United States Bankruptcy Court
District of New Mexico

Document Verification

Case Title: **Lois Detwiler v. New Mexico Educational Assistance Founda**
Case Number: **99-01105**
Nature of Suit:
Judge Code: **S**
Reference Number: **99-01105 - S**

Document Information			
Number: 29			
Description: Findings of Fact and Conclusions of Law Re: [1-1] Complaint to Determine Dischargeability of Debt and for Violation of 11 USC 524 .			
Size: 12 pages (26k)			
Date Received: 04/17/2000 11:51:19 AM	**Date Filed:** 04/17/2000	**Date Entered On Docket:** 04/19/2000	

Court Digital Signature View History

a7 61 6e d4 6d 6a 0b 3f da 3e 22 e5 f2 17 1f cf 21 9b 52 32 00 6c 8a 89 ec 75 d5 8d 17 56 54 aa 20 5c a6 6a b0 f9 22 ed 47 f8 4a 6b 3c 61 8c 8c 9b bf f7 ab 2c 0d 42 0d 8a b6 8c 54 7b ec ab ae b2 d8 e6 fd 24 99 5d 53 b2 23 41 34 7b f7 44 33 cb 6e 91 fb 01 fd 97 58 5b 75 ce f0 17 82 4b 9f 5a a9 6f f5 72 72 7b 55 b3 f2 3e 73 02 9a 18 79 4b 88 50 1b 28 55 92 5f c6 4a cb fe 51 27 b0 4b

Filer Information

Submitted By:
Comments: Findings of Fact and Conclusions of Law

Digital Signature: The Court's digital signature is a verifiable mathematical computation unique to this document and the Court's private encryption key. This signature assures that any change to the document can be detected.

Verification: This form is verification of the status of the document identified above as of *Wednesday, December 22, 2004*. If this form is attached to the document identified above, it serves as an endorsed copy of the document.

Note: Any date shown above is current as of the date of this verification. Users are urged to review the official court docket for a specific event to confirm information, such as entered on docket date for purposes of appeal. Any element of information on this form, except for the digital signature and the received date, is subject to change as changes may be entered on the Court's official docket.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
LOIS E. DETWILER,
Debtor. No. 7-96-14395 S

LOIS DETWILER,
Plaintiff,
v. Adv. No. 99-1105 S

NEW MEXICO EDUCATIONAL
ASSISTANCE FOUNDATION,
Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came before the Court for trial on the merits of Plaintiff's complaint to determine dischargeability of debt pursuant to 11 U.S.C. § 523(a)(8). Plaintiff appeared through her attorney Michael Daniels. Defendant appeared through its attorney Reginald Storment. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

FACTS

1. Plaintiff attended the University of New Mexico from 1981 to 1985 and obtained a Bachelors of University Studies.
2. Plaintiff had a number of forbearance and deferral agreements due to periods of unemployment and low paying jobs.
3. In August 1995 plaintiff obtained a consolidation loan for her debt to defendant in the amount of $6,917.00.

4. Plaintiff filed a pro se chapter 7 petition on October 8, 1996. This was a no asset case. Discharge was entered on February 3, 1997.

5. At the time of trial plaintiff was 68 years old. She now lives in Troy, New York. She has two part-time telemarketing jobs, one at $7.00 per hour and one at $8.00 per hour, and earns between $500 and $550 per month. This employment started about three months before trial.

6. Plaintiff was expected to have both eye surgery and knee replacement surgery shortly after trial. She estimated that recuperation would take three months and involve a great deal of physical therapy. She hopes to continue working.

7. Plaintiff receives social security of approximately $633 per month.

8. In 1997 plaintiff inherited approximately $64,000, receiving $5,000 in July 1997, $35,000 in November 1997, and $24,000 several months later.

9. At the time, plaintiff believed that the debt owed to defendant was discharged in her Chapter 7 proceeding. In the spring of 1997 she was informed by the former attorney for defendant that her debt had not been discharged by her chapter 7 proceeding.

