

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 03-60439-Civ-MARRA/SELTZER

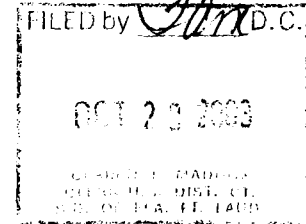
UNITED STATES OF AMERICA

Petitioner

vs.

ROBERT V. PLATH and
BEVERLY PLATH

Respondents.



ORDER HOLDING RESPONDENT ROBERT PLATH IN CONTEMPT

This Cause came before the Court on the Petitioner's Motion for Issuance of Order to Show Cause, filed August 11, 2003 (DE 6), why the Respondents¹ should not be held in contempt of court for failure to comply with the Court's Order entered on May 8, 2003. The Respondents filed a Response on August 22, 2003 (DE 9.). The Petitioner filed a Reply on September 8, 2003 (DE 10). The Court held a hearing on the matter on September 12, 2003. The matter is now ripe for review.

I. Factual Background

Based upon the testimony and evidence presented at the hearing on September 12, 2003, the Court makes the following findings of fact:

As part of a nationwide investigation of offshore credit card accounts conducted by the Internal Revenue Service ("IRS"), IRS Revenue Agent Barbara Kallenberg received information indicating that the Defendant, Robert Plath, had a credit card account with Leadenhall Trust

¹ At the hearing, both parties agreed that there is an insufficient basis upon which to hold Beverly Plath in contempt.

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Company in the Bahamas. Based upon this information, Revenue Agent Kallenberg sent Robert Plath and his wife Beverly Plath certain IRS Information Document Requests (“IDRs”), dated July 30, 2002 and October 9, 2002, requesting copies of various documents, including copies of statements for foreign bank accounts.

After receipt of the first IDR, the Plaths obtained counsel, Alan Weisberg of Weisberg and Kainen. Through counsel, the Plaths submitted some, but not all, of the requested documents. In particular, the Defendants did not submit any statements for foreign bank accounts or credit card accounts.

On November 12, 2002, the IRS issued two Summonses to the Plaths. The Summonses required the Plaths to produce documents related to foreign bank accounts (§ 1), foreign bank credit, debit or charge cards (§ 2), and a business called 1120 Eiffel Design (§ 3). The Summonses also required the Plaths to appear before the IRS on December 10, 2002.

After receipt of the Summonses, Alan Weisberg, Plaths’ counsel, had several discussions with various IRS personnel regarding the Summonses. Based upon those discussions, Weisberg understood that the IRS would file a Petition with the Court regardless of whether the Defendants appeared for the December meeting. Weisberg therefore advised the Plaths not to attend, and based upon that advice, the Plaths did not attend.

On March 13, 2003, the Government filed a Petition to Enforce Two Internal Revenue Service (“IRS”) Summonses and For Order to Execute Consent Directives (“Petition”). (DE 1.)

In response to the Petition, Weisberg informed the IRS that the Plaths would sign the Consent Directives and had conversations with IRS personnel. Based upon those conversations, Weisberg concluded that the Plaths did not need to file a response to the Petition since they were

willing to sign the Consent Directives. The Plaths therefore did not file a response to the Petition.

On March 14, 2003, the Court issued an Order to Show Cause ("First Order to Show Cause"). In the First Order to Show Cause, the Court ordered the Plaths to file and serve any written opposition to the Petition within twenty days of service of the Order. (DE 2.) After twenty days from the Order lapsed with no response by the Plaths, the Government filed a Motion for Entry of Order Enforcing the Summonses and Ordering Respondents to Execute Consent Directives, on May 5, 2003. (DE 3.) On May 8, 2003, upon the Government's motion, this Court entered an Order granting the Petition. (DE 4.) The Order directed the Plaths to attend, testify, and produce the documents required by the summonses and to execute the consent directives. (DE 4 at 2.)

On June 6, 2003, the Plaths appeared before Agent Kallenberg, as directed in the Order granting the Petition. The Plaths asserted the Fifth Amendment, and did not provide the requested documents or testify. The Plaths did sign the consent directives.

As a result of the Plaths' failure to provide the requested documents and testify, on August 11, 2003, the Government filed the Motion for Issuance of Order to Show Cause why they should not be held in contempt of court for failure to comply with the Court's Order entered on May 8, 2003, which is the motion now before this Court (DE 6.) Thereupon, the Court issued an Order to Show Cause why they should not be held in contempt, dated August 13, 2003 (DE 8), to which Plaths filed a response (DE 9), and the Government filed a reply (DE 10).

