UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 92-1473-CIV-MORENO

MIRACIANE ARMAND,

Plaintiff,

vs.

SECRETARY OF EDUCATION OF THE UNITED STATES, CITIBANK (New York State), a New York Corporation, FLORIDA COLLEGE OF BUSINESS, a Tennessee Corporation,

Defendants.
_____/

SECRETARY OF EDUCATION OF THE UNITED STATES,

Counter-Plaintiff,

vs.

MIRACIANE ARMAND,

Counter-Defendant.

_____/

ORDER GRANTING SUMMARY JUDGMENT

THIS CAUSE came before the Court on Defendant/Counter-Plaintiff Secretary of Education's Motion for Summary Judgment (D.E. 141) filed on November 29, 1993 and Plaintiff/Counter-Defendant Miraciane Armand's Motion for Summary Judgment (D.E. 198) filed on March 24, 1995. On October 7, 1994 and April 6, 1995, these motions were referred to United States Magistrate Judge Ted E. Bandstra by the

Honorable Federico A. Moreno pursuant to 28 U.S.C. Section 636(b). Accordingly, this Court heard oral argument on these motions on April 13, 1995. On June 28, 1995, the parties consented to the exercise of jurisdiction of the undersigned pursuant to 28 U.S.C. Section 636(c). Upon careful review of the pleadings, oral argument of counsel and the applicable law, this Court hereby ORDERS AND ADJUDGES that Defendant/Counter-Plaintiff Secretary of Education's Motion for Summary Judgment is GRANTED on its claims as well as the claims/defenses raised by Armand and that Plaintiff/Counter-Defendant Miraciane Armand's Motion for Summary Judgment is DENIED for reasons more fully explained below.

INTRODUCTION

Plaintiff/Counter-Defendant Miraciane Armand ("Armand"), was a former student at Florida College of Business ("FCB"), who enrolled at the school in or about the Fall of 1983. Armand received a $2500 student loan obtained through the Federal Insured Student Loan Program ("FISLP") from Citibank in order to attend FCB. On April 1, 1984, Armand defaulted on her loan. On July 23, 1985, the United States acting for the Secretary of Education ("Secretary") repaid $2757.67 to Citibank for Armand's default. The Secretary then instituted collection efforts against Armand and on June 24, 1992, Armand filed suit against Secretary, among others. On November 19, 1992, the Secretary filed his Counterclaim against Armand seeking payment of her defaulted student loan.

The Secretary argues that Armand's claims/defenses against the Secretary are

without merit; that the Secretary is entitled to recover his claim as a matter of law; and that summary judgment should be entered in favor of the Secretary. Armand argues (1) that her loan "contract" is unenforceable because the school she attended, FCB, allegedly was ineligible to participate in Title IV of the Higher Education Act of 1965, as amended ("HEA"), 20 U.S.C. Section 1077 et. seq., at the time she entered into the contract; (2) that an origination/agency relationship existed between FCB and the lender, Citibank, which would bar the Secretary from collection; (3) that the FTC Holder Rule and Florida Statute 501.201 prevents the Secretary from collection; and (4) that the Secretary is estopped from enforcing the loan due to his alleged failure to enforce "applicable regulations and statutes".

STANDARD OF REVIEW

The court in reviewing a motion for summary judgment is guided by the standards set forth in Rule 56(c) of the Federal Rules of Civil Procedure which provides as follows:

> .... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law ....

The moving party bears the burden of meeting this exacting standard. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970). Further, in addressing whether the moving party has satisfied this burden, the court is required to view the evidence and all factual inferences arising therefrom in the light most

favorable to the non-moving party. Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368 (11th Cir. 1982), citing, Adickes v. S.H. Kress & Co., 398 U.S. at 157, 90 S.Ct. at 1608; Augusta Iron & Steel Works v. Employers Insurance of Wausau, 835 F.2d 855, 856 (11th Cir. 1988). If the record presents issues of material fact, the court must deny the motion. Adickes v. S.H. Kress & Co., 398 U.S. at 157, 90 S.Ct. at 1608. The non-moving party, however, cannot rest upon mere allegations, but must rebut any facts properly presented by the moving party through affidavits or other evidence demonstrating the existence of a genuine and material issue of fact for trial. Id. at 398 U.S. 155, 90 S.Ct. at 1607. Moreover, summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53 (1986).

ANALYSIS

A. FCB'S ELIGIBILITY TO PARTICIPATE IN THE HEA

Armand argues that the Secretary is barred from collecting on her defaulted loan since it was void ab initio. Armand asserts that FCB was not eligible to participate in the HEA at the time Armand signed the application for the loan in question. As such, Armand argues that the loan "contract" is unenforceable. However, after a careful review of the undisputed facts, the undersigned finds that this argument is without merit.

