UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. PHILIP COLASUONNO, Defendant.	21 Civ. 10877 (PMH)

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

CLAIR GJERTSEN & WEATHERS PLLC
Attorneys for Defendant Philip Colasuonno
4 New King Street, Suite 140
White Plains, NY 10604
(914) 472-6202
erin@cgwesq.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Defendant Philip Colasuonno respectfully move the Court pursuant to Federal Rule of Civil Procedure 12(b)(6) to 12(c) and grant judgment on the pleadings against Plaintiff and to dismiss the Complaint with prejudice since Plaintiff failed to state a claim upon which relief can be granted.

PRELIMINARY STATEMENT

On July 24, 2009, Defendant filed a voluntary petition for bankruptcy pursuant to Chapter 7 of the Bankruptcy Code in the case *In re Maria & Philip Colasuonno*, No. 09-23330-rdd (Bankr. S.D.N.Y.). ECF Doc. No. 1 page 7. Plaintiff did not move within the bankruptcy for a relief of stay.

During the pendency of Defendant's bankruptcy proceeding, Plaintiff made an assessment dated April 21, 2011. ECF Doc. No. 1 page 7. Plaintiff also issued a Notice of Federal Tax Lien (NFTL) dated May 26th, 2011 and filed with the County Clerk for the County of Westchester on June 8, 2011. Exhibit A. Defendant received a bankruptcy discharge on July 20, 2011, which ended the stay bankruptcy stay. ECF Doc. No. 1 page 7.

Since Plaintiff ignored the bankruptcy stay by issuing the Notice of Federal Tax Lien, they cannot now claim tolling of the statute of limitations and six-month extension of the statute of limitations they would have been entitled to.

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(c), a Court may grant judgment on the pleading "where material facts are undisputed and where a judgment on the merits is possible merely by considering the contents of the pleadings." *Sellers v M.C. Floor Crafters, Inc.*, 842 F2d 639, 642 (2d Cir 1988). "Judgment on the pleadings is appropriate if, from the pleadings, the

moving party is entitled to judgment as a matter of law." *Burns Intl. Sec. Servs. v Intl. Union*, 47 F3d 14, 16 (2d Cir 1994).

This motion is brought under both Rule 12(c) and Rule 12(b)(6) since failure to state a claim upon which relief can be granted may be raised by motion under Rule 12(C). Fed. R. Civ. P. 12(h)(2)(B). "The legal standards for review of motions pursuant to Rule 12(b)(6) and Rule 12(c) are indistinguishable." *DeMuria v Hawkes*, 328 F3d 704, 706, n 1 (2d Cir 2003), see *Miller v. Wolpoff & Abramson, LLP,* 321 F.3d 292, 300 (2d Cir. 2003).

"To survive a Rule 12(b)(6) motion to dismiss, 'a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Scott v Am. Sec. Ins. Co. (In re Scott)*, 572 BR 492, 502 (Bankr SDNY 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed.2d 929 (2007)).

In determining whether the movant has shown that judgment on the pleadings is appropriate, the Court applies the "same standard applicable" to Federal Rule of Civil Procedure 12(b)(6) motions to dismiss and "accept[s] all factual allegations in the complaint as true and draw[s] all reasonable inferences' in favor of the nonmoving party." *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 922 (2d Cir. 2010) (quoting *Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010). Although a "court must accept as true all of the allegations contained in a complaint," that "tenet" "is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Harris v Mills*, 572 F3d 66, 72 (2d Cir 2009) quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

ARGUMENT

The filing of a petition for bankruptcy "operates as a stay, applicable to all entities, of" …. "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6). However, the filing of a petition for bankruptcy "does not operate as a stay" … "of the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment." 11 U.S.C. § 362(b)(9)(D).

"The automatic stay provision is 'one of the fundamental debtor protections provided by the bankruptcy laws,' designed to relieve 'the financial pressures that drove [debtors] into bankruptcy.'" *E. Refractories Co. v Forty Eight Insulations*, 157 F3d 169, 172 (2d Cir 1998), quoting H.R. Rep. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97.

There is no dispute that Defendant filed a voluntary petition for bankruptcy pursuant to Chapter 7 of the Bankruptcy Code in the case *In re Maria & Philip Colasuonno*, No. 09-23330-rdd (Bankr. S.D.N.Y.). ECF Doc. No. 1 page 7. The filing of that petition operated as a stay of "any act to collect, assess, or recover" any claim that arose before the filing of the petition. 11 U.S.C. § 362(a)(6). The exception under 11 U.S.C. § 362(b)(9)(D) allowed Plaintiff to make their assessment on April 21, 2011, without violating the automatic stay but the exception did not allow for collection.

"A party in interest may request the Court to lift the stay pursuant to section 362(d)." *Garcia v Sklar (In re Sklar)*, 626 BR 750, 761 (Bankr SDNY 2021). Plaintiff did not seek relief from the stay imposed by the pending bankruptcy proceeding to collect even though other parties did. Instead, Plaintiff filed a Notice of Federal Tax Lien on June 8, 2011, impacting the bankruptcy estate and commencing efforts to collect on the assessment. This filing violated the bankruptcy stay which was not ended until the discharge was ordered on July 20, 2011.

26 U.S.C. § 6502 provides that "[w]here the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun— **(1)** within 10 years after the assessment of the tax." "The date of the filing of the complaint, rather than the date of service of process, marks the commencement of the action when the cause of action, as here, is federally based." *United States v Malkin*, 317 F Supp 612, 613, n 2 (EDNY 1970). It is undisputed that Plaintiff made the assessment on April 21, 2011, and this action was commenced on December 20, 2021, ten years 7 months and 29 days after the assessment was made.

Plaintiff seeks use of 26 U.S.C. § 6503 (h)(2) which extends the statute of limitations provided in 26 U.S.C. § 6502 for an additional six months past the period in which Plaintiff was prohibited from collecting. However, by using this statute, Plaintiff seeks to have it both ways. Plaintiff could not have believed they were prohibited from collecting during the pendency of the bankruptcy proceeding since they filed the Notice of Federal Tax Lien on June 8, 2011, during the pendency of the bankruptcy when the automatic stay was in place. Only now, when they need the extra six months, do they agree that the bankruptcy stay was in effect.

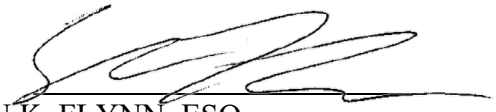
Since Plaintiff ignored the automatic stay on collection under 11 U.S.C. § 362(a)(6), Plaintiff is not entitled to the relief afforded by 26 U.S.C. § 6503 (h)(2).

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court grant its Motion for Judgment on the Pleadings.

Dated: White Plains, NY
July 1, 2022

CLAIR GJERTSEN & WEATHERS PLLC
Attorneys for Defendant Philip Colasuonno

By: 
ERIN K. FLYNN, ESQ.
4 New King Street, Suite 140
White Plains, NY 10604
(914) 472-6202
erin@cgwesq.com