IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY J. McGRATH,

Defendant.

OPINION AND ORDER

99-C-0567-C

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After plaintiff United States of America brought suit against defendant Anthony J. McGrath for recovery of an insured student loan he took out in 1983, defendant filed an answer and counterclaim. Plaintiff filed a motion for summary judgment and a motion to dismiss defendant's counterclaim; both motions were ready for decision as of January 27, 2000. Also pending was defendant's motion to strike Exhibit B, attached to plaintiff's complaint. On February 10, 2000, defendant filed a document entitled "Amended; Answers, Affirmative Defenses and Counterclaims," containing entirely new defenses to plaintiff's claim against him. He did not file a motion for leave to file amended pleadings but he submitted them before the cut-off date set by the United States Magistrate Judge at the preliminary pretrial conference

held on January 11, 2000. Under the circumstances and particularly because defendant was proceeding pro se, I concluded that the amended pleadings should be considered. In an order entered February 16, 2000, I gave plaintiff an opportunity to supplement its pending motions to address the new issues plaintiff raised in his amended answer. Plaintiff has filed the supplemental motions and they have been briefed by both parties.

From the parties' proposed findings of fact and the declarations of Lola Hom and William Pranchke, I find that there is no genuine dispute as to the following material facts.

UNDISPUTED FACTS

Defendant Anthony J. McGrath is an adult residing within the Western District of Wisconsin. On December 15, 1983, he executed a promissory note to obtain a loan from the First National Bank of Chicago, Illinois, in the amount of $2,500.00 at an interest rate of 8% a year. The note provides that in the event of a failure to make any payment when due, the holder may declare the entire amount of the note due and payable immediately. The note was guaranteed by the Illinois Student Assistance Commission and reinsured by the United States Department of Education pursuant to the provisons of Title IV-B of the Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1071-1087-4 and 34 C.F.R. Part 682.

The holder of the note demanded payment according to the terms of the note. On July

26, 1985, defendant defaulted on the obligation by failing to make payments of principal and interest when due. As a consequence, the guaranty agency paid a claim in the amount of $2727.00 to the holder and was reimbursed by the Department of Education under its reinsurance agreement.

On July 28, 1993, the holder of the note assigned all right, title and interest in the note to the United States Department of Education. Plaintiff is now the owner and holder of the promissory note.

Plaintiff has received a total of $1218.95 in payments from all sources, including Treasury Department offsets for the tax years 1995, 1997 and 1998. It did not receive a tax offset for the 1996 tax year because defendant's student loan account had been withdrawn from the Treasury Department's offset program at defendant's request pending review of defendant's student loan discharge application, which was based on his allegation that the school he attended had acted improperly in certifying his ability to benefit from the training offered. This application was denied on August 25, 1997, because defendant had received his student loan before January 1, 1986, when the discharge provisions went into effect.

In 1995, defendant objected to an offset because of false certification of eligibility but the Treasury Department failed inadvertently to follow its prescribed practice of protecting defendant's account from an offset pending evaluation of his application for discharge. Because

of this oversight, an offset took place on March 7, 1996. The interest amount in defendant's account was credited with $350.29 from the tax offset and debited $6.71 for the collection fee. Subsequently, his account was protected from an offset for the 1996 tax year.

As of June 17, 1999, the amount due and owing on the promissory note was the principal amount of $2727.00, plus interest totaling $1665.22 and interest thereafter, accruing to the date of judgment at the rate of 8% a year.

OPINION

Jurisdiction is present. Plaintiff brought this suit under 28 U.S.C. § 1345, which gives the district courts original jurisdiction of all suits begun by the United States. Personal jurisdiction exists: defendant resides in this district and has been served properly. See 28 U.S.C. § 1391(b) ("A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides . . . .") The fact that defendant borrowed the money in Illinois does not affect this court's jurisdiction to entertain this suit. Plaintiff is obligated to litigate against defendant in the district in which he resides, not the district in which he borrowed the money 17 years ago.

A. Motion to Strike Exhibit B to Plaintiff's Complaint

Defendant argues that the court should ignore any of the information included in plaintiff's Exhibit B, which is a summary of defendant's loan status prepared by a loan analyst for the United States Department of Justice on July 16, 1999, because the department's untruthfulness in the past makes this document suspect. He alleges that in a letter dated December 7, 1995, the department told defendant that it had withdrawn his account from the Internal Revenue Process for that tax year, yet in a letter from the Internal Revenue Service dated February 26, 1996, he was informed that his income tax refund had been taken by the Department of Education. For support of these allegations, defendant cites "Defendant's exhibits C and D," neither of which appears in the record.

Without the exhibits, it would be difficult to know exactly what defendant was told about the treatment of his tax refund or what tax years were at issue. However, plaintiff's supplemental filing supplies the missing information. Defendant is correct that the Department of Education did fail to protect his income tax refund from the offset program for the tax year 1995, but that negligent omission does not render suspect all of plaintiff's subsequent statements, including those made under oath. I conclude that defendant has failed to show that plaintiff's Exhibit B should be struck.

B. Plaintiff's Motion for Summary Judgment

Defendant maintains that disputed factual issues preclude a grant of summary jdugment, but he is wrong. His first contention relates to jurisdiction. He argues that the court lacks jurisdiction over the subject matter of this suit because he borrowed the money at issue in Illinois. As I have explained, this court has jurisdiction to hear the government's suit against defendant and it has jurisdiction over him because he lives in this district and has been served properly with a copy of the summons and complaint.

Defendant argues that the loan was a nullity because he was a minor when he signed it and because he lacked the mental capacity to enter into an agreement. His age is not a defense to the note because he acknowledged in the body of the promissory note that he was legally obligated to pay the note even if he was under the age of majority when he executed it. Moreover, 28 U.S.C. § 1901a(b)(2) provides that the Secretary of Education is not subject "to a defense raised by any borrower based on a claim of infancy." Defendant's alleged lack of mental capacity could be a defense, if he could prove that at the time he signed the loan agreement he lacked the capacity to understand what he was doing and the consequences of failing to fulfill his obligations under the agreement. However, defendant has not submitted any admissible evidence to support his alleged lack of mental capacity as of December 15, 1983. His conclusory averments in his March 24, 2000 affidavit, a medical bill from July 1982

and unsigned and undated probation orders fall far short of showing he lacked the mental capacity to enter into a binding agreement.

Defendant alleges that he signed the agreement under duress because his probation officer and his parents forced him to do so. Again, he has supplied no evidence to support this allegation. He has not attempted to explain why pressure from his parents or with his probation officer would nullify the agreement he had with the lending institution, which is not alleged to have engaged in any wrongdoing or fraud.

Defendant cannot show that his obligation is in dispute by showing that his copy of the note is not signed whereas the copy of the note attached to plaintiff's complaint does bear his signature. Plaintiff is required only to prove the existence of a signed note; it need not explain the existence of other copies, signed or unsigned. Also, it is irrelevant that, as defendant asserts, he did not receive the entire $2500.00 in cash when he executed the promissory note. (Defendant may be referring to the fact that the promissory note shows that he received only $2354.20 in loan proceeds when he obtained his loan because the bank made a deduction of $145.80 for a prepaid finance charge.) By signing the note, defendant evidenced his agreement that he was receiving $2500.00 and acknowledged his obligation to pay back that amount plus interest. (Even if he did not receive the full $2500 in cash, the money was used for his benefit if it was used for the prepaid finance charge; those costs were the costs of obtaining the loan and

his responsibility.)

Defendant raises the issue that the school he attended did not properly consider his ability to benefit from the program but he has not produced any factual evidence in support of this claim. Even if he had, it would not be a defense to his obligation under the loan. Congress did not make false certification by the educational institution a basis for discharge until 1986 and it did not make the provision retroactive. Until Congress made false certification a basis for discharge, a borrower could not use that claim as a means of avoiding a student loan agreement.

Defendant asserts that the terms of the note are deceptive, unclear and unfair but he does not support his assertion with any explanation. If he is arguing that the deception consisted of not informing him that the guarantor could assign all right, title and interest to the Department of Education, he has no claim.

Defendant contends that the note was not in default on July 26, 1985, as plaintiff asserts, because defendant had a nine-month grace period beginning on the day after graduation or after he ceased to be enrolled plus another 30 days before a payment was due. Whether the note was in default on July 26, 1985 is irrelevant. It is in default now.

Defendant argues that the Department of Education violated his constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution by illegally

offsetting his income tax refunds against his student loan obligation. Technically, this is not a defense to plaintiff's motion for summary judgment but a counterclaim. Whatever it is called, it has no chance of success. First, an inadvertent failure to follow regulations does not amount to a due process violation under these circumstances. Second, although plaintiff made a mistake in failing to protect defendant's tax refund for the tax year 1995 from offset, as it should have done under the applicable regulations once defendant applied for a discharge, it did not take any property of defendant's to which it was not otherwise entitled. The situation would be different if defendant's application for discharge had succeeded. In that case, plaintiff would have been required to refund the offset funds to defendant. With the denial of the application, plaintiff is entitled to collect the balance of the loan plus accrued interest from defendant. Plaintiff's inadvertence benefited defendant: his loan balance is $350.29 less than it would have been. His only loss is the $6.71 collection fee that is imposed whenever a tax offset is made and that is less than the amount of interest that would have accrued on the $350.29 had it not been credited to defendant through the tax offset.

Finally, defendant argues that this action is barred by the statute of limitations. He waived this defense by not asserting it in his first responsive pleading so it need not be considered. Waiver or not, the defense has no merit. Congress repealed the statute of limitations applicable to actions to recover defaulted student loans. See 20 U.S.C. § 1091(a).

Contrary to defendant's argument, this repeal is not a violation of defendant's right to due process. Defendant did not have a property right in the statute of limitations on the recovery of his debt. See Campbell v. Holt, 115 U.S. 620 (1885) (repeal of statute of limitation on personal debts does not deprive debtor of property in violation of Fourteenth Amendment).

In short, defendant has failed to demonstrate the existence of any disputed issue of fact that would provide a reason to deny plaintiff's motion for summary judgment. He borrowed $2500.00, after agreeing to make regular payments to repay the principal and interest. He is presently in default on the loan payments. As owner and holder of the note, plaintiff is entitled to the principal and interest due it.

C. Plaintiff's Motion to Dismiss Defendant's Counterclaims

In his counterclaims, defendant alleges that the Department of Education has been taking his income tax refunds illegally for the past few years. He seeks a return of the amounts taken, with interest. In addition, he alleges that the Department of Education has reported the status of his loan to credit bureaus and damaged his credit rating. He seeks removal of the unfavorable information and damages for the injury done to his credit rating.

Defendant has not stated any legal basis on which his counterclaims could be granted. 31 U.S.C. § 3720A(c) authorizes the Secretary of the Treasury to use refunds of federal taxes

to offset amounts owed by the taxpayer to any federal agency. Given this authorization, defendant has no ground to complain that his tax refund was used to offset his debt to the Department of Education.

Furthermore, he has no ground to contest the reporting of his default on his student loan. He acknowledges that the state of Illinois could take such action if he failed to repay his loan and he cites no law forbidding the transmission of accurate material information to a credit bureau.

ORDER

IT IS ORDERED that the motions of plaintiff United States of America for summary judgment and to dismiss defendant Anthony J. McGrath's counterclaims are GRANTED. The clerk of court is directed to enter judgment for plaintiff in the amount of $2727.00, plus interest totaling $1665.22 as of June 17, 1999, and interest accruing thereafter to the date of judgment at the rate of 8% a year.

Entered this _____ day of April, 2000.

BY THE COURT:

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BARBARA B. CRABB

District Judge