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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,)	
)	No. CV 09-310-HU
Plaintiff,)	
)	
v.)	
)	FINDINGS AND
TODD D. GASTALDO,)	RECOMMENDATION
)	
Defendant.)	
_____)	

Todd D. Gastaldo, DC
 22115 N.W. Imbrie Drive # 338
 Hillsboro, Oregon 97124
 Pro se

Kent Robinson
 Acting United States Attorney
 District of Oregon

Robert D. Nesler
 Assistant United States Attorney
 1000 S.W. Third Avenue, Suite 600
 Portland, Oregon 97204
 Attorneys for defendant

HUBEL, Magistrate Judge:

This is an action by the United States to collect from
defendant Todd Gastaldo amounts due on three federally insured

1 student loans. The loans were for \$2,500, \$3,500, and \$3,500
2 respectively, for a total of \$9,500. The government seeks the
3 unpaid principal¹ plus interest at 7% as of December 8, 2008, and
4 continuing thereafter, as well as administrative costs. The matters
5 before the court are Mr. Gastaldo's motion to dismiss (doc. #5) and
6 the government's motion for summary judgment (doc. #11). I
7 recommend that the motion to dismiss be denied and that the motion
8 for summary judgment be granted.

9 **Standards**

10 A motion to dismiss for failure to state a claim should be
11 granted if the plaintiff is unable to delineate "enough facts to
12 state a claim to relief that is plausible on its face." Bell
13 Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (*abrogating* Conley v.
14 Gibson, 355 U.S. 41 (1957)); Fed. R. Civ. P. 12(b)(6). For purposes
15 of such a motion, the complaint is construed in a light most
16 favorable to the plaintiff and all properly pleaded factual
17 allegations are taken as true. Jenkins v. McKeithen, 395 U.S. 411,
18 421 (1969); Everest & Jennings, Inc. v. American Motorists Ins.
19 Co., 23 F.3d 226, 228 (9th Cir. 1994). All reasonable inferences are
20 to be drawn in favor of the plaintiff. Jacobson v. Hughes Aircraft,
21 105 F.3d 1288, 1296 (9th Cir. 1997).

22 A party is entitled to summary judgment if the "pleadings,
23 depositions, answers to interrogatories, and admissions on file,
24 together with affidavits, if any, show there is no genuine issue as
25

26 ¹ As discussed below, part of the debt was offset by the
27 Treasury Offset Program.

1 to any material fact." Fed. R. Civ. P. 56(c). The moving party has
2 the burden of establishing the absence of a genuine issue of
3 material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).
4 If the moving party shows the absence of a genuine issue of
5 material fact, the nonmoving party must go beyond the pleadings and
6 identify facts which show a genuine issue for trial. Id. at 324.
7 Assuming that there has been sufficient time for discovery, summary
8 judgment should be entered against a "party who fails to make a
9 showing sufficient to establish the existence of an element
10 essential to that party's case, and on which that party will bear
11 the burden of proof at trial." Id. at 322.

12 **Discussion**

13 **I. Defendant's motion to dismiss**

14 Mr. Gastaldo asserts two grounds for his motion to dismiss the
15 government's complaint: failure to state a claim and an affirmative
16 defense that Mr. Gastaldo paid the debt by overpaying his federal
17 taxes.

18 **A. Failure to state a claim**

19 Mr. Gastaldo asserts that the government has failed to state
20 a claim because there was fraud in the inducement of his
21 chiropractic student loans. He argues that the government allowed
22 anti-chiropractic lobbyists to financially sabotage chiropractors
23 by requiring them to demonstrate vertebral subluxations by x-rays
24 ("radiation fraud,"). Mr. Gastaldo also asserts, presumably as part
25 of his fraud claim, that the government makes payments through
26 Medicare to hospitals to train obstetricians in "mass birth-canal-

1 closing/spinal manipulation child abuse" by allowing women to give
2 birth sitting or lying down; in "mass baby asphyxiation" by cutting
3 the umbilical cord immediately after birth; in "mass infant penis
4 ripping and slicing," by infant circumcision falsely justified by
5 an "obvious HIV/AIDS hoax;" and by promoting mandatory
6 immunizations and medical immunity from liability for vaccine-
7 induced injuries. He urges the lawyers representing the government
8 in this case to investigate these claims and file an action under
9 the False Claims Act, 31 U.S.C. § 3729(a)(1).

