NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 03-15888
	)	
ARTHUR M. VOLPE,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
ARTHUR M. VOLPE,	)	Adversary Proceeding No. 06-2038
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OF OPINION**
	)	(NOT FOR COMMERCIAL PUBLICATION)
INTERNAL REVENUE SERVICE,	)	
	)	
Defendant.	)	

Debtor Arthur M. Volpe filed this adversary proceeding against the Internal Revenue Service seeking a determination that his tax debts for the years 1997, 1998, and 1999 are dischargeable.[1] The IRS now moves for summary judgment, arguing that the debtor's tax liabilities for those years are excepted from discharge under 11 U.S.C. § 523(a)(1)(C). For the reasons stated below, the IRS's motion is denied.[2]

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

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[1] The debtor's bankruptcy case was filed before October 17, 2005, the effective date of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. All citations are, therefore, to the bankruptcy code as it existed before that date.

[2] In the court's view, the value of this opinion is solely to decide the dispute between the parties, rather than to add anything to the general bankruptcy jurisprudence. For that reason, the opinion is not intended for commercial publication.

DISCUSSION

The Summary Judgment Standard

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. The burden is then on the nonmoving party to show the existence of a material fact which must be tried. *Id.* at 324. The nonmoving party "may not rest upon the mere allegations or denials of the [nonmoving] party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). "Credibility judgments and weighing of the evidence are prohibited during the consideration of a motion for summary judgment; rather, the evidence should be viewed in the light most favorable to the non-moving party." *Ahlers v. Schebil*, 188 F.3d 365, 369 (6th Cir. 1999) (citing *Anderson*, 477 U.S. at 255). The issue at this stage is whether there is evidence on which a trier of fact could reasonably find for the nonmoving party. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989).

11 U.S.C. § 523(a)(1)(C)

An individual chapter 7 debtor is generally entitled to a discharge of all debts that arose prior to the filing of the bankruptcy petition. *See* 11 U.S.C. § 727(b). This general rule, however, is subject to the exceptions found in bankruptcy code § 523. In the present action, the IRS relies on the exception found in § 523(a)(1)(C), which states:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
>
> (1) for a tax . . .
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> * * *
>
> (C) with respect to which the debtor . . . willfully attempted in any manner to evade or defeat such tax[.]

11 U.S.C. § 523(a)(1)(C). This exception limits the discharge of tax debts to the honest, but unfortunate debtor. *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991). As with all exceptions to discharge, the IRS must prove that the exception applies by a preponderance of the evidence. *See id.* at 287–88; *Stamper v. United States (In re Gardner)*, 360 F.3d 551, 557 (6th Cir. 2004).

In this case, the inquiry is whether the debtor "willfully attempted in any manner to evade or defeat" the tax liability. The case law has divided this inquiry into two elements: a conduct element and a mental state requirement. *In re Gardner*, 360 F.3d at 558. The IRS must satisfy the conduct element by proving that the debtor avoided or evaded the payment or collection of taxes through either acts of omission, such as failure to file returns and failure to pay taxes, or affirmative acts of evasion, such as placing assets in the name of others. *See In re Gardner*, 360 F.3d at 557–58; *Toti v. United States (In re Toti)*, 24 F.3d 806, 809 (6th Cir. 1994); *Myers v. Internal Revenue Serv. (In re Myers)*, 216 B.R. 402, 404–05 (B.A.P. 6th Cir. 1998), *aff'd*, 196 F.3d 622 (6th Cir. 1999). Moreover, while evidence of nonpayment of tax, without more, is insufficient to satisfy the IRS's burden under § 523(a)(1)(C), "failure to pay a known tax duty is 'relevant evidence which a court should consider . . . to determine whether . . . the debtor willfully attempted to evade or defeat taxes.'" *In re Birkenstock*, 87 F.3d 947, 951 (7th Cir. 1996) (quoting *Dalton v. Internal Revenue Serv. (In re Dalton)*, 77 F.3d 1297, 1301 (10th Cir. 1996)) (second omission in original), *quoted by*, *In re Myers*, 216 B.R. at 405.

