not merely to the letter of the appellate court’s mandate, but also the “spirit” of the mandate, “taking into account [the appellate court’s] opinion and the circumstances it embraces.” Id.; Bell, 5 F.3d at 66 (quoting United States v. Kikumura, 947 F.2d 72, 76 (3d Cir.1991)).

In this litigation, the Fourth Circuit has already denied Defendants’ request to stay its mandate pending Defendants’ appeal to the Supreme Court. United States v. Kotmair, No. 07-1156, slip op. (4th Cir. Nov. 27, 2007). In making this decision, Rule 41(d)(2) required the Fourth Circuit to evaluate whether the certiorari petition would present a substantial question on appeal and whether good cause exists for a stay. Fed. R. App. P. 41(d)(2)(A) (“A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would

present a substantial question and that there is good cause for a stay.”). Thus in declining to grant Defendants’ motion to stay the mandate, the Fourth Circuit has already decided that good cause does not exist to insulate Defendants from this Court’s judgment while they file and await a response on their petition for certiorari. See, Lentz, 352 F. Supp. 2d at 727 (“In [denying defendant’s request to stay the mandate], the Fourth Circuit, which is well-placed to determine whether the Supreme Court is likely to grant a *certiorari* petition, has already carefully considered [the defendant’s] arguments for a stay and rejected them.”). As the Lentz court noted, once the Fourth Circuit declined to stay its mandate, staying enforcement of the affirmed relief is equivalent to granting at the district court level the relief the Fourth Circuit specifically declined to grant. Id. Because the mandate rule prevents this Court from granting a stay of the injunctive relief affirmed by the Fourth Circuit, it should deny the Defendants’ motion.

II. The present circumstances do not warrant a continued stay of injunctive relief

Assuming *arguendo* that this Court has jurisdiction to reach the merits of Defendants’ motion, under the applicable “balance-of-hardships” test, Defendants are not entitled to relief because the Fourth Circuit has affirmed the scope of the injunctive relief granted.

In its order of February 22, 2007, this Court stayed enforcement of the injunction when it determined that the scope of the injunctive relief presented litigable issues under the balance-of-hardships test laid out in Blackwelder Furniture Co. of Statesville v. Seilig Mfg Co., 550 F.2d 189, 195 (4th Cir. 1977); (Dkt. No. 83). This Court reasoned that the possible harm to Defendants in enforcing the injunction in light of the those issues outweighed the harm to the United States in delaying enforcement. Id.

Contrary to Defendants' assertions in their motion (Dkt. No. 92), the circumstances that persuaded this Court to stay enforcement of the injunction on February 22, 2007 have changed greatly. The Fourth Circuit has heard Defendants' arguments that the injunction is unconstitutionally broad and that the scope of the injunction offends Defendants' constitutional rights. The Fourth Circuit has rejected these arguments. United States v. Kotmair, No. 07-1156, slip op. at 2 (4th Cir. July 26, 2007) ("We have reviewed the record and find no reversible error.")¹

The Fourth Circuit has decided that the injunctive relief ordered was permissible in scope, that Defendants are unlikely to present a substantial question in a certiorari petition, and that good cause does not exist for a stay. These findings taken together must alter the calculus of harm. The issue of the permissible breadth of the injunction has been made far less "serious, substantial, difficult, and doubtful" in light of the Fourth Circuit's affirmance. Blackwelder, 550 F.2d at 195. Even assuming Defendants are correct that a constitutional injury is per se irreparable, the Fourth Circuit's decision affirms this Court's determination that no such injury has occurred. The Court's concerns about the "precise permissible scope of the injunctive relief" have been fully considered by the Fourth Circuit, and the Fourth Circuit has affirmed the relief ordered.

Under the Blackwelder test, a decreased probability of irreparable injury to Defendants increases the importance of the Defendants' having to show a likelihood of success in the action.

¹Thus, Defendants' contention that the Fourth Circuit did not "address" the issues that prompted this Court to stay enforcement of the injunction pending appeal is unfounded (Dkt. No. 92 at 4). The Fourth Circuit's opinion explicitly states it found no reversible error in this Court's decision not to modify the injunction. In reviewing this Court's order and finding no error, the Fourth Circuit addressed Defendants' constitutional arguments.

The Blackwelder court observed that “[t]he importance of probability of success increases as the probability of irreparable injury diminishes . . . and where the latter may be characterized as simply ‘possible,’ the former can be decisive.” Id. The Fourth Circuit’s decision establishes that Defendants’ constitutional rights will not be injured by enforcing the permanent injunction. In other words, the Fourth Circuit has determined that the probability of constitutional harm in enforcing this Court’s judgment is zero. Further, in denying Defendants’ motion to stay its mandate, the Fourth Circuit decided that Defendants are unlikely to present a substantial question in a certiorari petition. Thus, the Fourth Circuit ruled that it is unlikely Defendants will succeed in obtaining a writ of certiorari or obtaining a modification of the injunction on appeal.

The Fourth Circuit’s review and approval of the scope of the injunction affirms that Defendants’ constitutional rights will not be harmed by enforcing the injunction. Its decision not to stay its mandate signals that Defendants are unlikely to obtain certiorari or relief on appeal. The greatly diminished probability of any harm to Defendants tips the balance of hardships in favor of the United States, which, if a stay were in effect, would be unable to protect itself from the Defendants’ fraudulent activities.

CONCLUSION

For the foregoing reasons, the United States requests this Court deny Defendants' Motion to Extend or Reinstitute Stay Pending Appeal.

Respectfully submitted,

ROD J. ROSENSTEIN
United States Attorney

s/ Robert E. Fay

ROBERT E. FAY
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 305-9209
Facsimile: (202) 514-6770
Email: Robert.E.Fay@usdoj.gov

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Memorandum for the United States Opposing Defendants' Motion to Extend or Reinstitute Stay Pending Appeal has been made upon the following by depositing a copy in the United States mail, postage prepaid, this 7th day of December, 2007.

John Baptist Kotmair, Jr.
P.O. Box 91
Westminster, MD 21158

George Harp, Esq.
610 Marshall St., Ste. 619
Shreveport, LA 71101

s/ Robert E. Fay

ROBERT E. FAY