2006 BNH 003 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 96-10794-MWV
Chapter 7

Denise Amand Gallagher,
Debtor

Denise Amand Gallagher,
Plaintiff

v. Adv. No. 05-1002-MWV

Educational Credit Management Corporation,
Defendant

Denise Amand Gallagher
pro se Plaintiff

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Attorney for Defendant ECMC

MEMORANDUM OPINION

The Court has before it the second amended complaint of Denise Gallagher (the "Plaintiff") against Educational Credit Management Corporation ("ECMC").[1] The Plaintiff reopened her Chapter 7 bankruptcy case to file this adversary proceeding more than eight years after receiving a discharge. This Court has previously held that the Debtor's student loan obligations were not in fact discharged in 1996 when she received her Chapter 7 discharge. See In re Gallagher, 333 B.R. 169 (Bankr. D.N.H. 2005)

[1] The Plaintiff also sought to join U.S. Department of Education ("DOE"), American Student Assistance ("ASA"), and Sallie Mae Student Loan Marketing Association ("Sallie Mae") as defendants. In this Court's opinion, In re Gallagher, 333 B.R. 169, 173–74 (Bankr. D.N.H. 2005), DOE and ASA were determined to be neither necessary nor proper parties to the proceeding. The Court included Sallie Mae as a defendant "for the time being" because Sallie Mae had not filed any responses. Id. at 174. Sallie Mae never did respond, and it appears that ECMC is the sole obligee on the Plaintiff's student loans. Therefore, to the extent that Sallie Mae holds any debt owed it by the Plaintiff, the Plaintiff's motion to join Sallie Mae is denied.

(holding that the seven-year period under former section 523(a)(8)(A)[2] begins to run anew upon loan consolidation). In that opinion, the Court concluded that the issue of a section 523(a)(8) undue hardship discharge should proceed to trial. The Court conducted a trial on November 16, 2006, and took the matter under advisement upon the trial's conclusion.

JURISDICTION

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).

BACKGROUND

The Plaintiff is a forty-four year old female who received her Juris Doctor degree in 1987. Upon graduation, she owed approximately $33,000 in student loans to two lenders, American Student Assistance ("ASA") and Sallie Mae Student Loan Marketing Association ("Sallie Mae"). The Plaintiff began repaying the loans in November 1987, and consolidated the loans in 1992. She continued repaying the loans until filing a voluntary Chapter 7 bankruptcy petition with this Court on April 1, 1996. Between 1987 and the time she filed for bankruptcy protection, the Plaintiff repaid approximately $20,000. Although the Plaintiff listed ASA as a creditor in her schedules, ASA was not included on the Plaintiff's matrix. Consequently, it appears that ASA did not receive notice of the bankruptcy case. The Plaintiff received a discharge on August 7, 1996, and her case was closed on September 6, 1996.

Shortly after her bankruptcy case was closed, the Plaintiff began receiving letters and notices from ASA and DOE. Specifically, DOE intended to collect the allegedly defaulted loan by offsetting the

[2] Unless otherwise noted, all statutory section references herein are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, et seq.

debt against tax refunds. The Plaintiff objected to these collection attempts, maintaining that her student loan obligations had been discharged in bankruptcy. In November 1997, ASA denied the Plaintiff's objection, stating that it had no record of the bankruptcy proceedings. The Plaintiff requested a hearing, but ASA, without granting a hearing, notified the Plaintiff the following month of its determination that the debt was non-dischargeable. In February 1998, DOE notified Plaintiff that it had received her request for review from ASA and that no offset would occur pending DOE's decision regarding dischargeability. Regardless, DOE performed the offset, but the offset was undone upon Plaintiff's objection. In August 1998, the Plaintiff again requested a hearing, and in December 1998, DOE notified the Plaintiff that it would review ASA's determination of non-dischargeability. The Plaintiff states that beginning in October 1999 she made repeated requests for a hearing but a hearing was never granted. In April 2002, DOE notified the Plaintiff of its decision that her student loan debt was non-dischargeable. Since then, the Plaintiff's wages were garnished for a period of time, and her 2003 tax refund was withheld and applied to the debt. On January 6, 2005, the Plaintiff's loan with ASA was assigned to ECMC. In her second amended complaint, the Plaintiff listed the outstanding debt as $56,819.73, and testimony at trial estimated that approximately $58,000 is currently due. ECMC has proposed repayment schedules ranging from $463.33 to $518 per month for twenty to thirty years. The Plaintiff has proposed payments of $100 per month for ten years.

DISCUSSION

The Plaintiff argues that her loan is dischargeable pursuant to section 523(a)(8). Alternatively, she argues that the doctrine of laches prevents collection or that the Court should use its section 105(a) equitable power to grant relief.

A. Undue Hardship

The Plaintiff's primary argument is that her student loan debt should be discharged pursuant to section 523(a)(8) because repayment of the loan would create an "undue hardship." Section 523(a)(8)[3] provides:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
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> (8) for an educational benefit overpayment or 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, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents[.]

The phrase "undue hardship" is not defined in the Bankruptcy Code. Consequently, courts have differed on how to determine what constitutes an "undue hardship." By and large, courts have adopted either the "totality of the circumstances" test or the Brunner test, the latter having been introduced in Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2nd Cir. 1987). This Court has adopted the Brunner test. In re Garrett, 180 B.R. 358 (Bankr. D.N.H. 1995); In re Grigas, 252 B.R. 866 (Bankr. D.N.H. 2000). Thus, the "standard for 'undue hardship' requir[es] a three-part 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." Brunner, 831 F.2d at 396. Although the Plaintiff must satisfy all three elements, the first prong is really the threshold inquiry.

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[3] Section 523(a)(8) has twice been amended since the Plaintiff filed her bankruptcy petition in 1996. However, both the version existing in 1996 and the version in effect when the Plaintiff reopened her case and filed this adversary proceeding include essentially identical language requiring undue hardship. The excerpt quoted herein is the version in effect in 2005 when the Plaintiff commenced the adversary proceeding.

Failure to prove the inability to maintain a minimal standard of living if forced to repay the loan renders the remaining prongs of the test superfluous. See In re Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993).

To satisfy the first prong, the Plaintiff must prove that after maximizing her income and minimizing her expenses she still would be unable to repay her student loans while maintaining a minimal standard of living. In re Hambacher, 2005 WL 3307063, at *3 (Bankr. M.D.N.C. 2005). As for maximizing her income, this is not a case where an underemployed Plaintiff seeks an undue hardship discharge. See, e.g., In re Grigas, 252 B.R. at 875-76. The Plaintiff is an attorney employed by the State, and her current annual salary is approximately $49,081.50. Although it is within the realm of possibility that she could find higher-paying employment, the Plaintiff's present salary does not denote underemployment. More importantly, perhaps, her present employer affords her the flexibility she needs with regard to her multiple sclerosis, and the insurance coverage she receives through her employer is superior to that which she would likely obtain elsewhere (if she would even be able to do so given her pre-existing conditions). Her insurance coverage, for instance, includes approximately $1,200 in medications that she might otherwise have to pay out-of-pocket. Additionally, the Plaintiff's husband anticipates earning between $39,000 and $50,000 this year, which is consistent with his previous earnings. In all, the Court finds that the Plaintiff has maximized her income.

The Plaintiff's monthly expenses, while certainly not lavish, are not minimal. For example, the Plaintiff and her spouse own a time share in a ski house at a cost of $221 per month plus an annual maintenance fee of $500. Although at trial the Plaintiff expressed regret having made this investment, the fact remains that a substantial amount of money is spent every month on this time share. Also, the Plaintiff's exhibit listing her monthly expenses shows a monthly mortgage expense of $1,400. However, the actual payment due each month is $1,159.12. If the Plaintiff were to make only the required mortgage payments, she would have approximately $240 per month to put toward her student loan debt.

ECMC has proposed repayment schedules ranging from $463.33 to $518 per month for twenty to thirty years. Although this is a considerable sum, based upon the information before the Court the

Plaintiff has the ability to make such payments. For instance, eliminating the monthly time share expense (plus the attendant maintenance fee) and paying only the required mortgage payment would result in the availability of approximately $461 per month to satisfy her loan obligation. This does not even take into account the Plaintiff's monthly motorcycle payments. Finally, although the Court does not question the Plaintiff's choice of school for her son, the Plaintiff's monthly school expense of $460 calls into relevance In re Savage, 311 B.R. 835 (B.A.P. 1st Cir. 2004), in which the court denied discharge partly because the debtor failed to prove that her son's private school tuition was a necessary living expense.

The Court concludes that the Plaintiff is able to repay her student loans while maintaining a minimal standard of living. A "minimal" standard of living does not require living in "abject poverty." In re Faish, 72 F.3d 298, 305 (3rd Cir. 1995); see also In re Savage, 311 B.R. at 841 n.7 (quoting In re Faish). The Court does not doubt that repayment of her student loan debt will result in a hardship to the Plaintiff. However, the Court does not have the authority to grant a discharge under section 523(a)(8) on the showing of only a "hardship." In the Bankruptcy Code, the word "undue" modifies "hardship." The phrase "undue hardship" reveals a Congressional intent to discharge student loan debt only when the hardship is excessive, or when repayment would cause the Plaintiff to live a sub-minimal lifestyle. "The hardship alleged . . . must be undue and attributable to truly exceptional circumstances, such as illness or the existence of an unusually large number of dependents." TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 927 (1st Cir. 1995). Here, the hardship is not due to exceptional circumstances. Although the Plaintiff has been diagnosed with multiple sclerosis, the Plaintiff has not argued, and the evidence does not indicate, that this currently prevents her from repaying her student loan and maintaining at least a minimal standard of living. It is possible, though, that the Plaintiff's illness will one day become an "exceptional circumstance" that would render her hardship "undue." See In re Hertzel, 329 B.R. 221, 232 (B.A.P. 6th Cir. 2005) (multiple sclerosis is a degenerative disease and "a bankruptcy court may take judicial notice of the effect that a debtor's well-known medical condition may have on the debtor's ability to earn a living"). On the other hand, the Plaintiff testified that her multiple sclerosis could remain stable

for the rest of her life. Therefore, in consideration of the Plaintiff's income, expenses, and health, the Court concludes that the Plaintiff's possible hardship in repaying her student loan debt does not rise to the level of "undue hardship," and, therefore, the Court may not discharge the debt pursuant to section 523(a)(8).

B. Laches

Debtor argues that the doctrine of laches bars ECMC's right to payment because DOE's delay in issuing its decision that the debt is non-dischargeable prejudiced the Plaintiff. The Plaintiff received a discharge on August 7, 1996, and her bankruptcy case was closed on September 6, 1996. According to the Plaintiff's second amended complaint she began receiving collection letters in September 1996 from a collection agency working on behalf of ASA. In September 1997, Plaintiff received a notice from ASA that DOE held a claim for the defaulted student loans and that indicated an intent to collect the debt by offsetting it against tax refunds. The Plaintiff objected to this offset. In December 1997, ASA determined that the debt was non-dischargeable. The Plaintiff contested this determination with DOE, and in February 1998 DOE notified the Plaintiff that her request for review was pending. It was not until April 2002 that DOE rendered its final decision that the debt was non-dischargeable.

Regardless of DOE's protracted decisionmaking, collection of the Plaintiff's student loan debt is not barred by laches. "By virtue of 20 U.S.C. § 1091a, Congress has eliminated any time constraint on the United States' (or a guaranty agency) collection of student loan obligations." In re Loving, 269 B.R. 655, 663 (Bankr. S.D. Ind. 2001) (concluding that laches does not apply even when collection attempts resume out of the blue four years after debtor thought she had discharged the student loan debt in bankruptcy); see also United States v. Smith, 862 F. Supp. 257 (D. Haw. 1994); Kaufman v. Case W. Reserve Univ., 2002 WL 31972171 (M.D. Tenn. 2002). Section 1091a(a) provides:

> (a) In general
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> (1) It is the purpose of this subsection to ensure that obligations to repay loans and grant overpayments are enforced without regard to any Federal or State statutory, regulatory, or administrative limitation on the period within which debts may be enforced.
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> (2) Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by—
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> . . . .
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> (B) a guaranty agency that has an agreement with the Secretary under section 1078(c) of this title that is seeking the repayment of the amount due from a borrower on a loan made under part B of this subchapter after such guaranty agency reimburses the previous holder of the loan for its loss on account of the default of the borrower;
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> . . . .

The Court is compelled by section 1091a to reject the Plaintiff's argument that the doctrine of laches bars ECMC's collection efforts.

C. Section 105(a)

Finally, the Plaintiff argues that the Court should grant relief pursuant to its equitable power under section 105(a) of the Bankruptcy Code. The Court assumes that such desired relief would entail fully or partially discharging the Plaintiff's debt. The Court is unable to grant such relief. Section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." This power is not unfettered; the Court may use it only in the furtherance of the Bankruptcy Code's provisions. See In re Thinking Machines Corp., 67 F.3d 1021, 1028 (1st Cir. 1995). It logically follows that courts may not use section 105(a) to perform an act forbidden by another section of the Bankruptcy Code. After determining that the Plaintiff's debt is non-dischargeable under section 523(a)(8), this Court may not discharge the entire debt with section 105(a). As for a partial discharge, when the Plaintiff consolidated her student loans she created one new

loan, or one new debt. The text of section 523(a)(8) speaks in terms of individual debts causing undue hardship, and this Court may not partially discharge any one debt. In re Grigas, 252 B.R. at 872; see also In re Lamanna, 285 B.R. 347, 351 (Bankr. D.R.I. 2002). With regard to each debt, it is all or nothing.

CONCLUSION

The Court hereby concludes that the Plaintiff's student loan debt is not excepted from discharge by section 523(a)(8), that laches does not prevent ECMC from collecting the debt, and that granting relief pursuant to the Court's section 105(a) equitable power is not appropriate in light of the facts of this case. This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate final judgment consistent with this opinion.

DATED this 18th day of January, 2006, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge