

In the United States Court of Federal Claims

No. 02-979 T

(Filed June 9, 2005)

ORALIA M. VARGAS, *

*

Plaintiff, *

*

v. *

*

THE UNITED STATES, *

Defendant. *

ORDER

This tax refund suit, filed after a prior dismissal without prejudice (*Vargas v. United States* (No. 02-37), involves *pro se* plaintiff’s claim to recover \$2,000 in return preparer civil penalties assessed for the years 1996 and 1997. See 26 U.S.C. § 6694. The penalties were satisfied by payments and credits in 2001 and 2002. Plaintiff’s timely filed refund claim was denied by the Internal Revenue Service on April 11, 2002. This refund suit was filed on August 15, 2002.

After an extended discovery period the government concluded that material factual issues precluded resolution of this matter by summary judgment proceedings pursuant to RCFC 56. On October 14, 2004, a scheduling order was issued for the submission of Appendix A pretrial materials. This included an initial exchange of exhibit and witness lists followed by contentions of fact and law and final witness and exhibit lists filed with the court. A telephonic pretrial conference was then contemplated to establish a trial schedule.

On January 10, 2005, defendant filed a Motion to Dismiss for Failure of Plaintiff to Prosecute her Case and to Comply with the Court’s Pretrial Scheduling Order (“Motion”).

Defendant's Motion details plaintiff's failure to exchange initial witness and exhibit lists by November 9, 2004, as required by the October 14, 2004 Order. Defendant forwarded its lists to plaintiff by the required date. By letter dated December 16, 2004, defendant's counsel called this omission to comply with the October 14, 2004 Order to plaintiff's attention and inquired as to plaintiff's intentions with regard to continuing to litigate this case. The December 16, 2004 letter noted that plaintiff had not contacted defendant's counsel for approximately six months and ended with the sentence, "If I have not heard from you by December 31, 2004, I will conclude that you are no longer interested in pursuing this case, and I will move to dismiss the case in early January 2005 for failure to prosecute." Motion, Def. Exh. 6.

Substantial time has passed since the filing of defendant's detailed dismissal motion on January 10, 2005, with no response from plaintiff. This failure to respond was preceded by a substantial period of time during which plaintiff also did not respond to defendant's proposal concerning pretrial submission dates. Once it was concluded that trial proceedings were needed to resolve this \$2,000 tax penalty refund claim, plaintiff has failed to comply with the resulting pretrial order and to prosecute her claim.

In this circumstance, pursuant to the authority cited in defendant's motion, filed January 10, 2005, dismissal of this case is in order. *See also Claude E. Atkins Enter., Inc. v. United States*, 899 F.2d 1180 (Fed. Cir. 1990); *Kadin Corp. v. United States*, 782 F.2d 175 (Fed. Cir. 1986). Unlike the situation in *Bowling v. Hasbro, Inc.*, 403 F.3d 1373 (Fed. Cir. 2005), *sua sponte* action is not involved. Defendant's motion to dismiss, and the authority cited therein, clearly placed plaintiff on notice as to the consequences of non-action, and there has been no response. The time for a response has long since expired. There is no real alternative to dismissal. Obtaining a local courtroom from the district court and scheduling trial without pretrial compliance would constitute an unjustifiable expenditure of time and money for all concerned. Such a step would also not be fair to defendant, as plaintiff has not disclosed her case as required by pretrial order. Based on past events, it would also risk a continued failure by plaintiff to respond and show for trial, after the time and expense of travel by the court and counsel, which would comprise an additional ground for dismissal. *Syntex Ophthalmics v. Novicky*, 795 F.2d 983, 986 (Fed. Cir. 1986).

Defendant's dismissal motion sets out the evidence showing the Internal

Revenue Service's assessments of the penalties concerned. Plaintiff has not complied with the pretrial order and produced any proposed evidentiary basis upon which the assessments can be disputed. Sufficient time has expired to conclude that further prosecution of this case is not contemplated. Accordingly, it is **ORDERED** that this case shall be **DISMISSED**, pursuant to RCFC 41(b), with **NO COSTS** assessed.

James F. Merow
Senior Judge