ORDERED.

Dated: November 16, 2018

Karen S. Jennemann
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re	)	
	)	
CHERYL KUTTENKULER BEECE,	)	Case No. 6:17-bk-02724-KSJ
	)	Chapter 7
Debtor.	)	
	)	
	)	
CHERYL KUTTENKULER BEECE,	)	
	)	
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adversary No. 6:17-ap-00086-KSJ
	)	
AES/BRAZOSUS, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING CREDITORS' MOTIONS FOR SUMMARY JUDGMENT

Cheryl Beece ("Debtor") is a highly educated woman with three graduate degrees in law, business, and animal immunogenetics. She filed this adversary proceeding seeking a hardship discharge of her student loans held by the Department of Education and Education Credit

Management Corporation ("ECMC") (collectively, the "Defendants").[1] Debtor owes approximately $192,000 to both parties,[2] and has repaid about $24,000 since the inception of the loans. Defendants moved for summary judgment[3] arguing the Debtor does not qualify for an undue hardship discharge under § 523(a)(8) of the Bankruptcy Code[4] and the *Brunner* test. The Court partially agrees.

Summary Judgment Standard

Rule 56(a) provides "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[5] The moving party must establish the right to summary judgment.[6] A "material" fact is one that "might affect the outcome of the suit under the governing law."[7] Once the moving party has met its burden, the nonmovant must set forth specific facts showing there is a genuine issue for trial.[8] In determining entitlement to summary judgment, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts."[9]

Brunner Test

Section 523(a)(8) of the Bankruptcy Code, as amended, excepts qualified educational loans from discharge "unless excepting such debt from discharge. . .would impose an undue hardship on the debtor and debtor's dependents."[10] Absent a showing of undue hardship,

[1] Doc. No. 22 (the "Amended Complaint"). All Doc. No. citations refer to pleadings filed in Adversary Proceeding 6:17-ap-00086-KSJ unless otherwise noted.
[2] Doc. No. 32, Exh. C at 4-6; Doc. No. 33, Exh. "1."
[3] Doc. Nos. 32, 33 and 42.
[4] All references to the Bankruptcy Code refer to 11 U.S.C. §101 *et. seq.*
[5] Fed. R. Civ. P. 56(a).
[6] *Fitzpatrick v. Schlitz (In re Schlitz)*, 97 B.R. 671, 672 (Bankr. N.D. Ga. 1986).
[7] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); *Find What Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011).
[8] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587, 10 S. Ct. 1348 (1986).
[9] *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).
[10] 11 U.S.C. § 523(a)(8) (2017).

qualifying loans taken out by an obligor for the educational benefit of others are not dischargeable.[11] The parties opposing a debtor's request to discharge a student loan debt have the initial burden to prove the debt is an educational loan that would qualify as nondischargeable under § 523(a)(8).[12] The Eleventh Circuit has adopted the three-part *Brunner* test to determine whether a debtor has the undue hardship to discharge student loan debt.[13] A debtor will not receive a discharge if he or she cannot prove all three elements of the *Brunner* test.[14]

Under the **first prong** of the *Brunner* test, a debtor must demonstrate he or she cannot maintain a minimal standard of living based on income and expenses if forced to repay the student loans.[15] Courts may consider the particular aspects of a debtor's circumstances such as all sources of income, expenses, and opportunities for debt restructuring.[16] Courts also note a debtor does not have to live in poverty but may not necessarily maintain his previous standard of living.[17] "[D]ebtor's are not entitled to maintain whatever standard of living she has previously attained, nor the level she would maintain if required to repay the debt. 'Minimal does not mean preexisting, and it does not mean comfortable."[18] Modest and reasonable expenses exemplify a minimal standard of living.[19] A debtor must show a good faith effort to earn adequate income to pay reasonable expenses and student loans.[20] This prong is fact intensive and is rarely susceptible to resolution by summary judgment.

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[11] *See Salter v. Educ. Res. Inst. (In re Salter)*, 207 B.R. 272, 275 (Bankr. M.D. Fla. 1997).
[12] *Hemar Ins. Corp. of Am. v. Cox* (*In re Cox)*, 338 F.3d 1238, 1241-43 (11th Cir. 2003); *Matthews-Hamad v. Educ. Credit Mgmt. Corp.* (*In re Matthews-Hamad)*, 377 B.R. 415, 420 (M.D. Bankr. 2007).
[13] *See Brunner v. New York State Higher Educational Services Corp.*, 831 F.2d 395 (2d Cir. 1987); *Cox*, 338 F.3d at 1241.
[14] *Russotto v. Educ. Credit Mgmt. Corp. (In re Russotto)*, 370 B.R. 853, 856 (Bankr. S.D. Fla. 2007); *Southard v. Educ. Credit Mgmt. Corp*. (*In re Southard)*, 337 B.R. 416, 420 (Bankr. M.D. Fla. 2006).
[15] *Cox*, at 1242.
[16] *Matthews-Hamad*, 377 B.R. at 421.
[17] *Id*. (citing *Stanly v. Educ. Credit Mgmt. Corp. (In re Stanley)*, 300 B.R. 813, 818 (N. D. Fla. 2003)).
[18] *Stanley*, 300 B.R. at 817-818.
[19] *Id*.
[20] *Brosnan v. Am. Educ. Serv.* (*In re Brosnan)*, 323 B.R. 533, 538 (Bankr. M.D. Fla. 2005) (citing *Perkins v. PHEAA*, 318 B.R. 300, 305 (Bankr. M.D. N.C. 2004)).

Under the **second prong** of the *Brunner* test, which is also fact intensive, a debtor must demonstrate that "additional circumstances exist indicating that [debtor's] state of affairs is likely to persist for a significant portion of the repayment period."[21] Courts consider the analysis of additional circumstances as the most essential portion of the *Brunner* test.[22] Debtors must show a "certainty of hopelessness" not just the debtor's current "inability to fulfill [a] financial commitment."[23] A debtor must show that circumstances out of his control created the complete inability to pay future debts.[24]

Under the **third prong** of the *Brunner* test, a debtor must demonstrate he or she made a good faith effort to repay the student loans.[25] Although not determinative, an important factor courts must evaluate in determining good faith is whether a debtor attempted to negotiate a less burdensome repayment plan.[26]

Summary Judgment Granted on the Nature and Amount of Student Loans

Defendants met their burden of showing the loans at issue are "qualified education loans" protected from discharge under §523(a)(8) of the Bankruptcy Code. Defendants also have proven the amount outstanding and owed by the Debtor on these loans.

Debtor owes the Department of Education $138,912.89 as of June 2018,[27] on separate loans obtained to attend Stetson University and to pay for the college tuition of her nondependent children.[28] Debtor made payments of $7,061 in payments on these loans.[29]

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[21] *Cox*, 338 F.3d at 1241; *See also Matthews-Hamad*, 377 B.R. at 422; *See generally Brunner*, 831 F.2d at 396.
[22] *Matthews-Hamad*, 377 B.R. 415 (citing *Educ. Credit Mgmt. Corp. v. Frushour* (*In re Frushour)*, 433 F.3d 393, 401 (4th Cir. 2005)).
[23] *Douglas v. Educ. Credit Mgmt. Corp*. (*In re Douglass)*, 366 B.R. 241 (Bankr. M.D. Ga. 2007) (quoting *Educ. Credit Mgmt. Corp. v. Carter* (*In re Carter)*, 279 B.R. 872 (M.D. Ga. 2002)).
[24] *Mallinckrodt v. Chem. Bank* (*In re Mallinckrodt)*, 274 B.R. 560, 566 (S.D. Fla. 2002) (quoting *Brightful v. PHEAA* (*In re Brightful)*, 267 F.3d 324 (2001)).
[25] *Matthews-Hamad*, 377 B.R. at 396 (citing *Brunner*, 831 F.2d at 396).
[26] *Brosnan*, 3213 B.R. at 539; *Matthews-Hamad*, 377 B.R. at 423 (citing *Frushour*, 433 F.3d at 402); *Educ. Credit Mgmt. Corp. v. Mosley* (*In re Mosley)*, 494 F.3d 1320, 1327 (11th Cir. 2007)).
[27] Doc. No. 32, Exh. C at 4.

Debtor borrowed $59,120 to attend Stetson University.[30] In April 2017, Debtor entered an income-based repayment ("IBR") regarding the loans to attend Stetson University, leaving her with future obligations of $10.07/month.[31] She also borrowed $13,000 for her daughter to attend the University of Miami, and $26,240 for her son to attend Rensselaer Polytechnic Institute.[32] She has not entered an IBR plan regarding the loans she obtained for her children.[33]

Debtor owes ECMC $53,923.08 as of March 2018.[34] She has made $16,197 in payments on this loan.[35] A repayment plan is available for the Education and ECMC loans that would allow the Debtor to pay $214.35/month.[36]

Undisputed Facts

Although the Court will deny the Defendant's request for summary judgment on the undue hardship finding required by the *Brunner* test, many facts are undisputed by the parties. No further proof of the facts contained in this section is needed at trial, unless otherwise noted below.

Debtor is a highly educated sixty-five-year-old woman with no permanent disabilities who graduated from an Ivy League college and earned a Master of Science in Animal Immunogenetics before starting a family.[37] She also has earned advanced degrees in business administration ("MBA") and law ("JD"), and has passed the bar in three states.[38]

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[28] *Id*.
[29] *Id*. at 3.
[30] Doc. No. 32, Exh. C. Interest rates vary between 5.41% and 6.80%.
[31] Doc. No. 32, Exh. G at 2.
[32] Doc. No. 32, Exh. C. The interest rate of both loans is 7.9%.
[33] Doc. No. 32, Exh. A at 47-49; Exh. C at 4.
[34] Doc. No. 33, Exh. "1" at 2.
[35] *Id*.
[36] Doc. No. 32, Exh. C at 6.
[37] Doc. No. 32, Exh. A at 8, 15-16; Exh. B. at 8-9.
[38] *Id*. at 17

Debtor received her undergraduate degree from Cornell University.[39] From 1997 to 2002, she worked as a substitute teacher and eventually was promoted to a full-time position in the last two years.[40] Debtor voluntarily left this job to pursue a law degree at Pace University School of Law from August 2002 through June 2005.[41] She worked as a legal research clerk for a Connecticut trial court from 2006 to 2007, and as an associate attorney for a litigation firm from April 2006 through August 2009.[42]

Following the law firm's dissolution in 2009, the Debtor operated a sole proprietorship on a temporary basis.[43] She then sold her home in New York and, in 2010, moved to Florida.[44] Debtor bought a house in Florida using monies from a final divorce settlement and a mortgage loan.[45]

The Debtor worked as a substitute teacher in Florida while she was earning an MBA from Stetson University, which she got in 2014.[46] Since 2014, the Debtor has not worked in any job that requires any of her advanced degrees, whether it is her MBA, her law degree, or her advanced biology degree. (The Court, however, was unable to determine *on the existing record* the effort or willingness of the Debtor to find and keep a professional job and will request testimony on this at trial.)

In August 2014, the Debtor received $46,359 from her mother's estate.[47] (She apparently used this money for "general living expenses"[48] but offers no explanation why she used none of these monies to repay her student loans. The Court will want testimony at trial on this point.)

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[39] Doc. No. 32, Exh. A at 15; Exh. B. at 8.
[40] Doc. No. 42, p. 2-3.
[41] *Id*. at 3; Doc. No. 32, Exh. A at 16; Exh. B. at 8.
[42] Doc. No. 42, p. 3.
[43] *Id*.
[44] *Id*. at 4; Doc. No. 32, Exh. A at 8-9.
[45] Doc. No. 32, Exh. A at 8-9.
[46] Doc. No. 32, Exh. A at 17, Exh. B. at 7.
[47] *Id*. at 90; Exh. B at 9.

After graduating from Stetson, the Debtor got a Florida temporary teaching certificate to teach high school mathematics full-time.[49] She was hired as a teacher in Manatee County for the 2015–2016 schoolyear; however, the teaching contract was not renewed.[50] Debtor currently is working part-time as a cashier with Publix and as a substitute teacher in Manatee and Volusia Counties.[51]

Debtor requires minor surgery to correct a herniated disc in her back.[52] According to her physician, surgery to correct the hernia would require the Debtor to miss approximately two to three weeks of work, followed by a short recovery period.[53] She has no other health issues that impair her long term ability to work, and no further testimony on medical issues is required at trial. The Court specifically finds that, other than a temporary loss of income after her surgery, the medical issue will not persist for any significant portion of her loan repayment period.