As for the mental state requirement, the IRS must show that the debtor's attempt to avoid his tax liability was willful. For purposes of § 523(a)(1)(C), the Sixth Circuit "equates 'willful' with voluntary, conscious, and intentional . . . ." *In re Toti*, 24 F.3d at 809. Thus, "[t]he mental state requirement is proven when the debtor: '(1) had a duty to pay taxes; (2) knew he had such a duty; and (3) voluntarily and intentionally violated that duty[.]'" *In re Gardner*, 360 F.3d at 558 (quoting *United States v. Fretz (In re Fretz)*, 244 F.3d 1323, 1330 (11th Cir. 2001)). "This willfulness requirement prevents the application of the exception to debtors who make inadvertent mistakes, reserving nondischargeability for those whose efforts to evade tax liability are knowing and deliberate." *In re Birkenstock*, 87 F.3d at 952.

When determining whether or not the conduct element or mental state requirement has been satisfied, the totality of the debtor's conduct should be considered. *See, e.g.*, *In re Dalton*, 77 F.3d at 1301; *In re Myers*, 216 B.R. at 405; *Harris v. United States (In re Harris)*, 328 B.R. 837, 843 (Bankr. S.D. Ala. 2005); *May v. United States Internal Revenue Serv. (In re May)*, 247 B.R. 786, 793 (Bankr. W.D. Mo. 2000), *aff'd*, 251 B.R. 714 (B.A.P. 8th Cir. 2000), *aff'd*, 2 F. App'x 681 (8th Cir. 2001). Because direct proof of the debtor's intent is normally unavailable, intent may be proven by circumstantial evidence. *See, e.g.*, *In re Dalton*, 77 F.3d at 1303–04; *In re May*, 247 B.R. at 793; *Teeslink v. United States (In re Teeslink)*, 165 B.R. 708, 716 (Bankr. S.D. Ga. 1994). Summary judgment regarding a debtor's discharge may be granted in appropriate cases. *See, e.g.*, *Blakeman v. United States (In re Blakeman)*, 244 B.R. 100, 105 (Bankr. N.D. Ohio 1999); *Berning v. Internal Revenue Serv. (In re Berning)*, 244 B.R. 96, 100 (Bankr. N.D. Ohio 1999).

Evidence Presented by the IRS

The IRS proffers three categories of evidence that it argues demonstrates the nonexistence of a genuine issue of material fact: (1) evidence of repeated late filing of tax returns and nonpayment of taxes, (2) evidence that the debtor concealed a real estate asset, and (3) evidence that the debtor lived a "lavish" lifestyle during the period in which he was not paying taxes.

A. Late Filings and Nonpayment of Taxes

The IRS presents evidence that the debtor filed his income tax returns late for the years 1997, 1998, 2000, 2001, 2002, and 2004, and failed to pay his income taxes in full for the years 1997, 1998, and 1999. Indeed, the certified tax records attached to the IRS's motion for summary judgment show that the debtor filed his income tax returns on the following dates[3]:

Tax Year	Extension to File Granted Until	Date Debtor Filed Return
1997	October 15, 1998	April 5, 1999
1998	October 15, 1999	April 18, 2000

[3] Docket 25, attachments # 15–22.