Possession of Records and Efforts to Comply

As discussed above, the Summonses required the Plaths to produce documents related to foreign bank accounts (§ 1), foreign credit, debit or charge cards (§ 2), and a business called 1120

Eiffel Design (§ 3). The Summonses were served on November 12, 2002.

Since receipt of the Summonses, the Plaths have provided the Government only one item, a copy of the sales agreement for the business 1120 Eiffel Design, Inc. Approximately a week and a half before the hearing, Robert Plath contacted the law firm that handled the sale of his business in 1999 and requested a copy of the sales agreement. Robert Plath gave the copy of the sales agreement to his counsel who turned it over to the Government. To date, the Government has not received any of the other documents requested in the Summonses.

Robert Plath testified that he does not presently possess any of the records requested in the Summonses. Robert Plath also testified that he has not possessed any of the records since he and his wife were served the Summonses on November 12, 2002.

Robert Plath testified that he has not made any efforts to obtain any documents relating to foreign bank accounts or foreign credit, debit, or charge cards. Robert Plath testified that he has not made any such efforts because he would not know who to contact.

Robert Plath testified that the offshore account was not his account. However, Agent Kallenberg testified that she received information, from one of the vendors listed on a credit card account statement for the Leadenhall Trust account, a mail order company, Design Tescano Inc., that the customer making the purchase on the credit card requested shipment to a Robert Plath at 3030 NE 44th Street, Lighthouse Point, Florida.

II. Discussion

The Eleventh Circuit in United States v. Roberts, 858 F.2d 698, 701-02 (11th Cir. 1998) has set forth the applicable burden-shifting framework to guide a court's consideration of the defense of inability to comply with an IRS subpoena in a civil contempt proceeding. Under that

framework, a petitioner in a civil contempt proceeding must first establish by clear and convincing evidence that the alleged contemnor violated the court's earlier order. Id. at 701. Once the petitioner makes a prima facie showing of a violation, the burden shifts to the alleged contemnor to produce detailed evidence specifically explaining why he cannot comply. Id. at 701 (citing United States v. Rylander, 460 U.S. 752, 755 (1983)). This burden of production is not satisfied by a "mere assertion of inability." Id. (quoting United States v. Hayes, 722 F.2d 723, 725 (11th Cir. 1984)). Rather, in this circuit, a party subject to a court's order demonstrates inability to comply only by showing that he has made "in good faith all reasonable efforts to comply." Id. The showing required by the rigorous "all reasonable efforts to comply" standard is a substantial one. Id. at 702.

In this case, the Court finds that the Government has established by clear and convincing evidence that Robert Plath has violated the Court's Order enforcing the Petition. Plath's violation of the Order is not disputed. The burden therefore shifted to Robert Plath to produce detailed evidence explaining why he has not complied and to show that he has taken all reasonable efforts to comply. Plath explained to the Court that he has not complied with the Summons because he does not possess the documents. Plath has not, however, adequately demonstrated to the Court that he has taken all reasonable efforts to comply with the Summons. In fact, the only effort taken by Robert Plath to comply with the Summons was his contact with a law firm to request one item listed in the Summons, the Eiffel Design sales agreement. The evidence indicates that Plath received a package purchased on the Leadenhall Trust account, and thus he had some knowledge of the offshore account at Leadenhall Trust. Yet, Plath failed to use any efforts to contact Leadenhall Trust to obtain the necessary documentation. Accordingly, the Court finds that Plath

has failed to meet the substantial and rigorous burden of showing that he has made "all reasonable efforts to comply."

III. Conclusion

Based upon the foregoing, the Court finds that Plath is in civil contempt for failure to comply with the Court's Order granting the Petition to Enforce Two IRS Summonses and For Order to Execute Consent Directives. Accordingly it is

ORDERED AND ADJUDGED that Robert Plath is held in contempt of court. Robert Plath has thirty (30) days, i.e. until November 28, 2003, to purge himself of the contempt by complying with the Summons.² If Plath fails to purge himself of the contempt on or before November 28, 2003, he shall be taken into the custody of the Attorney General for confinement at a corrections facility and shall be confined until he does purge himself of the contempt or until further Order of the Court.

It is further **ORDERED** that Petitioner's Motion for Issuance of Order to Show Cause, filed August 11, 2003, (DE 6) is **DENIED** as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 29th day of October, 2003.



KENNETH A. MARRA
United States District Judge

copies to:
Scott Grossman
Hermant Sharma
Alan Weisberg

² If the Plath intends in good faith to purge himself of the contempt but needs additional time to comply with the Summons, Plath may request an enlargement of time from the Court.