UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 01-11556-JMD
Chapter 7

Marie Sperl,
Debtor

Marie Sperl,
Plaintiff

v. Adv. No. 01-1217-JMD

New Hampshire Higher Education Assistance Foundation,
Defendant

Dennis G. Bezanson, Esq.
Attorney for Debtor/Plaintiff

Mark F. Weaver, Esq.
FORD & WEAVER, P.A.
Attorney for Defendant

MEMORANDUM OPINION

I. INTRODUCTION

The Court has before it a complaint filed by Marie Sperl (the "Debtor") against the New Hampshire Higher Education Assistance Foundation ("NHHEAF") in which the Debtor asks the Court (1) to disallow NHHEAF's claim on the grounds that the claim has not been substantiated based on proper documentation and original promissory notes; and (2) to permit the discharge of any student loan obligation of the Debtor pursuant to 11 U.S.C. § 523(a)(8) because (a) the obligation was not properly guaranteed by a governmental unit or made under a program funded by

a governmental unit or non-profit institution; and (b) the obligation imposes an undue hardship on the Debtor.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The Debtor is a single forty-nine year old woman with no dependents and no apparent health problems who works as a dietician. She attended Northern Michigan University ("NMU") between 1984 and 1987 and the University of New Hampshire ("UNH") between 1987 and 1997. She received a bachelor's degree in nutrition in 1992 and a master's degree in adult education in 1997, both from UNH. The Debtor borrowed all of the money she needed to pay for her education during this fourteen year period, apparently over $10,000.00 to attend NMU and over $95,000.00 to attend UNH. Altogether the Debtor obtained more than thirty different loans to pay for her schooling.

Within a year of obtaining her master's degree, the Debtor applied for a loan from the New Hampshire Higher Education Loan Corporation ("NHHELCO"), a non-profit institution, through its servicing agent Granite State Management & Resources ("Granite State"), another non-profit institution, to consolidate all of her various student loan obligations. The Debtor testified that she had had difficulty keeping track of her various loans and the amounts owed, and that by applying for a consolidation loan she sought to simplify her life and verify her outstanding student loan debt. On March 3, 1998, the Debtor completed an Easy Loan Application and Promissory Note for

Federal Consolidation Loan, which was a one page, two-sided document consisting of the loan application and a promissory note (the "Application" or "Consolidation Note"). The front page of the Application contained a space for the Debtor to set forth all of the loans she wished to consolidate and required the Debtor to identify the holders of such loans and the amounts due. The Debtor listed amounts owing to Granite State,[1] UNH, NMU, Unipak (St. Paul Center) ("MHESLA"), and Sallie Mae ("SLMA") with a total balance due of $82,799.69. The Debtor also made a notation on the front page of the Application indicating that it was "page 1 of 2." However, the second page was not received by NHHELCO nor Granite State and the Debtor was not certain whether such a page was ever created or whether she sent it to NHHELCO or Granite State. The second page may have contained a list of loans from USA Group, Inc. ("USA Group"), on which the Debtor owed approximately $30,000.00 at the time. The Debtor was given the opportunity to select a payment option from the three different payment options listed on the Application: level equal payments, graduated payments, and income-sensitive payments. The Debtor checked the box for graduated payments.

Shortly after the Application was submitted, Granite State was informed by UNH that the Debtor was still a student, which would disqualify her for a consolidation loan from NHHELCO. After being informed that her Application was being rejected, the Debtor contacted UNH which ultimately confirmed that the Debtor was no longer a student. Accordingly, the Debtor was eligible for the consolidation loan, and she requested that Granite State resubmit her consolidation request. The Debtor wanted Granite State to re-use the Application signed on March 3, 1998, because of the difficulty she had encountered in obtaining the outstanding balances on her loans when completing the Application. Granite State re-used the Application and it was approved.

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[1] While in school, the Debtor obtained some student loans directly from Granite State.

