

IT IS SO ORDERED.

Dated: 05:20 PM July 25 2007



**UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF OHIO
 EASTERN DIVISION**

IN RE:)	CASE NO. 03-53961
)	
KATRENA HENRY,)	CHAPTER 7
)	
DEBTOR(S))	
)	
KATRENA HENRY,)	ADVERSARY NO. 07-5043
)	
PLAINTIFF(S),)	JUDGE MARILYN SHEA-STONUM
)	
vs.)	
)	
E D U C A T I O N A L C R E D I T)	MEMORANDUM OPINION RE:
MANAGEMENT CORP.)	DEFENDANT'S MOTION FOR
)	SUMMARY JUDGMENT
DEFENDANT(S).)	

On March 5, 2007 Katrena Henry, the debtor in chapter 7 case number 03-53961, initiated this adversary proceeding on a *pro se* basis by filing a pleading captioned "Motion to Determine Dischargeability of Student Loans" pursuant to 11 U.S.C. § 523(a)(8) [docket #1]. An answer was filed on April 5, 2007 [docket #8] by intervening defendant, Educational Credit Management Corporation ("ECMC"). During the initial pre-trial in this matter, held on May 2, 2007, Ms. Henry

and counsel for ECMC indicated that no discovery was needed. The Court scheduled a telephonic status conference for June 4, 2007 to determine whether the matter should be set for trial or could be decided on dispositive motions [docket #13].

The June 4, 2007 status conference was held as scheduled and only counsel for ECMC participated.¹ Pursuant to that status conference counsel for ECMC indicated that he wished to file a motion for summary judgment on behalf of his client so an order was issued setting June 29, 2007 as the filing deadline for ECMC's motion for summary judgment and July 13, 2007 as the deadline for plaintiff-debtor's response [docket #15]. ECMC's motion for summary judgment [docket #17] and affidavit in support [docket #18] were timely filed. Plaintiff-debtor has never filed a 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. It is determined to be 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), 157(a) and 157(b).

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

¹ The Court attempted to contact Ms. Henry twice at the telephone number she provided the Court during the May 2nd pre-trial conference but there was no answer at such number.

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). However, the ultimate burden of demonstrating the existence of a genuine issue of material fact lies with the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Even though plaintiff-debtor did not file a response to defendant's motion for summary judgment, that motion cannot be granted simply for plaintiff-debtor's failure to respond. *See The Huntington Nat'l Bank v. Parton (In re Parton)*, 137 B.R. 902, 905 (Bankr. S.D. Ohio 1991). Instead, this Court must review the motion for summary judgment to determine whether defendant has discharged its burden relative to that pleading. *Id.*

Based upon the pleadings on file in the main chapter 7 case and this adversary proceeding, the complaint, the uncontroverted affidavit in support of the motion for summary judgment and plaintiff-debtor's answers to defendant's interrogatories the following facts are not in dispute in this case.

1. Plaintiff-debtor initiated a chapter 7 case on July 30, 2003 with the assistance of a bankruptcy petition preparer. On her Schedule F - Creditors Holding Unsecured Nonpriority Claims she listed student loan debt in an amount of \$24,068.20. Also listed on Schedule F was \$38,955.43 in non student loan debt.

2. Plaintiff-debtor received a discharge in her chapter 7 case on December 30, 2003.

3. On January 8, 2007, plaintiff-debtor filed a motion to reopen her chapter 7 case to initiate an adversary proceeding regarding the dischargeability of her student loan debt. That motion was granted by an order entered on February 15, 2007.

4. ECMC is a guarantor in the Federal Family Education Loan Program and the current holder of nineteen student loans taken out by plaintiff-debtor between September 1993 and March 2002 (collectively, the "Student Loans"). *See* Aff. in Support of Motion for Summary Judgment [docket #18] at ¶¶ 1-7. The Student Loans were originally guaranteed by Great Lakes Higher Education Corporation and transferred to ECMC on or about March 23, 2007. *Id.*

5. The balance on the Student Loans as of June 4, 2007 was \$55,750.04 which consists of principal and interest. *See* Aff. in Support of Motion for Summary Judgment [docket #18] at ¶9.

6. Plaintiff-debtor completed 60 credits of college courses while majoring in nursing. Plaintiff-debtor did not receive any degree or certificate. *See* Answers to Interrogatories No. 1 [docket #17, Exhibit A].

7. Plaintiff-debtor is employed full time by Progressive Insurance and has been so since 2003. *See* Answers to Interrogatories No. 2 [docket #17, Exhibit A].

8. Plaintiff-debtor is 32 years old, is unmarried and has no dependents. *See* Answers to Interrogatories No. 3 and 8 [docket #17, Exhibit A].

9. In the course of her employment, plaintiff-debtor receives bi-weekly gross pay of \$1,050.00 and net pay of \$750.82 and she receives no government assistance. *See* Answers to Interrogatories No. 4 and 5 [docket #17, Exhibit A].

