UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 03-51889
	)	
ELEANOR TAYLOR,	)	CHAPTER 7
	)	
DEBTOR(S)	)	
	)	
ELEANOR TAYLOR,	)	**ADVERSARY NO. 03-5177**
	)	
PLAINTIFF(S),	)	JUDGE MARILYN SHEA-STONUM
	)	
vs.	)	
	)	**MEMORANDUM OPINION RE: DISCHARGEABILITY OF EDUCATIONAL LOANS PURSUANT TO 11 U.S.C. §523(a)(8)**
SALLIE MAE SERVICING, ET AL.	)	
	)	
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 October 18, 2004. Appearing at the trial were Susan Gray, counsel for plaintiff-debtor and Mark Young, counsel for defendant, Pennsylvania Higher Education Assistance Agency ("PHEAA"). 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). In reaching its determinations and whether or not specifically referenced in this Memorandum Opinion, the Court considered the demeanor and credibility of the testifying witness. Based upon such testimony, the 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 [docket #34].

1. Plaintiff-debtor incurred student loan debt on behalf of her son, Justin Traina, during his enrollment at the Pennsylvania Culinary School from August 2000 to June 2001.

2. The total amount of the debt owed to PHEAA is $16,215.08, plus any and all associated interest (the "Student Loan Obligation"). PHEAA is the holder of the three PLUS loans and those loans were executed and distributed in the following fashion:

Date of Execution	Amount of Loan Requested	Date of Disbursement
August 11, 2000	$7,785.00	October 6, 2000
December 4, 2000	$3,582.00	March 22, 2001
May 21, 2001	$6,448.00	June 14, 2001

3. The three loans at issue are PLUS loans and the Income Contingent Repayment Plan associated with the William Ford Program does not apply to PLUS loans.

4. Ms. Taylor filed a petition for relief under Chapter 7 of the Bankruptcy Code on April 15, 2003 (the "Petition Date"). Further, on Schedule F of her petition, Ms. Taylor listed a student loan obligation to Sallie Mae Servicing in the amount of $16,019.48.

5. On August 25, 2003, Ms. Taylor filed the present adversary proceeding seeking a discharge of the Student Loan Obligation.

6. On October 7, 2003, PHEAA filed a motion to intervene as an additional defendant claiming to be the guarantor of the loans. At that time, PHEAA filed an Answer and Counterclaim.

7. No defendants originally named in the adversary complaint, specifically Sallie Mae Servicing, United States of America and Great Lakes Higher Education Guarantee Corporation, have filed answers and plaintiff-debtor has filed motions for default judgment against those defendants. The United States of America responded to the motion for default judgment against it and an agreed order between plaintiff-debtor and the United States of America has been entered [docket #32].

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

1. At the time of trial, plaintiff-debtor was 56 years old.

2. Plaintiff-debtor and her former husband are the parents of 6 children, none of whom are now dependents of plaintiff-debtor. The youngest of those children is Justin Traina who was adopted in 1984. All of plaintiff-debtor's 6 children attended college.

3. The Student Loan Obligation at issue in this case did not provide a direct educational benefit to plaintiff-debtor.[1]

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[1] A Parental Loan for Undergraduate Student ("PLUS loan") enables parents with good credit histories to borrow at a rate that is lower than is otherwise available to pay the educational expenses of a child who is a dependent undergraduate student. *See McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1219 (11th Cir. 2002).

4. Justin Traina has alcohol and drug problems that interfered with his education at the Pennsylvania Culinary School. After having to repeat at least one semester of classes, Mr. Traina has, to date, completed all of his in-class education. He has not, however, completed the required practicum and has, therefore, not received a degree.

5. Mr. Traina also incurred student loans for his education at the Pennsylvania Culinary School and he has made payments on those loans.

6. In 2002 plaintiff-debtor married her current husband, William Pickel. At the time of trial Mr. Pickel was 53 years old.

7. Prior to her remarriage, plaintiff-debtor faced difficulty each month in paying her bills (including the Student Loan Obligation) and she did not have any health insurance. After the remarriage, plaintiff-debtor was covered under Mr. Pickel's health insurance and they pooled their income to pay all of their monthly expenses including payments due on the Student Loan Obligation.

8. Plaintiff-debtor and her husband made payments on the Student Loan Obligation until plaintiff-debtor's chapter 7 bankruptcy was filed. Mr. Pickel is not in any way obligated to make payments on the Student Loan Obligation.

9. As of the Petition Date, Mr. Pickel was employed by Crane and Shovels Sales Corp. His net income from that job was listed on Schedule I at $2,652.00 per month.

10. In April 2004, Mr. Pickel involuntarily lost his job at Crane and Shovels Sales Corp. Since losing that job, plaintiff-debtor and her husband have had no health insurance.

