

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) Case No. 1:06-cv-11457-DPW
)
STEVEN A. BERK, et al.,)
)
Defendants.)

**PLAINTIFF UNITED STATES’ MEMORANDUM IN OPPOSITION TO THE BERK
DEFENDANTS’ MOTIONS FOR “AMENDED JUDGMENT” AND “A NEW TRIAL”
AND FOR A STAY PENDING APPEAL**

The United States of America opposes the various motions by Defendants Steven and Deborah Berk (the “Berk Defendants” that seek, in effect, reconsideration of this Court’s dismissing the Berk Defendants’ Counterclaim,¹ and a stay of execution of the separate judgment of foreclosure against the Berk Defendants’ property pending appeal.

A motion to reconsider is not a forum to repeat already-rejected arguments. The Berk Defendants offer nothing new in their motion. To the contrary, they merely repeat the same arguments this Court has already considered and rejected. Other than reciting facts that (they continue to allege) constitute illegal collection activity by the IRS, the motion merely asserts that this Court has jurisdiction because they belatedly filed an administrative claim for damages

¹ The Berk Defendants have filed both a “Motion for Amended Judgment” and a “Motion for a New Trial.” The former appears to seek reconsideration of the Court’s order dismissing the Counterclaim, rather than amending the Court’s separate judgment entered on August 17, 2007 relating solely to the foreclosure count of the United States’ Complaint, not the Counterclaim. The latter is, of course, inappropriate for the simple reason that the Court’s judgment did not result from a trial but from motion practice. Interpreting these pleadings in the light most favorable to the pro se Berk Defendants, the United States construes these motions together as a motion for reconsideration of the Court’s dismissal of their Counterclaim.

under I.R.C. §7433 after filing their Counterclaim. As this Court correctly held, belated filing of such a claim is not enough. In order for the Court to have subject matter jurisdiction, the administrative claim must be filed before the civil action under §7433.

Nor do the Berk Defendants establish that they are entitled to a stay. “[T]he applicable standards for a party seeking such a stay [pending appeal] are 1) a strong showing that he is likely to succeed on the merits, 2) a showing that unless a stay is granted he will suffer irreparable injury, 3) a showing that no substantial harm will come to the other interested parties, and 4) a showing that a stay will do no harm to the public interest.” Ainsworth Aristocrat Intern. Pty. Ltd. v. Tourism Co. of Com. of Puerto Rico, 818 F.2d 1034, 1039 (1st Cir, 1987) (footnote omitted). As in the analogous preliminary injunction context, if the movant cannot demonstrate that it is likely to succeed, all the remaining factors become matters of “idle curiosity.” New Comm. Wireless Sers, Inc., v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002).

The Berk Defendants make no attempt to show that they are likely to succeed on the merits on appeal. Nor are they likely to succeed. This Court’s judgment of foreclosure is based on tax assessments that are presumptively valid as a matter of law, and under First Circuit precedent the Berk Defendants have not made any showing to overcome that presumption.

Further, the Berk Defendants do not show irreparable injury. The mere fact that they will have to take the trouble to find new housing and office space is not enough. On the other hand, the United States would be substantially harmed by an extended stay pending appeal. As this Court held in its order granting a separate judgment, delay would compromise the value of the foreclosure remedy because carrying costs would continue to accrue. A stay pending appeal, which is likely to take, at best, several months to complete, would result in the same harm to the

parties—including the Berk Defendants, who would only stand to benefit from a greater portion of the sale proceeds going toward their tax liabilities as opposed to carrying costs. For the same reason, a stay would harm the public interest in enforcing the tax laws by collecting unpaid taxes.

Conclusion

For the foregoing reasons, this Court should deny the Berk Defendants’ various motions for reconsideration or for a stay.

Respectfully submitted,

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I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on 9/6/07
/s/ Robert J. Kovacev