1999	(unnecessary)	April 15, 2000
2000	October 15, 2001	October 23, 2001
2001	October 15, 2002	December 17, 2002
2002	October 15, 2003	October 28, 2003
2003	October 15, 2004	October 13, 2004
2004	October 15, 2005	June 12, 2006

These same records show the following tax assessment and payment history, which the debtor does not dispute[4]:

For the year 1997, the debtor reported $225,475.00 in gross income. The amount owed in taxes was $64,981.54. The debtor made one $12,000.00 payment on April 15, 1998. On April 7, 1999, the debtor made a $16,000.00 payment toward his 1998 tax liability, which the IRS applied to his outstanding taxes for 1997. On January 28, 2002, one of the debtor's rental properties was sold pursuant to an IRS levy, and the proceeds totaling $45,729.80 were applied to the debtor's 1997 tax debt. The IRS's motion states that the debtor's underling tax liability has now been paid, but the accrued penalties and interest to the petition date remain in the amounts of $15,851.08 and $22,165.22 respectively.[5]

For the year 1998, the debtor reported $174,161.00 in gross income. The amount owed in taxes was $64,414.00. The debtor's $16,000.00 payment made on April 7, 1999 was applied to his 1997 tax debt. No other payments were made, leaving $64,414.00 in tax liability remaining for 1998, with accrued penalties and interest to the petition date existing in the amounts of $33,520.65 and $28,448.65 respectively.[6]

For the year 1999, the debtor reported $115,736.00 in gross income. The amount owed for 1999 was $32,862.00. The debtor made no payments at the time he filed his return. The IRS applied two overpayments from tax year 2000 totaling $9,994.00 to the debtor's 1999 tax debt.

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[4] Docket 26, at unnumbered page 5.

[5] Docket 25, attachment # 15.

[6] Docket 25, attachment # 16.

No other payments were made, leaving $22,868.00 in tax liability remaining for 1999, with accrued penalties and interest to the petition date existing in the amounts of $6,814.37 and $6,753.12 respectively.[7]

B. Concealed Real Estate Asset at Crossbrook Drive

The IRS presents the following evidence purporting to show that the debtor concealed a real estate asset located at 548 Crossbrook Drive, Berea, Ohio:

With respect to the purchase and maintenance of the property, the IRS's evidence shows that on September 28, 1998, Janice Justice, a friend of the family, signed a general warranty deed conveying the Crossbrook property to Audrey Volpe, the debtor's mother.[8] According to the debtor's deposition testimony, the debtor arranged the transaction between Ms. Justice and Ms. Volpe, and negotiated the terms of the purchase money mortgage securing the property (no money down, no closing costs, $145,000.00 over fifteen years at between 7% and 7.5% interest).[9] Ms. Volpe bought the house for the debtor and his children to live in while he was going through a divorce.[10] According to the debtor, he rented the house from his mother, although he admits that there was no formal rental agreement between them.[11] He stated that each month he would give Ms. Volpe the mortgage payment to give to Ms. Justice, although he would sometimes pay Ms. Justice directly.[12] Ms. Volpe stated that the debtor made all the mortgage payments.[13] The debtor also admitted to paying the real estate taxes and general upkeep costs of the house.[14] The debtor stated that he believed Ms. Volpe paid the insurance

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[7] Docket 25, attachment # 17.

[8] Docket 25, attachment # 4.

[9] Docket 25, attachment # 3, at 23–25.

[10] Docket 25, attachment # 2, at 17.

[11] Docket 25, attachment # 3, at 25–27.

[12] Docket 25, attachment # 3, at 26.

[13] Docket 25, attachment # 2, at 18.

[14] Docket 25, attachment # 3, at 26–27.

costs on the house, but Ms. Volpe stated that the debtor paid everything, including insurance payments and utility bills.[15] During the time in which the debtor was living at the house and making rent payments to Ms. Volpe, Ms. Volpe never reported the rent payments as income on her income taxes.[16]

The IRS also presents evidence that the Crossbrook property was mentioned in the divorce. The separation agreement attached to the Agreed Judgment Entry of Divorce states in pertinent part, "[u]pon the signing of this Agreement, Wife shall, by proper Deed, transfer all her right, title and interest to the real estate located at . . . 548 Crossbrook Drive, Berea, Ohio, to Husband."[17] The debtor states that inclusion of the Crossbrook property in his divorce was probably a mistake by his attorney because the property was never in his name.[18] The debtor did admit that he discussed plans to place the property in his mother's name with his then-wife, but the debtor characterized the transaction as one necessary to keep the property out of the divorce.[19]

The remainder of the IRS's evidence concerning the Crossbrook property relates to its refinancing and subsequent transfer to the debtor. According to the debtor's deposition testimony, in 2003 Ms. Volpe and Ms. Justice agreed to refinance the property, lowering the interest rate to 5% and raising the monthly payments to $1,486.00.[20] A note dated July 15, 2003 and signed by Ms. Volpe, which appears to be a refinancing agreement, was attached to the IRS's motion. The note was in the amount of $136,650.00, to be paid back at 5% interest with

[15] Docket 25, attachment # 2, at 18–19; attachment # 3, at 27.

[16] Docket 25, attachment # 2, at 19.

[17] Docket 25, attachment # 8, exh. A, at 3.

[18] Docket 25, attachment # 3, at 117.

[19] Docket 25, attachment # 3, at 130–31.

[20] Docket 25, attachment # 3, at 30–31.

monthly payments of $1,080.62.[21] In March 2006, Ms. Volpe transferred the property to the debtor via quit-claim deed.[22] Ms. Volpe stated that the transfer was for no consideration or for consideration already rendered in the form of mortgage payments to Ms. Justice, but the debtor stated that he paid $179,000.00, financed through a purchase money mortgage with Ms. Justice.[23] A mortgage deed, dated March 8, 2006 between the debtor and Ms. Justice references consideration in the amount of $179,000.00, at 5.75% interest with monthly payments of $1,486.43 for 15 years.[24] Ms. Volpe stated that the transfer was made because the debtor's ex-wife could no longer take the property away from him, and the debtor stated that the transfer was made because his mother was ill.[25] The debtor further stated that at the time of the transfer he asked his attorney, "can I even put this house in my name or is it going to get taken away from the divorce or IRS or what's going to happen to it?"[26]

C. The Debtor's "Lavish" Lifestyle

Finally, the IRS presents evidence purporting to show that the debtor lived a "lavish" lifestyle and, therefore, flaunted his duty to pay taxes. This evidence consists of affidavits and deposition testimony that the debtor took several trips between 1997 and 2005 and that the debtor sent both his children to private, parochial schools.

Concerning the trips taken by the debtor, the IRS attached an affidavit of Diane Podway, the debtor's girlfriend from approximately 1997 to 2002.[27] Ms. Podway declared that she and the debtor took a trip to Hawaii in November 1999 and trips to the Bahamas and Florida at some

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[21] Docket 25, attachment # 5.

[22] Docket 25, attachment # 6.

[23] Docket 25, attachment # 2, at 22–23; attachment # 3, at 31–32.

[24] Docket 25, attachment # 7.

[25] Docket 25, attachment # 2, at 22; attachment # 3, at 32–33.

[26] Docket 25, attachment # 3, at 33.

[27] Docket 25, attachment # 13.

point during their relationship. She further declared that, with the exception of a contribution of between $800.00 and $1,000.00 for the Hawaii trip, she did not make any other contributions for the trips.[28] According to the debtor's deposition testimony, Ms. Podway paid for half of the trip to Hawaii—approximately $2,500.00.[29] The debtor did not remember taking any more trips with Ms. Podway. The debtor did recall a business trip to Florida for the National Association of Realtors convention, which was paid for by Pulte Homes, and a trip to the Bahamas with his wife before the divorce, which was paid for by her father.[30] The debtor also testified that he reluctantly took a week-long trip to the Sandals Resort in the Bahamas in 2004 or 2005 with Deb Bubar, his then-girlfriend. Ms. Bubar paid for the trip, but the debtor paid her back over the next several months for a total expense of $3,000.00.[31]

The IRS also presents deposition testimony concerning tuition paid to send the debtor's children to private school. The debtor stated in his April 2007 deposition that his son should graduate from the University of Dayton in May of that year, and that his daughter currently attends Holy Name high school. His daughter attended Holy Name for three years, prior to which she attended St. Mary's for eight years. His son went to high school at St. Ignatius, prior to which he also attended St. Mary's for eight years. The debtor stated that he paid the tuition for his son and daughter to attend these schools: $26,560.00 per year for the University of Dayton; $6,700.00 per year for Holy Name; and around $6,300.00 or less per year at St. Mary's.[32]

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[28] Docket 25, attachment # 13.

[29] Docket 25, attachment # 3, at 86.

[30] Docket 25, attachment # 3, at 88–92.

[31] Docket 25, attachment # 3, at 89–91.

[32] Docket 25, attachment # 3, at 36–37. The IRS presented no evidence concerning tuition paid for the debtor's son to attend St. Ignatius.

The IRS's Motion for Summary Judgment

The IRS does not differentiate between evidence relating to the conduct element and evidence concerning the mental state requirement. Nevertheless, for the reasons stated below, the evidence presented by the IRS is sufficient to meet its initial burden on summary judgment.

A. Conduct Element

The IRS presents evidence of both omissions and evasions. The IRS's evidence shows that the debtor repeatedly failed to timely file his income tax returns and repeatedly failed to pay the taxes assessed. In this Circuit, evidence that the debtor failed to file his returns, combined with evidence showing the debtor's failure to pay, satisfies the conduct element. *See In re Toti*, 24 F.3d at 809; *accord In re Fretz*, 244 F.3d at 1330. This case, however, is not as straightforward, as the debtor did file his tax returns eventually. The debtor also filed his 1999 and 2003 returns on time and made some payments to his tax liability. The court will, therefore, consider these late filings in the totality of the debtor's conduct, but notes that evidence of late filings alone does not establish the IRS's burden on the conduct element. *See In re Myers*, 216 B.R. at 405; *see also Hassan v. United States (In re Hassan)*, 301 B.R. 614, 623 (S.D. Fla. 2003) (noting that filing of tax returns late is evidence to be considered in the totality of the circumstances when determining dischargeability); *In re Teeslink*, 165 B.R. at 716 (including "repeatedly filing returns late" in fact patterns evidencing badges of fraud).

The court will also consider the debtor's conduct as it relates to the Crossbrook property. *See In re Zuhone*, 88 F.3d 469, 471 (7th Cir. 1996); *Dalton*, 77 F.3d at 1303; *In re Hassan*, 301 B.R. at 624. Even viewing the evidence in the light most favorable to the debtor, it appears that the Crossbrook property was owned by Ms. Volpe in name only. The evidence shows that the debtor's monthly rent payments equaled Ms. Volpe's monthly mortgage payments, that they were consistently paid directly to the mortgagee, and that they were not reported on Ms. Volpe's income tax. The debtor also paid the real estate taxes and general upkeep on the house and arranged the initial transaction between Ms. Justice and Ms. Volpe to give himself a place to live. These acts are not consistent with a person merely renting a house.

The reasons why the debtor kept the property out of his name relate to the mental state requirement, but the fact that the property was in his mother's name and not his own demonstrates an affirmative act of evasion. Keeping the property in Ms. Volpe's name prevented the IRS from attaching liens to the property and, therefore, prevented the IRS from collecting an assessed tax liability against the debtor.

Taken as a whole, the evidence of late filings and nonpayment, along with the evidence relating to the Crossbrook property, shows that the debtor avoided or evaded the payment or collection of taxes.[33] *See In re Gardner*, 360 F.3d at 559–60; *In re Toti*, 24 F.3d at 807–09; *In re Myers*, 216 B.R. at 406–07; *see also In re Fretz*, 244 F.3d at 1330. The remaining concern is whether the debtor engaged in these acts and omissions "willfully."

2. Mental State Requirement

In this case, the debtor admits that he had a duty to pay taxes and that he knew that he had such a duty.[34] This leaves only the question of whether he voluntarily and intentionally violated this duty. *In re Gardner*, 360 F.3d at 558. The IRS's evidence initially demonstrates the absence of a genuine issue of material fact as to this question.

