NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2443

UNITED STATES OF AMERICA

v.

DARREN COMMANDER; KENNETH SKERIANZ

Darren Commander
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.N.J. No.: 3-13-cv-01092)
District Judge: Honorable Anne E. Thompson

Submitted under Third Circuit L.A.R. 34.1(a)
on April 20, 2018

(Opinion filed: May 25, 2018)

Before: GREENAWAY, JR., RENDELL, and
FUENTES, *Circuit Judges*

OPINION*

RENDELL, *Circuit Judge*

The IRS assessed trust fund recovery penalties against the two owners of Darken LLC, a New Jersey woodwork fabrication company that did not fully pay its payroll taxes from 2007 to 2009. One of the owners, Darren Commander, now appeals the District Court's grant of summary judgment in favor of the Government, denying his claims that he was not responsible for paying the taxes and that his failure to pay them was not willful. Because Commander did not raise a genuine dispute of material fact as to either issue, we will affirm.

I. BACKGROUND

A. Facts

Defendant-Appellant Darren Commander, along with his now-deceased business partner Kenneth Skerianz, formed two New Jersey LLCs—Darken Architectural Woodwork Installation and Metropolitan Architectural Woodwork—to fabricate and install architectural woodwork. This appeal concerns Darken's payroll tax delinquency. Commander and Skerianz were each fifty-percent owners of Darken, and the company's only officers. The operating agreement gave

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

them joint managerial control of the company and prohibited either one from engaging in major financial transactions without the other's approval. Commander's title was "managing member." A. 924. Commander oversaw Darken's business, and Skerianz oversaw the woodwork installation in the field.

Both Commander and Skerianz had signing authority on Darken's bank accounts. Commander frequently signed checks, including payroll checks, during the years 2007–2009. Darken had a stamp of Commander's signature, and Commander regularly directed the employee who handled payroll to issue checks with his signature to employees and creditors. Commander admitted that he decided which bills to pay if there were insufficient funds to pay them all. Darken also had an outside accountant, Frank Dragotto, who prepared Darken's corporate income and employment tax returns. Once Dragotto prepared the returns, he discussed them with Commander and Skerianz before filing.

From 2007–2009, Darken did not fully pay its federal payroll taxes.[1] Commander was aware that employers are required to withhold income and social security taxes from their employees' wages. He also became aware at some point during this time period that

[1] For the fourth quarter of 2007, Darken reported payroll taxes of $613,379.59, but only paid $65,000. For the fourth quarter of 2008, it reported $832,941.62 but only paid $158,000. For the fourth quarter of 2009, it reported $652,709.76, but made no payments.

Darken owed taxes. Further, he said that "every year we were in business we had some tax issue." A. 1178.

Commander said that he first learned that the payroll taxes were not being paid when an IRS agent came to the office. Commander then tried to work with the IRS to pay the delinquent taxes. Dragotto corroborated that Commander was kept apprised of Darken's ongoing tax struggles.

Following an administrative investigation, the IRS determined that both Commander and Skerianz were "responsible persons" who had willfully failed to pay over the trust fund taxes.[2] It assessed trust fund recovery penalties against both of them under I.R.C. § 6672.

B. Procedural History

During the pendency of this case, Skerianz died and was dismissed as a defendant. The case proceeded against Commander. The Government sought a judgment against Commander for the unpaid balance of the amounts assessed against him—$468,470.55 for 2007, $620,329.81 for 2008, and $502,461.88 for 2009. The parties filed cross-motions for summary judgment on the issues of: (i) Whether Commander was a person responsible for paying over the trust fund portion of Darken's payroll taxes; and (ii) Whether Commander willfully failed to pay over those taxes. The District

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[2] Trust fund taxes are amounts withheld for income and social security tax and remitted to the IRS. 26 U.S.C. § 7501.

Court granted the Government's motion and denied Commander's motion.

The District Court concluded that Commander was a responsible person because he was a fifty-percent owner, one of only two officers, he had check-signing authority, and he exercised his power to pay Darken's bills and sign paychecks. The Court further determined that Commander learned between 2007 and 2009 that the taxes were not being paid, and that he received regular updates on communications with the IRS regarding the delinquencies. The Court concluded that he was willful because he paid other creditors after having actual knowledge that the payroll taxes were not being paid, and because he acted with reckless disregard for whether the taxes were being paid.

