THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 02-51800
	)	
GWENDOLYN BARLOW-MARTINEZ,	)	CHAPTER 7
	)	
DEBTOR(S)	)	
	)	
GWENDOLYN BARLOW-MARTINEZ,	)	ADVERSARY NO. 02-5181
	)	
PLAINTIFF(S),	)	JUDGE MARILYN SHEA-STONUM
	)	
vs.	)	
	)	
SALLIE MAE SERVICING CENTER / USA FUNDS	)	**MEMORANDUM OPINION RE: DISCHARGEABILITY OF EDUCATIONAL LOANS PURSUANT TO 11 U.S.C. §523(a)(8)**
	)	
	)	
DEFENDANT(S).	)	

This matter comes before the Court on plaintiff-debtor's complaint to determine the dischargeability of student loan debt pursuant to 11 U.S.C. §523(a)(8). A trial in this matter was held on January 21, 2003. Appearing at the trial were Chris Manos, counsel for plaintiff-debtor and Matthew Thompson, counsel for defendant. During the trial, the Court received evidence in the form of exhibits and in the form of testimony from plaintiff-debtor. At the conclusion of the trial, the Court took the matter under advisement.

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)(A) and (I) over which this Court has jurisdiction pursuant to 28

U.S.C. §1334(b). Based upon testimony and evidence presented at the trial, the arguments of counsel, the pleadings in this adversary proceeding and plaintiff-debtor's main chapter 7 case and pursuant to Fed. R. Bankr. P. 7052, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The following facts are not disputed by plaintiff-debtor and defendant and are the subject of stipulations addressed by counsel at the beginning of trial.

1. Plaintiff-debtor is indebted on two student loans.

2. As of July 21, 2002 the total amount due and owing for those loans is $34,823.06.

3. Plaintiff-debtor graduated from the University of Akron in 1992 with a Bachelor's Degree in Social Work.

4. Plaintiff-debtor began making payments on her student loans on March 4, 1993 and, to date, plaintiff-debtor has made payments totaling $8,445.36.

5. From December 1993 to August 1996 plaintiff-debtor was employed by H.M. Life Opportunity Services.

6. From December 1996 to October 1999 plaintiff-debtor was employed by the Summit County Sheriff's Office on site at the Summit County Jail.

7. Since October 1999 plaintiff-debtor has been self-employed doing business as "Ms. Poop Scooper." That business entails the on-site elimination of pet animal excrement.

8. Plaintiff-debtor reported the following adjusted gross income for the years 1998 to 2001:

Year 2001	$10,223.00
Year 2000	$ 9,385.00

Year 1999	$20,385.00
Year 1998	$21,251.00

9. Plaintiff-debtor is a single parent of a seven year old son who resides with her.

10. Plaintiff-debtor receives child support in the amount of $300.00 per month.

11. Plaintiff-debtor uses that child support to offset costs of $209.00 per month for her son's education at a private religious school.

In addition to the foregoing stipulations, the Court makes the following findings of fact.

1. At the time of trial, plaintiff-debtor was 43 years old.

2. Plaintiff-debtor owns the residence in which she and her son currently live. That residence appears to have a fair market value of between $30,000 and $40,000 and is encumbered by a mortgage in the approximate amount of $34,000.[1] Plaintiff-debtor is current on her mortgage payments.

3. Excluding the amount due and owing on her student loans, plaintiff-debtor lists $8,379.49 in unsecured debt on her Schedule F.

4. Plaintiff-debtor received a discharge in her main chapter 7 case on September 12, 2002.

5. Plaintiff-debtor is no longer employed in the field of social work due to diagnosed depression associated with her prior social work employment.

6. Plaintiff-debtor is currently being successfully treated for depression with medication and counseling.

7. In January 1997 plaintiff-debtor was diagnosed with uterine cancer. She was successfully treated for that cancer and, to date, has had no recurrences.

8. Plaintiff-debtor currently suffers from pain in her lower back which she

[1] On her Schedule A - Real Property debtor listed the fair market value of her residence at $30,000 but during trial she testified that the fair market value was $40,000.

sometimes finds to be debilitating especially after prolonged physical activity.

9. Plaintiff-debtor's son receives primary health insurance coverage from his father and secondary health insurance coverage from a program with the U.S. Department of Health and Human Services. Plaintiff-debtor has no private health insurance coverage but due to her current limited income she is able to qualify for heath insurance through a program with the U.S. Department of Health and Human Services.

10. Plaintiff-debtor incurs some child care expenses for her son for after school day care.

DISCUSSION

Pursuant to §523(a)(8) of the Bankruptcy Code, educational loans are not dischargeable in bankruptcy "unless excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor's dependents." Congress did not define what constitutes an "undue hardship" but courts, including the Sixth Circuit Court of Appeals, have employed what has come to be known as the *Brunner* test. *Cheesman v. Tennessee Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356 (6th Cir. 1994). Under the *Brunner* test a debtor must prove the following three factors by a preponderance of the evidence in order to be entitled to an "undue hardship" discharge of educational loans:

> [1] that 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 to indicate that this state of affairs is likely to persist for a significant portion of the loan repayment period; and
>
> [3] that debtor has made good faith efforts to repay the loans.

Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2nd Cir. 1987).

Factor One: Minimal Standard of Living

Based upon her Schedule I - Current Income of Individual Debtor(s) and her Schedule J - Current Expenditures of Individual Debtor(s), plaintiff-debtor shows a monthly deficiency of $447.25. A review of plaintiff-debtor's monthly expenses does not reveal any extravagant expenditures and there does not appear to be any room in her budget to minimize those expenditures in a way that would allow her to reach a monthly net surplus. Accordingly, based upon her current income and expenses, plaintiff-debtor cannot maintain a minimal standard of living for herself and her son if she were required to repay the loans. The first factor of the *Brunner* test has, therefore, been met.

Factor Two: Additional Circumstances

To satisfy the second factor of the *Brunner* test plaintiff-debtor must demonstrate that her current financial adversity is more than a temporary state of affairs. Instead, plaintiff-debtor must show a "certainty of hopelessness." *See, e.g., Goulet v. Educ. Credit Mgmt. Corp.*, 284 F.3d 773, 778 (7th Cir. 2002). Such a showing requires evidence of "additional, exceptional circumstances strongly suggestive of continuing inability to repay over an extended period of time . . . ." *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2nd Cir. 1987).

During trial, plaintiff-debtor acknowledged that, but for her education and degree from the University of Akron, she would not have been able to obtain her prior employment in the field of social work. When plaintiff-debtor was employed as a social worker she was earning more than double what she now earns by being self-employed. In fact, during plaintiff-debtor's employment in social work she made significant payments on account of her student loans.

During the trial plaintiff-debtor testified that she left her prior two jobs in social work due to diagnosed depression that was caused, at least in part, by the high level of stress associated with such employment. However, plaintiff-debtor also testified that she is currently being successfully treated for that depression. Plaintiff-debtor offered no evidence to explain why her currently controlled depression would prevent her from returning to employment in the field of social work nor did she present any evidence to suggest that all jobs in social work would subject her to the same level of stress she experienced with her prior employment.

As for her current business, plaintiff-debtor presented only cursory balance sheets regarding total income and expenses for years 2000 and 2001. Plaintiff-debtor's 2001 income was slightly higher than her 2000 income. As for her year 2002 income plaintiff-debtor testified that it would be similar in amount to that earned in year 2001 but, aside from that testimony, plaintiff-debtor presented no documentary evidence to substantiate this information. The Court is somewhat suspect of whether all self-employment income was disclosed given plaintiff-debtor's testimony that shortly before trial she lost a large condominium client which paid her approximately $1,300.00 per month.

During the trial, plaintiff-debtor also testified that she expects her income to continue to rise and that she wants to give the business a "3 to 5 year chance." Notwithstanding this desire to continue operating her own business, plaintiff-debtor's direct testimony regarding lower back problems suggests that she may not be able to continue doing the physical labor that her "Ms. Poop Scooper" enterprise entails. Plaintiff-debtor noted her strong desire to be self-employed. This "desire" does not outweigh her obligation to maximize income in an effort

to make payments on her educational loans. *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993) ("With the receipt of a government-guaranteed education, the student assumes an obligation to make a good faith effort to repay those loans, as measured by his or her efforts to obtain employment, maximize income, and minimize expenses.").

Based upon the fact that plaintiff-debtor has viable skills in the field of social work for which she was employed at a significantly higher salary than she now earns being self-employed the Court does not find there to be a "certainty of hopelessness" regarding her current financial condition, but does note as a practical matter that her medical history does not preclude significant concern about her future prospects. Although the Court is sensitive to the fact that plaintiff-debtor may have reservations about returning to social work employment given her prior experience with job related depression, she has not presented any evidence to demonstrate that she is medically unable to find work that would be higher paying then her reported income. *Cf. Kelsey v. Great Lakes Higher Educ. Corp. (In re Kelsey)*, 287 B.R. 132 (Bankr. D. Vt. 2001) (undue hardship found where debtor presented evidence from her psychiatrist that a severe, debilitating and longstanding bipolar mood disorder prevented her from performing legal work for which she was educated); *Anelli v. Sallie Mae Servicing Corp. (In re Anelli)*, 262 B.R. 1 (Bankr. D. Mass. 2000) (undue hardship found where debtor presented evidence from treating physician that, due to Chronic Fatigue Syndrome, arthritis, fibromyalgia and depression, debtor was totally and permanently disabled); *Kline v. United States*, 155 B.R. 762 (Bankr. W.D. Mo. 1993) (undue hardship found where debtor presented

evidence from treating physicians that chronic depression, anxiety and panic disorders would prevent debtor from obtaining jobs related to her degree).

Factor Three: Good Faith

To date, plaintiff-debtor has made payments totaling $8,445.36 on account of her student loans. Based upon this payment history there is little doubt that plaintiff-debtor made a good faith effort to repay the challenged loans when she had excess income with which to do so. However, in evaluating "good faith," courts may also consider whether a debtor has availed herself of all available options to repay educational loans even when finances are limited. *See, e.g., Archibald v. United Student Aid Funds, Inc. (In re Archibald),* 280 B.R. 222 (Bankr. S.D. Ind. 2002); *Swinney v. Academic Fin. Servs. (In re Swinney),* 266 B.R. 800 (Bankr. N.D. Ohio 2001); *England v. United States (In re England),* 264 B.R. 38 (Bankr. D. Idaho 2001); *United States Dep't of Educ. v. Rose (In re Rose),* 227 B.R. 518 (W.D. Mo. 1998).

One repayment option available to plaintiff-debtor is the federal income contingent repayment program ("ICRP") in which the amount of required monthly payments is determined and then recalculated yearly based upon the borrower's adjusted gross income. *See* http://www.ed.gov/DirectLoan/pubs/exitborr/exb7.html. Monthly payments will not exceed 20 percent of a borrower's "discretionary income" (which is defined as adjusted gross income minus the poverty level for debtor's family size) and the repayment period under the ICRP can extend for up to twenty five years. *Id*. If a debtor's adjusted gross income is less

than or equal to the applicable poverty level then monthly payments would be $0.00. *Id.*[2]

During trial, plaintiff-debtor testified that she did not pursue the ICRP due to a concern that she would not be able to make payments into the future and that, because of such non-payment, interest would continue to accrue. Plaintiff-debtor indicated that she did not want to end up "right back where she started."

Such concerns, although valid, do not excuse plaintiff-debtor from pursuing all options available to her for repayment of her educational loans. Although a twenty five year repayment plan may seem daunting to plaintiff-debtor given her current state of financial affairs, the fact is that during the second half of a twenty five year repayment plan her now minor son will be emancipated. Additionally, given that plaintiff-debtor has been able to remain current on mortgage payments notwithstanding her current financial difficulties, the equity in her home will continue to grow and would provide another potential source of revenue for her to pay on her student loans in the future.[3]

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[2] The only information presented to the Court regarding plaintiff-debtor's current income relative to the poverty level was a print-out from the web site of the U.S. Department of Health and Human Services. That information shows the 2001 HHS Poverty Guideline to be $11,610.00 for a family of two.

[3] Under the ICRP if a debtor has not fully repaid her loans after twenty five years, the unpaid portion will be discharged but under current law the debtor would be required to pay taxes on that debt forgiveness. This may, therefore, be another financial issue that plaintiff-debtor will have to address in the future. That issue is, however, speculative at best given the possibility that the law on this issue could change in that twenty five year time frame and the fact that the Internal Revenue Service has in place repayment or forgiveness programs to address taxes. *See, e.g.*, 26 U.S.C. §301.7122-1 (providing that offers of compromise can be made if doubt as to collectibility exists in any case where the taxpayer's assets and income are less than the full amount of the liability).

Equitable Considerations

The Sixth Circuit Court of Appeals has noted that "when facts and circumstances require intervention in the financial burden on the debtor," an "all or nothing approach" to dischargeability of educational loans actually thwarts the purpose of the Bankruptcy Code. *Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 439 (6th Cir. 1998). To this end, a bankruptcy court may utilize its powers under 11 U.S.C. §105(a) to partially discharge a nondischargeable student loan or grant some other form of equitable relief. *Id.*

The Court finds this case to be one in which an "all or nothing approach" should not be taken given plaintiff-debtor's current status as single mother of a minor son, her past diagnosis of depression and uterine cancer and her current sole reliance upon heath insurance through a program with the U.S. Department of Health and Human Services. Additionally, although the Court has determined that plaintiff-debtor might be able to obtain more lucrative employment in her chosen field of social work, prospects for obtaining such employment are to be assessed in light of current cutbacks in social programs. Based upon these facts, it would serve neither plaintiff-debtor nor defendant to declare the entire amount now due on plaintiff-debtor's student loans to be nondischargeable.

Conclusion

Based upon the foregoing the Court finds that plaintiff-debtor is not entitled to an "undue hardship" discharge of her student loans as she has not satisfied her burden of proving all three factors of the *Brunner* test. However, the circumstances in this case compel the Court to grant plaintiff-debtor some financial relief. **THEREFORE, IT IS HEREBY ORDERED:**

1. That the balance of the principal still due and owing on plaintiff-debtor's student loans is not dischargeable;

2. That because of her recent medical history all interest and other charges that have accrued, to date, on the unpaid principal balance of plaintiff-debtor's student loans is discharged; and

3. That if plaintiff-debtor enrolls in the ICRP, then interest on the then unpaid balance of plaintiff-debtor's student loans shall stop running at the time of enrollment and shall not begin to run again until plaintiff-debtor's son reaches the age of 21 or is no longer enrolled full time in school, whichever occurs first.

A entry of judgment consistent with this Memorandum Opinion will be entered separately in this case.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: March 10, 2003