

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

CLEVELAND STATE UNIVERSITY, :
 :
 Plaintiff-Appellee, :
 : No. 108058
 v. :
 :
 THOMAS SIMPSON, :
 :
 Defendant-Appellant. :
 :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: June 6, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-17-880240

Appearances:

Keith D. Weiner & Associates Co., L.P.A., Paul K. Rode,
Michael S. Berkowitz, and Stacie Hackel Snow, *for*
appellee.

Frantz Ward, L.L.P., Patrick F. Haggerty, and Justin W.
Yunker, *for appellant.*

KATHLEEN ANN KEOUGH, J.:

{¶ 1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc.App.R. 11.1. The purpose of an accelerated appeal is to allow

this court to render a brief and conclusory opinion. *State v. Priest*, 8th Dist. Cuyahoga No. 100614, 2014-Ohio-1735, ¶ 1.

{¶ 2} Defendant-appellant, Thomas Simpson (“Simpson”), appeals from the trial court’s judgment that granted the motion for summary judgment of plaintiff-appellee, Cleveland State University (“CSU”), and denied Simpson’s motion for summary judgment. For the reasons that follow, we reverse and remand with instructions that the trial court enter judgment in favor of Simpson.

I. Background

{¶ 3} Simpson was a full-time student at CSU during spring semester 2010. He received F’s in three classes, and withdrew from a fourth class.

{¶ 4} Simpson received federal subsidized and unsubsidized Stafford loans and a federal Pell grant to pay for his courses, as authorized by Title IV of the Higher Education Act of 1965, 20 U.S.C. 1070 et seq. CSU’s policy regarding returning “unearned” Title IV federal financial aid was set forth in a document published by its Financial Aid Office entitled “Return of Title IV Funds Policy (RTIV) Official/Unofficial Withdrawals” (“RTIV Policy” or “Policy”). The Policy stated:

If you are receiving federal financial aid, and completely withdraw (all W grades) or receive all non-passing grades (F, I, W, X, UD, or UF) during a semester, CSU will return all “unearned” Title IV aid under federal mandate.

In order to receive 100% of federal financial aid you must receive at least one passing grade, and/or attend 60% of one academic course throughout the semester. If you failed to earn a passing grade, but were in attendance at an academically-related activity through 60% of the period, then the Financial Aid Office will verify your last date of attendance with your course instructors(s).

{¶ 5} In July 2010, having determined that Simpson had unofficially withdrawn from the university, CSU returned his unearned financial aid funds to its federally backed lender. In May 2017, seven years after Simpson's unofficial withdrawal from the university, CSU filed a complaint for unjust enrichment against Simpson seeking monies allegedly due from him as a result of his returned financial aid. Simpson, pro se, answered CSU's complaint, denying that he owed CSU any money.

{¶ 6} CSU then filed a motion for summary judgment in which it asserted that although Simpson had withdrawn from one class during the spring 2010 semester, he had received failing grades in the other three classes, thereby rendering him ineligible to retain his full financial aid awards and necessitating the return by CSU of a portion of those funds to CSU's federally backed lender, as required by Title IV and U.S. Department of Education Guidelines. CSU asserted that it was seeking repayment only for the courses in which Simpson remained enrolled but that were not covered as a result of his returned financial aid.

{¶ 7} CSU attached to its motion various documents that it asserted demonstrated Simpson's debt, as well as a copy of CSU's RTIV Policy. None of these documents were authenticated as required by Civ.R. 56(C). CSU also attached to its motion the affidavit of Robert Yono, an external collections support coordinator with the Ohio Attorney General's Office, Collection Enforcement Section, in which Yono averred that Simpson owed CSU \$3,820.48, with interest and collection costs continuing to accrue. Yono identified the current certified amount due as

\$2,363.50; current collections costs due as \$990.50; and attorney general interest recoverable under R.C. 131.02(D) as \$466.48, continuing to accrue at 4% per annum from July 25, 2012.¹

{¶ 8} The trial court subsequently granted CSU's motion for summary judgment, which Simpson did not oppose. After obtaining counsel through Legal Aid, Simpson filed a Civ.R. 60(B) motion for relief from judgment. In his motion, Simpson argued that he had a meritorious defense to CSU's complaint because CSU's RTIV Policy permits a student to receive 100% of financial aid if the student attended 60% of at least one academic course throughout the semester. Simpson attached an affidavit to his motion in which he averred that he had met the 60% threshold by attending at least 60% of the class sessions of a spring semester course, and that CSU Professor Stephen Stanziano had indicated to him that he had attended more than 60% of his class sessions.

{¶ 9} The trial court granted Simpson's Civ.R. 60(B) motion for relief from judgment. Thereafter, the parties exchanged discovery, and Simpson deposed CSU pursuant to Civ.R. 30(B)(5). Both parties then filed motions for summary judgment. CSU did not oppose Simpson's motion. Nevertheless, the trial court granted CSU's motion and denied Simpson's motion. This appeal followed.

¹These amounts did not match the amounts sought by CSU in both its complaint and its motion for summary judgment. CSU's complaint and motion sought judgment against Simpson in the amount of \$3,802.65, of which it identified \$2,363.50 as principal, \$985.88 as collection costs under R.C. 131.02, and \$453.27 as accrued interest, with interest continuing to accrue from May 20, 2017, a date different from that identified by Yono.

II. Law and Analysis

{¶ 10} In his first assignment of error, Simpson contends that the trial court erred in denying his unopposed motion for summary judgment. In his second assignment of error, he contends that the trial court erred in granting CSU's motion.

A. Standard of Review

{¶ 11} We review a trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 210 (1998).

{¶ 12} The party moving for summary judgment bears the burden of demonstrating that no material issues of fact exist for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). The moving party has the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims. *Id.* After the moving party has satisfied this initial burden, the nonmoving party has a reciprocal duty to set forth specific facts by the means listed in Civ.R. 56(C) showing that there is a genuine issue of material fact. *Id.*

B. Analysis

{¶ 13} CSU's position in this case is that Simpson did not meet the required criteria to fully earn his federal aid and, therefore, CSU has a right to seek the returned funds from him. Simpson's argument is that CSU breached its own policy pertaining to the return of federal funds and, therefore, is unable to recover from him under the Policy.

{¶ 14} Simpson argues that the trial court erred in denying his motion for summary judgment because CSU's RTIV Policy created a contract between him and CSU. Simpson contends that under the Policy, he was eligible to receive 100% of his financial aid if he *either* received at least one passing grade or attended 60% of one academic course during the spring 2010 semester, and CSU's Financial Aid Office would verify the last day of attendance with his instructor if he was in attendance through 60% of the semester. Simpson contends that he met his attendance obligations under the Policy, but CSU failed to meet its contractual responsibility to establish his attendance before returning his federal aid funds to its lender. Therefore, Simpson asserts that CSU breached its contractual obligations under the RTIV Policy and, consequently, is precluded from bringing claims against him under the Policy. Accordingly, he contends there is no genuine issue of material fact that CSU is not entitled to pursue collection from him, and therefore, the trial court erred in denying his motion and granting CSU's motion. We agree.

{¶ 15} "The relationship between a student and a university is contractual in nature." *Spafford v. Cuyahoga Community College*, 8th Dist. Cuyahoga No. 84786,

2005-Ohio-1672, ¶ 34, citing *Behrend v. State*, 55 Ohio App.2d 135, 139, 379 N.E.2d 617 (10th Dist.1977). The terms of the contract are found in the university's handbooks, catalogs, policies, and brochures supplied to the students. *Leiby v. Univ. of Akron*, 10th Dist. Franklin No. 05AP-1281, 2006-Ohio-2831, ¶ 15, citing *Embrey v. Cent. State Univ.*, 10th Dist. Franklin No. 90AP-1302, 1991 Ohio App. LEXIS 4886 (Oct. 8, 1991). As relevant to this case, the terms of the contractual relationship between Simpson and CSU regarding CSU's return of unearned financial aid are contained in the RTIV Policy, which, as admitted in CSU's responses to Simpson's discovery requests, was in effect during the spring 2010 semester and published to its students.

{¶ 16} During discovery, CSU designated William Caraballo as its representative authorized to testify at deposition on its behalf under Civ.R. 30(B)(5). A transcript of Caraballo's deposition was attached to Simpson's motion for summary judgment.

{¶ 17} In his deposition, Caraballo testified that under the RTIV Policy, Simpson was entitled to retain 100 percent of his federal financial aid if he *either* earned a passing grade or attended at least 60 percent of a single academic class (Carabello dep. tr. 32, 34, 48.) Thus, according to Caraballo, even where a student receives a failing grade in a class, a student's attendance of 60 percent of the course will permit the student to retain 100 percent of his federal financial aid. *Id.*

{¶ 18} Carabello also testified that under the RTIV Policy, CSU's Financial Aid Office has the obligation to determine whether a student attended 60 percent of

any one class before concluding that federal aid was unearned (*id.* at 45). Carabello testified that CSU does not take attendance, however, and he testified further that CSU does not know how many classes Simpson attended in the spring 2010 semester nor whether he attended more than 60 percent of any one class that semester. (*Id.* at 28, 31, 33, 45, 49-51.) Carabello also admitted that CSU did not verify Simpson's attendance with his professors as required by the RTIV Policy (*Id.* at 29). Simply put, CSU has no record of Simpson's attendance and did not verify his attendance before it returned his federal financial aid.

{¶ 19} In light of Carabello's testimony, it is apparent that CSU did not meet its contractual obligations under the RTIV Policy before it determined that Simpson's federal financial aid was "unearned" and returned the monies to its lender. A university that does not follow its express manual or handbook procedures breaches its contract with concerned parties. *Chan v. Miami Univ.*, 73 Ohio St.3d 52, 60, 652 N.E.2d 644 (1995). A party cannot maintain a breach of contract action where the party has itself failed to perform its obligations under the contract. *Bank of Am. v. Berman*, 8th Dist. Cuyahoga No. 101049, 2014-Ohio-3331, ¶ 17, citing *Mtge. Electronic Registration Sys. v. Mosley*, 8th Dist. Cuyahoga No. 93170, 2010-Ohio-2886, ¶ 47. Thus, it is apparent that CSU cannot pursue monies allegedly due from Simpson under the RTIV Policy.

{¶ 20} In its second motion for summary judgment, CSU asserted that its "Title IV return calculation," which was attached to its motion, demonstrated that Simpson attended only 49.5 percent of the semester, thereby obliging CSU to return

a portion of his federal financial aid pursuant to federal law. CSU's "calculation" was included in a form that CSU's Financial Aid Office apparently sent to the federal government when it returned a portion of Simpson's federal financial aid.

{¶ 21} This "calculation," however, fails to establish that Simpson attended less than 60 percent of the semester. First, it directly contradicts the sworn testimony of Carabello, CSU's designated corporate representative, who testified that CSU does not take attendance, does not know how much of any course Simpson attended during the spring 2010 semester, and did not check with any of Simpson's professors regarding his claim that he attended 60 percent of the semester. Significantly, despite Carabello's acknowledgement that Simpson's attendance of 60 percent of a single course relieved him of any obligation to return financial aid monies to CSU, and despite two discovery extensions, CSU did not conduct any discovery on the issue of Simpson's attendance, and left Simpson's sworn assertion of 60 percent attendance undisputed.

{¶ 22} Furthermore, as Carabello admitted, it is not clear how CSU's Financial Aid Office could determine that Simpson attended only 49.5 percent of the semester without taking attendance or consulting with his professors regarding his attendance. Although Carabello submitted an affidavit with CSU's second motion for summary judgment in which he averred that the exhibits attached to the motion were "true and accurate copies" of the originals, he did not give any explanation regarding how the 49.5 percent "calculation" occurred without attendance records. Indeed, CSU's newly asserted "calculation" of Simpson's attendance was

unsupported by any signature, sworn testimony, or explanation regarding how the “calculation” could occur without attendance records. The “calculation” is therefore meaningless.

{¶ 23} It is undisputed that (1) CSU’s RTIV Policy allows a student to retain 100 percent of federal funding if he or she attends at least 60 percent of a single course; (2) to enforce the Policy, CSU has the burden of verifying a student’s last date of attendance; and (3) CSU does not take attendance, has no attendance records for Simpson, and does not know his last date of attendance during the Spring 2010 semester. In light of these undisputed facts, there is no genuine issue of material fact that CSU breached its obligations under the RTIV Policy before returning Simpson’s federal aid monies and, therefore, is unable to pursue a claim against Simpson for monies allegedly due under the Policy. Accordingly, the trial court erred in denying Simpson’s motion for summary judgment and granting CSU’s motion. We therefore reverse the trial court’s judgment and remand with instructions for the trial court to enter judgment in favor of Simpson.

{¶ 24} Reversed and remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

**PATRICIA ANN BLACKMON, P.J., and
LARRY A. JONES, SR., J., CONCUR**

