SO ORDERED.
SIGNED this 9th day of May, 2023

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

SCOTT ALLEN NEAL

Debtor

Case No. 3:22-bk-31542-SHB
Chapter 13

MEMORANDUM AND ORDER ON STATE OF FLORIDA, DEPARTMENT OF REVENUE'S MOTION FOR SUMMARY JUDGMENT

On December 22, 2022, Debtor filed an Objection to Claim Number Two ("Claim Objection"), objecting to the proof of claim in the amount of $168,527.76 filed by the State of Florida, Department of Revenue ("State of Florida") for unpaid sales taxes, interest, and penalties. The State of Florida filed a Motion for Summary Judgment on March 20, 2023 [Doc. 49], together with a Statement of Undisputed Facts [Doc. 50]. It argues that Debtor is personally liable for sales taxes not remitted by Ready Cars, Inc. ("RCI"), a Florida corporation, pursuant to Florida Statutes section 213.29 because he was an officer of the corporation and the person who electronically filed the sales and use tax returns for RCI In support of its Motion for Summary Judgment, the State of Florida relies on Debtor's Response to Requests for Admissions, the

Affidavit of Jane Reese, the Affidavit of Gina Imm, and a Notice of Proposed Assessment dated November 7, 2019. [Docs. 50-1, 50-2, 50-3, 50-4.]

On April 7, 2023, Debtor filed his responses to the Motion for Summary Judgment and Statement of Undisputed Facts, an affidavit, and a brief (collectively, "Response") [Docs. 61-63.[1]]. Although he does not dispute most of the facts stated by the State of Florida or the documentation supplied, Debtor disputes assertions that he "willfully" failed to pay sales tax owed by RCI as required by Florida Statutes section 213.29. [Docs. 61-3 at ¶¶ 2-8.] Debtor also avers that the assessed tax liability arose because the State of Florida was unable to audit repossession tax credits. [Doc. 61-3 at ¶ 12.]

I. Summary Judgment Standard

"The court shall grant summary judgment 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(c). The court does not weigh the evidence to determine the truth of the matter asserted when deciding a motion for summary judgment but simply determines whether a genuine issue for trial exists. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986). "As to materiality, the substantive law will identify which facts are material [and o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248; *see also Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008) (holding that a dispute is genuine "if a reasonable trier of fact could return judgment for the non-moving party.").

As the moving party, the State of Florida must prove, based on the record before the

[1] Debtor filed all documents collectively on April 7, 2023; however, the brief and response to material facts were filed as separate docket entries on April 11, 2023, after a courtesy call from the clerk's office advising counsel that each document was required to be filed separately on the docket.

Court, that it is entitled to judgment as a matter of law because "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party [and] there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co*., 391 U.S. 253, 289 (1968)).

> The party bringing the summary judgment motion has the initial burden of informing the . . . court of the basis for [the] motion and identifying portions of the record that demonstrate the absence of a genuine dispute over material facts. *Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc.,* 276 F.3d 845, 848 (6th Cir. 2002). Once that occurs, the party opposing the motion then may not "rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact" but must make an affirmative showing with proper evidence in order to defeat the motion. *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1479 (6th Cir. 1989).

Alexander v. CareSource, 576 F.3d 551, 558 (6th Cir. 2009); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The Court must review the facts and all resulting inferences in a light most favorable to Debtor, the non-moving party, and decide whether "the evidence presents a sufficient disagreement to require submission to a [fact-finder] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 243.

II. Undisputed Facts

Debtor does not dispute the following facts as stated by the State of Florida. [*See* Docs. 50, 63[2].] Debtor filed a Chapter 13 bankruptcy case on October 11, 2022, and the State of Florida filed its proof of claim on October 18, 2022. Public records maintained by the Florida Secretary of State identified Debtor as the Vice President of RCI, a Florida corporation. [Doc. 50 at ¶¶ 1-2; Doc. 50-1 at ¶ 1; Doc. 63 at ¶¶ 1-2.] Debtor was a signatory on RCI's checking account, from which he paid, among other things, the company's sales and use tax obligations. [Doc. 50 at ¶¶ 3-4, 7; Doc. 50-1 at ¶¶ 3-4, 7; Doc. 63 at ¶¶ 3-4, 7.] Additionally, Debtor

[2] The Court also takes judicial notice, pursuant to Federal Rule of Evidence 201, of material facts of record in Debtor's bankruptcy case.

maintained RCI's books, accounts, and records, had knowledge about and managed the company's inventory, and reported its sales and use tax to the State of Florida. [Doc. 50 at ¶¶ 5-8; Doc. 50-1 at ¶¶ 10-12; Doc. 63 at ¶¶ 5-8.] On November 7, 2019, the State of Florida issued a Notice of Proposed Assessment to Ready Cars, Inc., c/o Mary Ready following an audit for the period of February 1, 2016, through January 31, 2019. [Doc. 50 at ¶ 9; Doc. 63 at ¶ 9; Doc. 50-4.]

III. Relevant Law

A proof of claim executed and filed in accordance with the Federal Rules of Bankruptcy Procedure constitutes prima facie evidence as to the amount and validity of the claim, which is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a); Fed. R. Bankr. P. 3001(f); Fed. R. Bankr. P. 3007. The State of Florida based its claim on Florida Statutes section 213.29, which states, in material part:

> Any person who is required to collect, truthfully account for, and pay over any tax enumerated in chapter 201, chapter 206, or chapter 212 and 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 such tax or the payment thereof; or any officer or director of a corporation who has administrative control over the collection and payment of such tax and who willfully directs any employee of the corporation to fail to collect or pay over, evade, defeat, or truthfully account for such tax shall, in addition to other penalties provided by law, be liable to a penalty equal to twice the total amount of the tax evaded or not accounted for or paid over.

