RENDERED: AUGUST 17, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000376-MR

CHRIS RACHFORD — APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 15-CI-00739

NATIONAL COLLEGIATE STUDENT
LOAN TRUST 2005-3 — APPELLEE

AND NO. 2017-CA-000377-MR

CHRIS RACHFORD — APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 15-CI-00737

NATIONAL COLLEGIATE STUDENT
LOAN TRUST 2005-1 — APPELLEE

AND NO. 2017-CA-000400-MR

CHRIS RACHFORD APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 15-CI-00740

NATIONAL COLLEGIATE STUDENT
LOAN TRUST 2004-2 APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: D. LAMBERT, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Chris Rachford ("Rachford") challenges the Kenton Circuit Court's award of summary judgment to National Collegiate Student Loan Trust 2005-3, 2005-1 and 2004-2 ("National") in three separate cases in the wake of Rachford's default on three private education undergraduate loans[1] totaling $44,000. Rachford admits receiving the loans, but claims they were not "educational loans" because National did not prove he used all loan proceeds for

[1] Three cases have been consolidated for purposes of appeal.

educational purposes, and he signed each loan agreement only once—on page one, rather than at the end, on page four—making all language appearing *after* his signature—including notice the loans were not subject to discharge in bankruptcy and were guaranteed by a non-profit institution—ineffective. As framed by Rachford, this appeal turns on whether the three loans were "educational loans" under 11 U.S.C.A. § 523(a)(8). On review of the record, the briefs and the law, we affirm.

Between 2004 and 2005, Rachford received three educational loans from Charter One Bank, N.A.[2] to attend Northern Kentucky University ("NKU"). Identified as a "Student Borrower," Rachford signed three separate Non-Negotiable Credit Agreements. All three loans were identical except for the amount of the loan and the academic period covered. The loan in Case No. 15-CI-00737, is illustrative of all three and is the only one we discuss in detail.

On August 19, 2004, Rachford signed the first of four consecutively-numbered pages agreeing to finance and repay $10,000.[3] Above his signature on page one—identified as the "signature page"—appeared this language: "CFS

[2] Each loan was ultimately transferred, sold and assigned to National Collegiate Funding, LLC, which immediately transferred, sold and assigned them to National.

[3] A second loan for $14,000 was signed on November 22, 2004, and a third for $20,000 on August 20, 2005.

Private Education Undergraduate Loan;" "Academic Period: 08/2004-05/2005;"[4] "School: NORTHERN KENTUCKY UNIVERSITY," and:

> [b]y my signature, I certify that I have read, understand and agree to the terms of and undertake the obligations set forth on all four (4) pages of this Credit Agreement.

After Rachford's signature—on page two of each agreement—appeared more essential terms including the promise to pay, an explanation of interest calculation, late fees, timing of the repayment period (generally to occur in equal monthly installments over twenty years, unless the debt was retired earlier); and, instructions for cancelling the loan (including return of disbursed proceeds). Page three contained "Additional Agreements" stating Ohio law governs the loan, "proceeds of this loan will be used only for my educational expenses at the School[,]" and, in bold print:

> I acknowledge that this loan is subject to the limitations on dischargeability in bankruptcy contained in Section 523(a)(8) of the United States Bankruptcy Code. Specifically, I understand that you[5] have purchased a guaranty of this loan, and that this loan is guaranteed by The Education Resources Institute, Inc. ("TERI"), a non-profit institution.

[4] The second loan was for the same academic period; the third loan was for "Academic Period: 08/2005-12/2005."

[5] "You" is defined as "Charter One Bank, N.A., its successors and assigns, and any other holder of this Credit Agreement." (Footnote in original).

On August 24, 2004, a Note Disclosure Statement[6] was generated—the same date the loan was disbursed to Rachford—confirming $10,000 was the amount financed and the amount paid to Rachford, with repayment to occur in 240 monthly installments of $95.53 beginning on December 21, 2007. Rachford admitted receiving the funds. He made no payments.

On October 30, 2012, Rachford filed for Chapter 7 bankruptcy protection in the United States District Court for the Eastern District of Kentucky, Case No. 12-22237, listing the three unpaid loans in the petition. Chapter 7 discharge was granted on March 20, 2013. National did not challenge discharge.[7]

On April 16, 2015, National filed three separate actions in Kenton Circuit Court seeking to recover $35,939.88, $26,072.84, and, $18,853.88, plus interest on each amount. On October 14, 2016, National moved for summary judgment in all three cases.

Accompanying each summary judgment motion was a memorandum in support, Rachford's loan payment history, and an "Affidavit and Verification of Account" signed by Deanna Martinez,[8] identifying herself as a Legal Case

[6] Note Disclosure Statements were also generated on the other two loans.

[7] National was not required to object. "[A] creditor need never file an exception to discharge [under § 523(a)(8)], because bankruptcy law makes these and other § 523(a) exceptions self-executing." *See In re Bayhi*, 528 F.3d 393, 408 (5th Cir. 2008).

[8] A verbatim affidavit signed by Jacqueline Jefferis was submitted in Case No. 15-CI-00737.

Manager for Transworld Systems, Inc. ("TSI")—National's Subservicer on Rachford's account and custodian of records for Rachford's loans. A letter in the record from U.S. Bank—Special Servicer of National's trusts—confirms TSI is the dedicated record custodian for National's trust accounts.

Submitted with the Martinez affidavit was a copy of the loan agreement signed by Rachford and supporting documentation. In her affidavit, Martinez stated she has access to and has been trained on the record-keeping system into which loan records are routinely entered as part of TSI's regularly-conducted business practice, and, she has "personal knowledge of the business records . . . related to [Rachford's] educational loan." Based on the business record, she specified: the loan was disbursed to Rachford on August 24, 2004; he repaid zero on the loan; and, as of September 14, 2016, he owed the "principal sum of $18,853.88, together with accrued interest in the amount of $2,795.72, totaling the sum of $21,649.60[.]" The affidavit also described transfer of the loan from the original lender to National.

Rachford opposed entry of summary judgment, arguing Martinez—being employed by TSI rather than National—lacked personal knowledge of the loan, and therefore, her affidavit did not support the motion. Rachford further argued the debts had been discharged in bankruptcy; National had not proven the debts were "made, insured or guaranteed by a governmental institution" so as to

qualify as educational loans; he "was assured[9] that the loans were not federally guaranteed;" and, he was unaware language appearing after his signature said the loan could not be discharged in bankruptcy and was guaranteed by a non-profit institution.

On appeal, Rachford argues the restriction on dischargeability in bankruptcy is unenforceable under KRS[10] 446.060(1) because he did not sign the agreement "at the end or close of the writing." He also claims the loan—to be repaid in 240 monthly installments—could not, and was not contemplated to be, performed within one year, making it subject to the Statute of Frauds pursuant to KRS 371.010(7), and, as a result, language about nondischargeability—following his signature—never became part of the agreements.[11]

---

[9] In an affidavit submitted with his response opposing National's summary judgment motion, Rachford wrote, "[p]rior to signing the Agreement, I had communications with [National's] alleged assignor. I was assured that the loans were not federally guaranteed. Knowing that federally guaranteed loans could not be discharged in bankruptcy, I agreed to the loan." Rachford did not identify the "assignor" he now claims misguided him.

[10] Kentucky Revised Statutes.

[11] While making this argument to this Court, he has not specified how and where he made this argument to the trial court. CR 76.12(4)(c)(v) requires each argument to begin "with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Compliance with the rule is critical because a claim cannot be raised for the first time on appeal, *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011), as modified (Sept. 20, 2011), and noncompliance often carries severe consequences. CR 76.12(8). As an appellate court, we have no duty to search the record for preservation of errors. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). Because the trial court addressed the issue in 15-CI-00740, it apparently was raised and is properly before us, but counsel is cautioned to fully comply with the rules in the future.

In December 2016, Rachford filed his own summary judgment motion, arguing National had failed to show he "obtained the funds 'solely' to pay for education expenses and that he did not intend to use the funds partly for educational expenses and partly for other living expenses." Without admitting he intended to use the loan proceeds for "other expenses," he argued National's failure to prove he *did not* exempted the agreement from being a "qualified education loan" under 26 U.S.C.A. § 221(d)(2). *See also In re Gamble*, 388 B.R. 877, 879 (Bankr. C.D. Ill. 2008) ("open account" with university for "incidentals" incurred during semester, as opposed to tuition, housing, activity and recreational fees and other charges required to be paid before semester commenced, was not educational loan and was subject to discharge in bankruptcy).

On February 1, 2017, summary judgment in favor of National was entered in two cases[12] in separate, but virtually identical, opinions finding in part:

> [u]nder the clear terms of the agreement of the parties and the applications of federal law this loan is not dischargeable in bankruptcy and defendant has put forward no other defense to the complaint against him.

On February 7, 2017, summary judgment was granted in favor of National in the third case[13] stating in part:

[12] 15-CI-00737 and 15-CI-00739.

[13] 15-CI-00740.

> [s]ince it is evident from the loan document itself that this was an educational loan, designated for tuition to attend Northern Kentucky University, this Court finds that the purpose of the Defendant's loan was educational and thus the loan was not discharged in bankruptcy.

The court went on to address Rachford's theory of the debts being unenforceable because his signature appeared at the bottom of page one—*before* the paragraph about the debt not being dischargeable in bankruptcy under 11 U.S.C.A. § 523(a)(8)—rather than at the end of the complete agreement. The court wrote:

> [t]his Court is of the opinion and finds that the argument is without merit. The Defendant's signature appears at the end of the promissory note, although there are attached terms and conditions. Thus, the enforcement of the loan agreement is not barred by the provisions of KRS 446.060(1).

This appeal followed.

Because this case reaches us by way of summary judgment, we begin with the applicable standard of review.

> On appeal from the granting of a motion for summary judgment, the appellate court must determine "whether the trial court correctly found that there were no genuine issues of any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR[14] 56.03. In considering a motion for summary judgment, the trial court must consider the evidence in a light most favorable to the non-moving party. *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky.

[14] Kentucky Rules of Civil Procedure. (Footnote added).

> 1991). Summary judgment is proper where the movant shows that the adverse party could not prevail under any circumstances. *Id*. Because summary judgment involves no fact finding, this Court will review the trial court's decision *de novo*. *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist*., 174 S.W.3d 440, 445 (Ky. 2005).

Davis v. Scott, 320 S.W.3d 87, 90 (Ky. 2010).

At the heart of this appeal is 11 U.S.C.A. § 523, which states in relevant part:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
>
> . . .
>
> (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
>
> (A) (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
>
> . . .
>
> (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1)[15] of the Internal

[15] 26 U.S.C.A. § 221(d)(1) defines a "qualified education loan" as:

> Revenue Code of 1986, incurred by a debtor who is an individual[.]

Thus, 11 U.S.C.A. § 523(a)(8) excepts educational loans from a debtor's discharge only when the debtor can demonstrate repayment would impose undue hardship. Rachford has not alleged, demonstrated or attempted to demonstrate undue hardship.

The rationale for requiring repayment of an education loan is explained in *Gamble.*

> Pursuant to Section 523(a)(8), a discharge issued under Section 727 does not discharge an individual debtor from any debt for "an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution." The purpose underlying this provision is to protect the solvency of the student loan system and to prevent debtors, who often have little earning power in the early years after graduation, from reaping the windfall of a free education. *In re Merchant*, 958 F.2d 738 (6th Cir. 1992).

---

any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses—

(A) which are incurred on behalf of the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer as of the time the indebtedness was incurred,

(B) which are paid of incurred within a reasonable period of time before or after the indebtedness is incurred, and

(C) which are attributable to education furnished during a period during which the recipient was an eligible student.

Gamble, 388 B.R. at 880-81. Echoing *Gamble*, is the more recent case of *In re Rust*, 510 B.R. 562, 566 (Bankr. E.D. Ky. 2014), which states:

> "in the case of section 523(a)(8), Congress has revealed an intent to limit the dischargeability of educational loan debt, and we can construe the provision no more narrowly than the language and legislative history allow." [*In re*] *Pelkowski*, 990 F.2d [737, 745 (3d Cir. 1993)].

As a creditor seeking to recoup its loss, National bore the initial burden of proving: (1) Rachford executed educational loans, (2) they were not repaid, and, (3) they were not discharged in bankruptcy. To meet its burden, National filed the three loan agreements, Rachford's loan payment history on each, affidavits of two records custodians, and other supporting documentation. Rachford admits he received the three loans and did not repay them. The rub is his belief the loans did not qualify as "educational loans" and were discharged in his bankruptcy proceeding. We disagree and address each of Rachford's arguments in turn.

First, we reject Rachford's attack on the affidavits of the records custodians filed in support of summary judgment. Both affiants adequately established their role in, authority over, and familiarity with Rachford's loans. The trial court did not err in relying on these affidavits and other documents provided by National.

Second, we reject Rachford's claim the loans were not educational loans. The first page of each agreement indicates *above* Rachford's signature, the agreement is for a "CFS Private Education Undergraduate Loan" for a specified academic period at NKU. Also appearing above Rachford's signature is the sentence,

> [b]y my signature, I certify that I have read, understand and agree to the terms of and undertake the obligations set forth on all four (4) pages of this Credit Agreement.

This language demonstrates an obvious intention to incorporate all four pages into the loan agreement, but is not the only unifying language in the document. Pages are numbered as "1 of 4," "2 of 4," "3 of 4" and "4 of 4." The loan applicant is directed to read the entire document because there are "obligations set forth on all four (4) pages of this Credit Agreement." The agreements state: "[t]he terms and conditions set forth in this Credit Agreement and Instructions and the Disclosure Statement constitute the entire agreement between you and me." Rachford's choice not to read the entire document on not one—but three—separate occasions, rests on his shoulders, not on National's.

> "It is settled law that, absent fraud in the inducement, a written agreement duly executed by the party to be bound, who had an opportunity to read it, will be enforced according to its terms." *United Servs. Auto. Ass'n v. ADT Sec. Servs., Inc.*, 241 S.W.3d 335, 339 (Ky. App. 2006) (citation omitted).

Foursome Properties, LLC v. Rite Aid of Kentucky, Inc., --- S.W.3d ---, 2016-CA-000414-MR, 2018 WL 1439830, at *4 (Ky. App. Mar. 23, 2018). Stated otherwise,

> [i]t is abundantly clear that a party is bound by his agreement with the terms of a contract he has signed and had an opportunity to review, and ignorance of the terms thereof is not a defense to the rights and obligations set forth therein. *See Prewitt v. Estate Building & Loan Ass'n*, 288 Ky. 331, 156 S.W.2d 173, 174 (1941) (general principle is that a person given opportunity to read contract he signs is bound by it, unless there was fraud in obtaining his signature).

Villas at Woodson Bend Condominium Ass'n, Inc. v. South Fork Development, Inc., 387 S.W.3d 352, 358-59 (Ky. App. 2012).

Rachford has not alleged he was pressured into signing the loan agreements or lacked time or opportunity to read them in their entirety. Nor has he alleged fraud. Furthermore, Rachford initiated the loan application so he should have had plenty of time and opportunity to read and question the stated terms—especially item L.11. which plainly states the loan for which he is applying cannot be discharged in bankruptcy. As expressed in *Gamble*, 11 U.S.C.A. § 523(a)(8) was adopted to avoid this precise situation—recent graduates "reaping the windfall of a free education" and sending the student loan program into insolvency. *Gamble*, 388 B.R. at 880-81. Based on Rachford's own affidavit, he wanted a loan dischargeable in bankruptcy. His reasons were unstated and subject to conjecture,

but a simple reading of the clear language of the agreements would have alerted him the loans were not dischargeable in bankruptcy, allowing him to make an informed decision to either accept all the terms or walk away.

There is no doubt Rachford received three separate loans he agreed were to "be used only for my educational expenses at" NKU.

> "Although the breadth of [the term educational loan] has been the subject of some debate, a majority of courts determine whether a loan qualifies as an 'educational benefit' by focusing on *the stated purpose for the loan when it was obtained*, rather than on how the loan proceeds were actually used." *See* [*In re Maas*, 497 B.R. 863, 869-70 (Bankr. W.D. Mich. 2013), *aff'd sub nom. Maas v. Northstar Educ. Finance, Inc.*, 514 B.R. 866 (W.D. Mich. 2014)] (citations omitted) (emphasis in original).

In re Rust, 510 B.R. 562, 567 (Bankr. E.D. Ky. 2014). By signing the loans, Rachford agreed the loan proceeds would be "used only for my educational expenses." His signature further confirmed,

> I understand that I am responsible for repaying immediately any funds that I receive which are not to be used or are not used for educational expenses related to attendance at the School for the academic period stated.

Rachford repaid nothing. The loans were educational loans and, as such, were not dischargeable in bankruptcy.

Coincidentally, the language in the *Rust* agreement is strikingly similar to the language under review in this case. Section L.2. of Rachford's

agreements read, "[t]he proceeds of this loan will be used only for my educational expenses at the School[,]" which mirrors the *Rust* agreement exactly. Additionally, Section L.11. of Rachford's agreements, in bold print, reads:

> I acknowledge that the requested loan *is* [may be] subject to the limitations on dischargeability in bankruptcy contained in section 523(a)(8) of the United States Bankruptcy Code. Specifically, I understand that you have purchased a guaranty of this loan, and that this loan is guaranteed by The Education Resources Institute, Inc. ("TERI"), a non-profit *institution* [loan guaranty agency].[16]

"TERI" is the non-profit guarantor in both *Rust* and the case at bar. The claim in *Rust* was not dischargeable. *Id.* at 571.

Third, the structure of the agreements just discussed also refutes Rachford's notion the entirety of each agreement appeared only above his signature. He bases the argument on KRS 446.060(1)—"[w]hen the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature is subscribed at the end or close of the writing[,]" which he claims is made applicable by the Statute of Frauds. *Dixon v. Daymar Colleges Group, LLC*, 483 S.W.3d 332, 344 (Ky. 2015). However, the applicability of KRS 446.060(1) under any circumstances is questionable because paragraph L.1. of

[16] Italicized language appears in Rachford's loans; bracketed language appears in *Rust* loans. *Rust*, at 567.

each loan agreement states Federal law and Ohio law govern the loans—a point argued by neither party. Moreover, *Dixon* makes clear, KRS 446.060(1) "does not abolish incorporation by reference." *Id.* As detailed above, all terms contained within the four-page education loan agreements were fully incorporated into the entirety of the documents—whether above or below the signature line.

Rachford alleges an unnamed "assignor" orally contradicted paragraph L.11. by assuring him the loan(s) for which he was applying were not federally guaranteed. However, he fails to identify the "assignor," explain how or where the conversation came about, or explain why he did not question the alleged inconsistency before signing the agreements—on three separate dates—especially since it appears he did not want a federally guaranteed loan which he knew could not be discharged in bankruptcy. Assuming someone associated with National told Rachford the loans are "not federally guaranteed," there was no error because that is a true statement. The loans are not federally guaranteed, but they are guaranteed by TERI, a non-profit institution, which under 11 U.S.C.A. § 523(a)(8)(A)(i) makes them equally nondischargeable in bankruptcy. In short, there are no grounds upon which to relieve Rachford of responsibility for repaying all three educational loans.

Having completed *de novo* review of the three educational loans, there are no genuine issues of material fact in dispute. Furthermore, National was

entitled to judgment as a matter of law and Rachford could not prevail under any set of circumstances. Therefore, we affirm entry of summary judgment in all three cases.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Randy J. Blankenship
Erlanger, Kentucky

BRIEF FOR APPELLEE:

Lauren D. Lunsford
Louisville, Kentucky