STATE OF MICHIGAN

COURT OF APPEALS

DAVID BRACKENS,

Plaintiff-Appellant,

v

ASSET ACCEPTANCE, LLC,

Defendant-Appellee,

and

FULTON, FRIEDMAN & GULACE, LLP,

Defendant.

UNPUBLISHED
April 11, 2024

No. 360994
Genesee Circuit Court
LC No. 19-113352-NZ

Before: HOOD, P.J., and REDFORD and MALDONADO, JJ.

PER CURIAM.

Plaintiff, David Brackens, appeals by right the trial court's order granting summary disposition in favor of defendant, Asset Acceptance, LLC (AAL).[1] The court summarily dismissed Brackens's action under MCR 2.116(C)(7), (8), and (10). With respect to MCR 2.116(C)(7), the trial court determined that a count in Brackens's complaint coined an "independent action" for relief from a previous default judgment under MCR 2.612(C)(3) was barred by res judicata and collateral estoppel. In regard to MCR 2.116(C)(8) and (10), the trial court rejected as a matter of law Brackens's statutory and common-law claims brought against AAL. MCR 2.116(C)(10) also served as an additional basis to dismiss the independent-action count. We affirm.

[1] Defendant, Fulton, Friedman & Gulace, LLP, is not a party to this appeal.

I. MCR 2.612 – RELIEF FROM JUDGMENT

MCR 2.612 plays a significant role in this litigation, and in order to provide context to our discussion of the factual and procedural background, we start with a recitation and quotation of the pertinent language in the court rule:

> (B) A defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action,[2] may enter an appearance within 1 year after final judgment, and if the defendant shows reason justifying relief from the judgment and innocent third persons will not be prejudiced, the court may relieve the defendant from the judgment . . . .
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> (C) (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
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> * * *
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> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
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> (d) The judgment is void.
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> * * *
>
> (f) Any other reason justifying relief from the operation of the judgment.
>
> (2) The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken. . . . .
>
> (3) This subrule does not limit the power of a court to entertain an *independent action* to relieve a party from a judgment, order, or proceeding; to grant

[2] We note that a trial court cannot adjudicate an in-personam dispute without first having obtained personal jurisdiction over a defendant by service of process, which is necessary to satisfy the due-process requirement that a defendant be informed of an action by the best means available under the circumstances. *Lawrence M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 274; 803 NW2d 151 (2011). But actual personal notice is not absolutely necessary to satisfy due-process demands, so long as service of process is made in a manner that is reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard. *Id.* Therefore, personal jurisdiction can be acquired over a defendant even when the defendant may not in fact have actual knowledge of the pendency of an action.

relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court. [Emphasis added.]

II. FACTUAL AND PROCEDURAL BACKGROUND

In June 2005, a person presented a state-issued driver's license and a current credit card to support his identity as Brackens in order to enter into a credit agreement. It is Brackens's position that he did not enter into this agreement, that his identity was stolen, and that his name was forged on the agreement. There were 25 payments made on the account during the years 2005 to 2009, but the line of credit ultimately went into default. In July 2010, the initial creditor's files noted that mail had been returned after being sent to an address for Brackens in Holly, Michigan, and that the address could not be verified.

In November 2011, AAL purchased the credit account. The purchase statement included an address for Brackens in Grand Blanc, Michigan. In September 2013, AAL filed a one-page complaint against Brackens, alleging that he was in default on the debt and owed about $29,000. A process server unsuccessfully attempted to serve Brackens with the summons and complaint in Holly three times, and the server indicated that on the second attempt, a neighbor informed the process server that Brackens indeed lived or worked there. On the process server's verification form, a box was checked next to, "Address verified by Post Office." In December 2013, AAL moved for alternate service, asserting that Brackens's last known address was in Holly and that AAL was unaware of his current home address. The area or section on the motion form wherein AAL could list the efforts that it had made to ascertain Brackens's address was left blank. The trial court in the previous case ordered alternate service by delivery of a copy of the summons and complaint through the mail to the Holly address and by affixing a copy of the documents to the door at the Holly address. The mailed summons and complaint were returned unclaimed.

AAL requested entry of a default on the basis that Brackens failed to appear, and the trial court subsequently entered a default judgment in February 2014. Although AAL filed writs of garnishment in 2014 and 2015 relative to the IRS and Brackens's employer, Brackens claimed that it was not until his employer notified him in January 2018 of a December 2017 garnishment that he became aware of the default judgment.

In April 2018, in the earlier lawsuit, Brackens, acting pro se, moved to set aside the default judgment. He did not argue "good cause" for failing to answer the complaint or that he had a meritorious defense; rather, Brackens argued that he had not been personally served with the summons and complaint and thus the court lacked personal jurisdiction over him. AAL responded in pertinent part that Brackens's motion was untimely because it had not been filed within one year of entry of the default judgment. The trial court in that suit denied the motion to set aside the default judgment. The trial court in the instant case indicated that it reviewed a videotape of the hearing, including the court's ruling, in the previous proceeding, stating that the judge had denied Brackens's motion to set aside the default judgment solely and exclusively on the basis that it was

not filed within one year of entry of the default judgment.[3] There was no substantive analysis or ruling on Brackens's assertion that the court lacked personal jurisdiction because he had not been personally served with AAL's complaint. We note that a successful contention that a court lacked personal jurisdiction over a defendant would render a judgment void for purposes of MCR 2.612(C)(1)(d), in which case a motion for relief from judgment would only need to have been filed "within a reasonable time," MCR 2.612(C)(2), without application of the specific one-year limitation.[4] Brackens, however, did not appeal the earlier ruling.[5]

In September 2019, Brackens filed the instant lawsuit claiming that he did not receive actual service of the summons and complaint in the previous suit and that AAL engaged in fraud relative to service of process in that case. Brackens, framing a count as an independent action, sought relief from the default judgment pursuant to MCR 2.612(C)(3). Once again, MCR 2.612(C)(3) states that this "subrule does not limit the power of a court to entertain an independent action to relieve a party from a judgment . . .; to grant relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court."[6] Brackens also alleged various violations of Michigan debt-collection statutes, along with a couple of common-law claims and a count for exemplary damages. AAL subsequently moved for summary disposition under MCR 2.116(C)(7), (8), and (10). AAL contended that collateral estoppel and res judicata barred Brackens's "independent action" to set aside the default judgment, as well as all the other remaining counts. With respect to each of those remaining counts, AAL also argued that Brackens failed to state a claim and to factually support a claim. Additionally, there was a (C)(10) argument in regard to the independent-action count. Brackens filed a response to the motion, challenging AAL's arguments and asserting that it was entitled to summary disposition on its claims under MCR 2.116(I)(2).

On May 24, 2021, a hearing was conducted on AAL's motion for summary disposition. The trial court, however, declined to render a ruling on the motion. The court found that

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[3] The court's assessment is consistent with our review of a transcript of the hearing on Brackens's motion to set aside the default judgment. More particularly, the previous judge ruled that Brackens did not comply with the one-year period set forth in MCR 2.612(B).

[4] See 3 Longhofer, Michigan Court Rules Practice (5th ed), § 2612.8, p 505.

[5] The "collateral bar" rule or rule against collateral attacks generally prohibits a litigant from indirectly attacking a prior judgment in a later, separate action, except when the court that issued the prior judgment lacked jurisdiction over the person or subject matter; instead, the litigant must seek relief by reconsideration of the judgment from the issuing court or by direct appeal. *In re Ferranti*, 504 Mich 1, 22-23; 934 NW2d 610 (2019). Here, Brackens was not required to file an appeal in the earlier action and the collateral-bar rule does not apply to Brackens's instant lawsuit because he is raising, in part, a jurisdictional issue, and because MCR 2.612(C)(3) expressly authorizes a later, separate action on the basis of fraud or a lack of actual personal service of process that led to the underlying judgment.

[6] We note that MCR 2.603, which specifically addresses default judgments and motions to set aside a default judgment, provides that a "court may set aside a default and a default judgment in accordance with MCR 2.612." MCR 2.603(D)(3).

Brackens's various claims for damages, i.e., all the causes of action except the "independent action" count seeking to set aside the default judgment, were highly tenuous and questionable, but it did not summarily dismiss those claims or otherwise rule on them. The trial court was "troubled by the service" in relation to AAL's previous suit against Brackens, and the court was also "troubled that he was given short shrift" by the court that denied the motion to set aside the default judgment. The trial court stated, "I am willing to conduct that evidentiary hearing even at this late date." The court further observed:

> I am willing to conduct an evidentiary hearing on the service question. How I'm able to do it? I'll think of something. But I'm willing to do it in person in the courtroom when it is convenient for you. What do you think, [Brackens's counsel]?

After making a few comments about certain documents, Brackens's attorney responded, "I'd be glad to have an evidentiary—."

The trial court then made the following comments:

> I'm not going to limit the breadth of this hearing. If you two agree on what this hearing should be about, I think that's a better approach than this summary disposition motion in that—it may be that the summary disposition motion should be granted, but it also may be that I need to conduct a hearing on the underlying lawsuit.
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> * * *
>
> Okay, so I'll give you a week. You tell me the type of evidentiary hearing you want to have. I'm troubled by it. I'm troubled by the service thing. I'm troubled by the short shrift given to it. I'm troubled by the forgery information that we just picked up.
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> So I'll give you a week. You folks tell me the contours of your evidentiary hearing and I'm willing to have one. But you've got to fit it into something. Right now, all I've got in front of me is a motion for summary disposition on five counts claimed or how many ever counts claimed by [Brackens]. Okay. This is [Brackens's] affirmative lawsuit right now. Okay, and see what you can do and I'll be happy to conduct an evidentiary hearing and see where it goes. Okay.

Thereafter, unsuccessful facilitation took place in July 2021. In October 2021, there was a settlement conference, and in January 2022, Brackens accepted and AAL rejected case evaluation. On our examination of the record, at no point did Brackens move to have the court proceed with the offered evidentiary hearing, nor did Brackens seek intervention by the court on the basis that he wanted the evidentiary hearing but that the parties could not agree on the parameters of a hearing. There was no claim of an impasse on the subject of an evidentiary hearing. The record does not reveal whether the parties even had discussions regarding the parameters of an evidentiary hearing. The trial court then rescheduled the summary disposition hearing for February 14, 2022. On that date, the trial court first reiterated its thoughts that it had expressed at the hearing back on May 24, 2021, including its concerns regarding the validity of the personal service and the short shrift given to Brackens by the court in the previous case. The trial court noted that it never heard

back from the parties about an evidentiary hearing, which left the court with the impression that it needed to rule on the motion for summary disposition. The trial court then made the following remarks:

> Okay, so am I going to conduct this evidentiary hearing? My heart went out to the man [Brackens]. At the same time, I even said to sister counsel kiddingly that she was kidding bringing these causes of action seeking money. There isn't going to be any money going to Brackens.
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> * * *
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> But you know what? Nothing happened. Nothing happened.[7] So I can only do what I can do. And he has no claims against [AAL]. So I'm just going to deal with what I'm going to deal with and I am granting the motion for summary disposition for the reasons stated by [AAL].
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> And I will again say do you want to try to work off the $29,000 in some way? If you can't, you tell me, once again, if you want an evidentiary hearing, I will consider it. But geez, we are almost two years after the fact now that I've offered this.[8] I offered this May 24. And I said you could have until a certain date. Just tell me what you want the contours of the hearing to be. That's the way I remember it.
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> Mr. Brackens may have had a good argument in front of [the first judge], may have had a good argument in front of me, but he has no argument that he is entitled to money and, as a result, summary disposition is granted and you may submit a consistent order.

At this point, the attorneys for both parties thanked the court, and the hearing concluded; Brackens's counsel did not ask for the court to proceed with an evidentiary hearing despite the court's offer that it would still consider holding an evidentiary hearing. We find the trial court's comments somewhat puzzling, in that it appears that the court lost sight of the fact that Brackens's request seeking relief from the default judgment under MCR 2.612(C)(3) was an actual count in Brackens's complaint. The trial court's statements revealed an intent to summarily dismiss all of Brackens's claims seeking money damages, which the court seemed to believe encompassed Brackens's entire complaint, given that the court was still willing to consider conducting an evidentiary hearing on whether service of process on Brackens was legally sound.

Regardless of the trial court's intent, it did enter an order summarily dismissing Brackens's complaint in full under MCR 2.116(C)(7), (8), and (10), for the reasons stated on the record.[9] And

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[7] The trial court was clearly referring to its offer to conduct an evidentiary hearing.

[8] We note that it was actually closer to one year.

[9] "[A] court speaks through its written orders and judgments, not through its oral pronouncements." *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009).

given that the trial court stated on the record that it was granting summary disposition for the reasons urged by AAL, AAL's arguments effectively became the basis for the trial court's ruling.

Brackens moved for reconsideration, presenting a number of arguments and seeking in part "an evidentiary hearing with respect to the validity of service and the authenticity of his purported signatures on the underlying debt documents." In a cursory order, the trial court denied the motion for reconsideration on the basis that the motion failed to persuade the court that its initial decision was erroneous.

III. INDEPENDENT ACTION TO SET ASIDE THE DEFAULT

On appeal, Brackens first argues that the trial court erred by granting AAL's motion for summary disposition because MCR 2.612(C)(3) expressly permitted him to bring an independent action to set aside the default judgment outside of the one-year time period under two specific circumstances—that he lacked actual notice of the previous lawsuit brought against him and that AAL obtained the prior judgment by committing fraud on the court—both of which he alleged in this case. Brackens also contends that if the doctrines of res judicata and collateral estoppel bar his challenge to the previous judgment, MCR 2.612(C)(3) would be rendered meaningless; therefore, the trial court erred by summarily dismissing the independent-action count on the basis of those two legal doctrines. Brackens further maintains that there was a genuine issue of material fact regarding whether he had actual knowledge of the collection action brought by AAL against him and regarding whether AAL committed fraud on the court in the previous action. Premised on these arguments, Brackens demands an evidentiary hearing or trial so that he can have an opportunity to obtain an order to set aside the default judgment.

We decline to address Brackens's arguments because we conclude that he waived any claim for an evidentiary hearing or trial on his independent-action count to set aside the default judgment. Waiver is the intentional relinquishment of a known right; one who waives his rights may not then seek appellate review of a claimed deprivation of those rights because the waiver has extinguished any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Counsel cannot harbor error in the lower court and then use that error as an appellate parachute. *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011).

In this case, the trial court was prepared to ignore any res judicata or collateral estoppel argument posed by AAL, was prepared to disregard AAL's argument that there was no genuine issue of material fact with respect to the independent-action count under MCR 2.612(C)(3), and was prepared to give Brackens an evidentiary hearing on the validity of the process of service and effectively resolve the independent-action count. Yet, Brackens took no steps whatsoever to pursue the trial court's offer of an evidentiary hearing. None. Perhaps Brackens declined to do so on the belief that the trial court would grant him summary disposition on the independent-action count under MCR 2.116(I)(2), but, if true, it was a decision with consequences. Even as late as the second summary disposition hearing on February 14, 2022, the trial court expressed that it would still consider conducting an evidentiary hearing if requested, and counsel for Brackens remained silent. In his motion for reconsideration, Brackens asked for the very evidentiary hearing that it had earlier eschewed. When considering a motion for reconsideration, a trial court need not consider legal theories or positions that a party had ample opportunity to present earlier before the trial court's original order. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 630; 750 NW2d

228 (2008). In sum, we let stand the trial court's ruling granting summary disposition in favor of AAL with regard to the independent-action count.

IV. REMAINING CLAIMS

Brackens asserts that the trial court erred by granting summary disposition on his claims that were based on debt-collection statutes. We review de novo a trial court's decision on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). MCR 2.116(C)(8) provides for summary disposition when a "party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). In rendering its decision under MCR 2.116(C)(8), a trial court may only consider the pleadings. *Id.* The trial court must accept as true all of the factual allegations in the complaint. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). "The motion should be granted if no factual development could possibly justify recovery." *Beaudrie*, 465 Mich at 130.

In *Anderson v Transdev Servs, Inc*, 341 Mich App 501, 506-507; 991 NW2d 230 (2022), this Court set forth the governing principles in analyzing a motion brought pursuant to MCR 2.116(C)(10):

> MCR 2.116(C)(10) provides that summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a party's action. "Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . when judgment is sought based on subrule (C)(10)," MCR 2.116(G)(3)(b), and such evidence, along with the pleadings, must be considered by the court when ruling on the (C)(10) motion, MCR 2.116(G)(5). "When a motion under subrule (C)(10) is made and supported . . ., an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4).
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> A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). Like the trial court's inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party. Speculation is insufficient to create an issue of fact. A court may only consider substantively admissible evidence actually proffered by

the parties when ruling on the motion. [Quotation marks, citations, and brackets omitted.]

In this case, Brackens sought damages and declaratory relief under the Michigan regulation of collection practices act (MRCPA), MCL 445.25l *et seq*., Article 9 of the Michigan Occupational Code (MOC), MCL 339.901 *et seq*., and the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*.[10] The premise of all these claims is Brackens's assertion that AAL engaged in the practice of "sewer service" in relation to its action against Brackens in the underlying lawsuit. "Sewer service" has been defined as "failing to serve a debtor and filing a fraudulent affidavit attesting to service so that when the debtor later fails to appear in court, a default judgment is entered against him." *Freeman v ABC Legal Servs, Inc*, 827 F Supp 2d 1065, 1068 n 1 (ND Cal, 2011) (quotation marks and citation omitted).

The MOC prohibits certain acts by a "licensee." See MCL 339.915; MCL 339.915a. A "collection agency" must be licensed. MCL 339.904(1). The MOC defines a "collection agency," in pertinent part, as "a person that is directly engaged in collecting or attempting to collect a claim owed or due or asserted to be owed or due *another*." MCL 339.901(1)(b) (emphasis added). In this case, the record reflected that AAL was not acting as a "collection agency" in seeking payment from Brackens; rather, AAL was engaged in collecting or attempting to collect a claim owed or due or asserted to be owed or due to AAL *itself*. Brackens also acknowledges that AAL is not "licensed" as a collection agency. Accordingly, Brackens's MOC claim fails as a matter of law. See *Asset Acceptance Corp v Robinson*, 244 Mich App 728, 732; 625 NW2d 804 (2001) (a party who has purchased an account and all of its interests for value and then sues to recover the debt is not a collection agency because the party is acting in its own interests, not the interests of another).

On the other hand, the MRCPA prohibits a variety of collection actions by a "regulated person." MCL 445.252. And a "regulated person" is "a person whose collection activities are confined and are directly related to the operation of a business *other than that of a collection agency* including any of the following . . . ." MCL 445.251(1)(g) (emphasis added).[11] This would appear to encompass AAL. Nevertheless, we conclude that the MRCPA claim is not sustainable. In the general allegations in his complaint, Brackens made a reference to AAL being a "regulated person," and in his briefs below and on appeal, Brackens maintained and maintains that if AAL is

[10] Brackens also alleged claims of conversion and abuse of process, along with a count requesting exemplary damages. They were all summarily dismissed by the trial court. In his main brief on appeal, Brackens does not challenge the dismissal of these claims. Although he presents an argument regarding the abuse-of-process claim in his reply brief, we decline to address it. Reply briefs are limited to "rebuttal of the arguments in the appellee's or cross-appellee's brief." MCR 7.212(G). "[R]aising an issue for the first time in a reply brief is not sufficient to present the issue for appeal." *Bronson Methodist Hosp v Mich Assigned Claims Facility*, 298 Mich App 192, 199; 826 NW2d 197 (2012) (quotation marks and citation omitted; alteration in original).

[11] A "person" is defined in the MRCPA as "an individual, sole proprietorship, partnership, association, corporation, limited liability company, or other legal entity." MCL 445.251(1)(f). Contrary to AAL's argument, the MRCPA plainly does not concern prohibited practices by collection agencies.

not a collection agency, it is a "regulated person." But in the complaint's MRCPA count itself, Brackens did not allege that AAL was liable for prohibited acts listed in MCL 445.252 because it was a "regulated person." Instead, Brackens alleged that defendants AAL and Fulton, Friedman & Gulace, LLP, were liable under the MRCPA because they were " 'collection agencies,' 'creditors' or 'principals' within the meaning of MCL 445.251[(1)](b) and (e)." Without an allegation that MRCPA liability arose because AAL was a "regulated person," Brackens failed to state a cause of action for alleged violations of MCL 445.252. See MCR 2.116(C)(8). Moreover, even without the pleading failure, we cannot conclude that Brackens has a valid claim under the MRCPA. Brackens's "sewer service" argument essentially assails the validity of the default judgment as based on wrongdoing by AAL; however, because Brackens waived a challenge to the default judgment by not pursuing the trial court's offer of an evidentiary hearing on the validity of the service of process. Reversal is unwarranted.

Finally, with respect to the MCPA claim, Brackens argues in cursory fashion that a violation of collection-practices statutes necessarily constitutes a violation of the MCPA and that the MCPA claim was not barred by res judicata or collateral estoppel. The trial court, by adopting AAL's summary disposition arguments, summarily dismissed the MCPA count on the basis that the MCPA prohibits "unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce," MCL 445.903(1), that the only trade or commerce in this case was the extension of credit to Brackens, that the issuance of credit is regulated by the Consumer Credit Protection Act, 15 USC 1601 *et seq.*, and that, therefore, the conduct fit an MCPA exception for "conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of . . . the United States," MCL 445.904(1)(a). Effectively, Brackens does not challenge this reasoning on appeal. Accordingly, we uphold the trial court's dismissal of the MCPA count. See *Denhof v Challa*, 311 Mich App 499, 521; 876 NW2d 266 (2015) ("When an appellant fails to dispute the basis of a lower court's ruling, we need not even consider granting the relief being sought by the appellant.").

Affirmed.

/s/ Noah P. Hood
/s/ James Robert Redford
/s/ Allie Greenleaf Maldonado