THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE ELAINE MARLEEN VELKA DEBTOR	)	CASE NO. 98-50957 CHAPTER 7
ELAINE MARLEEN VELKA PLAINTIFF	)	ADVERSARY NO. 98-5079 JUDGE MARILYN SHEA-STONUM
v.	)	ORDER DENYING DEFENDANT HIRAM COLLEGE'S MOTION FOR SUMMARY JUDGMENT
OFFICE OF THE U.S. ATTORNEY AND GENERAL, ET AL. DEFENDANTS	)	PROVISIONALLY GRANTING MOTION FOR SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF

This matter is before the Court on the motion for summary judgment filed by Movant-Defendant, Hiram College, and the response to the motion for summary judgment filed by Plaintiff-Debtor. This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is determined to be 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), 157(a) and 157(b).

The Complaint in this matter alleges that Plaintiff-Debtor's student loan from, *inter alia,* Hiram College became payable more than seven years before the filing of her bankruptcy petition and is, therefore, dischargeable pursuant to 11 U.S.C. §523(a)(8)(A). Hiram College contends that the loan is not dischargeable because due to certain

extensions of the repayment period, it became payable within seven years of the bankruptcy filing. Based upon these contentions, Hiram College filed its motion for summary judgment asserting that whether the loan is dischargeable is a question of law and that there are no genuine issues as to the material facts in this case.

I. BACKGROUND

On July 24, 1982, Plaintiff-Debtor executed a National Direct Student Loan promissory note by which she agreed to repay Hiram College for certain student loans. Plaintiff-Debtor attended Hiram College from sometime in 1982 until June, 1986. After leaving Hiram College, Plaintiff-Debtor was given a nine month grace period before the first repayment of her student loan was due. After the expiration of that nine month grace period, Plaintiff-Debtor applied for and was granted a 30 month deferment thereby making the first repayment on her student loan due in September, 1989. These facts are not in dispute.

In its motion, Hiram College asserts that Plaintiff-Debtor has never made any voluntary payments on her student loan and that after attending Hiram College, she relocated several times but failed to notify Hiram College of her new address. *See* Hiram College's motion for summary judgment ("MSJ") at unnumbered pg. 3. These assertions were disputed by counsel for Plaintiff-Debtor in the response to the motion for summary judgment but were not the subject of any affidavit by the Plaintiff-Debtor herself. *See* Plaintiff-Debtor's response at unnumbered pgs. 1-2. Hiram College also asserts that during the periods when Plaintiff-Debtor's whereabouts were unknown, it had no way to communicate with her or file a suit to collect the debt. *See* MSJ at unnumbered pg. 3. Despite this assertion, Hiram College states that on March 3, 1995, it filed suit against Plaintiff-Debtor to collect on the loan in the Cleveland Heights Municipal Court and was ultimately granted default judgment against her in the amount of $9,421.94. *See id.*

Hiram College also states that on January 9, 1996, the Cleveland Heights Municipal Court forwarded proceeds from a wage garnishment that Hiram College had filed against Plaintiff-Debtor to collect on its default judgment. *See id.*

II. DISCUSSION

A court shall grant a party's motion for summary judgment "if...there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. The party moving for summary judgment bears the initial burden of showing the court that there is an absence of a genuine dispute over any material fact, *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), and, upon review, all facts and inferences must be viewed in the light most favorable to the nonmoving party. *Searcy v. City of Dayton*, 38 F.3d 282, 285 (6th Cir. 1994); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991), *cert. denied*, 503 U.S. 939 (1992).

Although debts for student loans are generally not dischargeable in a chapter 7 proceeding, §523(a)(8)(A) of the Bankruptcy Code provides that a student loan may be dischargeable if "such loan...first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition." 11 U.S.C. §523(a)(8)(A).[1] In this case, the parties do not dispute that Plaintiff-Debtor's loan first became due in September, 1989 or that Plaintiff-Debtor's petition was filed in March, 1998. Therefore, unless an "applicable suspension of the

---

[1] On October 7, 1998, §523 was amended to delete subsection (a)(8)(A) in its entirety. *See* Higher Education Amendments of 1998, Pub. L. No. 105-244. The amendment only applies to cases commenced after the law's enactment date. Because the within case was filed in March, 1998, the amendment would not apply.

repayment period" applies to this case, the loan is dischargeable because it first became due more than seven years before Plaintiff-Debtor's petition was filed.

In its motion for summary judgment, Hiram College contends that the student loans should not be dischargeable because (1) Plaintiff-Debtor's whereabouts were not known for much of the seven year period permitted by §523(a)(8); (2) Plaintiff-Debtor is under no undue hardship and could repay the debt; and (3) Plaintiff-Debtor has not in good faith attempted to repay the debt owed to Hiram College. *See* MSJ at unnumbered pgs. 3-4. Even assuming the truth of these contentions, none provide a basis for granting Hiram College's motion for summary judgment.

As for the claim that the loans should not be dischargeable because Hiram College did not know of Plaintiff-Debtor's whereabouts for much of the seven year period permitted by §523(a)(8), no legal or factual basis exists to support that argument. The language of §523(a)(8) directs that the seven year measuring period may only be extended by an "applicable suspension of the repayment period." Although not specifically defined in the statute, that phrase has been interpreted to only include express or implied requests by the debtor to extend payments under the term of his or her loan. *See, e.g., Woodcock v. Chemical Bank (In re Woodcock),* 144 F.3d 1340 (10th Cir. 1998) (repayment period suspended even though debtor was not entitled to deferments that he requested and was granted); *Chisari v. Florida Dept. of Educ. (In re Chisari),* 183 B.R. 963 (Bankr. M.D.Fla. 1995) (debtor's failure to inform lender of her withdrawal from school created default, not suspension of the repayment period); *Flynn v. New Hampshire Higher Educ. Assistance Found. (In re Flynn),* 190 B.R. 139 (Bankr. D.N.H. 1995) (retroactive student loan forebearance agreement did not suspend repayment period because agreements not initiated by debtor); *Commonwealth of Virginia, State Educ. Assistance Auth. v. Gibson (In re Gibson),* 184 B.R. 716 (Dist. E.D.Va. 1995) (suspension of repayment period

included period during which lender was prohibited from taking action to collect debt due to debtor's prior chapter 7 filing); *Marlewski v. Great Lakes Higher Educ. Corp. (In re Marlewski)*, 168 B.R. 378 (Bankr. E.D. Wisc. 1994) (creditor's unilateral cessation of collection activity for nonpayment of student loan did not suspend the repayment period). Such an interpretation furthers the legislative goal of preventing a debtor from manipulating loan deferments in order to defeat the period of nondischargeability. *See Woodcock v. Chemical Bank (In re Woodcock)*, 144 F.3d 1340 (10th Cir. 1998).

In the case at bar, Hiram College does not contend that Plaintiff-Debtor either expressly or impliedly requested a deferment of the payments due under her loan. It merely contends that she failed to keep it apprised of her whereabouts and that, due to such failure, "Hiram had no way to communicate with her or file a suit to collect the debt." *See* MSJ at unnumbered pg. 3. Such a contention is clearly not an "applicable suspension of the repayment period" pursuant to §523(a)(8)(A).

In addition to being unsupported by the language of §523, Hiram College's contention is discredited by the fact that in March, 1995 (clearly within 7 years of the September, 1989 first payment due date on the loan) it filed suit against Plaintiff-Debtor to collect on its loan. Because Hiram College ultimately received a judgment in that suit and successfully garnished Plaintiff-Debtor's wages, it must, at a minimum, be assumed that

---

[2] In their pleadings, neither party explained which provision of Ohio R. Civ. P. 4.1 was utilized to effect service on Plaintiff-Debtor in the Cleveland Heights Municipal Court suit so it is unclear whether the summons and complaint were, for example, mailed to Plaintiff-Debtor's last known address or whether Plaintiff-Debtor was personally served at some other location. *See* Ohio R. Civ. P. 4.1. However, because a successful garnishment necessitates that the judgment debtor's "employer" be identified, Hiram College had to know where Plaintiff-Debtor was employed in January, 1996. *See* Ohio Rev. Code §2716.01 et seq.

Hiram College knew where Plaintiff-Debtor was employed.[2] Additionally, even if Plaintiff-Debtor's whereabouts were truly unknown, Hiram College could still have filed a suit to collect the debt and served Plaintiff-Debtor by publication. *See* Ohio R. Civ. P. 4.4(A).

As for Hiram College's claim that the student loan should not be dischargeable because Plaintiff-Debtor is under no undue hardship and because Plaintiff-Debtor has not in good faith attempted to repay the loan, that matter is not before this Court. In her complaint, Plaintiff-Debtor seeks discharge of her student loan only pursuant to subsection (a)(8)(A) of §523 and not pursuant to subsection (a)(8)(B) which addresses discharge due to an undue hardship on the debtor. Hiram College's reliance on this provision to support its motion for summary judgment is clearly misplaced. *See Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433 (6th Cir. 1998) (noting one of the factors used to analyze if debtor is eligible for hardship discharge is whether he/she has made a good faith effort to repay the loan).

Based upon the foregoing, it is clear that no genuine issues of material fact exist in

---

[2] In their pleadings, neither party explained which provision of Ohio R. Civ. P. 4.1 was utilized to effect service on Plaintiff-Debtor in the Cleveland Heights Municipal Court suit so it is unclear whether the summons and complaint were, for example, mailed to Plaintiff-Debtor's last known address or whether Plaintiff-Debtor was personally served at some other location. *See* Ohio R. Civ. P. 4.1. However, because a successful garnishment necessitates that the judgment debtor's "employer" be identified, Hiram College had to know where Plaintiff-Debtor was employed in January, 1996. *See* Ohio Rev. Code §2716.01 et seq.

[3] Although the parties dispute whether Plaintiff-Debtor kept Hiram College apprised of her whereabouts during the seven year period addressed by §523(a)(8) or whether Plaintiff-Debtor made any voluntary payments on her loan, the resolution of that dispute is not necessary as those facts are not material in this case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (a material fact is one that must be decided before there can be a resolution of the substantive issue that is the subject of the motion for summary judgment).

this case.[3] Because Hiram College cannot establish that an "applicable suspension of the repayment period" applies, the Court finds that Plaintiff-Debtor's student loan first became payable more than seven years before her bankruptcy filing. As such, Hiram College's motion for summary judgment must be denied. Whether the Court can also find its loan to Plaintiff-Debtor to be nondischargeable is a different matter.

It is well established that if there is no genuine issue as to any material fact in a case, a federal court may enter summary judgment, *sua sponte. Celotex Corp. v. CatrettI,* 477 U.S. 317 (1986); *K.E. Resources, Ltd. v. BMO Financial Inc. (In re Century Offshore Mgmt. Corp.),* 119 F.3d 409 (6th Cir. 1997); *Ledford v. Tiedge (In re Sams),* 106 B.R. 485 (Bankr. S.D. Ohio 1989). This Court recognizes, however, that the entry of summary judgment in the absence of any cross-motion or other motion seeking summary judgment[4] should be exercised with great caution as the entry of summary judgment is subject to the requirements of due process. As such, the Court will provisionally enter summary judgment in favor of Plaintiff-Debtor so as to provide Hiram College with an opportunity to file a pleading explaining why summary judgment should not be entered in

---

[3] Although the parties dispute whether Plaintiff-Debtor kept Hiram College apprised of her whereabouts during the seven year period addressed by §523(a)(8) or whether Plaintiff-Debtor made any voluntary payments on her loan, the resolution of that dispute is not necessary as those facts are not material in this case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (a material fact is one that must be decided before there can be a resolution of the substantive issue that is the subject of the motion for summary judgment).

[4] In her response (which was captioned "Plaintiff's Response to Defendant Hiram College's Motion for Summary Judgment"), the last paragraph states that Plaintiff-Debtor "requests that Defendant Hiram College's Motion for Summary Judgment be denied and that the debts owed to Hiram College be found to be discharged pursuant to 11 U.S.C. Section 523(a)(8)(A)." This casual request for affirmative relief in favor of Plaintiff-Debtor cannot and will not be construed as a cross-motion for summary judgment.

Plaintiff-Debtor's favor.

III. CONCLUSION

Based upon the foregoing, IT IS HEREBY ORDERED:

1. That Hiram College's motion for summary judgment is denied;
2. That summary judgment in favor of Plaintiff-Debtor is provisionally granted;
3. That Hiram College shall have until December 22, 1998 in which to file and actually serve upon Plaintiff-Debtor a pleading explaining why summary judgment should not be entered in Plaintiff-Debtor's favor;
4. That if such explanatory pleading is timely filed, Plaintiff-Debtor shall have until December 31, 1998 in which to file a response;
5. That if Hiram College's explanatory pleading is not timely filed, the provisional portion of this order granting summary judgment in favor of Plaintiff-Debtor shall automatically become final; and
6. That if necessary, a further pre-trial in this matter shall be held on January 13, 1998, at 2:30 p.m., in Room 250, U.S. Courthouse and Federal Building, 2 South Main Street, Akron, Ohio.

_____

MARILYN SHEA STONUM
Bankruptcy Judge

DATED: 12/3/98