UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

BERNADETTE MARIE DILIBERTO, Case No.: 3:11-bk-2757-JAF
Chapter 13

Debtor.
_____/

ORDER GRANTING TRUSTEE'S MOTION TO DISMISS DEBTOR'S CHAPTER 13 CASE AND EXTENDING THE EFFECTIVE DATE TO ALLOW FOR DEBTOR'S CONVERSION TO ANOTHER CHAPTER

This case is before the Court on the Chapter 13 Trustee's Motion to Dismiss the Debtor's Case (Doc. 13, the "Motion to Dismiss"). A final evidentiary hearing was held on April 19, 2012. The Debtor appeared at the hearing and testified. At the conclusion of the hearing, the parties were given an opportunity to file post-hearing briefs. Such briefs having been filed (Docs. 125, 129), the matter is now ripe for the Court's determination. For the reasons set forth below, the Motion to Dismiss will be granted as provided herein.

This Chapter 13 case was filed on April 15, 2011 (Doc. 1). In Schedule F of the voluntary petition, the Debtor listed unsecured obligations in the aggregate amount of $497,251.00 (Doc. 1 at 7, 18-27). The Debtor did not designate any of these debts as contingent, unliquidated, or disputed (*id*.). Approximately $468,825.00 of the Debtor's unsecured debt was scheduled as student loan debt (Doc. 1 at 18-27).

11 U.S.C. § 109(e) governs who may be a debtor under Chapter 13 of the Bankruptcy Code.[1] This provision provides: "[o]nly an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $360,475 . . . may be a debtor under chapter 13 of this title."[2]

Section 109(e) provides that the eligibility computation is to be determined as of the petition date. "Based on § 109(e)'s plain language, courts calculate such debts as of the petition date." *In re De La Hoz*, 451 B.R. 192, 197 (Bankr. M.D. Fla. 2011). In addition, the majority view is that a debtor is ineligible for Chapter 13 relief where the debtor's schedules, on their face, reflect debts that exceed the applicable § 109(e) limitations. *See, e.g.*, *In re Grew*, 278 B.R. 619, 620-22 (Bankr. M.D. Fla. 2002); *In re Murphy*, 374 B.R. 73, 75-78 (Bankr. W.D.N.Y. 2007); *In re Hansen*, 316 B.R. 505, 506-10 (Bankr. N.D. Ill. 2004). While the Debtor may find the aforementioned case law interpreting the applicability of § 109(e) to be "nothing short of irritating" (Doc. 129 at 2), the Court finds such case law to be persuasive.[3]

As noted above, in Schedule F of the Debtor's Chapter 13 petition she listed unsecured obligations in the aggregate amount of $497,251.00 (Doc. 1 at 7, 18-27). None of these debts were designated as contingent, unliquidated, or disputed (*id*.). Part of the reasoning behind the majority view, *supra*, is that "debtors should expect to be bound by the representations they make in their schedules (regarding the amount of the debt or whether the debt is noncontingent

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[1] Unless otherwise indicated, all references to the "Bankruptcy Code" or "Code" are to 11 U.S.C. § 101 *et seq*.

[2] Under 11 U.S.C. § 104(b), the § 109(e) debt limits are adjusted every three (3) years to reflect changes in the cost of living.

[3] The Eleventh Circuit Court of Appeals has not directly addressed the scope of the Court's review in determining a debtor's eligibility for Chapter 13 relief; therefore, there is no binding precedent on the issue. *See In re De La Hoz*, 451 B.R. at 200.

and liquidated), particularly considering those representations are made under the penalty of perjury." *In re De La Hoz*, 451 B.R. at 201.

Subsequent to filing her petition, the Debtor initiated several adversary proceedings against her student loan lenders, seeking to have her student loan debt(s) excepted from the exception to discharge provisions of 11 U.S.C. § 523(a)(8). Pursuant to one or more of these adversary proceedings, the Debtor reached a settlement agreement wherein one of her lenders agreed to reduce the principal balance of certain student loan(s) held by it by approximately $20,000.00 (*see* Doc. 129 at 8-10, 20-23; *see also* Doc. 1 at 18-19; Doc. 119 at 7). The Debtor asserts, *inter alia*, that this post-petition reduction in her student loan debt should be considered in calculating her eligibility for Chapter 13 relief (Doc 129 at 8-10, 19-21).

The Debtor, however, cites no authority for the proposition that a debtor may schedule unsecured debts in excess of the § 109(e) limitations and then have the Court recalculate such debts pursuant to a post-petition settlement agreement. *See Comprehensive Accounting Corp. v. Pearson (In re Pearson)*, 773 F.2d 751, 756 (6th Cir. 1985) ("Congress did not intend that a determination of Chapter 13 eligibility be delayed until the case has substantially progressed. Post-petition events should not be considered because they often occur 'after the debtor and other parties in interest have expended relatively large amounts of time, money, and effort toward the debtor's reorganization'"); *see also In re Hansen*, 316 B.R. at 509 (noting post-petition changes to debt are irrelevant under a § 109(e) analysis).

The Debtor additionally posits that her amended schedules (Doc. 119), which reflect a reduction in her unsecured debt due to the outcome of the aforementioned litigation, should "relate back" to the petition date and make her eligible for Chapter 13 relief "*nunc pro tunc*"

(Doc. 129 at 8-10). The case the Debtor cites in support of this novel approach, however, is inapposite. Specifically, the Debtor cites a Florida Third District Court of Appeal case wherein the court found an agreement in accord and satisfaction of a debt discharged the underlying contractual obligation. *Martinez v. South Bayshore Tower, L.L.L.P.*, 979 So.2d 1023 (Fla. 3d DCA 2008). This non-bankruptcy case speaks only to state law contract theories with respect to the impropriety of initiating litigation after accepting monies in an accord and satisfaction of an underlying contract claim—it does not address § 109(e)'s eligibility requirements.

Another novel argument proposed by the Debtor is that, since she presently qualifies for the federal government's student loan income based repayment ("IBR") program,[4] her underlying federal student loan obligations are now contingent and unliquidated (Doc. 129 at 19; *see also* Doc. 119 at 19).[5] In support of her argument in this regard, the Debtor maintains federally-backed student loan debt(s) can never be noncontingent, or liquidated, because of the availability of the IBR program, which renders the ultimate amount to be repaid by the borrower "depend[ant] on future occurrences" (Doc. 129 at 14). Such future occurrences include, *inter alia*: (1) the borrower meeting the IBR income requirements (annually) for twenty-five (25) years; and (2) the borrower making all required payments under the IBR plan. *See* 20 U.S.C. § 1098e.

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[4] Under the College Cost Reduction Act of 2007, 20 U.S.C. § 1078 *et seq.*, a borrower who has a "partial financial hardship," as defined by the statute, qualifies for the IBR program and has reduced monthly loan payments. Under the IBR program, the borrower's eligibility is assessed annually. If the borrower continues to qualify for the IBR program, and makes the required monthly payments, any remaining balance on such loans under the program will be forgiven after twenty-five (25) years.

[5] The Debtor's original Schedule F did not designate any of her student loan debt(s) as contingent or unliquidated (Doc. 1 at 18-27). In Debtor's amended Schedule F, however, she now designates her aggregate federal student loan debt of $134,083.00 as being contingent and unliquidated (Doc. 119 at 10).

The Bankruptcy Code defines a "debt" as a liability on a claim. 11 U.S.C. § 101(12). A "claim" is a right to payment. 11 U.S.C. § 101(5)(A). "Reading sections 101(12) and 101(5) coextensively, the term 'debt' refers to any obligation capable of enforcement against the debtor." *Morgan v. Musgrove (In re Musgrove)*, 187 B.R. 808, 811-12 (Bankr. N.D. Ga. 1995). A debt is contingent if it does not become an obligation to make payment until the occurrence of a future event. *In re Murphy*, 374 B.R. at 76. A debt is noncontingent when all the events giving rise to the liability have occurred prior to the debtor filing bankruptcy. *Id*.

Here, the Debtor's liability for her student loan debt(s) arose when she signed the attendant promissory note(s) and accepted the loan proceeds; therefore, the Debtor's obligation(s) for the underlying debt(s) are enforceable against her. *See, e.g., In re Silva*, Case No. 10-60077 CN, 2011 WL 5593040, at *3 (Bankr. N.D. Cal. Nov. 16, 2011) (noting the debtors' liability for the debt arose when the promissory note was signed).

Further, a debt is liquidated where the claim is readily determinable by reference to an agreement or by a simple computation. If the amount of the creditor's claim at the time of filing the petition is ascertainable or calculable with certainty, then it is liquidated for the purposes of § 109(e). *United States v. Verdunn*, 89 F.3d 799, 802 (11th Cir. 1996). With respect to an obligation on a student loan, the underlying debt can be readily calculated based on the agreement of the parties, as provided in the promissory note(s). *See id.* at n.12 ("[e]xamples of liquidated claims are claims upon promises to pay a fixed [or determinable] sum, [and] claims for money paid out . . .").

> A liquidated debt is that which has been made certain as to amount due by agreement of the parties or by operation of law. Therefore, the concept of a liquidated debt relates to the amount of liability, not the existence of liability. [. . .] If the amount of the debt is dependent, however, upon a future exercise

> of discretion, *not restricted by specific criteria*, [then] the claim is unliquidated.

Id. at 802 (emphasis added) (internal quotations and citations omitted). Thus, even if the Court were to accept Debtor's argument that the amount she may ultimately be required to repay depends upon a future exercise of the federal government's discretion under the IBR program, any such discretion is restricted by the criteria specified in 20 U.S.C. § 1098e, *supra*. Consequently, the Debtor's liability on her federal student loans is not unliquidated. Again, the Debtor cites no authority for the proposition that the federal government's IBR program makes student loan debt(s) either contingent or unliquidated, and the Court is aware of none.

Since the Debtor's argument that the IBR program renders her federal student loan debt contingent and unliquidated fails, even the Debtor's amended schedules, on their face, reveal she is ineligible for Chapter 13 relief. Specifically, the Debtor lists unsecured debts in the aggregate amount of $363,156.51 ($354,258.86 in unsecured nonpriority claims and $8,897.65 in unsecured priority tax claims) (Doc. 119 at 1, 5-11). As noted previously, only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $360,475 may be a debtor under Chapter 13 of the Code. 11 U.S.C. § 109(e).

While the Debtor, on her amended schedules, now designates several debts as disputed (Doc. 119 at 7-12), the majority view is that the mere fact the amount of or liability on a claim is disputed is not sufficient to render any such claim "unliquidated" when determining eligibility

for relief under Chapter 13. *See Verdunn*, 89 F.3d at 802 n.9.[6] Consequently, the Court will not exclude these "disputed" amounts in calculating the Debtor's eligibility for Chapter 13 relief.[7]

Based on the foregoing, it is **ORDERED**:

1. The Chapter 13 Trustee's Motion to Dismiss the Debtor's case (Doc. 13) is granted as provided herein.

2. The Debtor is not eligible for Chapter 13 relief.

3. The debtor has fourteen (14) days from the date of this Order within which to convert this case to one under either Chapter 7 or Chapter 11.

4. If no conversion occurs, or if no motion for conversion is filed, within the specified time, *supra*, the Court will enter an order dismissing the case.

DATED this 5th day of June, 2012 in Jacksonville, Florida.

/s/ Jerry A. Funk
Jerry A. Funk
United States Bankruptcy Judge

Copies to:
Brett A. Mearkle, Attorney for Debtor
Douglas W. Neway, Chapter 13 Trustee

[6] Although the Eleventh Circuit did not address specifically the issue of including disputed debts in the calculation of § 109(e)'s eligibility requirement(s), from the inclusion of footnote 9 in the context of the opinion, it appears the Eleventh Circuit agrees that disputed debts are to be included in any such eligibility calculation. *See also Vaughan v. Central Bank of the South* (*In re Vaughan),* 36 B.R. 935, 939 (N.D. Ala. 1984), *aff'd Vaughan v. Central Bank of the South*, 741 F.2d 1383 (11th Cir. 1984) (noting that to allow debtors to exclude disputed claims from the section 109(e) calculation would encourage debtors to dispute claims merely in order to come within the eligibility limits).

[7] The Court would note that the Debtor brought proposed amendments to her schedules to trial, and only after the final evidentiary hearing did she formally amend her schedules (*see* Doc. 119). In addition, the Debtor's amendments were filed more than one year after the petition date. Debtor's counsel had a duty to diligently research the Chapter 13 eligibility requirements prior to advising the Debtor to file for Chapter 13 relief. *See Healy v. Macaluso (In re Healy)*, Case No. 04-28375, 2006 WL 6810949, at *6 (9th Cir. BAP Aug. 22, 2006).