No. 14-15015

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES,

Plaintiff-Appellee

v.

STANLEY KIRK BURRELL, STEPHANIE DARLENE BURRELL,

Defendants-Appellants

and

IMAGE, LIKENESS, POWER LLC,

Defendant

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

ANSWERING BRIEF FOR THE APPELLEE

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GLOSSARY

Acronym	Definition
ER	Excerpts of Record
IRS	Internal Revenue Service

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STATEMENT OF JURISDICTION

The United States brought this suit in the United States District Court for the Eastern District of California seeking to reduce to judgment federal income tax assessments made against Stanley Burrell

and his wife, Stephanie Burrell, (taxpayers) for the 1996 and 1997 tax years. (ER 247.)[1] The district court had jurisdiction under §§ 7402 and 7403 of the Internal Revenue Code of 1986 (26 U.S.C.) (the Code or I.R.C.) and 28 U.S.C. §§ 1340 and 1345.

On August 30, 2013, the district court granted the Government's motion for summary judgment. (ER 10-17.) On December 4, 2013, the court entered a judgment holding that taxpayers are jointly and severally indebted to the United States in the amount of $798,033.48, plus interest. (ER 9.) That judgment was final and appealable and disposed of all claims of all parties. *See* 28 U.S.C. § 2107 and Fed. R. App. P. 4(a). On December 31, 2013, taxpayers timely filed a notice of appeal. (ER 1.) This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly held that the Government was not equitably estopped from collecting tax assessments based on

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[1] "ER" references are to the pages of taxpayers' Excerpts of Record. "Br." references are to taxpayers' opening brief in this Court.

amounts reported by taxpayers on their federal income tax returns for 1996 and 1997.

STATEMENT OF THE CASE

The Government brought this action to reduce to judgment tax assessments against taxpayers Stanley and Stephanie Burrell for unpaid income taxes for the 1996 and 1997 tax years. (ER 247.) In addition to the taxpayers, the Government also named as a defendant Image, Likeness, Power LLC, Stanley Burrell's solely-owned limited liability company. The district court granted summary judgment to the United States, holding that the federal income tax assessments against taxpayers for the 1996 and 1997 tax years should be reduced to judgment. (ER 10-17.) Taxpayers now appeal. (ER 1.)

A. Facts

Taxpayer Stanley Burrell, known professionally as M.C. Hammer, is a rapper, dancer and entrepreneur. (ER 38, 235.) Stanley Burrell had great success as a musical and performing artist in the 1980s and through much of the 1990s. On April 1, 1996, however, taxpayers filed a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Northern District of California (Oakland). *In*

re Stanley K. Burrell, Stephanie D. Burrell, 4:96-BK-42564-RJN (Bankr. N.D. Cal.). (ER 54.) On April 16, 1996, the IRS filed a proof of claim (Claim No. 1) in the total amount of $1,495,734.92 for the 1993, 1994 and 1995 tax years. (ER 54.) On February 20, 1997, the IRS filed an amended proof of claim (Claim No. 52) in the bankruptcy case, increasing the amount due for 1993, 1994 and 1995 to $1,603,017.95. (*Ibid.*)

While operating under the protection of the bankruptcy laws, taxpayers continued in their failure to pay their income tax. On October 16, 1997, while the bankruptcy proceedings were ongoing, taxpayers filed (on extension) their joint return for 1996. (ER 54.) On that return, they reported an income tax liability of $255,211. Taxpayers did not, however, pay the reported tax liability at the time they filed their return. (ER 74.) Pursuant to statutory authority (I.R.C. § 6201(a)(1)), the IRS, on November 24, 1997, made an assessment against taxpayers in the amount of $255,211 for the 1996 tax liability that they had self-assessed on their tax return. The IRS also made assessments against taxpayers for penalties for underpayment of estimated taxes and failure to pay and interest. (*Ibid.*) After receiving

two extensions of time until October 15, 1998, to file their 1997 return, taxpayers filed that return on February 18, 1999. (ER 82.) On their 1997 return, taxpayers reported an income tax liability of $12,399. Taxpayers, however, did not pay the reported tax liability at the time they filed their 1997 return. (*Ibid.*) On April 19, 1999, the IRS made assessments for the unpaid 1997 tax liability plus penalties for underpayment of estimated taxes, late filing and failure to pay and interest. (*Ibid.*) There is no dispute as to the amount of tax liabilities for 1996 and 1997, which were assessed from amounts reported by taxpayers on their tax returns. (ER 11, 54.) It is those tax liabilities for 1996 and 1997 that the United States seeks to reduce to judgment and collect in this case.

On January 9, 1998, the IRS objected to the confirmation of the proposed Chapter 11 plan, stating that the taxpayers had incurred additional federal income tax liabilities for post-petition tax periods (tax years 1996 and 1997). (ER 55.) On January 14, 1998, Michael Cooper, counsel for taxpayers, stated on the record in the bankruptcy court that he was aware of post-petition tax liabilities of the taxpayers for the 1996 and 1997 tax years and that taxpayers had an agreement to pay

those liabilities to the IRS outside of the proposed Chapter 11 plan. (ER 150-152.) Neither the United States nor taxpayers filed a proof of claim for the 1996 and 1997 tax years in taxpayers' bankruptcy case. (ER 55.)

The Chapter 11 bankruptcy case was converted to a Chapter 7 bankruptcy case on September 23, 1998. On June 5, 2000, the IRS filed a second amended proof of claim (Claim No. 85) in the bankruptcy case in the total amount of $1,517,450.92 for the 1993, 1994 and 1995 tax years. (ER 55.)

On June 29, 2000, the bankruptcy court approved and filed a stipulation and order based on the second amended proof of claim. (ER 55, 120-123.) The stipulation was signed by Terrance Stinnett, counsel for William H. Broach, the Chapter 7 Trustee, and Thomas R. Mackinson, counsel for the United States (Internal Revenue Service as creditor). (ER 121.) In the stipulation, the parties agreed that the tax liabilities listed in Claim No. 85 were allowed and that the secured portion thereof had been paid (ER 121):

> NOW, THEREFORE, IT IS HEREBY AGREED AND STIPULATED as follows:
>
> 1. The trustee and the Department of Treasury – Internal Revenue Service agree that (i) the secured portion of said Claim No. 85 is allowed in the sum of $795,734.92, and said

> secured claim has been paid in full (ii) the only amount due and owing to the Department of Treasure Internal Revenue Service at this time is the unsecured priority portion of said claim in the sum of $716,000, and (iii) the unsecured priority portion of said claim shall be allowed in said sum of $721,716.00.

The court authorized and approved the stipulation. (ER 121.) The stipulation and order did not include any reference to taxpayers' 1996 and 1997 tax years. (ER 120-121.) Almost two years later, on April 23, 2002, the bankruptcy court entered an order denying discharge in taxpayers' Chapter 7 case. (ER 57.)

B. Proceedings in the district court

On November 21, 2011, the Government filed a complaint in the district court seeking to reduce to judgment the income tax assessments against taxpayers for the 1996 and 1997 tax years. (ER 247-253.) Taxpayers filed a motion for summary judgment on April 8, 2013. (ER 235.) Taxpayers asserted that the instant proceeding arose out of the same facts that were adjudicated in their bankruptcy case and that the Government was collaterally and equitably estopped from relitigating its claim for the taxes for 1996 and 1997. (ER 235-236.) The United States opposed taxpayers' motion for summary judgment and filed a cross-motion for summary judgment. (ER 37-52.)

The district court, on August 30, 2013, issued an order granting the Government's motion for summary judgment. (ER 10-17.) The court first noted that there was no dispute as to the amount of the tax liabilities for 1996 and 1997 as these amounts were assessed based on amounts reported by taxpayers on their tax returns. (ER 11.) The court rejected taxpayers' contention that collateral estoppel and res judicata barred the Government's claim. The court held that the stipulation and order in the bankruptcy case was only a judgment on the merits for the 1993, 1994 and 1995 tax years, and not 1996 and 1997. Thus, the court concluded that res judicata did not bar the Government from litigating taxpayers' liability for 1996 and 1997. (ER 14-15.)

The court also rejected taxpayers' contention that equitable estoppel barred the Government's suit. The court stated that, in addition to the traditional elements for estoppel, a party asserting equitable estoppel against the Government must establish that the Government engaged in affirmative misconduct going beyond mere negligence. The court held that in this case taxpayers failed to establish that the Government's inaction in failing to file a proof of

claim for 1996 and 1997 rose to the level of affirmative misconduct required to assert equitable estoppel against the Government. Accordingly, the court held that the Government's suit was not barred by equitable estoppel. (ER 16-17.)

On December 4, 2013, judgment was entered in favor of the Government and against taxpayers in the amount of $798,033.48, plus interest. (ER 9.) Taxpayers now appeal. (ER 1.)

SUMMARY OF ARGUMENT

In taxpayers' bankruptcy proceeding, the Government had filed a proof of claim for their income tax liabilities for 1993 to 1995, but did not amend the proof of claim to include their post-petition income tax liabilities for 1996 or 1997. Nor did taxpayers file a proof of claim for these taxes, although the Bankruptcy Code allows them to do so. In this action to reduce taxpayers' 1996 and 1997 tax liabilities to judgment, taxpayers argued that the Government's failure to seek collection of these liabilities in the bankruptcy court equitably estopped it from doing so in this proceeding. The district court correctly rejected taxpayers' estoppel argument.

Estoppel is an equitable doctrine invoked to avoid injustice in a particular case. The Supreme Court has held that a party claiming estoppel must satisfy the traditional elements of estoppel; he must have relied on its adversary's conduct in such a manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading. In addition, equitable estoppel can be applied against the United States only where the proponent of estoppel proves (1) that the Government engaged in affirmative misconduct, (2) that withholding estoppel would result in a serious injustice, and (3) that applying it would not impose an undue burden on the public. Affirmative conduct is defined to mean a deliberate lie or pattern of false promises.

Here, taxpayers have not even proven any of the elements necessary to estop a private party. There is no language in the proof of claim or the stipulation that can plausibly be construed as a misrepresentation. The Government's failure to include the 1996 and 1997 tax liabilities in the proof of claim and various amendments thereto did not constitute a representation that taxpayers had no

liability for these years as there is no requirement that a creditor file a proof of claim in bankruptcy. Nor were taxpayers ignorant of the true facts. They knew of their tax liabilities; their counsel represented in the bankruptcy court that they had an agreement to pay the 1996 and 1997 tax liabilities outside of the Chapter 11 plan.

Taxpayers have not shown detrimental reliance by reason of the IRS's failure to submit a proof of claim for the 1996 and 1997 taxes. Since they were denied a discharge, whether the assets in the hands of the bankruptcy trustee were used to pay tax claims or other claims had no immediate effect on them; they remained personally liable for all their debts.

Moreover, taxpayers failed to prove the additional elements necessary to estop the Government. Indeed, in their brief on appeal, taxpayers do not even discuss these requirements, much less allege that the district court erred in its holding. Thus, taxpayers have waived this argument on appeal. Moreover, there is not a shred of evidence in this case that the IRS tried to mislead taxpayers through a deliberate lie or a pattern of false promises. At most, taxpayers complain of neglect, and neglect is not affirmative misconduct. Further, it is readily apparent

that applying estoppel would unduly burden the public by preventing the Government from pursuing a tax liability of $798,033.48.

The judgment of the district is correct and should be affirmed.

ARGUMENT

The district court correctly held that the United States was not equitably estopped from reducing tax assessments to judgment against taxpayers for the 1996 and 1997 tax years

Standard of review

The district court's entry of summary judgment is subject to *de novo* review. *Baccei v. United States*, 632 F.3d 1140, 1144 (9th Cir. 2011).

A. Introduction

On appeal, taxpayers do not contend that the amount of taxes that the Government is seeking to reduce to judgment for 1996 and 1997 is incorrect. Rather, taxpayers contend that the Government should be estopped from collecting those amounts based on a stipulation entered into in the bankruptcy court on a proof of claim filed by the IRS for the 1993, 1994 and 1995 tax years. (Br. 6-8.) As discussed below, taxpayers have not even established the requirements for the application of estoppel against a private party, much less met the far heavier burden of establishing an estoppel against the Government.

B. Taxpayers failed to establish the traditional elements for equitable estoppel

Estoppel is an equitable doctrine invoked to avoid injustice in a particular case. *Heckler v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 59 (1984). A party claiming estoppel "must have relied on its adversary's conduct 'in such a manner as to change his position for the worse'" and "that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." *Id.* at 59. In this circuit, the party asserting estoppel carries the burden of proof. *Estate of Amaro v. City of Oakland*, 653 F.3d 808, 813 (9th Cir. 2011).

The traditional elements of an equitable estoppel claim include "'(1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.'" *Baccei v. United States*, 632 F.3d at 1147, *quoting Morgan v. Gonzales*, 495 F.3d 1084, 1092 (9th Cir. 2007).

Taxpayers contend (Br. 7-8) that the Government made a misrepresentation in the proof of claim that was filed in the bankruptcy court upon which they relied to their detriment. They are mistaken. The Government's failure to include the 1996 and 1997 tax liabilities in the proof of claim and various amendments thereto did not constitute a representation that taxpayers had no liability for these years as there is no requirement that a creditor file a proof of claim in bankruptcy. *See* 11 U.S.C. § 501(a) ("A creditor . . . *may* file a proof of claim") (emphasis added). The filing of the claim only means that the creditor can participate in any distribution from the bankruptcy estate. When, as here, a creditor holds a non-dischargeable claim,[2] he could simply forego the bankruptcy claim route and seek to satisfy the claim outside of bankruptcy, once the automatic stay is terminated. *See In re Grynberg*, 986 F.2d 367, 372 (10th Cir. 1993).

The stipulation does not advance taxpayers' cause as it refers to Claim No. 85 in stating that "the only amount due and owing to the

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[2] The post-petition income taxes for 1996 and 1997 were not dischargeable in bankruptcy. *See* 11 U.S.C. §§ 507(a)(8)(A)(i); 523(a)(1)(A).

Department of Treasury at this time is the unsecured portion of said claim in the sum of $716,000." (ER 121.) Claim No. 85 is for income taxes for 1993, 1994 and 1995. (ER 122-23). The post-petition income taxes for 1996 and 1997 were not dischargeable in bankruptcy. 11 U.S.C. §§ 507(a)(8)(A)(i), 523(a)(1)(A). Thus, neither the stipulation nor the proof of claim purported to waive tax liabilities for 1996 or 1997.

Nor were taxpayers ignorant of the true facts. They knew of their tax liabilities for 1996 and 1997 and the amount thereof because they reported these amounts on their tax returns for 1996 and 1997. (ER 89.) They also knew that they were liable for these taxes even though the IRS had not submitted a proof of claim for them. Indeed, their counsel stated at the bankruptcy court hearing on plan confirmation that taxpayers were aware of the tax liabilities for 1996 and 1997 and that they had an agreement with the IRS to pay those liabilities outside the proposed Chapter 11 plan. (ER 150-152.)

There is also no evidence that taxpayers reasonably relied on the IRS's failure to submit a proof of claim for the 1996 and 1997 taxes to their detriment. Any advantages to taxpayers of a filed proof of claim for the 1996 and 1997 tax liabilities could have inured to them

notwithstanding the IRS's failure to file one as taxpayers could have filed their own proof of claim for these tax liabilities. *See* 11 U.S.C. § 501(c) ("If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim."). *See also In re Grynberg*, 986 F.2d at 372. Taxpayers did not do so.

Furthermore, since taxpayers were denied a discharge, whether the assets in the hands of the bankruptcy trustee were used to pay tax claims or other claims had no immediate effect on them. Taxpayers remained personally liable for all of their debts, and any money applied to any debt by the Chapter 7 trustee would have benefited them, as all debts remained owing after the Chapter 7 case was closed. Thus the IRS's failure to include the 1996 and 1997 years on the amended proof of claim did not prejudice them, and the estoppel doctrine is unavailable. *See Sulit v. Schiltgen*, 213 F.3d 449, 454 (9th Cir. 2000) ("estoppel against the government is unavailable where petitioners have not lost any rights to which they were entitled.").

C. Taxpayers failed to prove the additional elements required to estop the Government

Where, as here, estoppel is sought to be applied against the Government to prevent it from enforcing the law, "the interest of the

citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler*, 467 U.S. at 60. In *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), the Supreme Court reiterated its long-standing view that equitable estoppel lies against the Government, if at all, only in the narrowest of circumstances. *Id.* at 419-420. Indeed, in *Richmond* the Court noted that it had "reversed every finding of estoppel [against the Government] that [it had] reviewed." *Id.* at 422. *See also Watkins v. U.S. Army*, 875 F.2d 699, 706 (9th Cir. 1989); *Costa v. INS*, 233 F.3d 31, 38 (1st Cir. 2000) (estoppel against the government, to the extent that "it exists at all[,] is 'hen's-teeth rare.'").

At a minimum, in addition to the traditional equitable estoppel factors set forth above, the party seeking to estop the Government must prove two additional elements. *Yerger v. Robertson*, 981 F.2d 460, 466 (9th Cir. 1992); *Watkins v. U.S. Army*, 875 F.2d at 707. First, he "must establish affirmative misconduct going beyond mere negligence." *Cadwolder v. United States*, 45 F.3d 297, 299 (9th Cir. 1995) (internal quotation marks omitted); *Yerger*, 981 F.2d at 466. Affirmative

misconduct on the part of the Government requires an affirmative misrepresentation or affirmative concealment of a material fact, such as a deliberate lie or a pattern of false promises. *Baccei v. United States*, 632 F.3d at 1147; *Elim Church of God v. Harris*, 722 F.3d 1137, 1144 (9th Cir. 2013). Second, he must prove that withholding estoppel would result in a serious injustice and that applying it would not impose an undue burden on the public. *Estate of Amaro v. City of Oakland*, 653 F.3d 808, 813 (9th Cir. 2011); *S & M Inv. Co. v. Tahoe Regional Planning Agency*, 911 F.2d 324, 329 (9th Cir. 1990). *See also Baccei v. United States*, 632 F.3d at 1147 (a "party asserting equitable estoppel against the government must also establish that (1) the government engaged in affirmative misconduct going beyond mere negligence; (2) the government's wrongful acts will cause a serious injustice; and (3) the public's interest will not suffer undue damage by imposition of estoppel.").

Taxpayers have made no effort to show that the Government committed affirmative misconduct or that applying estoppel would not impose an undue burden on the public. Thus, taxpayers have waived this argument on appeal. *United States v. Wahchumwah*, 710 F.3d 862,

868 n.2 (9th Cir. 2013) (arguments not raised in a party's opening brief are deemed waived); *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (same).

Moreover, it is readily apparent that applying estoppel would unduly burden the public by preventing the Government from pursuing a tax liability of $798,033.48. It is also evident that neither the failure of the IRS to file a proof of claim for 1996 and 1997, nor the stipulation entered into in the bankruptcy court detailing the tax liability for the 1993 through 1995 tax years, rises to the level of affirmative misconduct required to assert equitable estoppel against the Government. The Government's failure to seek recovery of the 1996 and 1997 tax liabilities in the bankruptcy case was, at most, a negligent act. But a negligent act does not constitute affirmative misconduct. *See Baccei v. United States*, 632 F.3d at 1147; *Elim Church of God v. Harris*, 722 F.3d at 1144; *Morgan v. Gonzales*, 495 F.3d at 1092.

Although taxpayers assert in their brief that withholding estoppel would be "[u]nconscionable" (Br. 8), the facts are to the contrary. At the time of the bankruptcy action, taxpayers knew of their 1996 and 1997 tax liabilities. Indeed, their counsel represented that taxpayers "agreed

with the Internal Revenue Service that . . . the taxes for 1997 will be paid by April 15 [1998]" and that "the Internal Revenue Service has agreed to a payment program over three years" for the 1996 tax liability. (ER 152.) Taxpayers' outstanding tax liabilities result from their failure to honor their agreement notwithstanding their earning substantial income while operating under the protection of the Bankruptcy Code. On these facts, it would be "unconscionable" for them to obtain the benefit of the equitable estoppel doctrine. *See In re Wigley*, 333 B.R. 768, 780-81 (Bankr. N.D. Tex. 2005) ("It is not good faith for Debtors to file Chapter 13 bankruptcy and then continue to earn income but not pay the post-petition taxes on that income") (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, the judgment of the district court is correct and should be affirmed.

Respectfully submitted,

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JUNE 2014

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the United States respectfully inform the Court that they are not aware of any cases related to the instant appeal that are pending in this Court.

CERTIFICATE OF COMPLIANCE

With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements of Federal Rule of Appellate Procedure 32(a)

Case No. 14-15015

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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(s) /s/ Regina S. Moriarty

Attorney for United States

Dated: June 11, 2014

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the 11th day of June, 2014. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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