

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JAMIL NAEEM BEY,	:	
	:	
Plaintiff	:	Civil No. 1:CV:02-1413
	:	
v.	:	(Judge Kane)
	:	
INTERNAL REVENUE SERVICE, et al.,	:	
	:	
Defendants	:	

ORDER

_____ Before this court are: (1) Plaintiff’s complaint alleging improper taxation of his wages by the Internal Revenue Service (“IRS”) and his employer, the United States Postal Service, (2) Plaintiff’s motion for a preliminary restraining order and for temporary and permanent injunctions, (3) Magistrate Judge Smyser’s Report and Recommendation concerning the motion for preliminary restraining order, (4) Plaintiff’s objections thereto, (5) Defendants’ motion to dismiss, (6) Plaintiff’s motion of refusal for fraud of respondents motion to dismiss, and (7) Plaintiff’s motion for leave to amend the complaint. For the reasons that follow, the Court will overrule the Plaintiff’s objections to the report and recommendation, adopt the findings and recommendations of the Magistrate Judge, deny the Plaintiff’s motion for preliminary injunctive relief, and grant Defendants’ motion to dismiss.

I. Background

Plaintiff’s complaint seeks a court order restraining the Defendants from levying and collecting wage taxes. Plaintiff also seeks a preliminary restraining order preventing the collection of wage taxes. Plaintiff’s claims seem to be grounded on the premise that he is not

subject to the jurisdiction of the federal government or the IRS and therefore his taxation constitutes a deprivation of property without due process of law. The Magistrate Court recommended dismissing the motion for a preliminary restraining order for failure to meet the standard required for a preliminary injunction. Plaintiff has filed objections to the Magistrate Court's recommendation. Since the filing of Plaintiff's objections, Defendants' have filed a motion to dismiss Plaintiff's complaint and Plaintiff has filed documents which will be construed as responsive briefs to Defendants' motion. Since Plaintiff is a pro se petitioner, this Court must construe all complaints and pleadings liberally. Boag v. MacDougall, 454 U.S. 364, 365 (1982); Todaro v. Bowman, 872 F.2d 43, 44 n. 1 (3d Cir. 1989). Accordingly, the arguments raised in Plaintiff's motion of refusal for fraud of respondents motion to dismiss (Doc. No. 15) and his motion for leave to amend the complaint (Doc. No. 16) will be construed as responsive briefs to Defendant's motion to dismiss (Doc. No. 11).

II. Discussion

A. Objections to the Magistrate Court's Report and Recommendation.

The Magistrate Court recommended denying Plaintiff's motion for a preliminary restraining order on the basis that a "tax protester" claim like Plaintiff's does not have a reasonable probability of success on the merits. Plaintiff objects to the Magistrate Court's characterization of him as a "tax protester." Although Plaintiff's objections are somewhat unclear, he appears to argue that the United States government is merely a corporate entity. Moreover, Plaintiff argues that he has legally declined to subject himself to the jurisdiction of this corporation as he is not a United States citizen, but rather a "Preamble Aboriginal and Natural Born Citizen of the United States" and "a free inhabitant-Common Law Citizen of the

Non-Partisan Republican State . . . of Pennsylvania.” Plaintiff argues that this distinction renders him immune from the laws of United States and exempt from federal taxes. Therefore, he argues, Defendants have violated his Constitutional rights by requiring federal income taxes to be withheld from his paychecks and by assessing a tax deficiency against him for failure to file a 1999 federal income tax return.

The Magistrate Court correctly stated that the Plaintiff’s motion for preliminary injunctive relief must be denied. To obtain a temporary restraining order a party must, among other things, demonstrate a reasonable probability of success on the merits of his claim. ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987). The Magistrate Court found the Plaintiff’s claim does not have a reasonable probability of success on the merits because similar “tax protest claims” have previously been rejected by the courts. Although Plaintiff rejects the label of “tax protester,” the substance of his argument still parallels that of the unsuccessful plaintiff attempting to avoid taxes in United States v. Sloan, 939 F. 2d 499, 500 (7th Cir. 1991). Plaintiff attempts to distinguish himself from the plaintiff in Sloan by asserting that unlike the Sloan plaintiff, he is not a United States citizen. Other than a form titled “Notice of Cancellation” (Doc. No. 8 at 11), which purports to cancel and rescind jurisdiction of the federal government over Plaintiff and has no legally binding effect, Plaintiff offers no evidence to support his theory that the IRS and the United States government fail to exercise jurisdiction over him. “All individuals, natural or unnatural, must pay federal income tax on their wages.” Sloan, 939 F. 2d at 500 (citing Lovell v. United States, 755 F.2d 517, 519 (7th Cir.1984)); see also, Studley v. United States, 783 F.2d 934, 937 (9th Cir.1986) (Studley's argument that “she is not a ‘taxpayer’ because she is an absolute, freeborn and natural individual ... is frivolous. An