As part of the loan process, NHHELCO obtained loan verification certificates ("LVCs") from the following lenders: UNH, NMU, MHESLA, SLMA, and USA Group. NHHELCO did not need to obtain LVCs for the loans it had previously made to the Debtor while she attended UNH. Employees of Granite State testified that the LVCs for SLMA and USA Group consisted of two parts: the first part was a signed cover letter that made the required certifications regarding the accuracy of the information, the validity of the loans, and its compliance with all applicable laws and regulations; the second part was a list of the Debtor's loans and the amounts due on those loans. The cover letter certification for USA Group was provided for numerous borrowers and loans and was not retained by Granite State.

On June 1, 1998, Granite State telephoned the Debtor to inquire about some loans that were not listed on the Application, namely, the loans held by USA Group. The Debtor indicated that her loans consisted of the loans on the Application plus the USA Group loans. The Debtor testified that it was her intention to include all of her student loan obligations in the Consolidation Note.

On or about June 18, 1998, Granite State sent a letter to the Debtor enclosing a payment chart indicating that the principal amount of the Consolidation Note would be $119,631.39, the amount needed to pay off her existing lenders, including USA Group. The payment chart listed the total amount due and six repayment options, including five level payment options and one graduated payment option with terms ranging from 10 years to 30 years. The letter indicated that the Consolidation Note was "going through" on June 23, 1998. The Debtor did not contest the amount disclosed in the letter as the principal loan amount after she received the letter. Instead she permitted the consolidation loan to go forward. Accordingly, on June 23, 1998, Granite State

disbursed funds in the total amount of $119,631.39 to the Debtor's student loan lenders.[2] In October 1998, Granite State also disbursed an additional $107.94 to SLMA to correct an underpayment. In 2001, Granite State discovered that it had double paid two loans in the total amount of $4,795.95 and that it had made slight overpayments to some lenders in the total amount of $380.75. Accordingly, Granite State adjusted the amount of the Consolidation Note down to $114,562.63.

The Consolidation Note obligated the Debtor to repay the amount disbursed under the consolidation loan even if the amount disbursed exceeded the payoff balances provided by the Debtor in the Application. The Consolidation Note provided specifically:

> I promise to pay to NHHELCO, or a subsequent holder of this Promissory Note, all sums disbursed (hereafter "loan") under the terms of this Note to discharge my prior loan obligations, plus interest and other fees which may become due as provided in this Note. . . . I understand that the amount of the loan will be based on the payoff balance(s) of such loan(s) selected for consolidation as provided by the holder(s)/servicer(s) of such loan(s) and may exceed my estimate of such payoff balance(s).

On or about June 24, 1998, Granite State sent the Debtor two Disclosure Statement and Repayment Schedules ("Disclosures") reflecting the principal loan obligation under the Consolidation Note[3] and informing the Debtor of her monthly payments. Granite State originally

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[2] SMLA received $58,353.62, USA Group received $30,204.72, NMU received $524.34, MHESLA received $12,089.41, UNH received $7,953.41, and Granite State received $10,505.89.

[3] The Consolidation Note provided:

> At or about the time my former loans are discharged, my lender will send me a Disclosure Statement and Repayment Schedule ("Disclosure"). The Disclosure will identify my Federal Consolidation Loan amount (as determined by my lender) and other additional terms of my loan. If I have questions concerning the information disclosed, I will contact my lender. If the information in this Promissory Note conflicts with the information in the Disclosure, the Disclosure will be controlling.

Consolidation Note, Disclosure of Terms, at 2.

sent a Disclosure which showed that the Debtor's monthly payments would be $1,469.00 under a level payment option, but then it sent a new Disclosure to the Debtor upon realizing that the Debtor had requested graduated payments in the Application. Under the graduated payment option the Debtor's initial monthly payments were $974.00. Granite State did not retain copies of these Disclosure Statements but only the data contained within them. The Debtor did not retain copies either and stated at trial that she did not even recall receiving them. After Granite State made the additional disbursement to SLMA in October 1998, it sent the Debtor a new Disclosure reflecting an increase in the balance of the Group C portion of the Consolidation Note, the portion that paid off the Debtor's unsubsidized student loans, to $43,365.82 resulting in an increased monthly payment. The Debtor signed and returned this Disclosure on November 12, 1998.