Commander submitted a declaration in opposition to the Government's motion for summary judgment, in which he averred—contrary to his deposition testimony—that he had *not* been aware of the delinquencies. The District Court disregarded this declaration because "conclusory, self-serving affidavits are insufficient to withstand a motion for summary judgment." A. 1367 (quoting *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 161 (3d Cir. 2009)).

This appeal followed.

II. DISCUSSION

On appeal, Commander contends that the District Court erroneously granted summary judgment in the Government's favor despite numerous purported disputes of material fact.

The District Court had jurisdiction pursuant to 26 U.S.C. §§ 7401–02 and 28 U.S.C. §§ 1340 and 1345. We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over a grant of summary judgment. *Coolspring Stone Supply, Inc. v. Am. States Life Ins. Co.*, 10 F.3d 144, 146 (3d Cir 1993). We apply the same standard as the District Court did. *Blair v. Scott Specialty Gases*, 283 F.3d 595, 602–03 (3d Cir. 2002). Summary judgment is appropriate when the moving party demonstrates that there is no genuine dispute of material fact and the evidence establishes its entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Federal Rule of Civil Procedure 56 requires summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. "In determining the existence of a disputed issue of material fact on a motion for summary judgment, all inferences, doubts, and issues of credibility should be resolved against the moving party." *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983).

Internal Revenue Code § 6672 provides that any person required to pay over trust fund taxes who

"willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof" will be liable for the amount of tax evaded. 26 U.S.C. § 6672(a). The two conditions of § 6672 liability are (1) that "the individual must be a 'responsible person,'" and (2) "her failure to pay the tax must be 'willful.'" *Greenberg v. United States*, 46 F.3d 239, 242 (3d Cir. 1994) (quoting *Brounstein v. United States*, 979 F.2d 952, 954 (3d Cir. 1992)). On appeal, Commander argues that his case presented genuine disputes of material fact regarding both conditions. As we explain below, his contentions are unavailing.

1. Whether Commander was a responsible person

First, Commander contends that he was not a "responsible person" under § 6672. "Responsible person," while not appearing in the statute itself, is a term of art for the person who has the duty or power to perform or direct the collecting, accounting for, or paying over trust fund taxes. *Brounstein*, 979 F.2d at 954. We have held that "[r]esponsibility is a matter of status, duty or authority, not knowledge." *Quattrone Accountants, Inc. v. I.R.S.*, 895 F.2d 921, 927 (3d Cir. 1990). And "[w]hile a responsible person must have significant control over the corporation's finances, exclusive control is not necessary." *Brounstein*, 979 F.2d at 954. Additionally, there can be more than one responsible person for a particular employer. *Id.* at 955. Section 6672 imposes joint and several liability on each responsible person. *Id.* A

person who has paid a § 6672 penalty may seek contribution from other liable persons. 26 U.S.C. § 6672(d).[3]

To determine whether an individual is a responsible person, we consider a nonexclusive list of factors:

> "(1) [C]ontents of the corporate bylaws, (2) ability to sign checks on the company's bank account, (3) signature on the employer's federal quarterly and other tax returns, (4) payment of other creditors in lieu of the United States, (5) identity of officers, directors, and principal stockholders in the firm, (6) identity of individuals in charge of hiring and discharging employees, and (7) identity of individuals in charge of the firm's financial affairs."

Brounstein, 979 F.2d at 954–55.

We perceive no error in the District Court's conclusion that Commander was a responsible person. The undisputed evidence establishes that he was a fifty-percent owner of Darken and one of only two officers, his approval was required for company decisions and many significant financial transactions, he had check-signing authority, and had exercised his power to pay the company's bills and sign paychecks. On appeal, Commander protests that he was not responsible for Darken's payroll or tax contributions. He claims these responsibilities were entirely Skerianz's. But the District Court properly determined that the division of

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[3] Any rights Commander may have to contribution or indemnity are not before us on this appeal.

labor between the two partners is irrelevant, because there can be more than one responsible person, and Commander possessed and exercised the authority that qualifies one as statutorily "responsible" to pay over taxes. Moreover, Commander's contentions that he is somehow not responsible because he managed Darken's business while Skerianz directly supervised employees only solidifies the District Court's conclusion. *See Greenberg*, 46 F.3d at 243 (stating that "significant control over the corporation's finances" is a necessary condition for responsible person status) (quoting *Brounstein*, 979 F.2d at 954)). Faced with this evidence, the District Court did not err in concluding that Commander was a responsible person under § 6672(a).

2. Whether Commander willfully caused the trust fund taxes to not be paid

Commander next argues that his failure to pay over the taxes was not willful. Willfulness under § 6672 is "a voluntary, conscious and intentional decision to prefer other creditors over the Government." *Quattrone*, 895 F.2d at 928. It may also be established if the responsible person acts with "reckless disregard" of a known or obvious risk that withheld taxes may not be remitted to the government. *Brounstein*, 979 F.2d at 956. "Reckless disregard includes failure to investigate or correct mismanagement after being notified that withholding taxes have not been paid." *Greenberg*, 46 F.3d at 244 (quoting *Morgan v. United States*, 937 F.2d 281, 286 (5th Cir. 1991) (per curiam)). Willfulness need

not be in bad faith, nor does it require actual knowledge of the tax delinquency. *Greenberg*, 46 F.3d at 244.

Here, the District Court concluded that Commander's behavior was willful because he permitted Darken to pay other creditors after he knew that the taxes were in arrears. The record demonstrates that he had actual knowledge the taxes were due, that he stated that Darken had tax issues "[e]very year we were in business," and that each time Dragotto received a notice from the IRS, "[e]verybody got spoken to every time there was some kind of issue." A. 1178–79. Despite this knowledge, Darken paid Commander and Skerianz about $4,000 a week throughout the delinquency.

In an attempt to manufacture a dispute of material fact, Commander submitted an affidavit in opposition to summary judgment, to the effect that he misspoke in his deposition and meant to say that he *later* learned of the tax delinquencies between 2007–2009. But as the District Court properly noted, "conclusory, self-serving affidavits are insufficient to withstand a motion for summary judgment." *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 161 (3d Cir. 2009) (quoting *Blair*, 283 F.3d at 608). Commander's affidavit only asserted that although his deposition could be read to show he was aware of the delinquencies, "[he] meant to say that [he] was aware at the time of the deposition that there had been issues from 2007–2009." A. 1247. Moreover, we have held that a district court may disregard a nonmovant's affidavit

contradicting earlier deposition testimony if it is "without a satisfactory or plausible explanation," and does not create "a genuine, material factual dispute." *Daubert v. NRA Group, LLC*, 861 F.3d 382, 391 (3d Cir. 2017). Here, Commander presented no specific facts to contradict his unmistakable deposition testimony that "there came a time I knew the taxes weren't being paid. . . . Somewhere between 2007 and 2009." A. 933.

Commander also asserts that summary judgment was inappropriate because he was "never given the opportunity to state his own recollection of the facts," as he would have at trial, and that he was denied the testimony of witnesses who would have corroborated his claims. *See* Commander Br. at 32, 34. But this argument misunderstands that on a motion for summary judgment, the nonmoving party must affirmatively demonstrate a genuine dispute of material fact. *Celotex*, 477 U.S. at 322–23. Nothing precluded Commander from presenting his version of events in his own summary judgment motion, let alone in opposition to the Government's. He did not offer any affidavits from the witnesses he now claims would have buttressed his claims at trial. Instead, he focused his motions practice on Skerianz's responsibilities and departure from the companies, and the embezzlement that led to Darken's bankruptcy, none of which created an issue of material fact.

Moreover, to the extent that Commander rests his argument on the claim that he was unaware the taxes were not being paid, he was in a position to know for certain that they were not. Under the circumstances,

his inaction amounts to the reckless disregard qualifying as willfulness. *See Greenberg*, 46 F.3d at 244 ("In order for the failure to turn over withholding taxes to be willful, a responsible person need only know that the taxes are due or act in reckless disregard of this fact when he fails to remit to IRS."). Commander's argument that the Government improperly conflated the quarters at issue (from 2007 to 2009) is therefore unavailing—as a co-owner and officer of the company, he indisputably was in a position to know there was a tax problem during each quarter at issue. Accordingly, there is no basis to disturb the District Court's judgment.

III. CONCLUSION

For the foregoing reasons, we will affirm the District Court's order.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, v. DARREN COMMANDER and KENNETH SKERIANZ, Defendants.	Civ. No. 13-1092 **OPINION**

THOMPSON, U.S.D.J.

This matter comes before the Court upon motions for summary judgment brought by Defendant Darren Commander ("Defendant" or "Commander") (ECF No. 57) and by Plaintiff United States of America ("Plaintiff" or "Government") (ECF No. 58). Each motion is opposed. (ECF Nos. 59, 60, respectively). The Court has issued the Opinion below based upon the written submissions and without oral argument pursuant to Federal Rule of Civil Procedure 78(b). For the reasons stated herein, Defendant's Motion for Summary Judgment will be denied and Plaintiff's Motion for Summary Judgment will be granted.

BACKGROUND

This case involves Defendants' failure to pay income and employment taxes they were required to

withhold and pay from employees' wages. The undisputed facts are as follows: Defendants Darren Commander and Kenneth Skerianz ("Skerianz") formed Darken Architectural Woodwork Installation LLC ("Darken") in 2003. (Pl.'s Undisputed Facts ¶ 5, ECF No. 58-1). Commander and Skerianz were each fifty-percent owners of Darken, signatories of Darken's Operating Agreement, and the sole officers of Darken. (*Id.* ¶¶ 8–11). Darken was member-managed, and all company decisions and actions and many significant financial transactions had to be by majority vote or with the other member's consent. (*Id.* ¶¶ 13–14). Skerianz was responsible for hiring field employees, assigning employees to each job, ensuring work was completed in the field, recording hours worked, and distributing employee paychecks. (Def.'s Undisputed Facts ¶¶ 24, 25, 29, ECF No. 57-3). Commander was aware that employers are required to withhold employment and income taxes from their employees' wages. (Pl.'s Undisputed Facts ¶ 39, ECF No. 58-1). Those withheld taxes are held in trust by the employer to be paid to the Government; as such, they are sometimes referred to as "trust fund taxes." Darken continued to employ and pay workers through 2009. (*Id.* ¶ 57). Recovery penalties totaling $1,591,262.24 were assessed against Commander in 2010 for failure to pay income and employment taxes for Darken's employees between 2007 and 2009. (*Id.* ¶¶ 1–3). Plaintiff alleges that the amount due as of February 20, 2017 is $1,946,023.93, which includes the statutory interest that accrued since the due date.

During the pendency of this action, Defendant Skerianz passed away; Plaintiff moved to voluntarily dismiss Skerianz from the action, without prejudice, and that motion was granted on November 15, 2016. (ECF No. 54). Thus, Commander is the sole remaining defendant in this case.

Plaintiff and Defendant each moved for summary judgment on February 13, 2016. These motions are presently before the Court.

LEGAL STANDARD

Summary judgment shall be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A dispute is "genuine" if it could lead a "reasonable jury [to] return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if it will "affect the outcome of the suit under the governing law." *Id.* When deciding the existence of a genuine dispute of material fact, a court's role is not to weigh the evidence; all reasonable "inferences, doubts, and issues of credibility should be resolved against the moving party." *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983). In resolving a motion for summary judgment, a district court considers the facts drawn from "the pleadings, the discovery and disclosure materials, and any affidavits." *Curley v. Klem*, 298 F.3d 271, 276–77 (3d Cir. 2002) (internal quotations

omitted). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 251–52 (1986). More precisely, summary judgment should be granted if the evidence available would not support a jury verdict in favor of the nonmoving party. *Id.* at 248–49. The Court must grant summary judgment against any party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

ANALYSIS

A. Plaintiff's Motion for Summary Judgment

In its Complaint, Plaintiff alleges that Defendant is liable for violations of 26 U.S.C. § 6672. Employers must withhold income, Social Security, and Medicare taxes from their employees' wages and hold such taxes in trust for the United States. 26 U.S.C. §§ 3102, 3402, 7501; *Greenberg v. United States*, 46 F.3d 239, 242 (3d Cir. 1994). Because the United States is required to credit employees for these withheld "trust fund taxes" regardless of whether they are actually paid over to the Government by the employer, *In re RIBS-R-US, Inc.*, 828 F.2d 199, 200 (3d Cir. 1987) (citing *Slodov v. United States*, 436 U.S. 238, 243 (1978)), Congress provided that an employer's responsible persons, such as officers

and managers, can be held personally liable under 26 U.S.C. § 6672 for "trust fund recovery penalties" if the trust fund taxes are not paid over when due. *United States v. Pepperman*, 976 F.2d 123, 127 (3d Cir. 1992). Liability under § 6672 is joint and several among responsible persons, and "each responsible person can be held [liable] for the total amount of withholding not paid." *Quattrone Accountants, Inc. v. I.R.S.*, 895 F.2d 921, 926 (3d Cir. 1990).

The two elements for liability under § 6672 are:

> (i) the individual was a responsible person within the business, i.e., someone required to collect, truthfully account for, or pay over the trust fund taxes; and
>
> (ii) the taxpayer willfully failed to do so.

Quattrone, 895 F.2d at 927; *Brounstein v. United States*, 979 F.2d 952, 954 (3d Cir. 1992).

Plaintiff argues Defendant was a responsible person who willfully failed to pay employment taxes in violation of § 6672, and, therefore, Plaintiff is entitled to summary judgment.

"Responsibility is a matter of status, duty or authority, not knowledge." *Quattrone*, 895 F.2d at 927. "A person is responsible if the person has significant, though not necessarily exclusive, control over the employer's finances." *Quattrone*, 895 F.2d at 927 (citing *United States v. Vespe*, 868 F.2d 1328, 1332 (3d Cir. 1983)). "A person has significant control if he has the final or significant word over which bills or creditors

get paid." *Quattrone*, 895 F.2d at 927. In determining whether an individual is a responsible person, courts also consider:

> (1) The contents of the corporation's bylaws;
>
> (2) whether the individual had the ability to sign checks on the company's bank accounts;
>
> (3) whether the individual signed the company's tax returns;
>
> (4) whether the individual made payments to other creditors instead of the United States;
>
> (5) the identity of the officers, directors, and principal stockholders of the company;
>
> (6) the identity of the individuals with authority to hire and/or fire employees;
>
> (7) the identity of the individuals in control of the company financial affairs.

Brounstein, 979 F.2d at 954.

Defendant does not dispute that he was a fifty-percent owner and one of two officers of a member-managed company, Darken, which failed to pay its trust fund taxes. (Pl.'s Undisputed Facts ¶¶ 8–11, 13–14, ECF No. 58-1; Def.'s Resp. ¶¶ 8–11, 13–14, ECF No. 60-1). Furthermore, his approval was required for all company decisions and actions and many significant financial transactions. (*Id.* ¶¶ 13–14). Defendant had check signing authority for Darken's bank accounts. (*Id.* ¶ 18). Defendant had and exercised power to pay

the company's bills, and sign paychecks on occasion. (Def.'s Resp. ¶¶ 21–22). Thus, Defendant was a responsible party as a matter of status, duty, authority, and control.

Defendant argues that he did not know or have reason to know of the tax delinquencies and thus he is not liable. Defendant claims, "Skerianz was solely responsible and had the sole obligation for . . . making payroll and ensuring that the trust fund taxes were in fact remitted to the Internal Revenue Service." (Def.'s Undisputed Facts ¶¶ 45, 44, ECF No. 57-3). Furthermore, Defendant argues "[he] had no knowledge that the sums were not being paid," (*Id.* ¶ 45), and he only learned of the delinquency at the end of 2009, when he began to receive notices from the IRS. (*Id.* ¶ 48).

However, whether payroll and related taxes were the primary responsibility of Defendant—or those were the purview of Skerianz—is irrelevant, because Defendant was in a responsible position in the business. There is no remaining genuine issue of material fact on the first factor.

The second factor for liability under § 6672 is willfulness. *Quattrone*, 895 F.2d at 927. Willfulness under § 6672 is "a voluntary, conscious and intentional decision to prefer other creditors over the Government." *Brounstein*, 979 F.2d at 955–56 (internal citation omitted). "[W]illfulness" need not involve any evil motive or bad purpose, or actual knowledge of the tax delinquency. *Greenberg*, 46 F.3d at 244. The responsible person acts willfully if he (1) clearly ought to have known

that (2) there was a grave risk that the withholding taxes were not being paid and (3) he was in a position to find out for certain very easily. *Vespe*, 868 F.2d at 1335. Alternatively, "[a] responsible person acts willfully when he pays other creditors in preference to the IRS knowing that taxes are due, or with reckless disregard for whether taxes have been paid." *Brounstein*, 979 F.2d at 956. "Reckless disregard includes the failure to investigate or correct mismanagement after being notified that withholding taxes have not been paid." *Greenberg*, 46 F.3d at 246. Where the responsible person "only later becomes aware that [taxes] were not paid, he acts willfully by paying other creditors in preference to the United States, even if money specifically withheld has been dissipated" already. *Vespe*, 868 F.2d at 1334.

Plaintiff argues that Defendant knew of tax issues when they were occurring, from 2007 to 2009. (Pl.'s Resp. to Def.'s Undisputed Facts ¶¶ 44–45, 47–48, ECF No. 59-1). Defendant testified, "[T]here came a time I knew the taxes weren't being paid . . . Somewhere between 2007 and 2009." (Commander Dep. Tr. 48:16–25, 113:7–114:25, ECF No. 58-8). He further testified that during that time period he received regular updates about correspondence with the IRS regarding the delinquency. (*Id.* 113:7–114:25).

Defendant submitted a declaration with his opposition to Plaintiff's motion for summary judgment, saying that he misspoke and meant to say that he subsequently learned that there were tax delinquencies between 2007 and 2009, rather than that he learned of

the tax delinquencies between 2007 and 2009. (Def.'s Opp'n Decl. ¶¶ 25–27, ECF No. 60-2). However, "conclusory, self-serving affidavits are insufficient to withstand a motion for summary judgment." *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 161 (3d Cir. 2009); *see also* Fed.R.Civ.P. 56(e)(2). Defendant does not present specific facts that contradict his deposition testimony or show a genuine issue of material fact for trial. *Id.* Defendant's deposition testimony is clear. These conclusory, self-serving statements only appear in opposition to Plaintiff's motion, when Defendant has the greatest motive to issue a self-serving statement. Therefore, the Court is not persuaded that Defendant's Declaration in opposition to Plaintiff's Motion can defeat Plaintiff's Motion for Summary Judgment. It appears that Defendant had actual knowledge that the taxes were not being paid. The Court need not consider the disputed Dellelo deposition testimony in order to reach this conclusion.

Furthermore, as one of two managing members, Defendant clearly ought to have known that the withholding taxes were not being paid, and Defendant was certainly in a position to find out for certain. *Vespe*, 868 F.2d at 1335. Defendant does not dispute that he knew that Darken had to pay the trust fund taxes. (Def.'s Resp. to Pl.'s Undisputed Facts ¶ 3 9, ECF No. 60-1). Defendant paid employees and other creditors and did not remedy the tax delinquency. (*Id.* ¶¶ 21–22).

Plaintiff has shown that Defendant is a responsible party with significant control over Darken's finances, and that he acted willfully, at least with

reckless disregard for whether the taxes had been paid. Therefore, there remain no genuine disputes as to material facts and Plaintiff is entitled to judgment as a matter of law.

B. Defendant's Motion for Summary Judgment

Defendant argues he is not a responsible party and his acts were not willful because he was not the person primarily responsible for payroll and related taxes and did not have actual knowledge of the tax delinquency. (Def.'s Undisputed Facts ¶¶ 44, 45, 48, ECF No. 57-3).

As discussed in the preceding section of this Opinion, Defendant was a fifty-percent owner, one of two officers, and one of two managing members of this member-managed company. As such, Defendant was a responsible person in the business. Defendant testified that he was regularly informed that there were tax problems; therefore, he either knew or ought to have known that there was a grave risk that the withholding taxes were not being paid, and, as a managing member, he was in a position to find out for certain very easily. *See Vespe*, 868 F.2d at 1335. Therefore, when Defendant paid other creditors, he acted willfully, at least with reckless disregard for whether the taxes were paid.

Defendant has failed to show that he is entitled to summary judgment and Defendant's motion for summary judgment will be denied.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment (ECF No. 57) will be denied and Plaintiff's Motion for Summary Judgment (ECF No. 58) will be granted. A corresponding order will follow.

/s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

Date: 4/3/17

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, v. DARREN COMMANDER and KENNETH SKERIANZ, Defendants.	Civ. No. 13-1092 **ORDER**

THOMPSON, U.S.D.J.

This matter having come before the Court upon Defendant Commander's Motion for Summary Judgment (ECF No. 57) and Plaintiff's Motion for Summary Judgment (ECF No. 58), and for the reasons set forth in this Court's Opinion on this same day,

IT IS on this 3rd day of April, 2017,

ORDERED that Defendant's Motion for Summary Judgment (ECF No. 57) is DENIED; and it is further

ORDERED that the Plaintiff's Motion for Summary Judgment (ECF No. 58) is GRANTED; and it is further

ORDERED that Plaintiff submit a proposed judgment within ten days specifying the principal amount, the interest calculation and relevant statute, and the total amount owed.

/s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.