Fl. St. § 213.29. Notwithstanding that both elements – whether an individual is the responsible person and whether there was willfulness – must be satisfied, the State of Florida appears to ask the Court to adopt a "per se" standard for section 213.29: that if the individual in question was the person responsible for paying a company's sales and use taxes, that individual bears personal responsible under the statute. That interpretation, however, ignores the express statutory requirement that the individual must *willfully* act under the statute.

As acknowledged in the Motion for Summary Judgment, Florida Statutes section 213.29 does not define "willfully." [*See* Doc. 49 at p. 3.] Nevertheless, state courts routinely rely on the federal courts' interpretation of statutes with similar language as well as other states' judicial interpretation of similarly worded statutes. *See, e.g., In re Inselman,* 334 B.R. 267, 270-71 (Bankr. D. Ariz. 2005); *In re Rainey*, 257 B.R. 792, 796 n.4 (Bankr. W.D. Va. 2001). Here, the Internal Revenue Code, namely 26 U.S.C. § 6672(a), provides comparable statutory text, providing for personal liability for individuals who willfully fail to pay taxes owed to the federal government by a corporation.[3]

Willfulness under § 6672(a) means a "voluntary, conscious and intentional decision to prefer other creditors over the Government." *Monday v. United States*, 421 F.2d 1210, 1216 (7th Cir. 1970). The *Monday* definition of willfulness under § 6672(a) has been adopted by every federal circuit court. *Domanus v. United States,* 961 F.2d 1323, 1325-26 (7th Cir. 1992) (collecting cases from each federal circuit court adopting this definition). Under Sixth Circuit authority, "[a] responsible person may willfully fail to pay taxes in one of two ways. He may know that the company did not pay the taxes. Or he may 'deliberately or recklessly disregard[] facts and known risks that the taxes were not being paid.'" *United States v. Hartman*, 896 F.3d 759, 761 (6th Cir. 2018) (quoting *Calderone v. United States*, 799 F.2d 254, 260 (6th Cir. 1986)).

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[3] Section § 6672(a) states, in material part:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title 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, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672. A responsible party under § 6672 is "generally understood to encompass all those officers who are so connected with a corporation as to have the responsibility and authority to avoid the default which constitutes a violation[,]" *Rosenheim v. United States*, 159 Fed. Cl. 559, 565 (Fed. Cl. 2022).

"The responsible party need not exhibit an intent to defraud the IRS or some other evil motive; all that is necessary to demonstrate willfulness is the existence of an intentional act to pay other creditors before the federal government." *Bell v. United States*, 355 F.3d 387, 393 (6th Cir. 2004); *see also Rosenheim v. United States*, 159 Fed. Cl. 559, 565 (Fed. Cl. 2022) ("'Willfulness must also be viewed in light of the "personal fault" of the [debtor].'" (quoting *Godfrey v. United States*, 748 F.2d 1568, 1577 (Fed. Cir. 1984))).

Whether an individual "willfully failed to carry out his responsibility of causing the corporation to collect or pay over the taxes depends upon the facts and circumstances of each case." *Feist v. United States*, 607 F.2d 954, 957 (Cl. Ct. 1979) (citation omitted); *see also Rosenheim*, 159 Fed. Cl. at 565 (holding that both elements of § 6672(a) "require a fact-specific inquiry by the court") (citations omitted)); *Latin v. State Bd. of Equalization (In re Latin)*, BAP No. EC-08-1082-JuMkH, 2009 WL 7751424, at *7 (B.A.P. 9th Cir. Feb. 11, 2009) (stating that "[w]hether the responsible person 'willfully refused' to pay the tax is a factual question" when interpreting Cal. Code Regs. Title 18 § 1702.5(b)(2) (citing *Teel v. United States*, 529 F.2d 903, 905 (9th Cir. 1976))).[4]

The documentation submitted by the State of Florida in support of its Motion for Summary Judgment clearly establishes – and the parties do not appear to dispute – that Debtor falls within the scope of "responsible person" under Florida Statutes section 213.29. The same cannot be said, however, as to the "willfulness" requirement. That Debtor was a responsible party for payment of the taxes is insufficient; the State of Florida must also prove that Debtor

[4] In the context of summary judgment, the Fifth Circuit has held that "[a]lthough the willfulness 'determination [for § 6672] is usually factual,' 'evidence that the responsible person had knowledge of payments to other creditors after he was aware of the failure to pay withholding tax is sufficient for summary judgment on the question of willfulness.'" *United States v. Williams*, No. 20-10433, 2021 WL 2819016, at *2 (5th Cir. July 6, 2021) (quoting *Mazo v. United States*, 591 F.2d 1151, 1157 (5th Cir. 1979)). Here, the State of Florida has offered no such evidence.

either diverted funds for sales and use taxes to other creditors or that he recklessly disregarded factual information that the taxes were not being paid. The summary-judgment record does not satisfy that factual question; thus, Debtor's willfulness is a material fact that is in dispute.

IV. Order

The Court, accordingly, directs the following:

1. For the foregoing reasons, the State of Florida, Department of Revenue's Motion for Summary Judgment filed on March 20, 2023 [Doc. 49], is DENIED.

2. The status hearing on the Claim Objection will be held on May 10, 2023, at 9:00 a.m., in Bankruptcy Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee, at which time a new evidentiary hearing trial date will be scheduled.

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