The application for the loan in question was signed in May 1983 by Armand for the academic year commencing June 1983 and continuing through March 1984. In August 1983, FCB's satellite campus, which is the campus at issue, was granted eligibility to participate in the HEA. In September 1983, Citibank funded the loan in question and Armand signed the promissory note evidencing her debt to Citibank. This Court concludes from these undisputed facts that no enforceable obligation arose at the time Armand signed the application for the loan. Rather, the undersigned finds that an enforceable obligation arose at the time Armand signed the promissory note in question which occurred after FCB was granted its eligibility to participate in the HEA program.

B. ORIGINATION/AGENCY

The term "origination relationship" is defined in FISLP regulations, 34 C.F.R. Section 682.200, 682.200(b), and refers to an agency relationship that arises when a lender delegates to a school substantial functions or responsibilities normally performed by lenders. Armand lists various functions which allegedly were performed by FCB on Citibank's behalf which she claims created an origination relationship. However, as noted by the Secretary, most if not all of the functions listed are functions which are imposed on the schools by law. As such, no delegation of duties can be deemed to have occurred when a party is simply performing the duties required of it pursuant to statutory guidelines.

Armand argues that FCB marketed the loans but the HEA and its regulations specifically required a school to provide to students information regarding financial aid.

20 U.S.C. Sections 1092, 1094(a)(9); 34 C.F.R. Sections 668.34; 668.36. Moreover, Citibank indicated in its answer to its interrogatories that a Citibank employee was responsible for marketing its loans on behalf of Citibank. Armand also lists other functions which FCB allegedly performed which include providing loan applications; obtaining information about loan sources and amounts; explaining the loan process; answering students questions about eligibility, loan amounts and repayments; certifying eligibility; assisting students in completing loan applications; as well as insuring that they sign the applications. The undersigned finds that all of these functions were required by law to be performed by the school. 20 U.S.C. Sections 1078(a)(2)(A)-(F), 1092, 1092(a)(1)(A)-(C), 1094(a)(9); 34 C.F.R. Sections 668.33, 668.34(b)(1)-(2), 682.34(c), 682.605. Moreover, there is no record evidence which shows that the actual lending decision was made by anyone other than Citibank. In fact, the deposition of Michael Beauregard indicated that often when loan applications were rejected by Citibank the school was oftentime's unaware of the reasons why the loan was rejected demonstrating that the lender made its lending decision on its own. See, Deposition of Michael Beauregard, pgs. 128-151. Thus, the undersigned finds that Armand has failed to provide any evidence that Citibank delegated substantial loan-making functions to FCB. See Norwood v. Secretary of Education, Civ. Action No. 93-1316-CIV-MARCUS (March 31, 1995); Jackson v. Culinary School of Washington, 27 F.3d 573 (D.C. Cir. 1994); Jackson v. Culinary School of Washington, 811 F.Supp. 714, 722 (D.D.C. 1993).

Armand offers the same evidence presented above to establish the existence

of an agency relationship between FCB and Citibank, and alleges that FCB's misfeasance can be asserted as a defense to repayment of her loan. As stated above, the President of FCB, Michael Beauregard, specifically admitted that Citibank never delegated any of its loan-making functions to FCB and that no one from FCB made determinations as to whom the lenders would lend money. Additionally, there is no record evidence that FCB consented to act on behalf of Citibank or that Citibank gave FCB authority to act on its behalf. As such, the undersigned finds that no agency relationship has been established which would serve as a valid defense to the repayment of Armand's loan. See Overseas Private Inv. v. Dade County, 826 F.Supp. 1564, 1577 (S.D. Fla. 1993).[1]

C. FTC Holder Rule and Florida Statute 501.201

Armand also argues that her loan is void since the Secretary, Citibank, and FCB failed to include the Notice of Claims and Defenses required by the Federal Trade Commission. The FTC Holder Rule requires the inclusion of a notice in the loan that states that any holder of a consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained with the proceeds thereof. 16 C.F.R. Section 433. This notice must only be provided within the loan note if a referral or affiliation relationship between the seller (the school) and the lender is established. 16 C.F.R. Section 433.2.

Even assuming that Armand could demonstrate that an affiliation relationship

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[1] Armand also argues that her eligibility to borrow money was falsely certified by FCB. However, since the undersigned has concluded that no origination or agency relationship has been established this argument must fail as well.

existed between the school and the lender, Armand cannot obtain any relief from this provision since it was not included in her promissory note.[2] Since the basis of such relief is contractual, the fact that the clause was not included in Armand's note is fatal to any such cause of action or defense. Moreover, even if such clause was included, there is no private right of action under the Federal Trade Commission Act. See Jackson v. Culinary School of Washington, 788 F.Supp. 1233, 1251 (D.D.C. 1992) (counter-plaintiffs have no rights under the student loan contracts as a matter of federal law when the FTC's notice of defenses clause is not contained therein); Shorter v. Alexander, No. 1:92-civ-1021-RLV, slip op. at 21 (N.D. Ga. Dec. 8, 1991)(unpublished opinion)("Because the language [of the Rule] was not included, this Court holds that the counter-plaintiffs may not rely upon the FTC Holder Rule to assert any defenses they may have against Connecticut Academy against the Defendants.")

