IN THE UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF OHIO

Eastern Division

IN RE:

Charles Williams, Sr.

Debtor.

In Proceedings Under Chapter 7

Case No.: 94-11979
Adv. No.: 10-1199

JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

This matter came before the Court on the motion of Defendant, Sallie Mae, Inc. ("Sallie Mae") seeking summary judgment with respect to Plaintiff's complaint which seeks the discharge of student loan debt pursuant to 11 U.S.C. § 523(a)(8). Core jurisdiction of this matter is acquired under provisions 28 U.S.C. § 157(b)(2), 28 U.S.C. § 1334, and General Order No. 84 of this district. Upon conclusion of a duly noticed hearing, and for the reasons stated herein, this Court grants summary judgment in favor of the Defendant, Sallie Mae; overrules Plaintiff's oral motion to strike Sallie Mae's motion for summary judgment; and determines that this Court has no authority to determine the dischargeability of debt incurred by Lonnie Williams.

The Debtor, Charles Williams, Sr., filed for relief under Chapter 7 of the Bankruptcy Code on May 9, 1994. The Debtor received a discharge of his debts on September 9, 1994 and

the case was closed on October 13, 1994. Subsequently, on or about March 8, 2006, the Debtor executed a loan application with Sallie Mae, which resulted in a consolidation loan in the amount of $27,797.30. The application consolidated student loans that the Debtor applied for and received between 1987 and 1992 to attend DeVry Institute of Technology and Cleveland State University (Debtor amended complaint, Exhibit A). Sallie Mae serves as the servicer of the consolidated loan.

On April 19, 2010, the Debtor motioned this Court to reopen his case in order to pursue an adversary proceeding to determine the dischargeability of certain student loans. Said motion was granted May 27, 2010. On June 7, 2010, the Debtor filed a complaint against Sallie Mae, seeking to discharge student loan debt pursuant to 11 U.S.C. § 523(a)(8). The Debtor alleges that he was eligible for a hardship discharge in his 1994 bankruptcy, however, his then attorney did not inform him of the option and he now seeks to discharge the loans through the above-captioned adversary proceeding. The Debtor also seeks to discharge the student loan debt of one Lonnie Williams. A non-debtor third party who was allegedly related to the 1994 bankruptcy filing.

In response, Sallie Mae filed the present motion for summary judgment. The motion raises three issues. First, whether consolidated loans are new loans which constitute new post-petition/post-bankruptcy debt; second, whether post-petition/post-bankruptcy debt can be discharged; and finally whether the Court has the authority to discharge the student loan debt of a non-debtor.

Summary judgement within a bankruptcy is governed by the Federal Rules of Bankruptcy Procedure 7056, which incorporates Rule 56 of the Federal Rules of Civil Procedure. The

purpose of summary judgment is to determine whether a genuine issue of material fact exists that can be tried. *Lashlee v. Sumner*, 570 F. 2d 107, 111 (6th Cir. 1978). Summary judgment will be granted "If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact..." Fed. R. Civ. P.56(c)(2). The moving party has the initial burden of pointing out to the court that the nonmoving party cannot establish all the elements of their case; however that burden shifts to the nonmoving party to show that they can establish the existence of a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317,325 (1986). Thus, "[s]ummary judgment will be granted if the nonmoving party fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof. Thus the ultimate burden of demonstrating the existence of a genuine issue of material fact lies in the nonmoving party." *Logan v. U.C. Lending, Inc. (In re Caldwell)* 257 B.R. 241, 243 (6th Cir. 2000); citing *Celotex at* 322, 324 (1986). While the Court must draw inferences in light of the nonmoving party, "a mere scintilla of evidence in support of the nonmoving party will not be sufficient." *Nye v. CSX Transportation,* 437 F.3d 556, 563 (6th Cir. 2006).

The Debtor alleges in his amended complaint that he is eligible for a hardship discharge of his student loans. In order for a debtor to receive a discharge of student loan debt, the debtor must show that a repayment of the loans will cause an undue hardship on the debtor and his dependants. 11 U.S.C.A. § 523(a)(8). Furthermore the determination of the hardship discharge, must be adjudicated through an adversary proceeding. *United States Aid Funds Inc., v. Espinosa*, 130 S. Ct. 1367, 1379 (2010)(stating that courts are required to make certain findings before discharging student loan debt.); Fed. R. Bankr. P. 7001(6). While there is no exact definition as

to what constitutes an undue hardship, the Sixth Circuit has adopted, the Brunner test from the Second Circuit, to consider whether a Debtor meets the requirement to discharge his student loan debt. *Cassim v. Educ. Credit Mgmt.* (In re Cassim), 594 F.3d 432,435 (6th Cir. 2010); *Barrett v. Educ. Credit Mgmt. Corp.* (In re Barrett), 487 F.3d 353, 358-59 (6th Cir. 2007); *Oyler v. Education Credit Management Corp.* 397 F.3d 382,385 (6th Cir 2005). *Brunner v. New York State Higher Education Services Corp.,* 831 F.2d 395, 396 (2nd Cir. 1987). The Brunner test requires:

> "(1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependants if forced to repay the loans;
> (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
> (3) that the debtor has made a good faith effort to repay the loans."

Brunner at 396. The party asserting the hardship bears the burden of the of proving there is an undue hardship by establishing each of the three prongs of the Brunner test by a preponderance of the evidence. *Barrett at* 358. Failure to prove any of the three prongs will result in a finding that an undue hardship does not exist. *Id.*

Not only has the Debtor failed to establish the existence of an essential element to his case, he has not established any element of his case. The July 28, 2011 Debtor failed to comply with an order of the Court requiring him to submit a brief in response to Sallie Mae's Motion for summary judgment (Docket # 41). The order which required the Debtor to file within 14 days a responsive brief, was properly serviced, yet the Debtor failed to comply with the order. While summary judgment cannot be granted by way of default, failing to take advantage of the opportunity to assist the court in understanding the facts will likely impact the outcome of the

nonmoving party's case negatively. Fed. R. Civ. P. 56, advisory committee note (2010)("summary judgment cannot be granted by default even if there is a complete failure to respond to the motion..."); *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 405(6th Cir. 1992).

The only items in which this Court has to consider in favor of the Debtor are the complaints (initial and amended), three exhibits, and attachments which even in concert do little to support an undue hardship in which the Debtor claims. There is no requirement created by either the Federal Rules of Civil Procedure or case law that requires a court to search the record in order to find a genuine issue of fact for the non moving party. *Id.* While the court is able to make inferences in light of the nonmoving party, it is not able to make the Debtor's case for him and it would be "utterly inappropriate for the court to abandon its position of neutrality in favor of a role equivalent to champion for the non-moving party: seeking out facts, developing legal theories and finding ways to defeat the motion." *Id* at 406.

Since the Debtor has failed to provide any pleadings, affidavits, or other materials showing that there is a genuine issue as to material fact in dispute this Court will rely on the pleadings filed by Sallie Mae in determining whether to grant the summary judgment. *Id* at 410.

In its motion for summary judgment, Sallie Mae contends that the consolidation loan is a new debt and is therefore not subject to discharge under the 523(a)(8). In March 2006, the Debtor consolidated his student loans which were executed prior to his 1994 bankruptcy. Sallie Mae cites several court decisions which indicate that the Debtor by executing the consolidation loan created a new post-petition/post-bankruptcy debt. Sallie Mae argues correctly that the subject consolidation loan is a newly created post-petition/post-bankruptcy debt. *Hiatt v. Indiana State*

Student Assistance Comm'n, 36 F.3d 21, 23 (7th Cir. 1994) (finding that consolidation loans are new loans that create a new debt); see, *United States Aid Funds v. Flint (In re Flint)*, 238 B.R. 676,679 (Bankr. N.D. Ohio 1999)("courts have roundly agreed that the act of consolidating student loans creates a new loan..."). The Debtor, in opposition, alleged at the hearing on the motion, that Sallie Mae used the "tactic" of consolidation in order to re-affirm the loan. There is nothing in the record to indicate that Sallie Mae resorted to any "tactic" in order to reaffirm the loan or that it otherwise acted in bad faith, as alleged by the Debtor. The Debtor's argument in this regard is wholly conclusory and is unsubstantiated.

The consolidation of the Debtor's student loan created a new post-petition/post-bankruptcy debt. The discharge of debt through a Chapter 7 bankruptcy pursuant to § 727(b) only allows debtors to discharge debts entered into prior to the filing of a bankruptcy. *Stamper v. United States (In re Gardner)*, 360 F.3d 551 (6th Cir 2004)("a debtor is generally granted discharge from debts that arose prior to the filing of the bankruptcy petition."); *In re Hollis*, 810 F.2d 106, 108 (1987). The Debtor executed the consolidation loan with Sallie Mae twelve years after he earlier filed for bankruptcy relief which renders the consolidation loan as new debt not entered into prior to the filing of the bankruptcy. Accordingly, the subject consolidation loan is beyond the scope of a dischargeable debt. See, *Educ. Credit Mgmt. Corp., v. McBurney (In re McBurney)*, 357 B.R. 536 (9th Cir. BAP 2006)(holding that the consolidation loan was a post–petition debt that was not eligible for discharge under § 528(a)(8)); *Barret v. Lakes* (*In re Barrett)*, 417 B.R. 471, 478(Bankr. N.D. Ohio 2009) (holding that a debtors consolidation of student loans creates a new debt for purposes of determining when a debt arose in the consideration of discharge pursuant to § 727(b)). *See also, Clarke v. Paige (In re Clarke)*, 266

B.R, 301 (Bankr. E.D. PA 2001).

Also at the hearing on the motion, the Debtor orally moved to strike Sallie Mae's motion for summary judgment citing insufficient process under Fed. R. Civ. P. 12(b)(4). Notwithstanding, it is hereby determined that the motion for summary judgment was duly noticed to all interested parties, including the Debtor. Therefore, the Debtors argument must fail as the record reflects that service was perfected and Debtor was given adequate notice to respond and further prosecute this case.

The Debtor seeks to discharge the student loan debts of one Lonnie Williams. Lonnie Williams was a not a party to the Debtor's 1994 bankruptcy filing. This Court does not have the authority to consider the discharge of any debts incurred by Lonnie Williams. A discharge in a Chapter 7 bankruptcy applies only to the debt owed by the person who filed the bankruptcy. 11 U.S.C. §524 (a)(2) and §727 (b). Additionally, the power of attorney executed over Lonnie Williams has no effect on the determination of whether she is a debtor eligible for a discharge in this dispute.

Finally, the doctrine of latches applies herein to the Debtor's attempt to discharge his student loan debt though this adversary proceeding. Laches is the "negligent and unintentional failure to protect one's rights." *In re Bowshier*, 389 B.R. 542 (2008) (quoting *Elvis Presley Entertainment, Inc. v. Elvis Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991)). In order to prove laches the asserting party must first show that there was a lack of diligence on the behalf of the opposing party, and second, prejudice on the asserting party. *Induct-O-Matic Corp. v. Inductotherm Corp.*, 747 F. 2d 358, 367 (6th Cir. 1984). Both prongs of that test are clearly shown in the instant case.

The Debtor filed for bankruptcy in 1994. Twelve years later he attempts to obtain a discharge of his student loan debt through an adversary proceeding filed over a year ago. The Debtor has provided no persuasive argument as to why it took so long to prosecute this proceeding. Without just cause shown, the Debtor failed to prosecute the discharge action diligently. As such the present attempt is prejudicial to the affected parties including Sallie Mae.

Accordingly, the Defendant Sallie Mae's Motion for Summary Judgment is hereby **GRANTED**. The Debtor's oral Motion to Strike is **OVERRULED**. This court does not have the authority to discharge the debt of the non-debtor, Lonnie Williams. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated, this 29th **day of**

July, 2011

JUDGE RANDOLPH BAXTER

UNITED STATES BANKRUPTCY COURT