THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	CASE NO. 98-52612
ERIK EDWARD STAUB	)	
Debtor	)	CHAPTER 7
	)	
	)	ADV. NO. 98-5132
	)	
	)	JUDGE MARILYN SHEA-STONUM
ERIK EDWARD STAUB	)	
Plaintiff	)	**ORDER DENYING**
	)	**PLAINTIFF'S MOTION FOR**
v.	)	**DEFAULT JUDGMENT AND**
	)	**ALLOWING NEW YORK**
SALLIEMAE-FL	)	**STATE HIGHER EDUCATION**
Defendant	)	**SERVICES CORPORATION**
	)	**TO INTERVENE IN THE WITHIN**
	)	**ADVERSARY PROCEEDING**

This matter came before the Court on the plaintiff-debtor's "Motion for Default Judgment," which was filed on October 23, 1998 (the "Motion") and New York State Higher Education Services Corporation's ("NY-HESC") "Response and Memorandum in Opposition to Debtor's Motion for Default Judgment," which was filed on November 6, 1998 (the "Response"). This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the pleadings and for the reasons set forth below, the Court determines that the Motion is not well taken.

FACTS

On August 21, 1998, the plaintiff-debtor filed a voluntary chapter 7 bankruptcy petition. On August 28, 1998, the plaintiff-debtor initiated the within adversary proceeding by filing a complaint against SallieMae-FL, the lender on his student loans. In that complaint, the plaintiff-debtor alleged that his educational loans with SallieMae-FL were dischargeable pursuant to 11 U.S.C. §523(a)(8)(A).

NY-HESC is the guarantor to the lender on the plaintiff-debtor's student loan obligations and the assignee of the lender's claims against the plaintiff-debtor for non-payment. In an apparent response to the complaint against SallieMae-FL, the plaintiff-debtor's counsel received a letter from NY-HESC dated September 14, 1998 and signed by a legal assistant in NY-HESC's office of counsel. That letter stated that NY-HESC's records showed plaintiff-debtor's loan as becoming due more than seven (7) years prior to his chapter 7 filing and indicated that NY-HESC would be willing to sign a stipulation that the loan was dischargeable in bankruptcy. By letter dated September 21, 1998, plaintiff-debtor's counsel forwarded a stipulation as to dischargeability of the loan to NY-HESC's office of counsel. That stipulation was never signed by NY-HESC.

NY-HESC alleges that its September 14th letter was sent in error because, at the time of mailing, the office of counsel did not have accurate information regarding certain deferments of the plaintiff-debtor's loan. *See* Docket #10 - Affidavit of James Clancy. NY-HESC also alleges that, after learning of the error, it contacted plaintiff-debtor's counsel by telephone to relay the newly learned information about deferments and to discuss whether the plaintiff-debtor might be eligible for a hardship discharge of his student loans. *See* Docket #9 - Response at unnumbered pg. 3. NY-HESC claims that on October 2, 1998, it sent interrogatories to the plaintiff-debtor to determine whether he might be eligible for such hardship discharge. *See* Docket #9 - Response at unnumbered pg. 3. NY-HESC also claims that the plaintiff-debtor's counsel informed it that his client would not respond to those interrogatories. *Id.*

An answer was never filed in this adversary proceeding and, on October 23, 1998, plaintiff-debtor filed the Motion. On October 28, 1998, NY-HESC filed a "Motion to Intervene and for Leave to File Answer and Response to Debtor's Motion for Default Judgment." The first scheduled pre-trial in this matter was held on October 28, 1998, at which time counsel for both the plaintiff-debtor and NY-HESC appeared.[1]

DISCUSSION

In determining whether to grant or deny a motion for default judgment, a court should consider the same factors which it considers in determining whether to set aside default entries or default judgments pursuant to Fed. R. Civ. P. 55(c) and 60(b). These factors are (1) whether the plaintiff will be prejudiced if default relief is not granted; (2) whether the defendant has a meritorious defense; and (3) whether the defendant's culpable conduct led to its failure to plead or otherwise defend. *United Coin Meter Company, Inc. v. Seaboard Coastline R.R.*, 705 F.2d 839, 844 (6th Cir. 1983). Any doubt should be resolved in favor of the defendant so that cases may be decided on their merits. *Rooks v. American Brass Co.*, 263 F.2d 166, 169 (6th Cir. 1959) (per curiam).

Prejudice to the Plaintiff-Debtor: In the case at bar, it does not appear that the plaintiff-debtor will be prejudiced if the Motion is not granted. The plaintiff-debtor's ability to pursue his claim has not been hindered since the necessary evidence in this matter should still be readily available through customary discovery procedures. Also, the plaintiff-debtor does not appear to have expended any substantial amount of time or money in pursuing this matter as only a perfunctory complaint was filed to initiate this proceeding and only one pre-trial conference (in which NY-HESC also participated) has been held.[2] Although progression of this adversary proceeding may have been slightly postponed, a mere delay in satisfying a plaintiff's claim is not sufficient prejudice to justify granting the Motion. *Berthelsen v. Kane*, 907 F.2d 617, 621 (6th Cir. 1990); *United Coin Meter Company, Inc. v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983).

Meritorious Defense: In its proposed answer, NY-HESC has advanced what could prove to be a meritorious defense as 11 U.S.C. §523(a)(8)(A) provides that the seven (7) year period used in measuring the dischargeability of student loans is "exclusive of any applicable suspension of the repayment period." *See* Docket #9 - Response at unnumbered pages 10 and 11. If the alleged suspensions of the repayment period are

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1 At the conclusion of the October 28, 1998 pre-trial, NY-HESC's motion to intervene was partially granted for the limited purpose of allowing NY-HESC to respond to the Motion.

2 It should also be noted that, despite the fact that the plaintiff-debtor learned of NY-HESC's relationship to the student loans at issue shortly after his complaint was filed, the complaint has never been amended to name NY-HESC as necessary and/or dispensable party.

proved in this case then 11 U.S.C. §523(a)(8)(A) would not be applicable in this adversary proceeding. If the defense to be relied upon states a defense that is good at law, then a meritorious defense for purposes of evaluating default judgment has been advanced. *United Coin Meter Company, Inc. v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983).

Culpable Conduct: Finally, it does not appear that NY-HESC's culpable conduct led to its failure to plead or otherwise defend. "To be treated as culpable, the conduct of a defendant must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings." *Shepard Claims Service, Inc. v. William Darrah & Assoc.*, 796 F.2d 190, 194 (6th Cir. 1986). Although NY-HESC initially represented that the plaintiff-debtor's student loans were dischargeable, its collective actions in pursuing this matter do not appear to have been tainted with bad faith. For example, when NY-HESC initially believed that this adversary proceeding might be resolved by stipulation, it proposed the submission of an agreed to the Court. Also, when NY-HESC learned of possible deferments, it contacted plaintiff-debtor's counsel to relay that information and to discuss the possibility of a hardship discharge. Such conduct by NY-HESC does not point to an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings.

CONCLUSION

Based upon the foregoing, the Court finds that default judgment is inappropriate and that this matter should be decided on its merits. **THEREFORE, IT IS HEREBY ORDERED:**

1. That the Motion is denied;
2. That NY-HESC's Motion to Intervene and for Leave to File an Answer is granted;
3. That NY-HESC's Answer shall be filed on or before November 23, 1998; and
4. That the adjourned pre-trial, currently scheduled for November 18, 1998 at 2:30 p.m., shall go forward.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 11/16/98