Immediately after the Debtor obtained the Consolidation Note and Granite State disbursed the funds to the Debtor's student loan lenders, the Debtor applied for an economic hardship deferment wherein she indicated in her own writing that she owed $119,000.00 in student loans. The Debtor was able to obtain a deferment for the period from June 25, 1998, to June 25, 1999. The Debtor also obtained five forbearances covering most of the period from July 25, 1999, to May 6, 2001. The Debtor did not make any payments on the Consolidation Note from the date of disbursement on June 23, 1998, through the date of her bankruptcy filing on May 7, 2001. Prior to obtaining the Consolidation Note, the Debtor had made no more than a total of $500.00 in payments on all of her student loan obligations.

At the time the Consolidation Note was disbursed the Debtor was earning $41,000.00 per year. Between 1999 and 2001, before the Debtor divorced, she had annual household family income totaling over $100,000.00. In 2001 the Debtor earned $46,592.00, and in 2002 she was earning approximately $49,000.00 until she voluntarily left her job and moved to northern New

Hampshire. At the time of trial the Debtor was earning $32,448.00 per year based on a thirty-two hour work week, which resulted in monthly net income of $2,213.96. The Debtor testified that she hoped to work an additional eight hours per week at the same rate of pay, which would result in anticipated monthly net income of $2,767.59.[4] The Debtor's monthly expenses at the time of trial were $1,842.00. Without any deductions for unnecessary or unreasonable expenses, the Debtor has anticipated disposable income of $925.59 from which she could pay the Consolidation Note.

During the pendency of the Debtor's bankruptcy, Granite State sent the Consolidation Note to NHHEAF so that NHHELCO could be paid based on NHHEAF's guarantee. On January 29, 2002, NHHEAF paid NHHELCO $149,730.86 under its guarantee agreement.[5] As of the date of trial, the Debtor owed NHHEAF a total of $148,545.89. Employees of NHHEAF testified that the Consolidation Note could be paid in full at the rate of $791.68 per month for 353 months based upon current interest rates or at the rate of $999.20 per month for 228 months also based upon current interest rates. Under the William D. Ford Program, an income-sensitive program through the U.S. Department of Education for which the Debtor may or may not be eligible,[6] the Debtor's payments would be $535.17 per month if her annual salary were $40,000.00. After twenty-five years, or 300 months, of payments under the William D. Ford Program, any balance owed on the Consolidation Note would be written off.

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[4] The Debtor's net monthly pay is $2,213.96 for 138.67 (32 x 52 / 12) hours of work per month. The Debtor's net hourly pay is $15.97 ($2,213.96 / 138.67). An additional eight hours per week would result in an increase in net weekly pay of $127.76 ($15.97 x 8) and an increase in net monthly pay of $553.63 ($127.76 x 52 / 12).

[5] This amount was ultimately adjusted downward to $143,476.42 to take into account the underpayments, overpayments, and double payments outlined above.

[6] Apparently the Debtor would have been eligible for the program prior to bankruptcy. However, once in bankruptcy, a debtor is eligible only if she does not attempt to discharge her student loans, which is what the Debtor is attempting to do in this proceeding. Presumably, at the conclusion of this proceeding, the Debtor will be eligible again for the program.

III. DISCUSSION

A. Claim Disallowance

In her complaint the Debtor argues that NHHEAF's claim should be disallowed because it was not supported by adequate documentation. Based on the evidence at trial and the Debtor's post-trial proposed findings of fact and conclusions of law, the Debtor has apparently abandoned this argument. She apparently admits that some money is owed to NHHEAF, but argues that it should be discharged under section 523(a)(8).

B. Exception to Discharge

The Debtor argues that her obligation under the Consolidation Note should be excepted from discharge because (1) the Consolidation Note is not a "guaranteed" educational loan within the meaning of section 523(a)(8); and (2) repayment of the Consolidation Note would impose an undue hardship on the Debtor.

1. Status of the Consolidation Note

The Debtor argues the Consolidation Note does not qualify as an "educational . . . loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution" because NHHEAF or its predecessors-in-interest did not comply with certain provisions of the Code of Federal Regulations (the "CFRs") and the Common Manual, which interprets the CFRs and serves as a guideline for handling student loans. See 11 U.S.C. § 523(a)(8). The Debtor argues specifically that they failed to comply with 34 C.F.R. §§ 682.205(h)(1), 682.206(f)(1), 682.209(a)(7)(iii), 682.401(b)(19)(i)(E) and (b)(19)(ii), and 682.414(a)(4)(i) and (a)(4)(ii)(L) and paragraphs 9.1.A, 9.4.C, and 9.6 of the Common Manual. In the Debtor's view, because the Consolidation Note does not qualify as an educational loan, it may be discharged pursuant to 11 U.S.C. § 727.

Alternatively, the Debtor argues that because NHHEAF or its predecessors-in-interest violated the CFRs and the Common Manual, the loans purportedly consolidated under the Consolidation Note are not in fact consolidated and therefore the Court should either disallow any claim based on the Debtor's student loans or consider each loan separately in making a determination as to whether the Debtor's student loan obligations impose an undue hardship.

The Debtor cites no authority to support her theory that the Consolidation Note does not qualify as an educational loan under section 523(a)(8) because of the alleged failure of NHHEAF or its predecessors-in-interest to comply with certain governmental regulations which the Debtor argues voids NHHEAF's guarantee. Even if NHHEAF or its predecessors failed to comply with applicable regulations, the fact remains that NHHEAF paid on its guarantee. As noted by the court in Siegel v. U.S.A. Group Guarantee Servs. (In re Siegel), 282 B.R. 629, 632 (Bankr. N.D. Ohio 2002), proof of a guarantee is self-evident where the defendant assumes legal responsibility for the debt, as NHHEAF did here when the Debtor filed for bankruptcy protection.

In addition, even if NHHEAF or its predecessors failed to comply with applicable regulations, the Debtor has not persuaded the Court that she is entitled to raise such failure in the context of a dischargeability action in bankruptcy or that she is some type of third-party beneficiary of the guarantee agreement who might have standing to raise any non-compliance or breach of the agreement. Accordingly, the Court finds that the Consolidation Note is in fact an educational loan within the meaning of section 523(a)(8) because it was guaranteed by a governmental unit, i.e., NHHEAF, and it was made under a program funded in whole or in part by a non-profit institution, i.e., NHHELCO.

The Debtor also argues that because NHHEAF allegedly violated the CFRs and the Common Manual, the loans purportedly consolidated under the Consolidation Note are not in fact

consolidated. Again, the Debtor cites no authority for this proposition. When the Debtor sought to consolidate all of her educational debt in 1998, she agreed to undertake a new loan obligation in the form of the Consolidation Note. The proceeds of the Consolidation Note were used to repay her original educational loans in full, the notes on the Debtor's original loans were cancelled, and the underlying debt was discharged. Accordingly, the only outstanding debt that the Debtor currently owes is the new, distinct debt under the Consolidation Note. See Hiatt v. Indiana State Student Assistance Comm'n, 36 F.3d 21, 23 (7th Cir. 1994); Santa Fe Med. Servs., Inc. v. Segal (In re Segal), 57 F.3d 342, n.8 (3d Cir. 1995) (stating that courts routinely have viewed loan consolidations as educational loans within the meaning of section 523(a)(8)). The Debtor has presented no valid grounds for re-instituting the previously cancelled student loans. Therefore, the Court will not consider the underlying loans, which were extinguished and replaced by the Consolidation Note, in making a determination as to whether the Debtor's student loan obligation imposes an undue hardship within the meaning of section 523(a)(8).

2. Undue Hardship

The Court may permit the discharge of the Consolidation Note if the Court finds that it imposes an undue hardship upon the Debtor. Student loan obligations impose an undue hardship within the meaning of section 523(a)(8) if:

A. 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 loan;

B. Additional circumstances exist indicating that this state of affairs is likely to persist for significant portion of the repayment period of the student loan; and

C. The debtor has made good faith efforts to repay the loan.

Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1995); McClain v. Am. Student Assistance, 272 B.R. 42, 47 (Bankr. D.N.H. 2002); Grigas v. Sallie Mae Servicing

Corp. (In re Grigas), 252 B.R. 866, 874 (Bankr. D.N.H. 2000); Garrett v. New Hampshire Higher Educ. Assistance Found. (In re Garrett), 180 B.R. 358, 362 (Bankr. D.N.H. 1995). The Debtor must demonstrate the existence of all three factors.

The record does not support a finding that the Debtor is unable to maintain a minimal standard of living if forced to repay the Consolidation Note. Based on her financial condition, the Debtor should be able to pay $925.59 per month[7] toward her student loan obligation. Employees of NHHEAF testified that the Consolidation Note could be paid in full at the rate of $791.68 per month for 353 months based upon current interest rates or at the rate of $999.20 per month for 228 months also based upon current interest rates. NHHEAF is willing to accept repayment of the Consolidation Note under either term. In addition, if the Debtor were to apply for the William D. Ford Program, the Consolidation Note could be paid at the rate of $535.17 per month assuming the Debtor's annual salary is approximately $40,000.00. After twenty-five years of payments under the program, any balance owed on the Consolidation Note would be written off. Given these options and the Debtor's ability to make substantial payments based on her own testimony, the Court finds that the Debtor's standard of living would not fall below what is minimally necessary if compelled to repay the Consolidation Note.

In addition, the Court finds that the Debtor has failed to demonstrate that there are additional circumstances that would indicate a "hopelessness for the indefinite future as to any possibility of repayment." Keilig v. Massachusetts Higher Educ. Assistance Corp. (In re LaFlamme), 188 B.R. 867, 871 (Bankr. D.N.H. 1995). The Debtor argued only that she is forty-

[7] As explained above in Section II, at the time of trial the Debtor was earning $32,448.00 per year based on a thirty-two hour work week, which results in monthly net income of $2,213.96. The Debtor testified that she hoped to work an additional eight hours per week at the same rate of pay, which would result in anticipated monthly net income of $2,767.59. The Debtor's monthly expenses at the time of trial were $1,842.00. Thus, without any deductions for unnecessary or unreasonable expenses, the Debtor's anticipated disposable income from which she could pay the Consolidation Note is $925.59 per month.

nine years old and does not expect to earn much more than she currently earns over the remainder of her working life. The Debtor presented no evidence that she has any dependents to support or that she has any health problems that would prevent her from working. Her failure to present exceptional circumstances warrants a finding that the Debtor has not met her burden under the second prong of the Brunner test.

Lastly, the Debtor must demonstrate that she has made a good faith effort to repay her student loan obligations. It is undisputed that the Debtor has made payments totaling no more than $500.00 on her student loan obligations, which at their inception totaled at least $105,000.00 and at the time of the consolidation totaled $114,562.63. It is also undisputed that since obtaining the Consolidation Note in 1998, the Debtor earned between $32,448.00 and $49,000.00 per year. It is further undisputed that the Debtor's Consolidation Note has been in deferment or in forbearance status for most of the period from June 25, 1998, until she filed her bankruptcy petition on May 7, 2001. As a result, the Consolidation Note has not been in default. Given these facts, the Court finds that the Debtor has made a good faith effort to repay her student loan obligations. See Grigas, 252 B.R. at 874 (holding that the debtor had satisfied the third prong of the Brunner test because, although her payments were few and intermittent, the debtor had devoted additional income to paying such loans and had made significant efforts to restructure them).

Because the Debtor has failed to satisfy two of the three Brunner factors, the Debtor has not met her burden of proof under section 523(a)(8). Therefore, the Court concludes that the Consolidation Note should be excepted from discharge under section 523(a)(8) as it does not impose an undue hardship on the Debtor.

IV. CONCLUSION

For the reasons articulated above, the Court will not disallow NHHEAF's claim on the grounds that the claim has not been substantiated by proper documentation and the original promissory notes. In addition, the Court will except the Consolidation Note from discharge under section 523(a)(8) because the Court finds that the obligation was properly guaranteed by a governmental unit and made under a program funded by a governmental unit or non-profit institution and because the obligation does not impose an undue hardship on the Debtor. The Court makes no determination regarding which repayment plan the Debtor must undertake (i.e., repayment over 353 months or 228 months under plans proposed by NHHEAF or over 300 months under the William D. Ford Program) but finds simply that the Debtor has failed to establish that repayment of the Consolidation Note will impose an undue hardship on her. Accordingly, the Consolidation Note will not be discharged by her bankruptcy filing.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

DATED this 7th day of November, 2002, at Manchester, New Hampshire.

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge