IN THE SUPREME COURT OF THE STATE OF NEVADA

BRADLEY S. WALKER, AN INDIVIDUAL,
Appellant,
vs.
HICA EDUCATION LOAN CORPORATION,
Respondent.

No. 56080

FILED

JAN 17 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment in a breach of contract action. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Summary judgment is appropriate when there is no genuine issue of material fact, and thus, the moving party is entitled to judgment as a matter of law. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). To avoid summary judgment once the movant has properly supported the summary judgment motion, the nonmoving party may not rest upon general allegations and conclusions, but must instead set forth, by affidavit or otherwise, specific facts demonstrating the existence of a genuine issue of material fact for trial. NRCP 56(e); Wood, 121 Nev. at 731, 121 P.3d at 1030-31. This court reviews an order granting summary judgment de novo. Wood, 121 Nev. at 729, 121 P.3d at 1029.

Having considered the parties' arguments and reviewed the record on appeal, we conclude that the district court properly granted summary judgment in favor of respondent. The terms of the promissory

note and the federal regulations clearly created an obligation for appellant to repay his loan in accordance with his repayment schedule. See Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. 481, 487-88, 117 P.3d 219, 223-24 (2005) (explaining that unambiguous contracts are construed according to their plain language); see also 42 C.F.R. § 60.8(b)(4) (providing that a borrower must repay loans under the Health Education Assistance Loan program in accordance with the repayment schedule). Here, appellant failed to perform his obligations by making untimely payments, not making his payments in full, and ceasing to make any payments on his loan at all. Appellant argues that an "erroneous late fee" and respondent's policy regarding the order in which payments were applied to his loan balance raises a dispute of material fact precluding summary judgment. The terms of the promissory note and the relevant regulations governing appellant's loan, however, allowed respondent to assess late fees. See 42 C.F.R. §§ 60.8(b)(6) and 60.15(a). Regardless, respondent waived any late fees related to the June and July 2007 bills, and subsequent bills did not contain any late fees. Further, appellant made no payments that were subject to respondent's policy as to the order in which payments are applied to a loan balance, as he was not required to pay any late fees and has not made any payment since September 2007.

Appellant asserts that respondent should have mitigated damages. The burden is on the party who breached the contract to show that "the damages might have been lessened by reasonable diligence on the part of the aggrieved party." Cobb v. Osman, 83 Nev. 415, 422, 433 P.2d 259, 263 (1967); see Sheehan, 121 Nev. at 492, 117 P.3d at 226. Beyond generally alleging that respondent could have lessened damages by "reasonable diligence," appellant did not provide any specific facts to

show that respondent failed to mitigate damages. His assertion that respondent should have accepted payment towards the principal and interest of his loan before applying it to the past due amount is contrary to the terms of the note.[1] Further, contrary to appellant's argument that respondent "refused to accept payment" from him, the record indicates that respondent actively sought payment while communicating their repayment policies.

It is undisputed that appellant did not make any payments towards the principal and interest of his loan after September 2007. Appellant was in default for failing to make timely payments in full during the repayment period, and for failing to make any payments after his deferment period ended in May 2008. Because there was no dispute that appellant breached the contract with respondent, the district court properly entered judgment in favor of respondent. The terms of the contract clearly and unambiguously allowed the loan company to make the entire unpaid principal and interest accrued immediately due and payable upon default.[2] The federal regulations do not prevent respondent from acting in accordance with the contract terms. Compare 42 C.F.R. § 60.11(b) (stating that a lender must generally provide at least ten years

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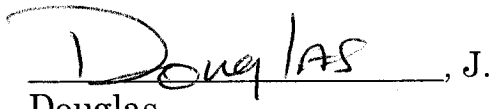
[1]Appellant asserts that the $9.92 "past due amount" on his December 2007 and subsequent bills is a prohibited and errant charge. The record clearly shows that the $9.92 billed represented the difference between the $648.98 appellant owed for June and July 2007 and the September 2007 payment he made of only $639.06 to bring his account current.

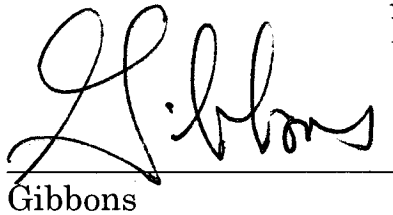
[2]Appellant did not show how the judgment included unauthorized late fees. Respondent by affidavit asserted that the amount sought and awarded in the judgment "do[es] not contain any embedded late fees or litigation fees related to this lawsuit or for any matter."

for repayment) with 42 C.F.R. § 60.35 (allowing a lender to prosecute a claim for default in its collection efforts). Accordingly, we

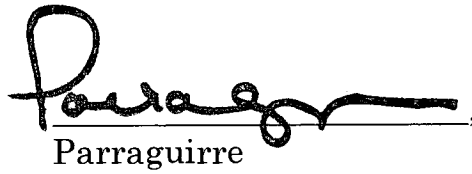
ORDER the judgment of the district court AFFIRMED.



_____, J.
Douglas



_____, J.
Gibbons



_____, J.
Parraguirre

cc: Hon. Linda Marie Bell, District Judge
Robert F. Saint-Aubin, Settlement Judge
Carbajal & McNutt, LLP
Matthew L. Johnson & Associates
Eighth District Court Clerk