10. Plaintiff-debtor reported adjusted gross income of \$26,884.00 for calendar year 2006 and \$29,920.00 for calendar year 2005. *See* Federal Income Tax Returns for 2005 and 2006 [docket #17, Exhibits B and C].

11. On her Schedule I, plaintiff-debtor reported monthly income of \$1,752.17 and on her Schedule J she reported monthly expenses of \$1,551.00. Plaintiff-debtor did not indicate in her schedules that she owned any automobiles or real property.

12. In the three and one-half years since plaintiff-debtor filed her chapter 7 case, she purchased a home which caused her housing expenses to increase from \$350.00 per month to \$586.00 per month. *Compare* Schedule J [main case - docket #1] *with* Answers to Interrogatories No. 17 [docket #17, Exhibit A]. Plaintiff-debtor also purchased and currently owns a 2006 Honda CRV and her payment for that vehicle is \$386.27 per month. *See* Answers to Interrogatories No. 4 and 5 [docket #18, Exhibit A].

13. Despite now having a mortgage and a monthly car payment, plaintiff-debtor has current monthly living expenses of \$1,502.00 which is less than the monthly living expenses reported on her Schedule J (\$1,551.00). *Compare* Schedule J [main case - docket #1] *with* Answers to Interrogatories No. 17 [docket #17, Exhibit A].

14. Plaintiff-debtor does not claim to suffer from any medical condition which would impact her employment now or in the future. *See* Answers to Interrogatories No. 22 and 24 [docket #17, Exhibit A].

15. Plaintiff-debtor has not entered into the Income Contingent Repayment Program under the William D. Ford Program of the United States Department of Education. Pursuant to her current circumstances, if plaintiff-debtor would enroll in that program she would be able to repay the Student Loans over 277 months at a rate of \$284.73 per month. *See* Motion for Summary Judgment, Exhibit D [docket #17].

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 adopted what has come to be known as the *Brunner* test. *Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch)*, 409 F.3d 677, 680 (6th Cir. 2005); *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005); *Miller v. Pa. Higher Educ. Assistance Agency (In re Miller)*, 377 F.3d 616, 623 (6th Cir. 2004); *Cheesman v. Tenn. 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).

In its motion for summary judgment, defendant sets forth an analysis of how, pursuant to the undisputed facts of this case and the applicable law, there exists no basis to grant plaintiff-debtor an undue hardship of the Student Loans. *See* Motion for Summary Judgment [docket #17] at pp. 6-8. Based upon that analysis, the Court finds that defendant has met its initial burden of demonstrating that there is an absence of a genuine dispute over any material fact regarding each element of the

Brunner test and that plaintiff-debtor would not be entitled to a finding that the Student Loans are dischargeable.

There is nothing in plaintiff-debtor's complaint or her answers to defendant's interrogatories to refute defendant's analysis and support a finding that a genuine issue exists as to the prongs of the *Brunner* test. The complaint simply recites several of the uncontroverted facts listed above:

5. Currently . . . [t]he total sum of both loans at this time are (\$54,369.45). In my present circumstance the current repayment structure totals \$600.00 a month an amount that is unsurmountable due to the following reasons:
6. I am currently employed with the Progressive Insurance Group as a Claims processor and have a monthly income of only approximately \$1,400.00 and have no other outside income.
7. My outgoing household expenses are approximately \$1,300.00 due to an addition to my household.
8. The addition in my household is . . . my mother, and she receives no outside financial assistance in order to care for her and for the purchase of her medications.

See Complaint [docket #1] at ¶¶ 5-8. Plaintiff-debtor's explanation in the interrogatories as to why she considers herself eligible for relief under § 523(a)(8) of the Code is as follows:

24. State and describe in detail both the reasons why you are presently entitled to an undue hardship discharge based upon your current financial situation and any additional circumstances existing that indicate that your current situation will persist for a significant portion of the repayment period of your student loan obligation.

ANSWER: I believe I'm entitled to an undue hardship because of the following: at the time I filed my bankruptcy I did include the student loans, because I am [sic] can't afford to pay them without going into economic hardship which would include me not being able to pay the day to day living expenses. I am currently living pay check to pay check and currently I don't have any extra money to pay on the student loans.

See Answers to Interrogatories No. 24 [docket #17, Exhibit A]. The foregoing, given even the most liberal of interpretations and when viewed in the light most favorable to plaintiff-debtor, cannot be construed as demonstrating the existence of genuine issues of material fact as to the matters established by defendant in its motion for summary judgment and supporting affidavit.

Based upon the uncontroverted facts in this case and the unchallenged analysis set forth in defendant's motion for summary judgment, the Court finds defendant's motion for summary judgment to be well taken. A entry of judgment consistent with this Memorandum Opinion will be entered separately in this case. This Memorandum Opinion is not intended for publication.

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