

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MERVIN J. SHOEMAKER, et al.,)

Plaintiffs)

v.)

Docket No. 97-365-P-C

UNITED STATES OF AMERICA,)

Defendant)

**MEMORANDUM DECISION ON PLAINTIFFS' MOTIONS TO AMEND COMPLAINT
AND FOR SANCTIONS AND RECOMMENDED DECISION ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT**

Plaintiff Mervin J. Shoemaker has filed a motion for summary judgment and to amend his complaint in this action concerning the payment of income taxes for the year 1994. The proposed amendment adds Rosemarie Shoemaker, wife of Mervin, as a party and changes the amount sought as a refund of income taxes “erroneously paid,” Complaint (Docket No. 1) ¶ 7 and prayer for relief (page 3). The defendant seeks summary judgment on the grounds that this court lacks jurisdiction over the plaintiff’s claim and that it is entitled to judgment as a matter of law. Both of the Shoemakers filed a motion for sanctions against the defendant’s counsel under Fed. R. Civ. P. 11, contending that he violated that rule in connection with the substance of the defendant’s opposition to Mervin J. Shoemaker’s motion for summary judgment and the defendant’s cross-motion for summary judgment. I grant the motion to amend the complaint, deny the motion for sanctions and recommend that the court grant the defendant’s motion for summary judgment and deny that of the

plaintiffs.¹

I. Motion to Amend Complaint

The defendant has not filed an objection to the motion to amend the complaint and it is therefore granted. *See* Local Rule 7(b).

II. Motions for Summary Judgment

A. Summary Judgment Standards

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by

¹ Because I am granting the motion to amend, I will treat the Shoemaker motion for summary judgment as that of both plaintiffs.

pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

The mere fact that both parties seek summary judgment does not render summary judgment inappropriate. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* (“Wright, Miller & Kane”) § 2720 at 19. For those issues subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720 at 24-25.

B. Factual Background

The plaintiffs’ motion for summary judgment fails to comply with this court’s Local Rule 56, which requires that a motion for summary judgment be accompanied by “a separate, short and concise statement of material facts, supported by appropriate record citations, as to which the moving party contends there is no genuine issue to be tried.” The plaintiffs appear pro se and demand that the court therefore construe their pleadings liberally, citing *Haines v. Kerner*, 404 U.S. 519 (1972). While the Supreme Court did note in *Haines* that it holds pro se complaints to less stringent standards than formal pleadings drafted by lawyers, *id.* at 520, this court will not “conjure up facts

that are not pleaded to support conclusory allegations of the complaint” filed by a pro se litigant, *Luce v. Hayden*, 598 F. Supp. 1101, 1102 (D. Me. 1984) (motion to dismiss). There is simply nothing in the plaintiffs’ submission in connection with their motion for summary judgment that can be construed to put the defendant on notice that it must respond or risk having factual statements made by the plaintiffs deemed to be admitted under Local Rule 56.

In contrast, the defendant has submitted a statement of material facts responsive to the local rule. Memorandum in Support of United States’ Objection to Plaintiff’s Motion for Summary Judgment and Cross-Motion for Summary Judgment (“Defendant’s Memorandum”) (Docket No. 8) at 2-20 (“Defendant’s SMF”). The plaintiffs have provided a “Statement of Facts” in their Memorandum in Support of Plaintiffs’ Objection to Defendant’s Cross-Motion for Summary Judgment and Motion for Sanctions (“Plaintiffs’ Second Memorandum”) (Docket No. 10) at 2-6.

To the extent that this document purports to supply the statement of material facts not in dispute that was required to be filed with the plaintiffs’ own motion for summary judgment, it is untimely. It would be inconsistent with the purpose of the summary judgment procedure to allow a moving party to supplement — or to present for the first time — its statement of material facts at a point at which the non-moving party has no opportunity to respond under the applicable rules of procedure, when such additions might well be outcome-determinative.

To the extent that this document may be construed to state facts as to which the plaintiffs contend there exist genuine issues to be tried, filed in response to the defendant’s cross-motion for summary judgment and as required by Local Rule 56, it raises additional concerns. Many of the factual allegations do not include the necessary citations to the record. *See Pew v. Scopino*, 161

F.R.D. 1, 1 (D. Me. 1995) (“A trial judge cannot comb through every deposition, affidavit, pleading, and interrogatory answer in search of disputed factual issues. The parties . . . cannot challenge the court’s summary judgment decision based on facts not properly presented [pursuant to the local rule].”) “[E]ven a pro se litigant must meet the specificity requirement of Federal Rule 56, at least when the litigant becomes aware that specific facts must be provided to defeat a motion for summary judgment.” *Posadas de Puerto Rico, Inc. v. Radin*, 856 F.2d 399, 401 (1st Cir. 1988).

Given this background, the following undisputed facts are appropriately supported in the summary judgment record. Mervin J. Shoemaker was self-employed for ten or eleven years in the plumbing and heating business prior to his retirement in 1997. Deposition of Mervin J. Shoemaker (“M. Shoemaker Dep.”), Exh. 1 to United States’ Cross-Motion for Summary Judgment (“Defendant’s Cross-Motion”) (Docket No. 6), at 4-5. In 1994, Mr. Shoemaker billed customers for work he did in the plumbing and heating business, and some customers paid him. *Id.* at 7-8. The plaintiffs made two payments of \$1,488 each to the Internal Revenue Service for 1994. *Id.* at 12-13. In 1995 the plaintiffs submitted to the Internal Revenue Service a Form 1040 for 1994 listing \$0.00 total income and claiming a refund of \$1,488. Exh. 3 to Defendant’s Cross-Motion at 1090-91.

In May 1996 the plaintiffs filed with the Internal Revenue Service another Form 1040 for 1994 in which they listed \$0.00 total income and claimed a refund of \$2,976. *Id.* at 1103-04. On or about December 11, 1996 the Internal Revenue Service mailed to the plaintiffs a Notice of Deficiency for, *inter alia*, their 1994 income taxes. Exh. 5 to Defendant’s Cross-Motion. On May 12, 1997 a delegate of the Secretary of the Treasury made assessments against the plaintiffs for their outstanding federal income tax liability for 1994 in the total amount of \$18,119.05, including interest and penalties accrued to that date, leaving a total due with credit for earlier payments of \$14,946.13.

Exh. 2 to Defendant's Cross-Motion. The plaintiffs have not made any payment since the assessment, nor have they filed any claim for refund of the two \$1,488 payments other than on the earlier-noted Forms 1040, nor have they filed any action in the Tax Court. M. Shoemaker Dep. at 11-12; Exh. 2 to Defendant's Cross-Motion. Mr. Shoemaker filed the complaint in this action on November 13, 1997. Docket No. 1.

C. Discussion

Under most circumstances, *Flora v. United States*, 362 U.S. 145 (1960), would be dispositive here. In *Flora*, the Supreme Court held that a federal district court does not have jurisdiction of a suit by a taxpayer for refund of payments made to the Internal Revenue Service when those payments did not discharge the entire amount of his assessment. *Id.* at 177. Here, the plaintiffs seek refund of payments that are less than the entire amount of their assessment for 1994. However, they contend that the assessment issued against them is invalid and that they have no income subject to tax in any event.

The latter contention is quite clearly wrong as a matter of law. It has long been the law in this circuit, as in all others, that all remuneration received for services is income subject to federal income taxation unless it falls within a specific statutory exclusion. *E.g.*, *Wilson v. United States*, 412 F.2d 694, 695 (1st Cir. 1969). *See also* 26 U.S.C. §§ 1 (imposing tax on income) and 61(a)(1) (gross income for purposes of Internal Revenue Code includes compensation for services). Mr. Shoemaker testified that he received remuneration for services he performed in 1994. Nothing further is necessary to establish the fact that he had some income that might be subject to federal income tax.

The second contention also requires little discussion. The certified Certificate of

Assessments and Payments (Form 4340) that has been submitted by the defendant is presumptive proof of a valid assessment and that the Internal Revenue Service gave notice to the taxpayer of the assessment and demanded payment. *Geiselman v. United States*, 961 F.2d 1, 6 (1st Cir. 1992); *see also United States v. Rindskopf*, 105 U.S. 418, 422 (1881) (Internal Revenue Service assessment, if not impeached, is sufficient to justify recovery of amount assessed). The plaintiffs offer no evidence to overcome the presumption beyond their argument that they owe no tax at all because their 1994 income was not subject to federal income taxation, a patently frivolous contention.

For the foregoing reasons, I recommend that the court grant the defendant's motion for summary judgment and deny that of the plaintiffs.

III. Motion for Sanctions

The plaintiffs have requested the imposition of sanctions against the attorney for the defendant under Fed. R. Civ. P. 11, asserting that he "intentionally, deliberately, and with apparent malice aforethought committed acts in violation of Rule 11(b)." Plaintiffs' Second Memorandum at 1. The plaintiffs do not allege any specific acts by the attorney, but apparently seek the sanctions "to deter th[e] type of fraudulent conduct" in which they allege the defendant has engaged. *Id.* at 7.

The defendant correctly points out that the plaintiffs have failed to comply with Rule 11(c)(1)(A), which provides:

A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subsection (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

Here, the motion does not describe the specific conduct of the defendant's attorney that is alleged to have violated subsection (b) of Rule 11, and the motion was not served upon the defendant before it was filed with this court, in disregard of the 21-day waiting period provided by the rule. The motion may be denied for these reasons alone. *Hedges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1328 (2d Cir. 1995).

IV. Conclusion

For the foregoing reasons, the plaintiff's motion to amend the complaint is **GRANTED** and the plaintiffs' motion for sanctions is **DENIED**. I recommend that the plaintiffs' motion for summary judgment be **DENIED** and that the defendant's motion for summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 16th day of July, 1998.

*David M. Cohen
United States Magistrate Judge*

