STATE OF MICHIGAN

COURT OF APPEALS

CALVIN BOWMAN,

Plaintiff-Appellant,

v

MICHIGAN HIGHER EDUCATION ASSISTANCE AUTHORITY a/k/a MICHIGAN GUARANTY AGENCY,

Defendant-Appellee.

UNPUBLISHED
January 14, 2014

No. 313444
Court of Claims
LC No. 12-000071-MK

Before: OWENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the Court of Claims granting summary disposition to defendant on all of plaintiff's claims under MCR 2.116(C)(4) (lack of jurisdiction) and MCR 2.116(C)(10) (no genuine issue of material fact). For the following reasons, we affirm.

I. BACKGROUND

Plaintiff, a debtor who defaulted on a consolidated student loan under the Federal Family Education Loan Program (FFELP), filed the instant complaint to contest actions taken by defendant, the guarantor of plaintiff's loans, in enforcing its rights under the Higher Education Act, 20 USC 1001 *et seq.* (HEA). The only student loan in dispute is plaintiff's June 9, 2005 FFELP Consolidation Loan.

The HEA established the FFELP, which is administered by the Department of Education (DOE). The HEA authorizes the Secretary of Education to promulgate regulations to carry out the FFELP. *Cliff v Payco Gen American Credits, Inc.*, 363 F3d 1113, 1122-1123 (CA 11, 2004). The following is an explanation of how FFELP loans operate under the HEA, as taken from *Rowe v Ed Credit Mgt Group*, 559 F3d 1028, 1030-1031 (CA 9, 2009) (alterations in original):

> "Under the HEA, eligible lenders make guaranteed loans on favorable terms to students or parents to help finance student education. The loans are typically guaranteed by guaranty agencies" and are ultimately reinsured by the DOE. *Pelfrey*, 71 F.Supp.2d at 1163. A "guaranty agency" is defined in the

FFELP regulations as "[a] state or private nonprofit organization that has an agreement with the Secretary under which it will administer a loan guarantee program under the [Higher Education] Act." 34 C.F.R. § 682.200; *see also id.* § 682.401(a) ("In order to participate in the FFEL programs, a guaranty agency shall enter into a basic agreement with the Secretary."). "In essence [a guaranty agency] is an intermediary between the United States and the lender of the student loan. The United States is the loan guarantor of last resort. [The guaranty agency] assists the United States in performing that function." *Great Lakes Higher Educ. Corp. v Cavazos,* 911 F.2d 10, 15 (7th Cir.1990).

One of the functions assigned to lenders and guaranty agencies under FFELP regulations is collection on defaulted student loans. When a borrower defaults on a loan, the lender is required to engage in a series of "due diligence" activities to try to get the borrower to repay the loan. 34 C.F.R. § 682.411. If the lender is unable to collect the debt despite complying with its due diligence requirements, the lender files a claim with the guaranty agency. *Id.* § 682.412(e)(2). The guaranty agency acts as a guarantor, paying the lender the unpaid balance of the defaulted loan. The guaranty agency is then assigned the loan by the lender. *Id.* § 682.410(b)(5)(vi)(A). In turn, guaranty agencies have various agreements with the DOE.

Depending on the precise agreement between a guaranty agency and the DOE, the agency can recover from the DOE 80 to 100 percent of its losses resulting from a defaulted loan, provided that the guaranty agency engages in "due diligence" in seeking to recover on the defaulted loan. 20 U.S.C. § 1078(c); 34 C.F.R. § 682.410. A guaranty agency's due diligence requirements include locating the defaulting borrower, offsetting federal and state tax refunds against money owed by the borrower, initiating administrative garnishment proceedings against the borrower, and filing suit against the borrower. 34 C.F.R. § 682.410(b)(6)(i)-(iv). Within 45 days of paying the default claim of a lender, a guaranty agency must notify the defaulting borrower that "if he or she does not make repayment arrangements acceptable to the agency, the agency will promptly initiate procedures to collect the debt." *Id.* § 682.410(b)(6)(v). The agency must notify the borrower of the various measures the agency may take "at the discretion of the agency," including offset of a tax refund, administrative garnishment and civil suit. *Id.*

Plaintiff filed for bankruptcy on February 5, 2005, and the bankruptcy case was closed in 2007. His bankruptcy filing stayed his other student loans, but it did not automatically stay the loan in dispute because it was post-petition debt. 11 USC 362(a). After purchasing the loan from the lender, defendant sent plaintiff a notice on February 28, 2007, informing him of his default and his right to seek administrative review. Plaintiff had various address changes from 2004 to 2007, and denied ever receiving the letter. Defendant also sent plaintiff a follow-up letter on March 2, 2007, in which defendant threatened to take collection actions against him. It is undisputed that this second letter did not contain all the notice requirements mandated by the HEA before a guarantor can initiate collection practices. See 20 USC 1095a(a)(2); 34 CFR 30.22(b); 34 CFR 682.410(b)(5)(*vi*).