10 Mr. Gastaldo's motion to dismiss for failure to state a claim
11 does not address the debt collection claims alleged in the
12 government's complaint.

13 B. Affirmative defense

14 Mr. Gastaldo also moves to dismiss on the ground that he has
15 repaid the loans through voluntary overpayment of his taxes. The
16 government counters that Mr. Gastaldo did not raise this defense in
17 his answer, and that it should therefore be disregarded. The
18 government cites Scott v. Kuhlmann, 746 F.2d 1377, 1378 (9th Cir.
19 1984) (affirmative defenses may not ordinarily be raised by motion
20 to dismiss); McNeil Const. Co. v. Livingston State Bank, 265 F.2d
21 308, 312 (9th Cir. 1959) (payment is an affirmative defense which
22 should be presented by answer).

23 The Ninth Circuit has, since these cases were decided,
24 "liberalized the requirement that defendants must raise affirmative
25 defenses in their initial pleadings." Magana v. Commonwealth of the
26 Northern Mariana Islands, 107 F.3d 1436, 1446 (9th Cir. 1997). A

1 defendant may raise an affirmative defense for the first time in a
2 motion so long as the delay does not prejudice the plaintiff. Id.

3 I am unpersuaded, therefore, by the government's argument that
4 Mr. Gastaldo's affirmative defense of payment fails because it was
5 not pleaded in his answer. Nevertheless, Mr. Gastaldo cannot
6 prevail on his motion to dismiss.

7 An affirmative defense may be raised in a motion to dismiss
8 only if it raises no disputed issues of fact. Scott v. Kuhlmann,
9 746 F.2d 1377, 1378 (9th Cir. 1984). Ordinarily, a court may look
10 only at the face of the complaint to decide a motion to dismiss. In
11 the context of a motion to dismiss under Rule 12(b)(6), all
12 material facts as pleaded in the complaint are assumed to be true,
13 and are construed in the light most favorable to the plaintiff.
14 See, e.g., Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 325 (1991);
15 Cervantes v. United States, 330 F.3d 1186, 1187 (9th Cir. 2003). The
16 material facts as pleaded in the complaint, and the reasonable
17 inferences to be drawn from them, contradict Mr. Gastaldo's
18 affirmative defense of payment. Such disputed issues of fact
19 preclude Mr. Gastaldo from raising his affirmative defense in a
20 motion to dismiss.

21 Nor can the court construe Mr. Gastaldo's motion to dismiss as
22 one for judgment on the pleadings pursuant to Rule 12(c). Rule
23 12(c) requires that a motion for judgment on the pleadings be made
24 after the pleadings are closed. Because Mr. Gastaldo has not filed
25 an answer, the pleadings are not closed. In the absence of an
26 answer, the only pleading to be considered under Rule 12(c) is the

1 complaint.

2 Further, a motion for judgment on the pleadings requires the
3 court to take all the allegations in the pleadings as true, and
4 construe the pleadings in the light most favorable to the nonmoving
5 party. Doyle v. Raley's, Inc., 158 F.3d 1012, 1014 (9th Cir. 1998).
6 When the allegations of the complaint are taken as true, with all
7 reasonable inferences drawn in the government's favor, Mr. Gastaldo
8 is not entitled to judgment in his favor on his affirmative
9 defense.

10 The court can convert Mr. Gastaldo's motion to dismiss into a
11 motion for summary judgment, pursuant to Rule 12(d), which
12 provides:

13 If, on a motion under Rule 12(b)(6) or 12(c), matters
14 outside the pleadings are presented to and not excluded
15 by the court, the motion must be treated as one for
16 summary judgment under Rule 56.

17 I recommend treating Mr. Gastaldo's motion to dismiss, pages
18 seven and eight, as a motion for summary judgment. The government's
19 motion for summary judgment should be treated as a response to Mr.
20 Gastaldo's motion.