When determining whether the debtor willfully evaded the assessment or collection of taxes, the court will consider evidence of property held in another's name. *See In re Zuhone*, 88 F.3d at 471; *Dalton*, 77 F.3d at 1302; *In re Hassan*, 301 B.R. at 620–21; *see also In re Gardner*, 360 F.3d at 557 (concerning concealed nominee accounts); *In re Birkenstock*, 87 F.3d at 952 (involving property held in trust). In this case, while the debtor claims that he arranged the transaction between Ms. Volpe and Ms. Justice to keep the Crossbrook property out of the divorce,[35] the IRS presents two pieces of evidence that show that the debtor kept the property out of his name, at least in part, because of the tax debt. First, the IRS points to the debtor's

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[33] Further, the court notes that the debtor does not dispute the satisfaction of the conduct element in his brief. (Docket 26).

[34] Docket 25, attachment # 11, ¶¶ 15–16.

[35] Docket 26, at unnumbered page 6.

deposition, where he testified that he consulted an attorney to determine if the IRS could take the house when it was finally placed in his name in 2006.[36] And second, the IRS presents the separation agreement signed prior to April 27, 1999, which states that the wife relinquished any interest she might have had in the Crossbrook property.[37] The separation agreement is consistent with the debtor's deposition testimony, which states that the debtor consulted his wife about the property before he bought it, and that she agreed to the transaction.[38] If the wife agreed to the transaction and relinquished any rights she might have had in the property, then the divorce could not have been the only reason to keep the property out of the debtor's name. It appears, therefore, that the debtor kept the property out of his name (especially after April of 1999 when the separation agreement was signed) to avoid a tax lien on the property.

The court will also consider the IRS's evidence regarding the debtor's "lavish" lifestyle insofar as it shows that the debtor had money which could have been used toward his tax debt. *See In re Gardner*, 360 F.3d at 560 (considering twenty golfing and vacation trips taken by the debtor as evidence of a "lavish" lifestyle); *In re Harris*, 328 B.R. at 843–45 (holding that the IRS met the mental state requirement, in part, by showing that the debtor paid for his daughter to attend private school, took at least five vacations, and gave his nephew approximately $10,000.00 for his education). Here, the debtor spent at least $2,500.00 for a vacation to Hawaii in November of 1999.[39] Also, the debtor spent approximately $12,000.00 per year between 1997 and 1999 to send his two children to private school.[40] The evidence shows, therefore, that the

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[36] Docket 25, attachment # 3, at 33.

[37] Docket 25, attachment # 8, exh. A, at 3.

[38] Docket 25, attachment # 3, at 131.

[39] Docket 25, attachment # 3, at 86; attachment # 13. The IRS also presents evidence that the debtor took various other trips, but the evidence fails to show that the debtor spent any of his own money on those trips.

[40] Docket 25, attachment # 3, at 36–37. The $12,000.00 figure was derived by multiplying $6,000.00 (an estimated reduced tuition cost) by 2 for the years when both of his children attended St. Mary's. This amount would only increase in the years following 1999 as his son attended high school and the amount of tuition at St. Mary's rose.

debtor spent thousands of dollars per year between 1997 and 1999 on vacation and private school tuition that could have been used to pay his taxes. The evidence also shows that the debtor continued to spend this amount or more on vacations and private school tuition between 2000 and 2003, which could have been used to pay off his tax liability before he filed for bankruptcy.

This evidence, combined with the tax records showing the debtor was competent enough to earn well over $100,000.00 per year (and sometimes over $200,000.00 per year) between 1997 and 2006 despite all the difficulties in his life, demonstrates that the debtor's failure to pay his taxes was voluntary and intentional. Under the applicable case law, therefore, the IRS has met its initial burden on the summary judgment motion. The debtor must produce evidence that shows the existence of a genuine issue of material fact to prevent a ruling in the IRS's favor.

