

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

Case No.: 05-15713
Chapter 7

BARBARA J. MILAM,

Debtor.

BARBARA J. MILAM,

Plaintiff,

v.

Adv. No.: 06-28

MICHIGAN GUARANTY AGENCY,

Defendant.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This Proceeding is before the Court upon the Complaint filed by Plaintiff, Barbara J. Milam, seeking a discharge of her educational loans pursuant to 11 U.S.C. § 523(a)(8). On September 5, 2006, the Court held the scheduled trial in abeyance after Plaintiff failed to appear. On September 14, 2006, Plaintiff filed a request to reschedule the trial. Although Court records show that proper notice was sent out, Plaintiff asserted that she had not received the notice scheduling the trial. On September 19, 2006, the Court held a telephonic conference call hearing on Plaintiff's request to reschedule the trial. At the conclusion of the hearing, the Court stated that it would give Defendant, who had traveled from Michigan to attend the trial, seven (7) days to provide to the Court the amount of costs incurred. On October 12, 2006, Defendant filed its Notice of Costs Incurred in the amount of \$ 661.61. On October 16, 2006, the Court entered an Order Requiring Funds to be Paid by Plaintiff, to be Deposited in the Unclaimed Funds Registry of the Court, and Dealing with Other Issues Including Scheduling the Trial of Adversary Proceeding. The order states that if Plaintiff deposited the \$661.61 in the Court's Unclaimed Funds Registry before November 6, 2006, the Court would reschedule the trial for November 28, 2006, at 1:00 p.m., if not paid the Court would dismiss the proceeding. On November 2, 2006,

Plaintiff paid the funds and on November 3, 2006, the Court sent out notice to the parties of the rescheduled trial. Despite receiving proper notice, Defendant failed to appear at 1:00 p.m. on November 28, 2006. The Court declined to reschedule the trial and upon the evidence presented, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff filed a voluntary petition under Chapter 7 of the Bankruptcy Code on November 16, 2005. The Court entered a discharge on March 31, 2006.

2. On February 8, 2006, Plaintiff filed the instant adversary proceeding seeking to discharge her student loan debt, which is currently held by Defendant, Michigan Guaranty Agency.

3. Plaintiff is single and has no children.

4. As of March 17, 2006, the amount owed to Defendant under the Note equaled \$49,840.10, and interest continues to accrue on the Note. [Pl. Ex. 4]. Plaintiff testified that when she first began repayment on her student loan the debt totaled approximately \$25,000. However, because of Plaintiff's failure to make payments on the loan, interest has caused the loan balance to increase substantially.

5. Over the last nine years, Debtor made only sporadic payments on the loan.

6. Plaintiff is currently employed full-time as a loan officer with RG Crown Bank. [Pl. Ex. 5] Plaintiff's November 15, 2006, earnings statement reflects that since beginning the job in February, 2006, she has earned a gross income of \$51,179.55. This amount is comprised of a bi-weekly base salary of \$1,000.00, \$28,250.76 in commission, a car allowance of \$3,528.67, and a cell phone allowance of \$661.64. After deducting \$12,078.45 for taxes, \$99.00 for medical expenses and \$1,173.85 for contributions into her 401K, Plaintiff's net monthly income over the past ten months averages \$3,782.82.

7. Plaintiff's 2004 income tax return reflects gross income of \$33,250.00 and her 2005 tax return reflects gross income of \$32,163.00. [Pl. Ex. 1] Plaintiff testified that she is currently earning approximately \$1,500.00 more per month in 2006, than she did in 2004 and 2005.

9. On Schedule J, Plaintiff lists her monthly expenses to be \$2,226.07. However, according to the interrogatories she filled out in August of 2006, her monthly expenses total \$1,798.15, which includes: \$620.16 for her mortgage payment, a \$570.99 car payment, \$155.00 for electricity, \$60.00 for water, \$125.00 for car insurance, \$67.00 for t.v. and \$200.00 for gasoline. The primary expenses Plaintiff lists on Schedule J that she did not include in her interrogatories include: \$200.00 for food, \$200.00 for home maintenance and \$130.00 for medical and dental expenses.

CONCLUSIONS OF LAW

The dischargeability of an educational loan is governed by 11 U.S.C. § 523(a)(8), which provides in relevant part:

A discharge under . . . this title does not discharge an individual debtor from any debt--

(8) 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, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

The Bankruptcy Code does not define "undue hardship." However, the Eleventh Circuit decided in the case of Hemar Ins. Corp. of Amer. v. Cox (In re Cox), 338 F. 3d 1238 (11th Cir. 2003) to adopt the undue hardship test first set forth in In re Brunner, 831 F. 2d 395 (2d Cir. 1987) to determine the dischargeability of student loans. The Brunner test requires Plaintiff to prove that:

- (1) he cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and dependents, if forced to repay the loan;
- (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant period, and,

- (3) he made good faith efforts to repay the loans.

Brunner, 831 F. 2d at 396;
Cox, 338 F. 3d at 1241.

Preponderance of the evidence is the standard of proof in student loan discharge cases. Grogan v. Garner, 498 U.S. 279, 291 (1991). Plaintiff bears the burden of proving all three prongs of the "undue hardship" test. The Cadle Co. v. Webb (In re Webb), 132 B.R. 199 (Bankr. M.D. Fla 1991). If one of the elements of the test is not proven, the inquiry ends, and the student loan cannot be discharged. Webb, 132 B.R. at 202.

The first prong of the Brunner analysis requires that Plaintiff prove that she cannot maintain a minimal standard of living based on current income and expenses if forced to repay the student loans. This Court has previously held that a debtor, "must show that her financial resources will allow her to live only at a poverty level standard for the foreseeable future if she is obligated to repay the student loan." Id. at 202.

Poverty guidelines, published annually in the Federal Register, indicate that the 2006 poverty level for a family of one is \$9,800. 70 Fed. Reg., at 3848-3849 (Jan. 24, 2006). Plaintiff's November 15, 2006, Earnings Statement shows that year to date Plaintiff has earned an annual income of at least \$51,179.55, over five (5) times the poverty level.

Plaintiff's November 15, 2006, earnings statement reflects that year to date she has earned a gross income of \$51,179.55. This amount is comprised of a bi-weekly base salary of \$1,000.00, \$28,250.76 in commission, a car allowance of \$3,528.67, and a cell phone allowance of \$661.64. After deducting \$12,078.45 for taxes, \$99.00 for medical expenses and \$1,173.85 for contributions into her 401K, Plaintiff's net monthly income over the past ten months averages \$3,782.82. As Plaintiff's monthly expenses total between \$2,226.07 and \$1798.15, she is left with a disposable monthly income of at least \$1,556.75. As Plaintiff testified that her monthly student loan payment would be approximately \$400.00, the Court finds Plaintiff clearly has the disposable income to make the loan payments without causing her lifestyle to fall below a minimal standard of living.

Assuming, without deciding, that this Court found that Plaintiff met prongs two and three of the Brunner test, Plaintiff would still not be entitled to a discharge since she clearly failed to meet the first

prong. Thus, the Court's analysis ends with the determination that Plaintiff would still be able to maintain a minimal standard of living while repaying her student loan.

CONCLUSION

Based upon the above, Plaintiff is not entitled under 11 U.S.C. Section 523(a)(8) to receive a discharge of her student loans. The Court will enter a separate judgment that is consistent with these Findings of Fact and Conclusions of Law.

Dated this 11 day of December, 2006 in Jacksonville, Florida.

/s/ George L. Proctor
George L. Proctor
United States Bankruptcy Judge

Copies to:
Plaintiff
Defendant