Debtor argues that, because she is 65 years old, she is a victim of age discrimination in hiring.[54] Her only supporting evidence of "discrimination" was an article taken from the Internet.[55] The Court also notes she just received her MBA in 2014, four years ago when she was 61. Debtor has failed to establish any credible basis to allege age discrimination on the pending motions for summary judgment, and no further evidence is needed (or will be permitted) on this point at trial.

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[48] Doc. No. 32, Exh. A at 90.
[49] Doc. No. 42, p. 5-6.
[50] *Id*. at 6.
[51] Doc. No. 32, Exh. A at 18.
[52] *Id*. at 22-23.
[53] *Id*. at 92-96, 128.
[54] Doc. No. 41, p. 6; Doc. No. 43, Exh. QQ at 14.

Summary Judgment is Denied as to Undue Hardship

Debtor claimed an income of $8,589.82 for the first quarter of 2018[56] and expenses, minus student loan payments, of $8,014.54.[57] Debtor claims social security benefits of approximately $1,171 per month and has about $25,000 remaining in her IRA account.[58] Debtor opposes summary judgment asserting she meets all three prongs of the *Brunner* test because: (1) she cannot maintain a minimal standard of living if forced to repay the student loans because her expenses are $400 above her income on monthly basis; (2) her circumstances are likely to continue or deteriorate because her age and health; and (3) she has made good faith efforts to pay her student loans because she has never had a loan in default.

Defendants dispute the reasonableness of the Debtor's expenses, the Debtor's dire characterization of her current financial condition, her ability to repay her and her children's student loans in the future, and the alleged "good faith" attempts to repay the debts due to the Defendants. They argue the *undisputed* facts support summary judgment as a matter of law on these "undue hardship" issues. The Court disagrees.

I cannot assess whether some of the Debtor's expenses are unreasonable *as a matter of law* without listening to the Debtor and weighing her credibility. I cannot assess whether her current financial condition will continue into the foreseeable future without allowing her to explain her job search efforts and prospects. I also cannot conclude whether the Debtor has made a good faith attempt to repay her loans, without providing the Debtor an opportunity to explain her repayment efforts. All of these issues are factual disputes appropriately raised by the Debtor in her opposition to summary judgment that require a trial for resolution.

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[55] *Id.*
[56] Doc. No. 33, Exh. "2."
[57] *Id.*
[58] Doc. No. 32, Exh. A at 24, 70.

Accordingly, it is

ORDERED:

1. Department of Education Motion for Summary Judgment (Doc. No. 32) and Education Credit Management Corporation Motion for Summary Judgment (Doc. No. 33) are **PARTIALLY GRANTED** to establish (a) the loans at issue are "qualified education loans" protected from discharge under § 523(a)(8) of the Bankruptcy Code, (b) Debtor owes the Department of Education $138,912.89 as of June 2018, (c) Debtor made payments of $7,061 in payments on the debt due to the Department of Education, (d) Debtor owes ECMC $53,923.08 as of March 2018, (e) Debtor has made $16,197 in payments on the debt due to ECMC, (f) Debtor has no medical condition that will persist in the foreseeable future or limit her employment options, (g) Debtor's age is not a limitation on her ability to obtain employment, and (h) the other undisputed facts listed above.
2. The Motions for Summary Judgment are otherwise denied to allow the Debtor to explain via testimony her current income and expenses, her recent job searches and prospects, her good faith efforts to repay her student loans, specifically including her use of the $46,000 she inherited, and to otherwise demonstrate why an undue hardship prevents her from repaying her and her children's student loans.
3. A one-day trial is scheduled for **10:00 a.m. on January 10, 2019,** at the United States Bankruptcy Court, Sixth Floor, Courtroom A, 400 West Washington Street, Orlando, Florida, 32801.

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The Clerk is directed to serve a copy of this order on all interested parties.