The Debtor's Response to Summary Judgment

The debtor attaches three exhibits to his brief in opposition to the IRS's motion: (1) a 29-page printout of the docket from his divorce case, (2) his own affidavit concerning his intent, and (3) a copy of the Agreed Judgment Entry of Divorce. The debtor argues that the divorce was the primary cause of both his failure to timely file his tax returns and his conduct concerning the Crossbrook property. Further, the debtor produces affirmative evidence that the tuition expenses were required by the separation agreement and were, therefore, involuntary. When viewed in the light most favorable to the debtor—as the court must at this stage in the proceeding—the debtor's evidence shows, albeit by a narrow margin, that a genuine issue exists as to the debtor's intent.

A. Evidence Presented by the Debtor

The debtor states in his affidavit that, "the divorce action filed by [my] ex-wife in 1997 was the sole cause of my failure to pay the income taxes that I owed during those years, 1997, 1998 and 1999."[41] The affidavit also states that the debtor's assets were frozen during the divorce, that the fees and expenses relating to the divorce exceeded $100,000.00, that he was

[41] Docket 26, exh. B, ¶ 2.

forced to pay excessive support payments to his ex-wife, that he was incarcerated for thirty days during this period, and that he was financially and mentally drained as a result of the divorce proceedings.[42] While some of this information is contained in the complaint, the information about his incarceration and the $100,000.00 estimate of attorneys' fees is not.[43] The evidence shows, therefore, that the debtor's finances were stretched during the divorce and that the divorce was a particularly difficult time for him.[44]

With respect to the Crossbrook property, the debtor's affidavit states: "Regarding the property located on 548 Crossbrook Drive, that it was purchased by [my] mother, Audrey Volpe, on her credit and used by myself and my children at [sic] a residence from 1998 until early 2006 when it was transferred to me by my mother."[45] The debtor explains that he "did not at any point conceal the transaction relating to the [Crossbrook property]," and that there is no question that his mother purchased the property on favorable terms and allowed him to live there without a formal rental agreement.[46] The debtor's brief and affidavit, however, do not explain why Ms. Volpe did not claim the rental payments as income, or provide any evidence that Ms. Volpe acted as an owner of the property other than signing the mortgage agreement with Ms. Justice. Put simply, the debtor might not have concealed the transaction regarding the Crossbrook

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[42] Docket 26, exh. B, ¶¶ 3–5.

[43] Docket 1, ¶¶ 7–11.

[44] The court notes, however, that although the evidence shows that the debtor's divorce was particularly painful, personal issues do not necessarily absolve him from his duty to pay taxes. *Compare Sonnenberg v. United States (In re Sonnenberg)*, 148 B.R. 35, 38 (Bankr. N.D. Ill. 1992) (holding that the IRS failed to meet its burden of proof to show the debtors' willfully attempted to evade paying their taxes, where events in the debtors' lives, including numerous failed investments and two divorces, "gave the Debtors little opportunity to regroup and sort out their financial affairs"), *with In re Fretz*, 244 F.3d at 1331 (holding that a debtor who had the wherewithal to maintain a position as an emergency room physician could not excuse his willful failure to file and pay taxes with testimony of severe alcohol dependency), *and In re Harris*, 328 B.R. at 840, 843 (holding that the debtor's personal problems, including divorces and chemical dependency, did not excuse his willful failure to file or pay his taxes as he was still able to earn a substantial income during that time).

[45] Docket 26, exh. B, ¶ 6.

[46] Docket 26, at unnumbered page 8.

property, but the debtor did not put forth any evidence rebutting the IRS's evidence that the Crossbrook property was, in fact, a concealed asset of the debtor.

Finally, concerning the IRS's "lavish" lifestyle argument, the debtor argues that he did not live lavishly. While the debtor does not produce any probative evidence rebutting the IRS's evidence regarding his various vacations (in fact he admits to a yearly expense of not more than $2,500.00),[47] the debtor does provide probative evidence regarding the expenses paid toward his children's educations. In his brief, he admits to paying for his children's pre-college education at parochial schools, but states that this was required per his divorce settlement.[48] Indeed, the divorce settlement states that "[u]ntil further order of Court, Husband agrees to pay all costs associated with the education expenses of the parties' minor children at parochial school through high school. Educational expenses include, without limitation, tuition and fees."[49]

B. The Debtor's Mental State

Based on this evidence, the debtor argues that the IRS has failed to prove that he willfully attempted to evade or defeat the assessment or collection of taxes.[50] To the limited extent of the IRS's motion for summary judgment, the court agrees.

The debtor's affidavit concerning his intent raises a genuine issue of material fact as to whether his failure to pay taxes in 1997, 1998, and 1999 was willful. Considering the difficulty of his divorce, the debtor's statement that the divorce was the sole cause of his failure to pay taxes could be taken at face value by a trier of fact. As a credibility determination of the debtor's affidavit is improper at this stage, the court will accept the statements made in it as true and accurate. *See Ahlers*, 188 F.3d at 369. In addition, the court notes that while the IRS's evidence shows a pattern of evasion of the debtor's tax duties from 1997 through 2006, the debtor did file his 1999 tax return on time, and made some overpayments in 2000. This could

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[47] Docket 26, at unnumbered page 7.

[48] Docket 26, at unnumbered page 7.

[49] Docket 26, exh. C., exh. A., at 2.

[50] Docket 26, at unnumbered pages 7–9.

show that the debtor lacked the required mental state for, at least, the 1999 tax year. *See In re Harris*, 328 B.R. at 843.

Further, the evidence presented by the debtor that the payment of his children's educational expenses was required by the divorce detracts from the IRS's evidence suggesting that the debtor voluntarily failed to pay his taxes. Without the evidence concerning the debtor's tuition payments, the IRS's lavish lifestyle argument rests solely on the debtor's vacation expenses. These vacation expenses do not compare with the expenses found in *In re Harris*, the main case cited by the IRS for the proposition that evidence of a "lavish" lifestyle can be used to prove the mental state requirement. In that case, in addition to the trips and tuition costs, the debtor invested approximately $10,000.00 in mutual funds and between $15,000.00 and $20,000.00 in stocks, bought investment properties worth an approximate $20,000.00, and spent over $30,000.00 on home repairs, and between $15,000.00 and $20,000.00 on luxury furnishings. *In re Harris*, 328 B.R. at 840. Such extravagance has not been proven here. While the IRS does submit evidence that the debtor paid for his son's tuition at the University of Dayton at the cost of $26,560.00 per year, that expense did not begin until 2004, after the debtor filed for bankruptcy and at a time where the debtor was fulfilling his tax obligations.[51]

The court concludes, therefore, that in light of the expense and difficulty of the debtor's divorce, the IRS's evidence concerning a suspicious real estate transaction and $2,500.00 spent annually on vacations, does not prove that the debtor intentionally and voluntarily failed to fulfil his tax duty. *See United States v. Comer*, 222 B.R. 555, 562 (E.D. Mich. 1998); *In re Harris*, 328 B.R. at 840, 843; *In re Sonnenberg*, 148 B.R. at 38. As a trier of fact could reasonably find for the debtor, the IRS is not entitled to judgment as a matter of law at this point in the proceedings.

[51] Docket 26, at unnumbered page 7.

CONCLUSION

For the reasons stated above, the IRS's motion for summary judgment is denied. A separate order will be entered reflecting this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 03-15888
	)	
ARTHUR M. VOLPE,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
ARTHUR M. VOLPE,	)	Adversary Proceeding No. 06-2038
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	(NOT FOR COMMERCIAL PUBLICATION)
INTERNAL REVENUE SERVICE,	)	
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion filed this same date, the defendant's motion for summary judgment is denied. (Docket 25).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge