

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re

Michel F. Garay,

Debtor.

Case No.: 11-820-PMG
Chapter 7

Michel F. Garay,

Plaintiff,

vs.

Adv.: 11-108-PMG

Educational Credit Management Corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Proceeding is before the Court upon the Complaint to Determine Dischargeability of a Debt filed by the Debtor, Michel F. Garay (Plaintiff/Debtor). In the Complaint, the Debtor asserts that the educational loans listed on his schedules should be discharged in his Chapter 7 case, because excepting such debts from discharge would impose an undue hardship on him within the meaning of 11 U.S.C. § 523(a)(8).

Findings of Fact

The Debtor obtained the student loans that are the subject of this Complaint to finance his expenses to attend the Florida Institute of Traditional Chinese Medicine ("FITCM") in St.

Petersburg, Florida, from 1994 until 1997. The loans were made pursuant to the Federal Family Educational Loan Program ("FFEL Program"), and are presently held by Educational Credit Management Corporation (ECMC/Defendant). The original loan amounts totaled \$31,500.00, and the balance due on the loans as of November 14, 2011 was \$67,293.22. (Def.'s Ex. 1). There is no evidence that the Debtor has ever made a payment on the student loans since incurring them.

The Debtor is sixty-one years old and is single with no dependents. For the past seventeen years he has been employed by the Florida Department of Health, makes an annual salary of approximately \$33,000.00 as a health educator, and has not received a raise in six years. The net income he receives from his bi-weekly paychecks is approximately \$1,000.00. The Debtor testified that although he may try to retire in four years, he does not know if he will be able to based upon his current income. (Tr. p. 18). He also testified that because of his age and the type of work he does he believes his chances of obtaining a more lucrative job are "[v]ery much a zero." (Tr. p. 18). Upon his retirement, the Debtor will receive a pension from the state and social security. (Tr. p. 23).

Debtor's Schedule J shows that he has an average monthly income of \$2,260.89 and average monthly expenses of \$2,124.42, leaving an average monthly net income of \$136.47. (Def.'s Ex. 13). The Debtor's monthly expenses include: \$1,200.57 for a mortgage payment (inclusive of taxes and insurance), \$193.00 for utilities, \$65.00 for home maintenance, \$400.00 for food, \$20.00 for clothing and laundry, \$25.00 for medical and dental expenses, \$100.00 for transportation, \$20.00 for recreation and entertainment, \$10.00 for charitable contributions, \$21.00 for auto insurance, and \$69.85 for miscellaneous expenses. (Id.) The Debtor testified that his

average monthly expenses have risen because he now pays \$50.00 a month for health insurance¹ and \$76.64 into his retirement plan, leaving a monthly net income of only \$9.83. (Tr. p. 22; D.'s Ex. 1).

The Debtor's federal income tax returns for 2008 to 2010 show that he has received tax refunds for each of those years. (Debtor's Ex. 2). In 2008 he received a tax refund of \$1,321.00, in 2009 he received \$1,425.00, and in 2010 he received \$1,625.00. (Id.) The Debtor testified that he typically relies on his income tax refund to make necessary repairs to his house and vehicle. (Tr. p. 17).

The Debtor testified that he has not been able to use his diploma in Chinese Medicine because at some time following his graduation the institute lost its accreditation, subsequently went out of business, and does not carry "the same power as one that has a current accreditation." (Tr. p. 17). There is no evidence of when the school lost its accreditation, or how long the Debtor may have been able to utilize his diploma after graduation.

Prior to filing this bankruptcy case the Debtor tried to negotiate the subject loans with Nelnet (the holder of the loans at that time) but testified that the monthly payment options offered to him were too high. (Tr. p. 19). The loan was subsequently assigned to ECMC, the Defendant. The Debtor testified that he did not contact the Defendant about consolidating his loans into the William D. Ford Direct Loan Consolidation Program because the previous holder of the loans told him "they didn't do any loan consolidation, so I was assuming that [Defendant] didn't do it either, because it's the – it's the company that took over." (Tr. p. 29).

¹ The Debtor's pay advices (Debtor's Ex. 1) show that the State contributes approximately \$500.00 per year for State Health Insurance.

During a telephonic deposition, Julie Swedback, a senior attorney for the Defendant, testified that the Debtor has repayment options available in his current loan program, the FFEL Program, and the William D. Ford Direct Loan Consolidation Program (the “Ford Program”) (Def.'s Ex. 6, p. 15). Specifically, she stated that the Debtor is eligible for amortized fixed payments and an income based repayment (“IBR”) option that would base the Debtor's monthly payment obligation on his adjusted gross income (D.'s Ex. 6 p. 16), and that the monthly payments under the IBR program are recalculated every twelve months based on the borrower’s adjusted gross income from a federal tax return, family size, and HHS poverty guidelines. (Def.'s Ex. 6 pp. 18-19). The Debtor is also eligible for Public Service Debt Forgiveness, which would enable him to have the balance of his loan forgiven after ten years if he were to continue his present employment and make consecutive payments under the IBR. (Tr. p. 57).

Conclusions of Law

11 U.S.C. § 523(a)(8) provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

...

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for--

(A)(i) 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

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

11 U.S.C. § 523(a)(8).

“[C]ongress intended to make it difficult for debtors to obtain a discharge of their student loan indebtedness,” and therefore established “‘undue hardship’ as the only possible avenue for a debtor to obtain a discharge of student loan indebtedness.” In re Cox, 338 F.3d 1238, 1243 (11th Cir. 2003).

The term “undue hardship” contemplates unique, extraordinary, or severe circumstances. In re Mosley, 330 B.R. 832, 840 (Bankr. N.D. Ga. 2005), aff’d 494 F.3d 1320 (11th Cir. 2007). “More than a ‘garden variety’ of hardship is required to meet the high standard set forth in § 523(a)(8).” In re Brosnan, 323 B.R. 533, 538 (Bankr. M.D. Fla. 2005)(citing Lawson v. Sallie Mae, Inc., 256 B.R. 512, 518 (Bankr. M.D. Fla. 2000)).

In In re Cox, 338 F.3d at 1240, the Eleventh Circuit Court of Appeals adopted the standard for establishing “undue hardship” that had previously been set forth by the Second Circuit Court of Appeals in Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987).

The standard requires the application of a three-part test commonly known as the Brunner test:

[to establish “undue hardship,” the debtor must show] (1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

Brunner, 831 F.2d at 396.

The debtor has the burden of proving the existence of undue hardship by a preponderance of the evidence. In re Mosley, 330 B.R. at 840 (citing Grogan v. Garner, 498 U.S. 279, 291

(1991)). Each of the three elements of the Brunner test must be established. The “failure to prove any one element is fatal to the claim.” Mosley, 330 B.R. at 840 (internal citations omitted).

The Court has applied the three elements of the Brunner test to the Debtor's circumstances, and finds that the student loan obligations owed by the Debtor to the Defendant are not dischargeable under § 523(a)(8) of the Bankruptcy Code.

A. Current income and expenses

Under the first prong of the Brunner test, the Debtor must show that he “cannot maintain, based on current income and expenses, a ‘minimal’ standard of living if forced to repay the loans.” Brunner, 831 F.2d at 396.

To satisfy this prong, the Debtor must show that he cannot maintain a minimal standard of living on his present income, if he is required to make monthly or periodic payments on the student loans.

Although no exact formula exists for ascertaining a “minimal” standard of living, the *Brunner* test considers the debtor’s particular circumstances—such as the debtor’s stream of income, obligations, and any available debt-restructuring options. (Citation omitted.) “Courts generally require ‘more than temporary financial adversity, but typically stop short of utter hopelessness.’” (Citations omitted.) Under this prong of the *Brunner* test, the debtor is not required to live in poverty, but she is also not entitled to maintain her previous standard of living.

In re Matthews-Hamad, 377 B.R. 415, 421 (Bankr. M.D. Fla. 2007). In other words, “courts have held that ‘minimal’ does not mean ‘preexisting’ (i.e., the lifestyle the debtor has been living) or ‘comfortable,’ but also does not mean ‘reduced to poverty.’” In re Nixon, 453 B.R. 311, 327 (Bankr. S.D. Ohio 2011)(citing Educational Credit Management Corp. v. Stanley, 300 B.R. 813, 817-18 (N.D. Fla. 2003)).

In this case, the Debtor is sixty-one years old, single, and has no dependents. He has worked for the Florida Department of Health for the past seventeen years, and makes an annual salary of approximately \$33,000.00. Although this annual income is below the median income in Florida for a household of one, it is well above the 2011 poverty guidelines issued by the United States Department of Health and Human Services (\$10,890.00 for a family of one). (Def.'s Ex. 9). No evidence was presented that the Debtor has any health or medical condition that will prevent him from retaining his employment for the foreseeable future. Upon retirement, the Debtor will receive a pension and social security.

Debtor's Schedule J shows that the Debtor has a monthly income of \$2,260.89 and average monthly expenses of \$2,124.42. The primary monthly expense is his home mortgage payment in the amount of \$1,293.00 per month. (Transcript, pp. 15, 25). The scheduled value of the home is \$161,195.00, and the scheduled amount of the mortgage is \$149,741.74, so that it appears that the Debtor may have more than \$11,000.00 in equity in the property. Significantly, the Debtor testified that he purchased the home in approximately 2003, seven years after attending the Institute, and while the student loan was outstanding. (Transcript, pp. 25-26).

Additionally, the Debtor has not attempted to repay the debt or to restructure the debt under one of the available restructuring programs.

Under these circumstances, the Court finds that the Debtor has not satisfied his burden of proof with respect to the first prong of the Brunner test. Although the Debtor lives frugally, the evidence shows that he receives a creditable and stable income, has no dependents, and may have alternative methods available to him to reduce his expenses and pay his obligations. See In re Matthews-Hamad, 377 B.R. at 421. The Debtor has not show that he cannot maintain a minimal

standard of living on his present income if he is required to make monthly payments on the student loans.

B. “Likely to persist”

The second prong of the Brunner test requires the Debtor to show that “additional circumstances exist indicating that this state of affairs [the Debtor’s inability to maintain a minimal standard of living] is likely to persist for a significant portion of the repayment period of the student loans.” Brunner, 831 F.2d at 396.

Under Bruner, it appears that the second prong of the three-part test should be considered only if the first prong has been satisfied. The Court has found that the Debtor in this case did not meet his burden under the first prong. Nevertheless, the Court also finds that he would not be able to satisfy the second prong of the standard. In re Kuznicki, 2012 WL 567127, at 3 (Bankr. W.D. Penn.).

Under this prong, the Debtor must show that he has a condition that impairs his ability to work, and that the condition will persist for a significant portion of the loan repayment period. “Generally, courts focus on whether the debtor will be completely unable to pay his student loan debt in the future for reasons beyond his control.” In re Mosley, 330 B.R. at 842. (emphasis added). A finding under this prong “requires the presence of unique or extraordinary circumstances that would render it unlikely that the debtor would ever be able to honor his obligations.” In re Folsom, 315 B.R. 162, 165 (Bankr. M.D. Fla. 2004). The second factor is, “a demanding requirement, and necessitates that a “certainty of hopelessness” exists that the debtor will not be able to repay the student loans. Only a debtor with rare circumstances will satisfy this factor.” In re Frushour, 433 F.3d 393, 401 (4th Cir. 2005) (internal cites omitted).

The additional circumstances that the Debtor asks the Court to consider are that his diploma from the Florida Institute of Traditional Chinese Medicine has been rendered useless, and the fact that he is sixty-one years old.

The Debtor may be correct in his assertion that his diploma has been rendered useless because the institution he attended lost its accreditation. However, as the Seventh Circuit has determined:

[t]he decision of whether or not to borrow for a college education lies with the individual; absent an expression to the contrary, the government does not guarantee the student's future financial success. If the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow.

In re Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993).

Additionally, the fact that the Debtor is sixty-one years old is not determinative because he has not presented evidence of any age-related illnesses that would prevent him from working. See Jones v. Bank One Texas, 376 B.R. 130, 139 (W.D. Tex. 2007); Educational Credit Mgmt. Corp. v. Spence (In re Spence), 341 B.R. 825, 828 (Bankr. E.D. Va. 2006). Also, because the Debtor obtained the student loans when he was in his mid-forties, it was foreseeable that he would be repaying the loans later in life. Goforth v. U.S. Dept. of Educ., 2012 WL 798575, at 8 (Bankr. W.D.Penn.)

Further, the Debtor has not explored repayment options available in his current loan program, such as the FFEL Program, and the "Ford Program." The Debtor is eligible for amortized fixed payments and an income based repayment (IBR) option that would base his monthly payment obligation on his adjusted gross income. Additionally, although the repayment period is twenty-five years, the Debtor is eligible for Public Service Debt Forgiveness which

would enable him to have the loan forgiven if, for the next ten years, he were to work for the State of Florida and make consecutive payments under the IBR. Alternatively, if the Debtor did not continue his current employment for another ten years and his income were to decrease when he retires, the loan payments would be lowered under the IBR as payments are recalculated every twelve months based on the borrower's income.

Because these programs are available to the Debtor, and the Debtor has not explored these options, the Court does not find the “certainty of hopelessness” about his ability to repay the student loans, necessary to satisfy the second prong. Accordingly, the second prong of the Brunner test is not satisfied.

C. Good faith efforts to repay

Under the third prong of the Brunner test, the Debtor must show that he “has made good faith efforts to repay the loans.” Brunner, 831 F.2d at 396.

Generally, this prong measures a debtor's efforts to obtain employment, maximize income, minimize expenses, and participate in alternative repayment programs. In re Mosley, 330 B.R. at 847. A debtor's failure to pursue alternative repayment plans such as the Ford Program is not “a *per se* indicator of bad faith” but may be considered, in conjunction with other evidence, in determining whether a debtor has made good faith efforts to repay the student loan debt. In re Burton, 339 B.R. 856, 888 (Bankr. E.D. Va. 2006).

Because the evidence does not indicate that the Debtor has made meaningful attempts to repay the loans, the Debtor has not satisfied the third prong of the Brunner test.

There is no evidence that the Debtor has made any payments on the loans, although they were incurred from 1994 to 1996. The Debtor finished the courses at the FITCM in 1997, fifteen

years ago. There is no explanation of the efforts made to use the education following completion of the courses and until the school lost its accreditation. The Debtor purchased a home in 2003, and there is no explanation of the circumstances at the time of the purchase. Although in the months before filing this bankruptcy case the Debtor did attempt to negotiate a lower payment with the prior holder of the loans, those negotiations were not successful, and the Debtor did not attempt to negotiate a lower payment or utilize one of the other repayment options with the Defendant in this case. (Tr. p. 29).

A debtor's obligation to make 'good faith' efforts to repay his [or her] educational loans is not extinguished with the filing of an adversary proceeding in bankruptcy. Since filing bankruptcy, Plaintiff has not tendered a payment on her student loans nor has she attempted to negotiate a lower loan payment. Therefore, Plaintiff does not meet prong three of the *Brunner* test.

Brosnan, 323 B.R. at 539 (citations omitted).

Unlike the debtor in Brosnan who had paid over \$54,000 of her student loan debt, there is no evidence that the Debtor in this proceeding has made any payments toward the student loans since obtaining them in 1994-1996. Clearly, this is not indicative of the Debtor having made good faith efforts to repay. The Debtor also testified that he did not make any efforts to consolidate his student loans into the Ford Program since the filing of his petition. (Tr. p. 28).

Under these circumstances, the Court finds that the Debtor did not make the good faith efforts to repay his student loan obligations that are necessary to satisfy the third prong of the Brunner test. See Brosnan, 323 B.R. at 538-39; Folsom, 315 B.R. at 165-66.

Conclusion

The Debtor has not satisfied the burden of proof in this proceeding. Although his current lifestyle is frugal, he did not show that he will be unable to maintain a minimal standard of living

if he is forced to repay the loans, that additional circumstances exist that will make the Debtor unable to pay the loans in the future, or that he has made a good faith effort to repay the loans.

Consequently, the student loans owed by the Debtor to the Defendant are not dischargeable pursuant to 11 U.S.C. § 523(a)(8). The Court will enter a separate judgment in favor of the Defendant.

Dated this 16 day of April, 2012, in Jacksonville, Florida.

BY THE COURT

Paul M. Glenn

Paul M. Glenn
United States Bankruptcy Judge