UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

KHERU RA EL IMANI BEY,

Plaintiff,

v.

UNITED PARCEL SERVICE, INC.,

Defendant.

Case No.: 2:11cv2993(SJF)(ETB)

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendant United Parcel Service, Inc. ("UPS"), by and through its attorneys, respectfully submits this memorandum of law in support of its motion pursuant to Federal Rule of Civil Procedure 12(b)(5) and (6) to dismiss this action with prejudice.

PRELIMINARY STATEMENT

Contrary to logic and reason, Plaintiff Kheru Ra El Imani Bey ("Plaintiff" or "Bey") has filed a Complaint against his employer, UPS, for withholding federal and state taxes from his paychecks. Bey claims he is exempt from paying taxes because he is a "Native American of Choctaw and Cherokee lineage," despite the fact that Bey is an American citizen, who does not live or work on an Indian reservation, but lives in Queens (or Hempstead), and works for an American corporation, UPS, in Uniondale, New York. In short, Bey asserts that UPS is "depriving" him of his rights under 42 U.S.C. § 1983 by continuing to withhold taxes from his paychecks. This claim is frivolous and should be dismissed out of hand.

STATEMENT OF ALLEGED FACTS[1]

According to Bey's complaint, Bey works for UPS. (Complaint ¶¶ 1-3.) His address is listed as P.O. Box 401, Hempstead, New York 11551. (*Id.* at 3.) Exhibits attached to the

[1] The following facts are derived from the Complaint filed by Bey on June 20, 2011. UPS refers to these facts for purposes of this motion, but does not admit such facts by restating them herein.

Complaint indicate that Bey may also go by the name James Lamar Mitchell, and live at 104 211th Street, Queens, New York 11429. (*See* Complaint, Exhibit B (p. 30 of 38).) In no part of the Complaint does Bey claim that he lives or works on a Native American reservation.

Bey claims he is entitled to exemption from taxation because of his Native American heritage, and offers a letter from the "International Indigenous Society Aboriginal Tribal Council" in support of this claim. (*See* Complaint, Exhibit B (p. 24 of 38).) Bey remains employed by UPS. (Complaint ¶ 1-2.)

Bey filed his Complaint on June 20, 2011. The Complaint alleges a claim of "deprivation of rights" under 42 U.S.C. § 1983 and 18 U.S.C. § 242. (Complaint at 1.) On August 26, 2011, this Court ordered Bey to serve a copy of the Complaint on UPS by October 18, 2011. UPS subsequently received a copy of the Summons, but not the Complaint. (*See* Section III, *infra*.)

ARGUMENT

This claim lacks merit on its face and should be dismissed out of hand. While a *pro se* litigant is entitled to have his pleadings read "to raise the strongest arguments that they suggest," *Green v. United States*, 260 F.3d 78, 83 (2d Cir. 2001), "dismissal is nevertheless appropriate where 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Rodriguez v. Weprin*, 116 F.3d 62, 65 (2d Cir. 1997) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Because Bey cannot prove any set of facts that would entitle him to relief, dismissal is warranted here.

I. Bey Is Not Tax Exempt

This action follows a long line of cases where individuals, bolstered by an organization such as the "International Indigenous Society," have unsuccessfully attempted to evade tax liability based on their claim of Native American heritage and a misreading of the Constitution. *See Bey v. IRS*, 2003 WL 1700293 (M.D.Pa. 2003) (dismissing claims of *pro se* plaintiff

claiming to be tax exempt because of aboriginal status); *United States v. $7,000 in U.S. Currency*, 583 F. Supp. 2d 725, 731-32 (M.D.N.C. 2008) (holding that petitioner El Bey's arguments, premised on his membership in the International Indigenous Society and the Watertown Treaty, "are so completely and utterly without merit that they are an affront to this court and to anyone of Native American heritage"); *Barrett v. United States*, 561 F.3d 1140 (10th Cir. 2009) (affirming summary judgment against Native American individual seeking exemption from taxation for compensation received as tribal chairman); *Metallic v. Comm'r of Internal Revenue*, 2006 WL 1627974 (U.S. Tax Ct. 2006), *aff'd*, 225 Fed. Appx. 1 (1st Cir. 2007) (holding that Watertown Treaty did not exempt Native American petitioner from taxation); *United States v. Sanders*, 2007 WL 2493920 (N.D.Ga. 2007) (permanently enjoining purveyor of tax evasion scheme from selling scheme and membership into his "tribe" in furtherance of the scheme); *Gunton v. Comm'r of Internal Revenue*, 2006 WL 1627978 (U.S. Tax. Ct. 2006) (holding that Constitutional phrase "Indians not taxed" did not render taxpayer exempt from federal income tax liability). The result should be no different here.

All individuals who are citizens or residents of the United States are required to pay federal income tax. 26 C.F.R. § 1.1-1(a)(1). Nonresident aliens who derive income from United States sources are also required to pay federal income tax. *See* 26 C.F.R. § 1.1-1(b). In general, individuals of Native American descent are not exempt from paying federal taxes, unless they are a member of a tribe with which the United States has a specific treaty exempting taxation, *and* they live *and* work on that tribe's reservation. Similarly, in order to qualify for any sort of tax exemption on the basis of Native American heritage in New York, an individual must: 1) be an enrolled member of a tribe or nation recognized by the United States; 2) work and live on that tribe's reservation; and 3) be seeking an exemption from income derived from the work on the

reservation. *See* Form IT-2104-IND, New York State Certificate of Exemption from Withholding.[2] Those narrow exceptions under federal and state law do not apply here.