21 In a motion for summary judgment, the moving party has the
22 burden of establishing the absence of a genuine issue of material
23 fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Further,
24 on a motion for summary judgment, the court must view the evidence
25 in the light most favorable to the non-movant and must draw all
26 reasonable inferences in the non-movant's favor. Clicks Billiards
27 Inc. v. Sixshooters Inc., 251 F.3d 1252, 1257 (9th Cir. 2001). Even

1 judgment, Mr. Gastaldo has not established the absence of a genuine
2 issue of material fact with respect to whether he has paid the debt,
3 as discussed below, and therefore is not entitled to summary
4 judgment on his affirmative defense.

5 **II. Government's motion for summary judgment**

6 The government moves for summary judgment. If the government
7 shows the absence of a genuine issue of material fact, Mr. Gastaldo
8 must go beyond the pleadings and identify facts which show a genuine
9 issue for trial in order to survive the motion. Celotex, 477 U.S.
10 at 323-24. Assuming that there has been sufficient time for
11 discovery, summary judgment should be entered against a "party who
12 fails to make a showing sufficient to establish the existence of an
13 element essential to that party's case, and on which that party will
14 bear the burden of proof at trial." Id. at 322.

15 The government has produced evidence proving its prima facie
16 case of Mr. Gastaldo's indebtedness. Declaration of Lynda Faatalale
17 ¶¶ 14, 15, 16, 17, attachments C, D, E, F, G, H, K, L, M, N, O, S,
18 T, U, V, W, X. Mr. Gastaldo does not dispute that the debts were
19 incurred. The government has produced competent evidence that the
20 debt has not been repaid. Id. at ¶¶ 15, 16, 17, 20, attachments I,
21 Q, Y, CC.² The government has produced evidence that despite
22 numerous attempts at collection, including 132 letters, Mr. Gastaldo
23 still owes \$26,412.59 in principal and interest as of June 1, 2009.
24 Id. at ¶¶ 15, 16, 17, 26, attachments KK and LL.

25
26 ² Some, but not all, of Mr. Gastaldo's debt has been
27 discharged through Treasury Offset Payments. Id. at ¶ 24, 25, and
28 attachments HH, II, JJ.

1 Mr. Gastaldo has not identified facts which contradict this
2 evidence. Mr. Gastaldo bears the burden of proof on his affirmative
3 defense, and thus must make a showing of payment.

4 Mr. Gastaldo's conclusory statements that the debt was
5 discharged through his voluntary overpayment of taxes, see
6 Defendant's Motion to Dismiss, pages seven and eight, is not
7 sufficient to create a genuine issue of material fact that defeats
8 the government's motion for summary judgment. The statements are not
9 allegations in an answer raising an affirmative defense. They are
10 not in the form of an affidavit. Even if the statements are treated
11 as an affidavit (which I do not recommend), they do not contain
12 facts which would either support Mr. Gastaldo's affirmative defense
13 or disprove the government's prima facie case, such as the date or
14 dates the alleged payments were made, the amounts allegedly paid,
15 or even the amount of the taxes allegedly due, to enable one to see
16 an overpayment had been made and the amount of that overpayment.

17 **Conclusion**

18 I recommend that Mr. Gastaldo's motion to dismiss (doc. # 5)
19 be treated as a motion for summary judgment and be DENIED, and that
20 the government's motion for summary judgment (doc. # 11) be GRANTED.

21 **Scheduling Order**

22 These Findings and Recommendation will be referred to a
23 district judge. Objections, if any, are due December 17, 2009. If
24 no objections are filed, then the Findings and Recommendation will
25 go under advisement on that date. If objections are filed, then a
26 response is due December 31, 2009. When the response is due or
27

1 filed, whichever date is earlier, the Findings and Recommendation
2 will go under advisement.

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4 Dated this 2nd day of December, 2009.

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/s/ Dennis James Hubel

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Dennis James Hubel
United States Magistrate Judge

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28 FINDINGS AND RECOMMENDATION Page 9