

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

KENNETH MOLAND,

Plaintiff and Counterclaim
Defendant,

v.

THE UNITED STATES OF AMERICA,

Defendant and Counterclaim
Plaintiff.

Case No. 3:20-cv-2050-SI (Lead)
Case No. 3:20-cv-2261-SI (Consolidated)

OPINION AND ORDER

Kenneth Moland, *pro se*.

Isaac M. Hoenig and Rika Valdman, U.S. DEPARTMENT OF JUSTICE TAX DIVISION, P.O. Box 683, Ben Franklin Station, Washington DC 20044. Of Attorneys for Defendant.

Michael H. Simon, District Judge.

This action arises from three athletic clubs' failure to pay federal employment taxes. The Internal Revenue Code requires employers to withhold federal income and payroll taxes from employee wages and remit those taxes to the government. *See* 26 U.S.C. §§ 3102(a), 3402(a). Withheld taxes are held in trust for the government and have come to be known as "trust fund taxes." *See Slodov v. United States*, 436 U.S. 238, 243 (1978). Struggling businesses sometimes use withheld funds unlawfully as a source of financing. *See id.* To combat the government's

losses suffered from that practice, 26 U.S.C. § 6672 provides for a penalty against individuals who were responsible for paying a company's trust fund taxes to the government but failed to do so. Here, Plaintiff Kenneth Moland brings this action for a refund of the penalties he paid under § 6672. Before the Court is Defendant United States' motion for summary judgment. For the reasons explained below, the Court grants the government's motion.

STANDARDS

A party is entitled to 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(a). The moving party has the burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001). Although “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment,” the “mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient . . .” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 255 (1986). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation and quotation marks omitted).

Moland did not file a response to the government's motion for summary judgment. A court may not, however, grant summary judgment by default. *See Heinemann v. Satterberg*, 731 F.3d 914, 916-17 (9th Cir. 2013). When a party fails to respond to a fact asserted by the movant, a court may:

(1) give [the party] an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or (4) issue any other appropriate order.

Fed. R. Civ. P. 56(e). This rule was amended in 2010 to incorporate the “deemed admitted” practice of many courts—where a party fails to respond to an asserted fact, that fact may be “deemed admitted” (considered as undisputed). *Heinemann*, 731 F.3d at 917. Here, the Court will consider as undisputed the facts asserted by the government in its unopposed motion.

Considering a fact as undisputed, however, does not mean that summary judgment automatically may be granted. A court must still determine, considering the facts the court has found undisputed for want of a response, the legal consequences and proper inferences to be drawn from those facts. *Id.* (quoting Fed. R. Civ. P. 56 Advisory Committee Notes (2010)). Accordingly, the Court considers the government’s motion on the merits in light of the undisputed facts.

BACKGROUND

A. Procedural Background

Moland filed his Complaint in May 2019 and was represented by counsel at that time. Moland now proceeds *pro se*. Moland alleges that he paid tax penalties that should not have been assessed against him and asserts a claim for a refund of those penalties. The Court later consolidated this case with *United States v. Michael*, Case No. 3:20-cv-02050-SI, because both cases involve unpaid trust fund taxes from the same three athletic clubs. After the close of discovery, the parties filed a stipulation for entry of judgment against John Michael for penalty tax assessments under 26 U.S.C. § 6672 in the amount of \$707,787.66. ECF 39. The Court entered judgment against Michael accordingly. ECF 41.

The government then filed a motion for summary judgment, seeking entry of judgment against Moland on his claim for a refund of his penalty assessment and in favor of the government on its counterclaims. Moland did not respond to the government's motion or move for an extension of time to respond. On May 31, 2022, the Court issued an order extending Moland's time to respond and stating that if he failed to respond or move for an extension, the Court would resolve the government's motion without the benefit of a response. Moland did not respond by the extended deadline.

On June 10, 2022, the government notified the Court that Moland had sent the government a cashier's check for the amount sought in its counterclaims. Accordingly, the government withdrew its motion for summary judgment as to its counterclaims but still seeks entry of judgment in its favor on Moland's claim for a refund. *Id.* Because the Court had not received any response from Moland, the Court entered another order extending his time to respond to the government's motion as to his claim for a refund. Moland has not responded or moved for an extension. Thus, the Court resolves the remaining issues in the government's motion without the benefit of a response.

B. Factual Background

In December 2013, Michael and Moland each held a 50 percent ownership interest in three athletic clubs in the Portland metropolitan area: Riverplace Athletic Club (Riverplace), Hawthorn Farm Athletic Club (Hawthorn), and Bethany Athletic (Bethany) (collectively, the Clubs). At that time, Michael and Moland served on the Clubs' board of directors, Moland served as president of the Clubs, and Michael as vice president. In April 2014, Michael replaced Moland as president of the Clubs. Michael remained president until the Clubs ceased operating in 2015. Moland retained his 50 percent ownership interest in the Clubs until the Clubs ceased operating.

Beginning in at least 2013 and through 2014, Moland also was the sole owner and manager of two companies: Barratt Leasing and Moland Associates. Barratt Leasing leased equipment to the Clubs and Moland Associates provided the Clubs' accounting services. Moland and two employees of Moland Associates held signatory authority over the Clubs' bank accounts. From those accounts, Moland Associates authorized payment of the Clubs' payroll and other expenses. Moland held authority to instruct these employees which checks to sign and not to sign drawing from the Clubs' bank accounts.

Between January 2014 and May 2015, Moland Associates prepared the Clubs' Internal Revenue Service (IRS) Forms 941, Employer's Quarterly Federal Tax Return. Moland signed the Clubs' Forms 941 for the first quarter of 2014 as "President," which showed unpaid employment tax liability for each of the Clubs. For the second quarter of 2014, Moland's employee at Moland Associates signed the Clubs' tax forms, which again showed unpaid employment tax liability. Moland signed the tax forms for the third quarter, which showed unpaid employment tax liability. For the fourth quarter, Moland signed Hawthorn and Bethany's tax forms, which showed unpaid employment tax liability. Moland Associates prepared Riverplace's form for the fourth quarter, but it was not filed. The IRS therefore assessed employment tax liability against Riverplace under 26 U.S.C. § 6020(b) for that quarter. The IRS's assessment matches the amount stated in Riverplace's unfiled form. The Clubs failed to file a Form 941 for the first quarter of 2015. As with the prior quarter for Riverplace, Moland Associates had prepared the tax forms for each of the Clubs, but they were never filed. The IRS therefore assessed employment tax liability against the Clubs for that quarter under 26 U.S.C. § 6020(b), which match the amount stated in the Clubs' unfiled forms.

In January 2014, Moland became aware that the Clubs had ceased paying their employment tax liabilities. Moland was also aware throughout 2014 and 2015 that the Clubs continued to pay other creditors, including Moland Associates and Barratt Leasing. In April 2014, Moland moved the Clubs' bank accounts from Washington Trust Bank to Banner Bank because those accounts were frequently overdrawn and hurt Moland's relationship with Washington Trust Bank.

In January and February 2018, the IRS assessed liability against Moland under 26 U.S.C. § 6672 for his willful failure to collect, truthfully account for, and pay withheld income and payroll taxes for the Clubs for the first quarter of 2014. As of April 2022, the total assessment against Moland, including interest and penalties, was \$93,386.04. In May 2019, Moland filed his Complaint, seeking a refund of the portion of that assessment he had paid, which he alleges totals \$496.34.

DISCUSSION

The United States seeks summary judgment only on Moland's claim for a refund of the tax penalties he already paid. An individual is liable under § 6672 if he or she: (1) is a "responsible person" within the meaning of the statute; and (2) willfully failed to pay the company's trust fund taxes. *Nakano v. United States*, 742 F.3d 1208, 1211 (9th Cir. 2014).

Additionally, in a lawsuit to collect taxes, the United States bears the initial burden of proof. *Oliver v. United States*, 921 F.2d 916, 919 (9th Cir. 1990). The government satisfies its burden by introducing into evidence its assessment of the taxes due. *Id.* Once the government satisfies its initial burden, the burden shifts to the taxpayer to show that he or she is not liable. *Nakano*, 742 F.3d at 1211.

A. Responsible Person

An individual is a “responsible person” under § 6672 if he or she “had the authority required to exercise significant control over the corporation’s financial affairs, regardless of whether he exercised such control in fact.” *Purcell v. United States*, 1 F.3d 932, 937 (9th Cir. 1993). Even if an individual’s daily duties are unrelated to financial decisionmaking, the individual may nevertheless be a responsible person if he or she has the authority to pay or order the payment of delinquent taxes. *Id.* Factors to consider when determining whether an individual is a responsible person include whether the individual holds significant control over the company’s finances and the individual’s duties outlined in any corporate bylaws, ability to sign checks, status as an officer or director, authority to hire and fire employees, ownership interest in the company, and involvement in day-to-day affairs of the company. *Id.*

The government has shown that Moland is a responsible person within the meaning of § 6672. Moland served on the Clubs’ board of directors and as president for the first quarter of 2014, signed the Clubs’ Forms 941 as president for the first quarter of 2014, held signatory authority over the Clubs’ bank accounts from December 2013 until at least March 2015, exercised control over where the Clubs banked, and held a 50 percent ownership interest in the Clubs. Because Moland has not responded to the government’s motion or put forward any evidence, the Court concludes that the government’s evidence shows Moland was a responsible person.

B. Willfulness

An individual acts willfully within the meaning of § 6672 if he or she makes a “voluntary, conscious and intentional act to prefer other creditors over the United States.” *Davis v. United States*, 961 F.2d 867, 871 (9th Cir. 1992). Willfulness does not require an intent to defraud the government, and “conduct motivated by a reasonable cause may nonetheless be

willful.” *Id.* “If a responsible person knows that withholding taxes are delinquent, and uses corporate funds to pay other expenses, even to meet the payroll out of personal funds he lends the corporation,” that person acts willfully. *Phillips v. U.S. I.R.S.*, 73 F.3d 939, 942 (9th Cir. 1996).

The government has shown that Moland acted willfully. Moland became aware that the Clubs could not meet their payroll tax obligations beginning in January 2014 and was also aware that his employees at Moland Associates continued to pay the Clubs’ other creditors while the Clubs’ employment tax liability remained unpaid. Because Moland has not responded to the government’s motion or put forward any evidence, the Court concludes that the government’s evidence shows Moland acted willfully.

Accordingly, the government has shown that Moland is liable under § 6672. Because Moland is liable under § 6672, he is not entitled to a refund of the penalties he already paid. Thus, the Court dismisses Moland’s claim against the government.¹

CONCLUSION

The Court GRANTS the government’s motion for summary judgment (ECF 40).

IT IS SO ORDERED.

DATED this 13th day of July, 2022.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

¹ As explained above, the government notified the Court that it no longer seeks entry of judgment against Moland on its counterclaims. The government also notified the Court that it does not intend to rely on Moland’s signed stipulated entry of judgment for those claims. Because the Court is terminating this case, the government has leave to reopen this case if needed to seek entry of that stipulated judgment.