First, according to Bey's own pleadings and documents, he does not even allege that he is a member of any particular tribe, but merely an individual of Chocotaw and Cherokee descent. (Complaint [Doc. #1] at ¶ 5.) The documents attached to the Complaint indicate that Bey *might* be a member of the "Abannaki Aboriginal Nation." (Doc. #1, p. 10.) Even if Bey were a full member of the Chocotaw, Cherokee, or Abannaki tribes, none of those tribes are recognized by the Bureau of Indian Affairs ("BIA") as operating within New York.[3]

Second, even if Bey were a full member of a tribe that operated in New York, Bey is not exempt from paying taxes because he is a citizen of the United States of America (Doc. # 1, p. 28 [Form I-9]), and does not live or work on an Indian reservation. Based on Bey's Complaint, although he lists his "address" as a P.O. Box in Hempstead, New York, it appears Bey lives in Queens. He signed the complaint in Queens (Complaint, p. 5), and the affidavit attached to his "cease and desist" letter to UPS was also signed in Queens (Doc. # 1, p. 38). He also attaches to his Complaint a "Notice Concerning Fiduciary Relationship" on behalf of James Lamar Mitchell, apparently another name used by Bey, indicating that Mitchell/Bey resides in Queens County, New York. (Doc # 1, p. 30.) Whether Bey lives in Queens County or in Hempstead, New York, there is no tribal reservation recognized by the BIA operating in either location.

Finally, even if Bey lived on a tribal reservation in Queens or Hempstead (which he does not allege), Bey does not allege that he works on or for a tribal reservation, or is seeking an exemption from income derived from work on the reservation. To the contrary, the documents submitted with the Complaint indisputably establish that he is employed by UPS, a private

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[2] Retrieved from http://www.tax.ny.gov/pdf/2009/fillin/wt/it2104ind_809_fill_in.pdf.

[3] *See* http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/index.htm#n.

corporation located in Uniondale, New York, and receives monthly earnings of between $2000 and $2500 from that employment. (*See* Request to Proceed In Forma Pauperis [Doc # 2].)

Accordingly, Bey's claim that he is entitled to a tax exemption is frivolous, and this action should be dismissed with prejudice.

II. Bey Has No Cause Of Action Against UPS For "Deprivation of Rights"

Even if Bey were entitled to a tax exemption (which he is not), no cause of action lies against UPS, a non-state actor, for "deprivation of rights" under 42 U.S.C. § 1983. "[T]he party charged with the deprivation must be a person who may fairly be said to be a state actor." *Flagg v. Yonkers Savings & Loan Ass'n*, 396 F.3d 178, 186 (2d Cir. 2005) (quoting *Am. Mfs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999)). UPS, a private corporation, is not a state actor.

Plaintiff similarly has no cause of action under 18 U.S.C. § 242, as this is a criminal statute that can only be enforced by the Department of Justice. *See, e.g., Hill v. Didio*, 191 Fed. Appx. 13, 14-15 (2d Cir. 2006) ("[T]here is no private right of action under section 242. … As a general matter, we have long recognized that crimes are prosecuted by the government, not by private parties.") (citing *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 511 (2d Cir. 1994); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81, 86-87 (2d Cir. 1972)).

Plaintiff contends – without legal or factual basis – that all tax withholding arrangements are voluntary and that an employee's consent is required to withhold taxes. This is simply false. Employers in the United States are "not only authorized, but also legally bound to withhold and pay federal income taxes to the Internal Revenue Service" on behalf of its employees. *Edwards v. Stringer*, 89 Fed. Appx. 663, 665 (10th Cir. 2004) (citing *United States v. Lee*, 455 U.S. 252, 261 (1982); *Payne v. Dixie Elec. Co.*, 174 Ga. App. 610, 330 S.E.2d 749, 750 (1985); *Wilhelm v. United States*, 1983 WL 1700 at *3 (E.D. Tex. 1983)). UPS's "compliance with its legal obligation to withhold taxes from its employees is not a violation of [Plaintiff's] civil rights." *Id.*

Accordingly, Bey's claim for "deprivation of rights" against UPS based on withholding taxes which it is required to withhold as a matter of law is frivolous and should be dismissed with prejudice.

III. UPS Has Not Been Served The Complaint

UPS has not been properly served with the Complaint. UPS initially received notice of this action through service of a scheduling order. (*See* Declaration of Michael P. McMahan ("McMahan Decl."), Ex. A.) Subsequent to this Court's order of August 26, 2011, directing Plaintiff to serve UPS, UPS received a copy of the Summons only, but not the Complaint. (*See* McMahan Decl., Ex. B.) As of the filing of this motion, there is no proof of service on file with the Court. Therefore, this action should be dismissed pursuant to Fed. R. Civ. P. 12(b)(5). *See Brewer v. Brewer*, 34 Fed. Appx. 28, 29 (2d Cir. 2002) (affirming district court dismissal of Section 1983 claims, in part, because of defect in service of process).

CONCLUSION

For all the foregoing reasons, Defendant UPS respectfully requests an Order from the Court dismissing this action with prejudice, and granting such other and further relief as the Court may deem just and proper.

Dated: New York, New York
October 17, 2011

By: DLA PIPER LLP (US)

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