

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

STEPHEN PIERCE,

Plaintiff,

v.

FEDERAL TRADE COMMISSION,

Defendant.

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CIVIL ACTION NO. 4:09-cv-00838

**FEDERAL TRADE COMMISSION'S MOTION TO DISMISS,
ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT**

Defendant, Federal Trade Commission (FTC), an agency of the United States of America (United States), moves this Court to enter an order dismissing this action, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, alternatively, for summary judgment, on the grounds that this Court does not have subject matter jurisdiction and because plaintiff Stephen Pierce (Pierce) has failed to state a claim upon which relief may be granted. *Rules 12 and 56, Fed.R.Civ.P.*

FACTS

1. The FTC brought an action against Pierce under Sections 5(a) and 12 of the FTC Act, 15 U.S.C. 45(a) and 52, which prohibited unfair and deceptive trade practices and false advertising. On May 14th, 2004, Pierce and the corporate defendants, who were controlled by him, were held jointly and severally liable for a monetary judgment in the amount of \$30,135,784.00 with post-judgment interest. *FTC v. Slim Down Solution, Stephen Pierce, et al*, 03-80051, United States District Court, Southern District of Florida. He now owes the FTC approximately \$29,410,784.00 and post judgement interest of \$392,710.52, a total of \$29,803,494.52.

2. After judgment was entered and pursuant to 28 U.S.C. § 3201, the FTC filed an abstract of to collect on the monetary the judgment in Montgomery County, Texas, where Pierce

resides. Under that statute, a judgment in a civil action creates a lien on all real property of the judgment debtor upon the filing of a certified copy of the abstract of judgment. The abstract of judgment is filed in the same manner that a notice of tax lien under 26 U.S.C. § 6232(f)¹ and, thereafter, has “priority over any other lien or encumbrance which is perfected later in time.” 28 U.S.C. § 3201(a) and (b).

With the exception of social security monies, FTC has taken no action to execute on the judgment or to otherwise enforce its rights. Sometime after the abstract judgment lien was filed, Pierce attempted to refinance or sell his homestead property. FTC refused to partially release its lien.

3. On February 10, 2009, Pierce filed this action for declaratory judgment to have FTC’s abstract lien declared void in District Court in Montgomery County, Texas. Pierce sought equitable relief, actual damages, attorney fees and costs.

4. Since the FTC is an agency of the United States of America, Pierce’s suit was removed to this Court.

MOTION TO DISMISS STANDARD

Rule 12(b)(1) of the Federal Rules of Civil Procedure authorizes the dismissal of an action when there is a “lack of jurisdiction over the subject matter.” Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint for “failure to state a claim upon which relief can be granted.”

In reviewing a 12(b)(6) motion, “a court must accept as true the factual allegations in the

^{1/} The cited section of the Internal Revenue Code provides that the notice, in the case of real property, shall be filed in one office within the state or county in which the property is located, as designated by the state. In the State of Texas, the United States perfects its liens by filing the abstracts of judgment in the county clerk’s office in which the property is located.

complaint and view them in the light most favorable to plaintiff.” *Groom v. Fickes*, 966 F.Supp. 1466, 1472 (S.D. Tex. 1997), *aff’d*, 129 F.3d 606 (5th Cir. 1997). The Court must determine whether the allegations set forth are sufficient to withstand dismissal. *Grisham v. United States*, 103 F. 3d 24, 25 (5th Cir. 1997). “The Complaint must state specific facts, not simply legal and constitutional conclusions in order to survive a motion to dismiss.” *Id.* A court may grant a Rule 12 (b)(6) motion only if it appears that no relief could be granted under any set of facts that could be proved consistent with the allegations, or if “...there is simply no legal theory entitling plaintiff to relief.” *Kansa Reinsurance Co., Ltd v. Congressional Mortg. Corp. of Texas*, 20 F.3d 1362, 1366 (5th Cir. 1994); *Groom*, 966 F.Supp. at 1472, *citing*, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

ARGUMENT AND ANALYSIS

I. Lack Of Subject Matter Jurisdiction

A. The Court Lacks Jurisdiction Because Pierce Has Not Appropriately Pleaded Jurisdiction Over the FTC.

A suit such as the instant one, seeking specific relief against an agency of the United States, is a suit against the sovereign and, absent a waiver of immunity, is not maintainable because of the absence of subject matter jurisdiction. *Land v. Dollar*, 330 U.S. 731 (1947). Pierce has not named the United States as a defendant herein but has instead named FTC who allegedly caused Pierce’s damages. Because the United States can only be the proper party on behalf of the defendant, this action must be dismissed against the FTC. Moreover, the action is barred by the doctrine of sovereign immunity.