individual is a ‘person’ under the Internal Revenue Code.”). Like the plaintiff in Sloan, Plaintiff’s “proposition that he is not subject to the jurisdiction of the laws of the United States is simply wrong.” Sloan, 939 F.2d 499, 501. Accordingly, Plaintiff’s objections must be overruled and the motion for temporary restraining order denied because Plaintiff cannot demonstrate a reasonable probability of success on the merits of his complaint.

B. Defendants’ Motion to Dismiss

Defendant’s have moved to dismiss this action for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). A Rule 12(b)(1) motion may be treated as either a facial or factual challenge to the court’s subject matter jurisdiction. Gould Electronics Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000) (citations omitted). In reviewing a facial attack, this Court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff. Id. In reviewing a factual attack, this Court may consider evidence outside the pleadings. Id. This Court will only grant Defendants’ motion to dismiss if there is clearly no remedy available for Plaintiff’s claim, or if Plaintiff has no right or power to assert the claim. Melo-Sonics Corp. v. Cropp, 342 F.2d 856, 859 (3d Cir. 1965).

An action against the United States government and the United States Postal Service may only be maintained only where sovereign immunity has been waived. “It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.” United States v. Mitchell, 463 U.S. 206, 212 (1983). It is well settled that “a suit against IRS employees in their official capacity is essentially a suit against the United States.” Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). Absent express

statutory consent to sue, this Court must dismiss the claims barred by sovereign immunity. Id.; United States v. Shaw, 309 U.S. 495, 500-01 (1940). Here, there is no applicable statutory consent to be sued and this Court, therefore, has no jurisdiction over Defendants in their official capacities. Moreover, Plaintiff's claim is barred by the Anti-Injunction Act which prevents judicial intervention in the regular collection of taxes. 26 U.S.C. § 7421. Accordingly, the claims brought against Defendants in their official capacities must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

To the extent that Plaintiff's claims can be construed as Bivens claims against the Defendants in their individual capacities, they must also be dismissed. Federal officers, operating under the color of federal law, can be sued for monetary damages for violations of constitutional rights. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics 403 U.S. 388 (1971). Plaintiff, however, has failed to state a Bivens claim for damages. A Bivens action "should not be inferred to permit suits against IRS agents accused of violating a taxpayer's constitutional rights in the course of making a tax assessment." Shreiber v. Mastrogiovanni, 214 F.3d 148, 153 (3d Cir. 2000). Plaintiff has not stated a complaint for which this Court can provide a remedy. Plaintiff's claim, therefore, must be dismissed.

III. Order

Accordingly, for the above reasons and all other reasons fully stated in Magistrate Judge Smyser's Report and Recommendation, **IT IS ORDERED THAT:**

1. Plaintiff's objections to Magistrate Judge Smyser's Report and Recommendation (Doc. No. 8) are **OVERRULED**.
2. The Report and Recommendation of Magistrate Judge Smyser (Doc. No. 4) is **ADOPTED**.
3. Plaintiff's Motion for Preliminary Restraining Order (Doc. No. 3) is **DENIED**.
4. Plaintiff's Motion of Refusal for Fraud of Respondents Motion to Dismiss (Doc. No. 15) and his Motion for Leave to Amend the Complaint (Doc. No. 16) are **DENIED** as moot.
5. Defendant's Motion to Dismiss (Doc. No. 11) is **GRANTED**.
6. Plaintiff's complaint (Doc. No. 1) is **DISMISSED**.
7. The Clerk of Court shall close the file.

s/ Yvette Kane
Yvette Kane
United States District Judge

Dated: February 25, 2003

Filed: February 25, 2003