10. Sometime in 1997 plaintiff purchased a house in Mountainair, New Mexico for $35,000. She paid $5,000 down. Plaintiff

could not recall on cross examination whether she was aware of defendant's claims at the time she contracted to buy this house. In any event, she was aware of the claim when she paid off the balance of $30,000 in November 1997. This house is currently vacant, and listed for sale at $42,000. The house was originally listed at $46,000, and altogether has been listed for over one year with no offers, despite the improvements that plaintiff made on the property.

11. Plaintiff filed this adversary proceeding on June 2, 1999.

12. In July 1999 plaintiff purchased a house in Troy, New York for $60,000, paying $24,000 down (the balance of her inheritance) and financing $36,000. The contract calls for payments of $264. Taxes on the Troy house are about $3,000 per year. This house is a three-family house, and plaintiff currently rents it for $800 per month. The financing contract calls for a balloon payment of $36,000 in July 2001. Plaintiff testified that she made this purchase as an investment, hoping to add about $300 a month to her net income.[1]

13. Currently, plaintiff's gross income is approximately $525 from employment, $633 social security, and $800 rents.

---

[1]Currently the net rental income is approximately $300 ($800 less $264 payment less $250 taxes). After July 2001, however, the net will rise by the $264.

14. Plaintiff testified that her expenses are about $1,464 per month. Although plaintiff had been working for about three months at her jobs, the approximate $1,500 she had earned was gone, so plaintiff estimated that the $1,464 monthly expense estimate was actually too low.

15. The parties stipulated that for the purposes of this case the Court need not decide this case as an "all or nothing" discharge issue, but could fashion an equitable remedy in the event that an "all or nothing" decision would not be equitable. See, e.g., Griffin v. EDUSERV (In re Griffin), 197 B.R. 144, 147 (Bankr. E.D. Ok. 1996). The Court expressly makes no finding that an equitable approach is authorized by the statute, whether with or without the consent of either the debtor or the creditor.

16. In closing argument, defendant stated it was willing not to accrue additional interest on the loan, if it could obtain a lien on the Mountainair property.

CONCLUSIONS OF LAW

The Statute

Section 523(a)(8) provides that a discharge does not discharge an individual for any debt –

> for an educational ... loan made, insured or guaranteed by a government 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.

This statute must be viewed in the light of congressional policy that student loans should not be discharged except in rare circumstances. Griffin, 197 B.R. at 147. This policy is further evidenced by the elimination in 1998 of the seven-year discharge provision under former law. See Kopf v. United States Department of Education (In re Kopf), 245 B.R. 731, 735 n. 7 (Bankr. D. Me. 2000).

Tests for "Undue Hardship"

In Woodcock v. Chemical Bank, NYSHESC (In re Woodcock), 45 F.3d 363, 367-68 (10th Cir.), cert. denied 116 S.Ct. 97 (1995), the Court of Appeals for the Tenth Circuit affirmed (with little discussion) the Bankruptcy and District Courts' application of three tests for a determination of undue hardship under section 523(a)(8).[2] Those tests were the "mechanical test", as set forth in Craig v. Pennsylvania Higher Educ. Assistance Agency (In re Craig), 64 B.R. 854, 856 (Bankr. W.D. Pa.) *appeal dismissed* 64 B.R. 857 (W.D. Pa. 1986); the "good faith and policy test", as set forth in North Dakota State Bd. of Higher Educ. v. Frech (In re Frech), 62 B.R. 235, 241, 244 n.9 (Bankr. D. Mn. 1986); and

[2] The Court has previously adopted and discussed the tests set out in Woodcock in Shay v. NM Educational Assistance Foundation, Adv. 99-1021 (Bankr. D. N.M. Jan. 18, 2000).

the "objective test", as set forth in In re Bryant, 72 B.R. 913, 915-16 (Bankr. E.D. Pa. 1987). In Woodcock, the debtor was found not to meet the tests for discharge of his student loans. Woodcock, 45 F.3d at 367-68. The Tenth Circuit did not, however, address the issue of whether meeting all three tests was necessary, or whether satisfaction of one test would allow discharge. Nor did the Tenth Circuit expressly limit future decisions to only these three tests.

Currently, four different Circuit Courts of Appeals have adopted a test set forth in Brunner v. New York State Higher Education Services Corp. (In re Brunner), 831 F.2d 395 (2nd Cir. 1987): the Second, Third, Seventh, and Ninth. Kopf v. United States Department of Education (In re Kopf), 245 B.R. 731, 739 (Bankr. D. Me. 2000)(detailed survey of various tests). In Brunner, 831 F.2d at 396, the Court announced the following test:

> "Undue hardship" requir[es] a three part showing: (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.

Two other circuits have adopted a "Totality of the Circumstances Test": the Sixth and Eighth. Kopf, 245 B.R. at 739. This test involves:

> an analysis of (1) the debtor's past, present, and reasonably reliable future financial resources; (2) calculation of the debtor's and his dependent's reasonably necessary living expenses; and (3) any other relevant facts and circumstances surrounding that particular bankruptcy case.

Id.

In a prior New Mexico case, Judge Rose cited the Brunner, Bryant, and In re Johnson[3], 5 B.C.D. 532 (E.D. Pa. 1979) tests as the three leading tests for determining §523(a)(8) issues. Garcia v. New Mexico Student Loan Guarantee Fund, Adv. No. 96-1317R (Bankr. D. N.M. Aug. 9, 1999).

Application of the tests

1. Mechanical Test.

In Craig, 64 B.R. at 857, the Court set forth the mechanical test as:

> Will the Debtor's future financial resources for the longest foreseeable period of time allowed for repayment of the loan, be sufficient to support the Debtor and her dependent at a subsistence or poverty standard of living, as well as to fund repayment of the student loan?

(Citing In re Johnson, 5 B.C.D. 532 (E.D. Pa. 1979)).

In this case, the debtor currently has a budget that is balanced, without payment of the student loan. She has, however, a substantial asset in the form of the Mountainair house. It is foreseeable that she will sell this house and, while she needs a

[3]In In re Johnson 5 B.C.D. 532 the Court used a combination of three tests: "undue hardship", "mechanical" and "good faith".

portion of the proceeds to pay off the upcoming balloon payment on her New York property, will have the funds to repay the loan without impacting on her budget. The debtor fails the mechanical test.

2. Good Faith and Policy Test.

The Frech Court, cited by the Tenth Circuit in Woodcock, described the good faith and policy test as two separate tests. First, it described the "good faith test" as a showing by the debtor that he is actively minimizing current household living expenses and maximizing his personal and professional resources. 62 B.R. at 241. Then, if so, the "policy test" would apply:

> The Court must determine whether allowing discharge of a given educational loan would constitute the abuse of bankruptcy remedies with which Congress was concerned. Basically, the Court must determine the relative magnitude of the debtor's educational loan obligations as a component of his or her total debt structure, and in conjunction must consider the personal, professional, and financial benefit which the debtor has derived and will derive from the education financed by the loans in question.

Id.

The debtor does not meet this test for two reasons. First, under the good faith portion of the test the debtor would need to demonstrate she is maximizing resources in an attempt to pay the loan. The Court finds that this would include utilizing the equity in the Mountainair house, which the debtor has not offered to do. Then, even if the good faith portion were met, the Court

finds that, given the small amount of the loan in relation to her obligation on the New York house (which was incurred after filing this complaint to determine dischargeability), it would not be consistent with stated congressional policy to discharge the debt. The Court finds that the benefits derived and to be derived from the loan are not particularly relevant in this case, partially due to the fact that debtor is on the verge of retirement. The debtor does not meet this test.

3. The Objective Test.

In Bryant, the United States Bankruptcy Court for the Eastern District of Pennsylvania constructed an "objective test" for determining dischargeability of student loan obligations. 72 B.R. at 913. This test is "objective" because it is tied to federal poverty guidelines:

> "Undue hardship" exists (1) Where the debtor has net income which is not substantially greater than federal poverty guidelines, because a debtor so living perforce is unable to maintain a minimal standard of living and make payments on student loans; or (2) Where the debtor has income substantially above the aforesaid poverty guidelines, but there is a presence of "unique" or "extraordinary" circumstances which render it unlikely that the debtor will be able to repay his or her student loan obligations.

Id.

As discussed above under the mechanical test, the Court finds that it is likely that debtor will be able to repay her student loan obligation. The debtor therefore also does not satisfy the objective test.

4. The Brunner Test.

The Court finds the Brunner test particularly persuasive in this case. First, the Court finds that the debtor can maintain, based on current income and expenses, a "minimal" standard of living for herself if forced to repay the loan out of the proceeds of the Mountainair house. Second, there are no additional circumstances that indicate that the debtor will not be able to maintain a minimal standard of living; indeed, the evidence appears to be that debtor's standard of living will improve with the sale of the Mountainair property.

Third, the Court does not find that debtor made a good faith effort to pay the loan. It is true that she was in repayment for many years, but she also had many deferments. More to the point, plaintiff presented no evidence at trial about efforts to work with defendant to develop a consensual repayment program. If the debtor asserts that she cannot repay the loan as owed, then it is incumbent on the debtor, in most instances prior to filing her bankruptcy petition, to attempt to obtain a restructuring of the loan so that it can be paid.[4] That restructuring can include deferrals, forgiveness of some or all of the fees, interest or

[4] The Court is not saying that a debtor's efforts to renegotiate must be successful, only that under this prong of the Brunner test, the debtor must demonstrate a genuine good faith effort to reach agreement with the creditor on a workable repayment plan.

principal, moratoria, and any number of other arrangements which the parties may devise. Here, there was no evidence whatever of plaintiff attempting to work out an overall agreement with defendant, even prior to initiating this adversary proceeding. Given the structure of Section 523(a)(8) and the congressional policy concerning student loans, the burden of coming forward with this evidence and the burden of persuasion on this issue is plaintiff's to carry. And significantly in this case, plaintiff failed to pay or negotiate a settlement when she inherited $64,000 in 1997.

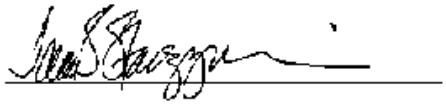
5. Totality of Circumstances.

The debtor's future financial resources will allow repayment of this loan without undue hardship when she sells the Mountainair house.

Conclusion

For the reasons set forth above, the Court will enter judgment in favor of defendant, declaring the principal of the student loan together with interest accrued through the date of the trial nondischargeable. Defendant of course is not precluded from filing a lien on the Mountainair property based on this judgment. Once the Mountainair house sells, interest will begin to accrue again on any balance that remains unpaid.[5]

[5] In so ruling, the Court is not suggesting that plaintiff should not have purchased the Troy property in order to assure



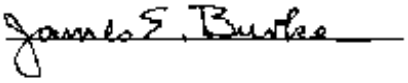
Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the listed counsel and parties.

Mr. Michael Daniels
Attorney At Law
P. O. Box 1640
Albuquerque, NM 87103

Mr. Reginald Storment
Attorney at Law
P.O. Box 27020
Albuquerque, NM 87125-7020

Office of the United States Trustee
PO Box 608
Albuquerque, NM 87103-0608



herself an income stream. And in closing argument defendant did not suggest otherwise. What the Court is ruling, however, is that plaintiff's efforts to provide herself with a continuing income stream do not override her obligation to repay the student loans.