Assuming *arguendo*, the United States may not be subject to an action in federal court in the absence of its consent. *FDIC v Meyer*, 510 U.S. 471 (1974). Where consent to suit has been given, it is narrowly construed. *Orff v United States*, 545 U.S. 596 (2005). The United States has effective

a limited waiver of sovereign immunity concerning properties on which a United States lien exists. *SEC v. Credit Bancorp., Ltd*, 297 F.3d 127 (2d Cir.2002). With regard to such properties, section 2410 of Title 28 permits a claim against the United States: (1) to quiet title, (2) to foreclose a mortgage or other lien upon, (3) to partition, (4) to condemn, or (5) for interpleader or in the nature of interpleader. *Id.*

Quiet title actions may be a limited waiver of sovereign immunity against the United States only for property in which the United States holds *title*; not ones in which it holds a mere security interest or lien. 28 U.S.C. § 2490a(a). Here, the FTC has not taken any action regarding Pierce's homestead. The FTC has a monetary judgment against Pierce plus interest. In order to give notice to others and to perfect the judgment lien, the judgment was docketed in Montgomery County where Pierce resides. See 28 U.S.C. § 3201(a). Pierce's action here, demanding that the FTC remove its lien is not one of the claims for which the United States has waived its immunity. Since the only matter at issue here is the FTC's judgment *lien*, there is no jurisdiction.

B. There Is No Waiver of Sovereign Immunity For Money Damages In A Quiet Title Action.

Even were Pierce to amend his complaint to state an appropriate jurisdictional basis for a suit against the United States, the only federal statute which waives sovereign immunity for actions contesting the priority of a *lien* held by the United States, that statute does not waive sovereign immunity for the monetary damages sought in Pierce's complaint. See *Murray v. United States*, 686 F.2d 1320 (8th Cir. 1982), cert. denied, 459 U.S. 1147 (1983) (waiver of sovereign immunity for damage actions must be express). Clearly, it does not authorize an award of money damages.

II. Pierce's Petition Fails To State A Claim Against The FTC

A. Pierce Does Not Have Standing

Pierce's petition seeks declaratory judgment as relief so an evaluation of standing is appropriate upon review of the nature of this case. Though the petition filed invokes the Texas Declaratory Judgment Act, the subsequent removal of the case to federal court demands the application of federal procedure for declaratory judgment. Pursuant to the Federal Declaratory Judgment Act, there must be an actual controversy for a plaintiff to maintain standing. The meaning of "actual controversy" under the Act is the same as "case or controversy" in Article III of the US Constitution. *Rowan Cos. v. Griffin*, 876 F.2d 26 (5th Cir. 1989). To establish a "case or controversy," a plaintiff must allege facts that constitute a substantial controversy between two adverse parties. *Id.*

The suggestion that the FTC may be ordered to remove its lien finds no support in law. The lien has the same force and effect as a tax lien, and it may not be discharged. 28 U.S.C. § 3201(a) and (b). The lien attached to whatever interest Pierce retains in property until that interest is extinguished. If valid and properly recorded, there is no statutory authority for a Court to order that it be removed. Thus, there is no adverse claim against Pierce.

B. Under The Federal Debt Collection Procedures Act, Federal Law Determines The Priority of Competing Federal and State Created Liens.

The judgment lien at issue was created under the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. §§ 3001-3308 ("FDCPA"). Except to the extent another federal law applies, it provides the "exclusive civil procedure" for the United States to recover on a judgment. 28 U.S.C. § 3001(a)(1). By its express terms, the FDCPA preempts state law to the extent it is inconsistent with the FDCPA's provisions. 28 U.S.C. § 3003(d).

Section 3201(a), 28 U.S.C. of the FDCPA governs creation of judgment liens for debts owed

the United States. It provides that a judgment in favor of the United States creates a lien on all the judgment debtor's real property upon appropriate filing of the judgment. Neither the FDCPA generally nor 28 U.S.C. § 3201 contains a limitation on the type of real property to which the lien of the United States attaches. Whatever limits Pierce argues are available under state law to exempt a homestead from execution, the FDCPA preempts and supercedes the limitations imposed on execution contained in Texas statute.² *In re Pierce*, 214 B.R. 550, 551 (E.D. N.C. 1997) (United States not bound by state statutes of limitation prohibiting enforcement more than 10 years after judgment entered since state statute preempted to extent inconsistent with FDCPA).

C. Even Under State Law, Pierce Fails to State a Claim Against the FTC.

Pierce claims that the FTC has “intentionally and wrongfully refused to release its judgment against his homestead. However, the FTC has no duty to release its lien. The government is not required, under either Texas or federal law, to release its judgment lien to Pierce's homestead.

Pierce's claim of harm with the interference with his ability to sell his homestead caused by a clouded title is not a continuing harm due to Texas legislation, effective September 1, 2007. The Texas statute created Pierce the procedural tools to simply file an affidavit to remove any possible cloud to title and thus prevent any present or future threat to the exercise of his right to sell his homestead. The purpose of the homestead exemption is not to immunize a judgment debtor from his

^{2/} The FDCPA governs the creation and priority given to federal liens. See 28 U.S.C. § 3201(a) and (b). The remedies available to the government to enforce its liens is tied, to some extent, to state law. For example, remedies may be enforced against co-owned property (i.e., property held in joint tenancy) to the extent allowed by state law. 28 U.S.C. § 3010(a). In addition, if the government chooses to enforce its liens, a debtor may elect to exempt certain property from enforcement, including property exempt under state law. 28 U.S.C. § 3014. The issue before this court, however, is not enforcement of liens but their creation and priority. Federal law clearly states that this judgment lien is attached to all Pierce's real property and has priority over later perfected liens. 28 U.S.C. § 3201(a) and (b).

valid debts. The homestead exemption law does not relieve one from his moral and legal obligation to pay what he owes. *Holden v. Farwell, Ozmun, Kirk & Co.*, 223 Minn. 550, 27 N.W.2d, 641, 646 (1947). Allowing the FTC to hold whatever place it has in line under state law fully meets the rehabilitative intent of the exemption statute. While the statute may rightly shield a debtor's homestead from sale or seizure, it is not a sword to fend off a judgment creditor, like the FTC, who is taking no enforcement action.

A judgment lien holder's mere refusal to partially release its lien on demand from the homestead of the judgment debtor does not constitute an adverse claim. In *Westman v. James B. Clow & Sons*, 38 F.2d 124 (W.D. Tex. 1930), the court did not find a justiciable controversy between a couple seeking to have the court declare their exempt property as homestead to dispel an alleged cloud of title created by an abstract judgment lien. There is no present threat of harm or potential future threat of harm through lost sale of the property.

As a matter of law, since there is no adverse claim against the Pierce homestead property, there is no real controversy that the Court may settle by declaration. Pierce has a judgment lien filed against him in the county of his homestead property. Similar to *Westman*, he claims that his effort to sell his homestead has been prevented thus constituting a cloud to title despite no adverse claim by the judgment lien holder. The Pierce's homestead exemption is not being contested. Also, the law is clear that a purchaser may take title to the property free and clear of the abstract judgment. *Hoffman v. Love*, 494 S.W. 2d 591, 594 (Tex. Civ. App.-Dallas 1973 writ ref'd n.r.e); *Meyer v. Paxton*, 78 Tex. 196, 14 SW 568, 568-69 (1890). There is no legal duty by the judgment lien holder to partially release any rights that they do not even hold. The sole difference in these cases is that Pierce seeks a declaration that the FTC's judgment lien is void and unenforceable instead of the

homestead owners in *Westman* request for an affirmation of homestead designation. The type of declaration sought does not by itself create a real controversy. Finally, this declaration would strip the FTC of its actual rights in the event that the homestead designation terminates. Thus, even were the court to look to Texas law, Pierce does not have standing for a declaratory judgment.

CONCLUSION

For all the reasons set forth above, the motion of the FTC for dismissal or, alternatively, for summary judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was sent via facsimile # 281.461.6116 and first class mail, on the 25th day of August, 2009, to Darren R. Rice, Walker, Rice & Wisdom, 1020 Bay Area Blvd, Ste 220, Houston, Texas 77058.

/s/ Eleanor Robinson Gaither
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Assistant United States Attorney

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O R D E R

Defendant Federal Trade Commission's Motion to Dismiss is GRANTED.

IT IS ORDERED that Plaintiff's Original Petition is Dismissed.

SIGNED at Houston on the ____ day of _____, 2009.

United States District Judge