Armand additionally argues that even if the Rule has no application in and of itself that it is still actionable when brought in conjunction with Florida Statute 501.201. This argument must fail as well since the undersigned finds that Florida Statute 501.201 does not apply to Citibank. Florida Statutes 501.212(5) provides that the Act does not apply to "... banks or savings and loan associations regulated by federal agencies." Since the record evidences that Citibank is regulated by several federal agencies, Florida Statute 501.201 does not apply to Citibank. See, Affidavit of Gary J. Sullivan attached as Exhibit A to Citibank's Motion to Dismiss Amended

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[2] As more fully explained above, the undersigned has concluded that no such affiliation relationship existed between Citibank and FCB.

Counterclaim. As such, the undersigned finds that no defense can be asserted against the Secretary, the assignee of Citibank. See, e.g., Leasing Service Corp. v. River City Construction, Inc., 743 F.2d 871, 875 (11th Cir. 1984).

D. ESTOPPEL

Armand next argues that the Secretary should be estopped from enforcing her loan due to the Secretary's alleged failure to enforce "applicable regulations and statutes." Armand supports this argument by alleging that the Secretary should have known that FCB had been "severely deficient" in areas of compliance and as such the Secretary should have taken "appropriate" action. Armand lists FCB's default rate as serving as evidence of such knowledge. The undersigned finds, however, that with respect to any alleged deficiencies revealed in the program reviews which were conducted, the Secretary took the only action available to him and fined FCB for every noted deficiency. Moreover, with regard to FCB's default rates, the Secretary once again took the only action available to him -- FCB is no longer allowed to participate in the student loan program.

Also, the undersigned finds that the Secretary cannot be asked to be the guarantor of the quality of the curriculum and activities of all schools throughout the nation since the practicalities of such a mandate would effectively bring about the end of the student loan program. See, Jackson, 811 F.Supp. at 719. Thus, the undersigned concludes that the Secretary should not be estopped from collecting on Armand's loan obligation since he effectively did all he could under the regulations and guidelines applicable to these circumstances.

Finally, as stated above, no private cause of action exists under the HEA. The undersigned finds no merit to Armand's argument that raising such as an affirmative defense is somehow distinguishable. To hold as Armand suggests would allow a party to circumvent Congressional intent and to obtain the identical affirmative relief solely based on the fortuity of beating another party to court. The undersigned refuses to interpret the law in such a manner.

SUMMARY

For the foregoing reasons, it is ORDERED AND ADJUDGED that Defendant/Counter-Plaintiff Secretary of Education's Motion for Summary Judgment is GRANTED as to his claims and as to the claims/defenses raised by the Plaintiff, Miraciane Armand. Accordingly, Plaintiff/Counter-Defendant Miraciane L. Armand's Motion for Summary Judgment is DENIED.

Defendant/Counter-Plaintiff Secretary of Education is hereby ordered to file a current Certificate of Indebtedness evidencing Plaintiff's current debt within ten (10) days of the date of this Order so that this Court can enter an appropriate Order awarding same.

DONE AND ORDERED in Chambers, at Miami, Florida, this 19th day of July, 1995.

Ted E. Bandstra
United States Magistrate Judge

copies furnished to:
All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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SECRETARY OF EDUCATION OF THE UNITED STATES, CITIBANK (New York State), a New York Corporation, FLORIDA COLLEGE OF BUSINESS, a Tennessee Corporation,

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SECRETARY OF EDUCATION OF THE UNITED STATES,

Counter-Plaintiff,

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MIRACIANE ARMAND,

Counter-Defendant.

_____/

ORDER

THIS CAUSE came before the Court on Plaintiff/Counter-Defendant Miraciane Armand's Motion for Clarification and/or Motion to Strike the Secretary of Education's Motion for Summary Judgment (D.E. 197) filed on March 13, 1995. Having carefully considered the motion, response and replies thereto, the court file and applicable law, it is hereby,

ORDERED AND ADJUDGED that Plaintiff/Counter-Defendant Miraciane

Armand's Motion for Clarification and/or Motion to Strike is DENIED AS MOOT in light of this Court's Order granting summary judgment in favor of the Secretary of Education.

DONE AND ORDERED in Chambers at Miami, Florida this 19th day of July, 1995.

TED E. BANDSTRA
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

All counsel of record