On March 30, 2010, plaintiff contacted defendant to facilitate the consolidation of all of his student loans from his various loan holders. Plaintiff asserted that when he was attempting to consolidate his loans in March 2010, defendant incorrectly informed him that it no longer held any of his loans. Defendant conceded that due to this error, plaintiff could not consolidate the loan along with his other student loans. In doing so, plaintiff claimed that defendant violated his procedural due process rights enshrined in the Michigan Constitution and the Fair Credit Reporting Act (FCRA), 15 USC 1681 *et seq.*, and breached the terms of the loan contract.

After defendant discovered that the loan, although inactive, was still in default, it reactivated the loan to active collection status in September 2010. Defendant sent plaintiff a "Notice Prior to Wage Withholding" letter on September 8, 2010, in order to comply with the wage garnishment requirements in 20 USC 1095a. According to plaintiff, he never received this letter because it was sent to one of his prior addresses. Defendant assessed collection costs on September 2, 2010, and reported plaintiff's default on the loan to the credit reporting agencies on September 30, 2010.

Plaintiff alleged that he contacted defendant in October 2010 and contested the collection practices. Because the parties could not come to an agreement, defendant purportedly reissued the "Notice Prior to Wage Withholding" to plaintiff on December 3, 2010, and plaintiff sought administrative review of defendant's decision to garnish his wages. During the administrative hearing, plaintiff raised similar arguments and claims to those raised in the instant case. The hearing referee indicated that he had the authority to consider plaintiff's challenge to the enforceability of the loan, and opined that defendant's error was an unintentional mistake and that defendant's mistake did not warrant discharge of the loan. During the hearing, defendant offered to do any of the following: (1) remove all of the negative reporting on the loan to the credit reporting agencies, if plaintiff agreed to drop the case; (2) consolidate the loan; or (3) rehabilitate the loan, which, if plaintiff successfully completed the rehabilitation process, would remove the negative reporting on plaintiff's credit ratings and reduce the collection costs. Plaintiff did not accept any of these options because none of them would have completely cancelled the collection costs and he was angry about his purported mistreatment by defendant. The hearing referee concluded that plaintiff defaulted on the loan and "failed to establish a credible challenge to either the existence or amount of the debt as a matter of law." The hearing referee imposed the garnishment order and held that the collection costs could not be waived, but that plaintiff could appeal the decision to federal or state courts. The order was temporarily stayed until April 24, 2011, to give plaintiff another opportunity to rehabilitate the loan.

The administrative order was affirmed on appeal by the circuit court. The circuit court affirmed the determination that plaintiff was in default and failed to cure the default before defendant attempted to garnish his wages and impose collection costs. The circuit court determined that it and the administrative tribunal lacked jurisdiction over plaintiff's claims for breach of contract and fraud, and that it lacked jurisdiction to consider plaintiff's challenge to the enforceability of the loan.

Rather than appeal the circuit court's decision to this Court, plaintiff filed this separate action in the Court of Claims. Plaintiff argued that defendant violated his right to due process protected by the Michigan Constitution by failing to give him adequate notice of his default or an opportunity to challenge the loan's enforceability before defendant placed him in default,

assessed collection costs, and destroyed his credit by reporting his default to the credit reporting agencies. He also argued that defendant violated the FCRA by reporting false and misleading information to the credit reporting agencies, as plaintiff was contesting the validity of the loan and of his default status. Plaintiff also asserted that defendant breached the terms of the loan's promissory note, which explicitly incorporated the requirements in the HEA and stated that the lender or guarantor would give the debtor notice and 30 days to seek review before reporting a default status to the credit reporting agencies. He asserted that he was denied a surety bond and had a credit card revoked due to his injured credit rating. Plaintiff sought declaratory, injunctive, and equitable relief from the court.

Defendant moved the Court of Claims for summary disposition. It argued that the court lacked jurisdiction to decide plaintiff's due process claim because he failed to exhaust his administrative remedies before filing the instant suit. Specifically, defendant argued that plaintiff failed to timely pursue administrative review within 60 days after being notified of his default on February 28, 2007, and failed to appeal the wage garnishment decision in the prior case to the United States Department of Education Ombudsman and then to the federal courts. Defendant argued that it provided plaintiff adequate notice because it mailed notices to plaintiff's last known address and that plaintiff's failure to receive the notices was due to his failure to formally notify defendant of his frequent address changes. Similarly, defendant argued that it did not breach the terms of the promissory note because it timely notified plaintiff of his default, as required by the note, before defendant took the disputed collection practices. Defendant denied that it violated the FCRA because it accurately reported that the loan was in default status, and because plaintiff only benefitted from the three-year grace period given to him by defendant.

The Court of Claims granted summary disposition to defendant on all counts. It held that plaintiff's FCRA and breach of contract claims failed because defendant provided adequate notice to plaintiff of his default in 2007, and because plaintiff offered no other evidence establishing that defendant violated the FCRA or breached the loan agreement. It determined that the court lacked jurisdiction over the due process claim because plaintiff did not exhaust his administrative remedies by failing to timely pursue administrative review of his default until 2010, and by failing to accept defendant's offer to rehabilitate the loan. The court also concluded that it was plaintiff's failure to update his address with defendant that caused him to not receive the notice.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Briggs Tax Serv, LLC v Detroit Pub Schools*, 485 Mich 69, 75; 780 NW2d 753 (2010). In reviewing a court's grant of summary disposition under MCR 2.116(C)(4) for want of jurisdiction, "'this Court must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate . . . [a lack of] subject matter jurisdiction.'" *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403, 407; 809 NW2d 669 (2011) (alterations in original) (citation omitted). In reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court evaluates whether a genuine issue of material fact exists. A genuine issue of material fact exists if the record, viewed in a light most favorable to the nonmoving party and making all reasonable inferences in the nonmovant's favor, establishes a

matter about which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Further, this Court may not make factual findings on disputed factual issues or determine credibility issues when deciding a dispositive motion. *Burkhardt v Bailey*, 260 Mich App 636, 647; 680 NW2d 453 (2004).

Additionally, equitable issues are reviewed de novo by this Court, but the lower court's ultimate decision to grant equitable relief is a matter that rests with the discretion of the court, and thus, is reviewed for an abuse of discretion. See *Tkachik v Mandeville*, 487 Mich 38, 44-45; 790 NW2d 260 (2010).

III. DUE PROCESS CLAIM

Plaintiff first argues on appeal that the Court of Claims erred in granting summary disposition to defendant on his due process claim. Specifically, he contends that defendant deprived him of various property rights when it increased his debt through the imposition of collection costs and harmed his credit rating by issuing negative reports to the credit reporting agencies before it gave him notice and opportunity to have an administrative review of the legal enforceability of his claim as required by 34 CFR 682.410(b)(5)(ii)(c). We conclude that plaintiff's procedural due process claim is untenable.

As discussed, because the United States guarantees loans administered under the HEA, the HEA authorizes the Secretary of Education to promulgate regulations to ensure that lenders employ due diligence in the collection of the loans administered by the FFELP to protect the United States against the risk of unreasonable loss. *Cliff*, 363 F3d at 1122-1123. These regulations include those listed under 34 CFR 682.410 and 682.411. *Id.* "While the HEA endows debtors with certain rights during the wage garnishment process, the HEA expressly empowers only the Secretary of Education—not debtors—with the authority to enforce the HEA and rectify HEA violations." *Id.* at 1123. "It is well[]settled that the HEA does not expressly provide debtors with a private right of action." *Id.*; see also *Labickas v Arkansas State Univ*, 78 F3d 333, 334 (CA 8, 1996); *Parks School of Business v Symington*, 51 F3d 1480, 1484 (CA 9, 1995). Debtors may seek relief under the Fair Debt Collection Practices Act, which provides them a remedy for "abusive, fraudulent, and deceptive collection practices," see *id.*, but plaintiff has not alleged such a claim. Rather, defendant alleged a violation of a regulation enacted to carry out the HEA, and as discussed, debtors may not maintain a private cause of action under the HEA. Thus, the Court of Claims correctly granted summary disposition to defendant on plaintiff's due process claim.

IV. FCRA VIOLATION

Plaintiff next argues that the Court of Claims erred in holding that plaintiff failed to introduce sufficient evidence to support his claim under the FCRA. We disagree.

15 USC 1681s-2(a)(1)(A) and (a)(1)(B) prohibit furnishers of information to credit reporting agencies from reporting information that they know is inaccurate. And if the information is disputed by the debtor, 15 USC 1681s-2(a)(3) and (b) require furnishers of information to include in their reports a notice indicating such. Additionally, 15 USC 1681s-

2(a)(2) requires furnishers of information to correct inaccurate or incomplete information provided to credit reporting agencies when the furnisher discovers the error.

However, 15 USC 1681s-2(c) "expressly precludes consumers from enforcing the requirement that furnishers, under § 1681s-2(a), initially provide complete and accurate consumer information to a [credit reporting agency]." *Boggio v USAA Fed Savings Bank*, 696 F3d 611, 615 (CA 6, 2012); see also *Gibbs v SLM Corp*, 336 F Supp 2d 1, 10-12 (D Mass, 2004) (stating that "enforcement of violations of § 1681s-2(a) is limited exclusively to designated state and federal officials."). Consumers may maintain a private cause of action under 15 USC 1681n and 1681o to hold furnishers of information civilly liable for negligence or willful noncompliance with the FCRA. A consumer may also use 15 USC 1681n and 1681o to enforce 1681s-2(b), but "only after a furnisher has received proper notice of a dispute from a [credit reporting agency]." *Boggio*, 696 F3d at 616 (noting that this rule has been adopted by every federal circuit court that has addressed the issue). Here, plaintiff presented no evidence that he directly contacted the credit reporting agencies, or that defendant refused to acknowledge that the claim was disputed after being contacted by the credit reporting agencies. Thus, the Court of Claims correctly granted summary disposition to defendant on plaintiff's FCRA claim because there is no private right of action to challenge the provision of inaccurate information under 15 USC 1681s-2(a).

V. BREACH OF CONTRACT

Plaintiff also argues that the court erred in summarily dismissing his breach of contract claim. Specifcally, plaintiff argues that defendant breached the terms of the promissory note by not providing him with notice and an opportunity to have an administrative review of the legal enforceability of his loan obligation before reporting a default. We disagree.

Plaintiff's claim specifically deals with conduct regulated by the HEA. And as discussed, debtors do not have a private right of action under the HEA. Although plaintiff has brought his breach of contract claim pursuant to state law, 34 CFR 682.410(b)(8) expressly preempts state laws that conflict with a guarantor's obligation to garnish wages, assess collection costs, make reports to credit reporting agencies, and exercise due diligence in collecting on defaulted loans.

Additionally, even though the loan documents stated that plaintiff would be provided with notice and an opporunity to have an administrative review, the alleged breaches still involve conduct that is strictly related to defendant's duties under the HEA, and thus plaintiff's state law claim would be preempted. See *American Airlines, Inc v Wolens*, 513 US 219, 228-233; 115 S Ct 817; 130 L Ed 2d 715 (1995) (discussing that although breach of a party's self-imposed promises may give rise to contractual liability, claims arising out of breaches of state-imposed obligations, even if enshrined in a contract, are preempted); see also 55 Fed Reg 40120-01 (Oct 1, 1990) (stating that the regulations enacted by the Secretary of Education to ensure due diligence in collecting student loan payments under the HEA, are intended to preempt State law regarding the conduct of loan collection practices). Had defendant's alleged breaches involved independent promises that were not strictly mandated by the HEA, plaintiff would likely have a tenable breach of contract claim against defendant. But a plain reading of the promissory note indicates that defendant's purported breaches of the promissory note flowed from promises that were strictly mandated by the HEA and its attendant regulations. See 34 CFR 682.410(b)(2),

(b)(5), (b)(6), and (b)(9). Defendant did not promise any additional rights other than those required of FFELP guarantors under the HEA. Accordingly, plaintiff's breach of contract claim was preempted by the HEA. Thus, the Court of Claims correctly granted summary disposition to defendants on plaintiff's breach of contract claim.

VI. EQUITABLE RELIEF

Finally, plaintiff argues that the Court of Claims erroneously failed to rule on his request to equitably estop defendant from asserting any rights of ownership in the loan. In essence, plaintiff is asserting that the court should have exercised its discretion to equitably extinguish defendant's interest in the loan. We disagree.

"It is well established under Michigan law that equitable estoppel is not a cause of action unto itself; it is available only as a defense." *Casey v Auto Owners Ins Co*, 273 Mich App 388, 399; 729 NW2d 277 (2006). Thus, because defendant attempted to assert equitable estoppel as a cause of action, his claim fails as a matter of law.

Moreover, even if defendant properly asserted the defense of equitable estoppel, he would not be entitled to equitable relief because he has unclean hands. "It is well settled that one who seeks equitable relief must do so with clean hands." *Attorney General v PowerPick Club*, 287 Mich App 13, 52; 783 NW2d 515 (2010). "The clean-hands doctrine closes the doors of equity to one tainted with inequitableness or bad faith relative to the matter in which he or she seeks relief, regardless of the improper behavior of the defendant." *Richards v Tibaldi*, 272 Mich App 522, 537; 726 NW2d 770 (2006). Because plaintiff failed to pay his student loans or make arrangements for more than five years, he cannot ask the court to equitably nullify the loan.

VII. CONCLUSION

The Court of Claims did not err in granting summary disposition to defendant on plaintiff's due process, FCRA, and breach of contract claims. It also did not err in refusing to grant plaintiff his requested equitable relief.

Affirmed.

/s/ Donald S. Owens
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher