

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case. No. 2:11-CV-0151
Magistrate Judge King

ROBERT RIDENOUR,

Defendant.

OPINION and ORDER

The United States of America ["plaintiff"] alleges that Robert Ridenour ["defendant"] is in default on a promissory note ("the promissory note") executed and delivered by defendant on June 26, 2001. *Complaint*, Doc. No. 2, ¶ 3. Plaintiff seeks recovery of unpaid principal and interest in the total amount of \$100,867.31. Attached to the *Complaint* is a photocopy of the promissory note, Exhibit A, and of a document denominated "Certificate of Indebtedness," Exhibit B. In response, defendant, who is proceeding without the assistance of counsel, filed an answer in which he expressly denies executing the promissory note. *Answer*, Doc. No. 6, pp. 1-2. Defendant characterizes the signature that appears on the promissory note attached to the *Complaint* as a forgery. *Id.*, p. 2. Defendant has also attached to the *Answer* his affidavit, in which he avers that he has "not signed any Promissory Note for a student loan for more than twenty years." *Affidavit*, ¶ 7, Exhibit A attached to *Answer*. Defendant's affidavit also denies that he has authorized "anyone . . . to sign [his] name on any loan agreement or Promissory Note for any

purpose." *Id.*, ¶8. With the consent of the parties, see 28 U.S.C. §636(c), this matter is now before the Court on defendant's *Motion to Dismiss*, Doc. No. 5. Attached to the *Motion to Dismiss* is the same affidavit attached to the *Answer*.

In response to defendant's *Motion to Dismiss*, plaintiff has submitted the *Declaration of Delfin M. Reyes*, a Loan Analyst for the United States Department of Education, who avers that the agency's records indicate that the proceeds of the promissory note referred to in the *Complaint* were used to pay off defendant's defaulted Federal Family Education Loan Program Consolidation loan in 2001. *Id.*, ¶¶ 20-22, attached to *United States of America's Memorandum Contra Defendant's Motion to Dismiss*, Doc. No. 8. Plaintiff contends that discovery is necessary to explore the circumstances surrounding the execution of various loans taken out in defendant's name, to determine whether the disbursement of proceeds under the promissory note benefitted defendant notwithstanding his defense of fraud and forgery, and to generally explore the defenses set forth in the *Answer*. *Id.* at 2.

Both parties have submitted evidentiary materials - attached to both the pleadings and their filings in connection with the *Motion to Dismiss*. The Federal Rules of Civil Procedure provide that "if, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d).¹

¹Because defendant also attached his affidavit to his *Answer*, the issue arises whether that affidavit constitutes a "matter outside the pleading" within the meaning of Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes").

Moreover, although all parties are entitled to "notice and reasonable opportunity to respond to all the issues to be considered by the court," *Employers Ins. of Wausau v. Petroleum Specialties, Inc.*, 69 F.3d 98, 105 (6th Cir. 1995), where both parties submit evidentiary materials fully addressing the issue for resolution, "they ha[ve] sufficient notice that the district court could consider this outside material when ruling on the issues presented. . . . *Id.*, at 932.

Rule 56(a) of the Federal Rules of Civil Procedure provides that a court must 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." However, "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Because, at this juncture, the record presents a material question of fact regarding the authenticity of defendant's purported signature on the relevant promissory note, summary judgment is unwarranted.

WHEREUPON defendant's *Motion to Dismiss*, Doc. No. 5, is **DENIED**.

Whether an affidavit constitutes a "written instrument" for purposes of Rule 10(c) within the Sixth Circuit is not entirely clear. See *Song v. City of Elyria, Ohio*, 985 F.2d 840, 842 (6th Cir. 1993)(parties' affidavits attached to complaint, which "did nothing more than verify the complaint," were properly considered on motion to dismiss). Nevertheless, because plaintiff has submitted evidentiary material in its response to the *Motion to Dismiss*, which material is clearly "outside the pleadings," the Court need not resolve this issue.

S/ Norah McCann King
Norah McCann King
United States Magistrate Judge

July 19, 2011