

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

JIM'S PAWN SHOP, INC. d/b/a)
 JIM'S GUN JOBBERY,)
)
 Petitioner,)
)
 v.)
)
 CARLTON BOWERS, Director of)
 Industry Operations, Charlotte)
 Field Division, Bureau of)
 Alcohol, Tobacco, Firearms and)
 Explosives,)
)
 Respondent.)

WESTERN DIVISION
 No. 5:05-CV-525-H(3)

JPS OF WILMINGTON d/b/a JIM'S)
 PAWN & GUN,)
)
 Petitioner,)
)
 v.)
)
 CARLTON BOWERS, Director of)
 Industry Operations, Charlotte)
 Field Division, Bureau of)
 Alcohol, Tobacco, Firearms and)
 Explosives,)
)
 Respondent.)

SOUTHERN DIVISION
 No. 7:05-CV-142-H(2)

ORDER

These consolidated matters are before the court on respondent's renewed motion for summary judgment, filed June 28, 2007. Petitioner has responded, and the time for further filings has expired. Respondent's motion is, therefore, ripe for adjudication.

I. Procedural Facts

On June 6, 2005, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") revoked petitioners' federal firearms licenses for willfully violating the Gun Control Act of 1968, as amended, 18 U.S.C. Chapter 44, and regulations issued thereunder ("GCA").¹ Petitioners filed the instant actions on August 1, 2005, seeking *de novo* judicial review of the revocation pursuant to 18 U.S.C. § 923(f)(3). Because the two cases involve common parties, claims, and legal issues, the court consolidated the cases on June 8, 2006. (See Order dated Jun. 8, 2006 [DE #15].)

II. Prior Summary Judgment Ruling

Respondent previously moved for summary judgment on the ground that petitioners' non-compliance with the record-keeping requirements for federal firearms licensees constitute willful violations of the GCA. Respondent argued that a violation is willful under the GCA when a licensee knows of its legal obligations and purposefully disregards them or is plainly indifferent to the record-keeping requirements. Petitioners did not dispute the various violations found by ATF, but contended that the violations were not willful, as is required for revocation of

¹The facts underlying the revocation of petitioners' licenses are detailed in this court's August 9, 2006, order denying respondent's first motion for summary judgment. (See Summ. J. Order dated Aug. 9, 2006 [DE #20].)

a license, because the violations were not the product of bad purpose or evil motive.

This court rejected both parties' definition of "willful," concluding that willfulness cannot be found absent deliberate conduct. Citing the Fourth Circuit's decision in Prino v. Simon, 606 F.2d 449 (4th Cir. 1979), this court explained that willful conduct includes "disregard of the legality of one's actions" but does not include "plain indifference." (Summ. J. Order dated Aug. 9, 2006 [DE #20] at 21.) The court further held that willfulness does not require a showing of malicious intent. (Id.) The court then denied respondent's motion for summary judgment, finding genuine issues of material fact as to the willfulness of petitioners' violations. (Id. at 26-27.) In so doing, the court specifically determined that petitioners' repeated violations, although powerful circumstantial evidence of willfulness, were not willful as a matter of law. (Id. at 18, 27.)

III. Respondent's Second Summary Judgment Motion

A. Respondent's Argument

Respondent now renews its motion for summary judgment, once again urging the court to find that "a willful violation of the administrative provisions of the GCA occurs when a Federal firearms licensee displays purposeful disregard or plain indifference to a known legal obligation." (Renewed Mot. Summ. J. & Mem. [DE #35] at 5.) Respondent argues that this standard was recently adopted by

the Fourth Circuit in RSM, Inc. v. Herbert, 466 F.3d 316 (4th Cir. 2006), reh'g and reh'g en banc denied, No. 06-1393 (4th Cir. Dec. 27, 2006).

B. Court's Discussion

Contrary to respondent's argument, the Fourth Circuit's decision in RSM does not compel an outcome different from that reached by this court in considering respondent's prior summary judgment motion. As noted by the Fourth Circuit, "willfully," although "a word of many meanings whose construction is often dependent on the context in which it appears . . . [a]t its core . . . describes conduct that results from an exercise of the will, distinguishing 'intentional, knowing or voluntary' action from that which is 'accidental' or inadvertent." RSM, 466 F.3d at 320 (citations omitted); see also Safeco Ins. Co. v. Burr, 127 S. Ct. 2201, 2215 (2007) (referring to the deliberate indifference standard espoused in Farmer v. Brennan, 511 U.S. 825 (1994), to define "willfully" for purposes of the Fair Credit Reporting Act's civil liability provision). While willfulness may be *inferred* from an individual's plain indifference to a legal requirement, RSM, 466 F.3d at 322, a licensee's repeated violations of the GCA do not necessarily *compel* a finding of willfulness as a matter of law. In RSM, the Fourth Circuit explained:

To be sure, a single, or even a few, inadvertent errors in failing to complete forms may not amount to "willful" failures, even when the legal requirement to complete the forms was known. Yet *at some point*, when

such errors continue or even increase in the face of repeated warnings given by enforcement officials, accompanied by explanations of the severity of the failures, one may infer as a matter of law that the licensee simply does not care about the legal requirements. At that point, the failures show the licensee's plain indifference and therefore become willful.

RSM, 466 F.3d at 322.

In RSM, the Fourth Circuit affirmed the district court's finding that a firearms dealer's plain indifference to its obligations under the GCA constituted willful violations authorizing revocation of the dealer's license. At issue in RSM was the license of a dealer who had been cited for over 900 federal firearms violations after having been twice counseled for previous violations of the GCA. ATF's inspection prior to the revocation of the dealer's license revealed 287 missing firearms, including three firearms designated as especially dangerous weapons subject to the special registration requirements of the National Firearms Act, as well as a number of instances where the dealer had failed to complete the required ATF Form 4473 upon the sale of a firearm and one instance where the dealer sold a firearm to an individual whose criminal background check had expired. RSM, 466 F.3d at 318.

Petitioners' violations, although undoubtedly serious, do not rise to the level of those involved in RSM. Nor do petitioners' histories of GCA violations compel the conclusion that they acted, as a matter of law, with plain indifference to their obligations under the GCA. As this court explained in denying respondent's

prior summary judgment motion:

[Evidence suggesting willfulness on the part of petitioners is] countered by evidence of petitioners' attempts to comply with the GCA and related regulations, and their efforts to be helpful in addressing issues raised during ATF's inspections. (See, e.g., Jim's Pawn Shop, Mem. Supp. Mot. Summ. J. Attach. A, Report and Recommendation of ATF Hearing Officer Ben Rider at 32 ["[Petitioner] went to great lengths to determine the disposition of all of the firearms recorded in the A&D Book but not found on the premises . . . and are to be commended for their efforts."]; Pet'r Resp. Mot. Summ. J. Ex. 1, James M. Faircloth Aff. ¶ 12 ["[M]y daughter, Jan, asked Tim Mabe how she should correct a mistake should she make one . . . and his response was that she could not make a mistake."]; ATF Warning Letter, Government Hr'g Ex. 7 ["[I]t appears that you have made a concerted effort to comply with the laws and regulations governing Firearm Transactions"]).

It is also crucial to consider petitioner's violations in the context of their overall volume of firearm transactions. (See, e.g., Jim's Pawn Shop, ATF Hearing Officer Report at 6 [noting that the ATF Industry Operations Investigator stated that "Jim's was the largest volume firearms dealer he had inspected at that time."]; id. at 46 [placing petitioner's two violations for failure to properly conduct NICS checks in the context of approximately 4000 firearms transactions per year]; Pet'r Resp. Mot. Summ. J. Ex. 2, Jo Faircloth Aff. ¶ 9 [for the time period during which petitioner admittedly failed to timely record the disposition of 80 firearms, Jim's Pawn Shop entered approximately 16,000 dispositions]. JPS of Wilmington, Pet'r Resp. Mot. Summ. J. Ex. 1, James M. Faircloth Aff. ¶ 5 [for the time period during which petitioner transferred firearms to nonlicensees without first obtaining an ATF Form 4473 on 28 occasions, JPS of Wilmington disposed of approximately 12,200 firearms). The court also notes that more than 1600 violations were found during ATF's 1996 inspection of Jim's Pawn Shop but that the number dropped considerably in subsequent inspections. While this does not, in and of itself, excuse petitioners' violations, it suggests that petitioners were not indifferent to the requirements of the GCA and its implementing regulations.


(Summ. J. Order dated Aug. 9, 2006, at 27-28.)

Having again reviewed the evidence of record in each of the underlying cases, the court concludes that respondent has failed to meet its burden of demonstrating the absence of a genuine issue of material fact as to the willfulness of any of petitioners' violations. See Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986) (burden on party seeking summary judgment to show absence of genuine issue of material fact).

IV. Conclusion

For the foregoing reasons, respondent's Second Renewed Motion for Summary Judgment [DE # 35] is DENIED. The petition in each of the underlying cases remains pending before the court, and the cases remain consolidated for trial. The bench trial of this matter is hereby scheduled for the court's April 21, 2008, civil term. The clerk shall schedule the pretrial conference accordingly.

This 2^m day of January 2008.


MALCOLM J. HOWARD
Senior United States District Judge

At Greenville
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