UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Chapter 7 Proceedings
	)	
PAMELA R. STARR,	)	Case No. 03-26158
Debtor.	)	
	)	Judge Arthur I. Harris
PAMELA R. STARR,	)	
Plaintiff,	)	Adversary Proceeding
	)	No. 04-1219
v.	)	
	)	
UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,	)	
Defendants.	)	

MEMORANDUM OF OPINION

Before the Court is defendant Case Western Reserve University's (CWRU) unopposed motion for summary judgment (Docket #46). At issue is the dischargeability of approximately $12,000 in student loans owed CWRU by the debtor-plaintiff Pamela Starr. CWRU argues that Starr has failed to present any evidence to support an undue hardship discharge of her student loan debt. For the reasons that follow, CWRU's motion for summary judgment is denied.

JURISDICTION

Determinations of dischargeability are core proceedings under 28 U.S.C. § 157(b)(2)(I). The Court has jurisdiction over core proceedings under 28 U.S.C. §§ 1334 and 157(a) and Local General Order No. 84, entered on July 16, 1984, by

the United States District Court for the Northern District of Ohio.

PROCEDURAL BACKGROUND

On December 8, 2003, Starr filed her chapter 7 petition. The summary of schedules listed $7,720 in assets and $63,088.03 in liabilities. Schedule F listed approximately $22,000 in student loan debt owed to the U.S. Department of Education, CWRU, and American Education Services. Schedules I and J listed no income or expenditures. The chapter 7 trustee eventually filed a no-asset report, and Starr received her discharge on June 16, 2004.

On April 15, 2004, Starr filed an adversary complaint seeking a determination that all of her student loan debt is dischargeable as an undue hardship under 11 U.S.C. § 523(a)(8). Starr alleges in her amended complaint (Docket #4) that she has health problems and receives support from her grandparents, with whom she lives. On January 24, 2005, ECMC, which apparently holds some of the student loan debt, stipulated to the dischargeability of approximately $4,000 in student loan debt that Starr owed to ECMC (Docket #35). American Education Services filed an Answer and Counterclaim (Docket #31) requesting a judgment for $4,061.58 and a nondischargeability determination. The United States filed an Answer (Docket #30) listing Starr's student loan debt owed to the United States at $8,417.66.

CWRU filed an Answer and a Counterclaim (Docket #12) asking the Court for a judgment on its student loan notes and for a nondischargeability determination. The Counterclaim indicates that Starr received the student loans from CWRU between 2000 and 2002, and payments on the loans became due, after a period of deferment, in early 2005.

On January 19, 2006, CWRU filed a motion for summary judgment (Docket #46). CWRU argues that plaintiff has not and cannot provide evidence to support a finding of any of the required elements of the *Brunner* test. Attached to the motion are medical reports from several doctors. Several of the documents suggest that Starr has been dealing with physical impairments since the late 1990s, her teenage years. One of the more recent documents, dated August 2, 2004, from Dr. Richard L. Stein states, "At this point, Pamela Starr is unable to be employed in any gainful capacity and this condition of disability is likely to persist either permanently or for a number of years." Dr. Stein repeated that opinion in a document dated February 23, 2005, and diagnosed Starr with fibromyalgia, Pott's syndrome, chronic knee pain, and cervical pain.

CWRU's motion for summary judgment requests a nondischargeability determination and a judgment for approximately $12,000 in student loan debt. Starr did not respond to CWRU's motion for summary judgment.

DISCUSSION

The Sixth Circuit applies the *Brunner* test to undue hardship determinations under section 523(a)(8). *See Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382 (6th Cir. 2005); *Brunner v. N.Y. State Higher Educ. Serv. Corp.*, 831 F.2d 395 (2d Cir. 1987). The *Brunner* test requires a showing

> (1) that the 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 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 good faith efforts to repay the loans.

831 F.2d at 396; *see, e.g., Flores v. U.S. Dept. of Educ. (In re Flores)*, 282 B.R. 847, 853 (Bankr. N.D. Ohio 2002).

At trial, a debtor has the burden of showing by a preponderance of the evidence that the three elements of the *Brunner* test have been met. At summary judgment, CWRU, as the moving party, has the burden of showing "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (made applicable by Bank. R. Civ. P. 7056); *Jones v. Union County*, 296 F.3d 417, 423 (6th Cir. 2002). *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Thus, even though Starr has failed to oppose summary judgment, the Court cannot grant CWRU's

motion without first establishing the absence of a disputed material fact regarding at least one element of the *Brunner* test, viewing all the evidence in the light most favorable to Starr. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160-61 (1970) (reversing the granting of summary judgment where plaintiff presented no admissible evidence of required element of claim but defendant did not present any evidence foreclosing that element). "[T]he Advisory Committee Note on the 1963 Amendment to subdivision (e) of Rule 56 made plain that 'where the evidentiary matter in support of the motion [for summary judgment] does not establish the absence of a genuine issue, summary judgment must be denied *even* if no opposing *evidentiary* matter is presented.' " *Fitzke v. Shappell*, 468 F.2d 1072, 1078 (6th Cir. 1972) (quoting *Adickes* and the Advisory Committee Note) (denying summary judgment even though supported by affidavits and no opposing evidence); *accord Vakilian v. Shaw*, 335 F.3d 509, 520 (6th Cir. 2003); *see also* 10B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 3d § 2739 at 391 (1998):

> The 1963 amendment implicitly recognizes that there are situations in which no defense will be required; in some situation this is true even though a motion for summary judgment has been supported by affidavits or other evidentiary material. Rule 56(e) states that a defense is required only if the motion for summary judgment is "supported as provided in this rule" and that even if the opposing party fails to submit counter-evidence, summary judgment shall be entered only "if appropriate."

CWRU has failed to establish the absence of a disputed material fact regarding any of the elements of the *Brunner* test. First, regarding Starr's ability to pay the debt and maintain a minimal standard of living, Starr's schedules, which are of public record and are signed under penalty of perjury, indicate that Starr has no income. CWRU has produced no evidence to show that Starr does have income sufficient to repay the debt. Second, regarding whether Starr's inability to pay "is likely to persist for a significant portion of the repayment period," the medical evidence supplied by CWRU indicates that one of Starr's doctors believes she is currently unemployable and has a condition that will last for a significant time period. Finally, regarding Starr's good faith, the medical evidence suggests that Starr may have been unemployable during some or all of the loan repayment period. The above evidence, viewed in the light most favorable to Starr, indicates that there are disputed issues of material fact as to each element of the *Brunner* test.

Thus, CWRU's motion for summary judgment must be denied even though Starr has failed to file anything in response. At trial, however, Starr will have the burden of establishing each of the elements of the *Brunner* test by a preponderance of the evidence.

CONCLUSION

For the reasons stated above, Case Western Reserve University's motion for summary judgment regarding debtor-plaintiff's undue hardship discharge is denied.

IT IS SO ORDERED.

/s/ Arthur I. Harris 2/14/2006
Arthur I. Harris
United States Bankruptcy Judge