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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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RICHARD NORRIS,

Plaintiffs,

v.

MAUREEN GREEN and LAYNE CARVER,

Defendants.

Case No. 2:15-cv-1238-APG-CWH

**ORDER GRANTING MOTION TO SET
ASIDE DEFAULT AND MOTION TO
DISMISS**

(Dkt. ##10, 16)

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Default was entered against defendants Maureen Green and Layne Carver on November 13, 2015. (Dkt. 7.) Green and Carver are Internal Revenue Service employees. The United States of America, the proper party acting on behalf of Green and Carver, moved to set aside the entry of default. (Dkt. #10.) In the motion, the United States demonstrates that Green and Carver were not properly served under Fed. R. Civ. P. 4(i). Plaintiff Richard Norris does not refute this in his opposition. It is clear that Green and Carver (along with the United States) were not properly served. Therefore, default should not have been entered against Green and Carver. I will set aside the entry of default.

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The United States, on behalf of Green and Carver, also moves to dismiss Norris's Amended Complaint for a variety of reasons. (Dkt. #16.) As set forth above, Norris has not properly served his Amended Complaint (or his original Complaint). Thus, his Amended Complaint is subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(5). Rule 4(m) states

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If a defendant is not served within [120] days after the complaint is filed, the court . . . must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

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Norris did not serve Green, Carver, or the United States within 120 days. Nor has Norris offered good cause—let alone any reason—for that failure. Thus, I must dismiss the Amended Complaint for this reason as well.

1 In addition to these problems with service of process, Norris's Amended Complaint is
2 substantively defective. In considering a motion to dismiss, "all well-pleaded allegations of
3 material fact are taken as true and construed in a light most favorable to the non-moving party."
4 *Wylor Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). However, I
5 do not necessarily assume the truth of legal conclusions merely because they are cast in the form
6 of factual allegations in the plaintiff's complaint. See *Clegg v. Cult Awareness Network*, 18 F.3d
7 752, 754-55 (9th Cir. 1994). A plaintiff must make sufficient factual allegations to establish a
8 plausible entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Such
9 allegations must amount to "more than labels and conclusions, [or] a formulaic recitation of the
10 elements of a cause of action." *Id.* at 555.

11 Norris's Amended Complaint fails to state a plausible claim for relief. He refers to his
12 claims as "trespass" but he does not allege any facts to support that claim. Nor does he identify the
13 property upon which the trespass occurred. Perusing the exhibits attached to Norris's Amended
14 Complaint, it appears that he is claiming that the United States failed to grant his request for a tax
15 refund. But Norris does not explain why he is entitled to a refund and how that claim, even if
16 plausible, can be asserted against defendants Green and Carver. 28 U.S.C. § 7422(f) ("A suit or
17 proceeding [to recover an improper tax payment] may be maintained only against the United States
18 and not against any officer or employee of the United States. . . .")

19 Finally, the United States points out that Norris's claims are barred by the doctrines of
20 sovereign immunity and failure to exhaust administrative remedies. A taxpayer may sue the United
21 States for a tax refund. See 28 U.S.C. § 1346(a)(1) (providing waiver of sovereign immunity for
22 refund suits). But the taxpayer must first pursue the refund administratively.

23 No suit or proceeding shall be maintained in any court for the recovery of any
24 internal revenue tax alleged to have been erroneously or illegally assessed or
25 collected, or of any penalty claimed to have been collected without authority, or of
26 any sum alleged to have been excessive or in any manner wrongfully collected,
27 until a claim for refund or credit has been duly filed with the Secretary, according
28 to the provisions of law in that regard, and the regulations of the Secretary
established in pursuance thereof.

1 28 U.S.C. § 7422(a). Similarly, a lawsuit for civil damages caused by an IRS employee cannot be
2 filed unless the taxpayer has first exhausted the IRS's administrative remedies. 26 U.S.C. §
3 7433(d)(1). The Amended Complaint does not allege that Mr. Norris properly filed a claim with
4 the Secretary prior to filing this lawsuit. Therefore, dismissal is appropriate on these grounds as
5 well.

6 The United States requests that I dismiss the Amended Complaint with prejudice. I am not
7 convinced that amendment would be futile. I will give Mr. Norris an opportunity to demonstrate
8 that he has complied with the applicable rules and statutes regarding service and exhaustion of
9 administrative remedies, and that he has plausible claims for relief. Mr. Norris may file a Second
10 Amended Complaint if he can truthfully allege facts to cure the deficiencies mentioned in this Order
11 and in the United States' motion to dismiss.

12 IT IS HEREBY ORDERED that the motion to set aside default (**Dkt. #10**) is **GRANTED**.
13 The clerk's entry of default (**Dkt. #7**) is **SET ASIDE**.

14 IT IS FURTHER ORDERED that the motion to dismiss (**Dkt. #16**) is **GRANTED**. The
15 plaintiff's Amended Complaint is dismissed without prejudice. The plaintiff may file a Second
16 Amended Complaint by May 4, 2016 if he can truthfully allege sufficient facts to cure the
17 deficiencies in the Amended Complaint. If the plaintiff fails to file an amended complaint by that
18 date, this case shall be closed.

19 Dated: April 5, 2016.



ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

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