11. Plaintiff-debtor has inquired about purchasing health insurance for her and her husband and received a quote of $467.00 per month. That monthly premium may, however, be higher given plaintiff-debtor's health problems.

12. Plaintiff-debtor completed primary education through only grade 9. Plaintiff-debtor possesses an Ohio real estate license.

13. Plaintiff-debtor is currently a residential real estate agent with ReMax Realtors ("ReMax") and is primarily a "buyer's agent" so she does not generally list homes for sale. Plaintiff-debtor has been affiliated with ReMax for a little over 1 year. Prior to that she was a residential real estate agent with Smythe Cramer for approximately 6 years.

14. Plaintiff-debtor is on a 100% commission base with ReMax and is also responsible for paying expenses associated with her work at ReMax such as leasing of office space, utilities and some advertising. Plaintiff-debtor remits to ReMax 30% of each commission she receives as payment on expenses owed. Plaintiff-debtor sometimes takes a "draw" from ReMax and she currently owes ReMax approximately $8,000.00 on account of drawn funds. Plaintiff-debtor also incurs other business related expenses such as a cable modem for her home computer and additional advertising for other agents' properties from which she hopes to receive inquiries from potential buyers.

15. Mr. Pickel is also a residential real estate agent and, since losing his job with Crane and Shovels Sales Corp., he has been attempting to earn income by selling real estate.

16. Plaintiff-debtor and Mr. Pickel rent a 2 bedroom, 1 bathroom home for $950.00 per month. Neither owns any real property.

17. Plaintiff-debtor does not own any assets of significant value and neither she nor Mr. Pickel have any retirement savings.

18. Plaintiff-debtor and Mr. Pickel each owns an automobile. Plaintiff-debtor owns a 1999 Mercury Villager with approximately 102,00 miles. That vehicle needs several repairs and its fair market value was appraised at $4,000.00. Plaintiff-debtor borrowed $4,000.00 from a friend, post-petition, in order to redeem the Mercury Villager. Plaintiff-debtor still owes a significant amount on that $4,000.00 post-petition loan.

19. Plaintiff-debtor purchases her clothing from thrift shops and she cuts and dyes her own hair.

20. Plaintiff-debtor has high blood pressure and high cholesterol and needs to take approximately $170.00 worth of medication per month. During some months plaintiff-debtor cannot afford to purchase all the medicine she needs. Plaintiff-debtor's medical conditions do not interfere with her job as a real estate agent.

21. Mr. Pickel (who was present in the courtroom during the trial) appeared to be in good health and does not currently take any medication.

22. Excluding the amount due and owing on the Student Loan Obligation, plaintiff-debtor lists $18,891.50 in unsecured debt on her Schedule F.

23. As of the Petition Date, plaintiff-debtor owed approximately $2,300.00 to the Internal Revenue Service ("IRS") for unpaid tax obligations. Plaintiff-debtor has entered into an agreement with the IRS to repay that debt over time at $300.00 per month. Plaintiff-debtor did not include this debt to the IRS anywhere on her Schedules.

24. Plaintiff-debtor has never filed amended Schedules in this case.

25. Plaintiff-debtor received a discharge in her main chapter 7 case on August 18, 2003.

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. *Miller v. Pennsylvania Higher Education Assistance Agency (In re Miller)*, 377 F.3d 616, 623 (6th Cir. 2004); *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). Courts in the Sixth Circuit may also consider other factors such as: (1) the amount of the debt and the rate at which interest is accruing; (2) the debtor's claimed expenses and current standard of living with a view toward ascertaining whether the debtor has attempted to minimize the expenses for herself and her dependents; (3) the debtor's income, earning ability, health, educational background, dependents, age, accumulated wealth and professional degree, and (4) whether the debtor has attempted to maximize her income by seeking or obtaining stable employment commensurate with her educational background and abilities. *Miller v. Pennsylvania Higher Education Assistance Agency (In re Miller)*, 377 F.3d 616, 623 (6th Cir. 2004).

Brunner Factor One: Minimal Standard of Living

Plaintiff-debtor's Schedule I - Current Income of Individual Debtor(s) and Schedule J - Current Expenditures of Individual Debtor(s), shows that the combined monthly income for plaintiff-debtor and her husband equals their combined monthly expenses. Schedule J includes a $421.00 monthly payment for plaintiff-debtor's automobile. Because that vehicle was redeemed, plaintiff-debtor no longer has that $421.00 monthly payment. She does, however, have a post-petition obligation to repay on a $4,000.00 from the friend she borrowed funds from in order to redeem the automobile.

As noted above, at the time this case was filed, plaintiff-debtor's husband was fully employed and Schedule I reflects his income from full employment. Because plaintiff-debtor's husband is not currently employed full-time, their monthly expenses, even deducting

the $400.00 automobile payment, would now exceed their monthly income especially since the couple no longer has any health insurance.

A review of the monthly expenses for plaintiff-debtor and her husband does not reveal any extravagant expenditures and there does not appear to be room in their budget to minimize those expenditures in a way that would allow them to reach a monthly net surplus. Accordingly, based upon the current income and expenses of plaintiff-debtor and her husband, the Court finds that plaintiff-debtor cannot maintain a minimal standard of living if she were required to repay the Student Loan Obligation. The first factor of the *Brunner* test has, therefore, been met.

Brunner Factor Two: Additional Circumstances

To satisfy the second factor of the *Brunner* test plaintiff-debtor must show that her current financial adversity is more than a temporary state of affairs. 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 the trial, plaintiff-debtor testified that this year she hopes to find buyers for 18 houses. Plaintiff-debtor then testified that, assuming she did find 18 buyers, she would receive commissions of approximately $54,000.00. From that $54,000.00, plaintiff-debtor indicated that she would have to pay 30% (or $16,200.00) to ReMax for her share of office expenses; $8,000.00 to ReMax for reimbursement on drawn funds and approximately $15,000.00 for other business related expenses, leaving a balance of $14,800.00. From that

balance, plaintiff-debtor testified that she would have to pay self employment taxes. On her Schedule J - Current Expenditures of Individual Debtor(s), plaintiff-debtor sets forth $700.00 per month for "self employment taxes" but testified that this amount included the $300.00 monthly payment to the IRS for previously unpaid income taxes. Assuming that plaintiff-debtor's self employment taxes were estimated to be only $400.00 per month, plaintiff-debtor could still only expect a yearly take home salary of $10,000.00.

There is nothing in the record to indicate that plaintiff-debtor could ever hope to find far in excess of 18 buyers per year or that she could substantially reduce her business expenses. Nor is there anything in the record to indicate that plaintiff-debtor could obtain other employment from which she could earn substantially more than she currently earns as a real estate agent. This limitation on employment, coupled with plaintiff-debtor's age, limited educational background, lack of retirement savings, medication requirements and current lack of health insurance, leads the Court to conclude that her current financial adversity is more than just a temporary state of affairs. The second factor of the ***Brunner*** test has, therefore, been met.

Brunner Factor Three: Good Faith

As noted above, plaintiff-debtor's current husband is not obligated on the Student Loan Obligation. Notwithstanding his lack of obligation, he and plaintiff-debtor pooled their resources and made payments on the Student Loan Obligation until plaintiff-debtor's chapter 7 bankruptcy was filed. Based upon this payment history there is little doubt that plaintiff-debtor made a good faith effort to repay the challenged loans when there was excess income

in the monthly budget with which to do so.[2] Accordingly, the Court finds that the third factor of the *Brunner* test has been met.

As noted above, plaintiff-debtor never amended her Schedules notwithstanding the fact that her financial circumstances changed during the pendency of this case. Additionally, plaintiff-debtor testified that when she answered PHEAA's first set of interrogatories in December 2003, she attached her Schedule I and J which, by that time, were no longer accurate given, *inter alia*, her change in employment to ReMax and her husband's unemployment. Plaintiff-debtor had an affirmative obligation under the Bankruptcy Code and Rules to accurately indicate her monthly income and expenses and a continuing duty to amend such information when her circumstances changed. *See* 11 U.S.C. §521(1); FED. R. BANKR. P. 1009(a). *See also Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002); *In re Bauer*, 298 B.R. 353, 357 (B.A.P. 8th Cir. 2003); *Casey v. Peco Foods, Inc.*, 297 B.R. 73, 76 (S.D. Miss. 2003). Moreover, plaintiff-debtor was obligated to completely and correctly reply to PHEAA's discovery requests. FED. R. BANKR. P. 7026; FED. R. CIV. P. 26(e) and (g). Based upon her testimony during trial, it appears that plaintiff-debtor relied upon counsel for direction in her bankruptcy proceeding and that plaintiff-debtor's failure to appropriately amend her Schedules and respond to discovery requests was neither willful nor deliberate.

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[2] 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., Swinney v. Academic Fin. Servs. (In re Swinney)*, 266 B.R. 800 (Bankr. N.D. Ohio 2001). In this case (and as stipulated to by the parties), no alternative repayments options (*i.e.* the income contingent repayment program) were available to plaintiff-debtor.

Given plaintiff-debtor's failure to amend her Schedules I and J, it might appear upon a review of only the docket in the main chapter 7 case that an undue hardship discharge is not warranted. However, based upon the testimony and other evidence adduced at trial, the Court finds that the Student Loan Obligation should be discharged.

CONCLUSION

Based upon the foregoing the Court finds that plaintiff-debtor is entitled to an "undue hardship" discharge of the Student Loan Obligation as she has satisfied her burden of proving all three factors of the *Brunner* test. A entry of judgment consistent with this Memorandum Opinion will be entered separately in this proceeding.

MARILYN SHEA-STONUM
U.S. Bankruptcy Judge