2009 BNH 038

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

Marc Andrew Moses,
Debtor

Bk. No. 02-12491-MWV
Chapter 7

Marc Andrew Moses,
Plaintiff

v.

Adv. No. 02-1156-MWV

Granite State Management and Resources,
American Education Services,
Franklin Pierce Law Center and
The Education Resource Institute,
Defendants

Marc A. Moses, Esq.
Pro se Debtor

Marc W. McDonald, Esq.
KAZAN, SHAUGHNESSY, KASTEN & MCDONALD
Attorney for The Education Resource Institute

Mark F. Weaver, Esq.
FORD & WEAVER
Attorney for New Hampshire Higher Education Assistance Foundation as assignee of Granite State Management and Resources

MEMORANDUM OPINION

Before this Court is the Debtor's complaint (Ct. Doc. No. 1) seeking an undue hardship discharge of his student loans pursuant to 11 U.S.C. § 523(a)(8). The Court held a hearing on August 15, 2003, and ordered the Debtor to make payments of $200 a month for twelve months pro rata to New Hampshire Higher Education Assistance Foundation ("NHHEAF") and The Education Resource Institute ("TERI") (collectively referred to as the "Defendants"). On October 20, 2004, the Court held a trial on the matter and took the matter under advisement ordering the Debtor to continue making the $200 monthly payment to the Defendants. Since taking the matter under advisement, the Court has directed the Debtor to provide

current financial statements for the years 2006, 2008, and 2009, and directed the Defendants to provide statements reflecting the current amount and monthly payments due on the student loans. For the reasons set forth below, the Court holds that the Debtor has not met his burden under § 523(a)(8) and that the student loans are excepted from discharge.

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 Debtor filed a voluntary case under Chapter 7 of the Bankruptcy Code on August 15, 2002. He received a discharge on January 1, 2003. Prior to receiving his discharge on November 15, 2002, the Debtor filed a Complaint against Granite State Management and Resources, American Education Services ("AES") and Franklin Pierce Law Center seeking a discharge of student loan debt on grounds of "undue hardship." On December 10, 2002, NHHEAF entered an appearance in the case as assignee of Granite State Management and Resources. Additionally, TERI, as guarantor of the loans held by AES moved the Court to add it as the real party in interest with regard to AES's loans. Franklin Pierce Law Center failed to file an Answer, and the Court defaulted Franklin Pierce Law Center on March 4, 2003. As of November 9, 2009, the current balance owed to the Defendants totals $200,516.27.[1] The following table[2] provides a detailed report of the current balances owed to the Defendants:

[1]NHHEAF's loan balance totals $99,692.15, and the current balance owed on TERI's five loans total an aggregate amount of $100,824.12.

[2]Information in the table is based on statements provided by the Defendants.

Lender	Amount Due	Monthly Payment	Payment Term	Interest Rate
TERI #1	$25,028.76	$215.03	180	4.5%
TERI #2	$27,396.99	$221.49	180	4.0%
TERI #3	3,577.29	$31.18	180	4.0%
TERI #4	$32,379.29	$270.16	180	4.5%
TERI #5	$12,441.79	$102.10	180	4.0%
NHHEAF	$99,692.15	$453.00	Term not provided	8.25%
TOTAL	**$200,516.27**	**$1,292.96**		

The Debtor is fifty-two years old and currently a resident of Studio City, California. He is re-married, but shares custody of his four sons from a previous marriage, ages: eighteen, sixteen, fourteen, and twelve. The Debtor has minimum assets and no severe or extraordinary medical conditions. He is well-educated and passed both the California and Massachusetts State Bar Examinations, and has been a self-employed attorney since February 2003. The Debtor incurred significant loan obligations in connection with his law school education from 1997 through 2000. Prior to attending law school, the Debtor received his bachelor's degree in environmental design from the University of Colorado in 1981.

Currently, the Debtor's income is solely derived from his law practice, although the Debtor does perform miscellaneous carpentry jobs, and advertises an architectural design business. The most recently filed financial statements reflect that the Debtor has a negative cash flow of $55.00, based on monthly expenses of $4,255, which include the Court ordered loan payments, and a combined monthly income of $4,200. The majority of the Debtor's expenses are due to child support payments he is required to make in conjunction with a divorce decree. At trial, the Debtor testified that he is required to pay forty-five percent of his income in child support, and child support payments will not end until March or April of 2016.

Prior to entering bankruptcy, the Debtor made no payments on his student loan obligations to the

Defendants as he either exercised his deferment or forbearance option. Until now, the Debtor has only made the Court ordered payments of $200 per month to the Defendants on a pro rata basis. Prior to trial, TERI proposed to reduce the principal balance of the loan and change the variable interest rate to a fixed interest rate, and NHHEAF proposed that the Debtor pay its loan according to the original repayment schedule, because it believes the Debtor can repay the loan. Moreover, the Debtor had contacted the Defendants in an effort to propose reduced monthly payments, but the parties have been unable to come to an agreement.

DISCUSSION

Under 11 U.S.C. § 523(a)(8)(A) and (B), the Debtor must show undue hardship by a preponderance of the evidence in order to have these loans discharged. Grogan v. Garner, 498 U.S. 279 (1991). In support of the complaint, the Debtor claims that his current income along with child support payments renders repaying his student loans a continuing and severe hardship. In Garrett v. New Hampshire Higher Educ. Assistance Found. (In re Garrett), 180 B.R. 358, 362 (Bankr. D.N.H. 1995), this Court adopted the three-part test set forth by the Second Circuit in Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987) (per curiam), to determine when undue hardship exists. Under the Brunner standard, the Debtor can show "undue hardship" by showing "(1) that the [D]ebtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [himself] and [his] 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." Id.; In re Garrett, 180 B.R. 358 at 362.

At trial, the parties stipulated to the educational nature of the loans and amounts due. The first element of the Brunner test requires that the Debtor demonstrate that he would be unable to maintain a minimal standard of living if forced to repay his loans. At the time of the trial, the Debtor had just opened his solo practice and reported an income of $2,300 per month with expenses of $5,200 per month. He

was a divorced individual supporting four children because his ex-wife could not work due to her religious affiliation. The Debtor's state of affairs at trial arguably indicated that his standard of living would fall below that which is minimally necessary if forced to repay his loans. However, five years later, the Debtor's current state of affairs seems to attack the second prong of the Brunner test, which requires that the Debtor evidence circumstances "generally indicat[ing] a hopelessness for the indefinite future as to any possibility of repayment." McClain v. American Student Assistance (In re McClain), 272 B.R. 42, 48 (Bankr. D.N.H. 2002) (internal citations omitted). Moreover, the Debtor's inactions seem to defeat any support for the third part of the Brunner test that he has made a good faith effort to repay the loans.

The Debtor's most recent financial statements show a fluctuation in income. From fiscal year 2006 to 2007, the Debtor's income increased from $44,199 to $52,562; however, fiscal year 2008 showed a decrease, as has been the case for many individuals. The Debtor heavily relies on his child support payments to support an inability to repay the loans. While the Court commiserates with the Debtor's position, the Court is not convinced that his hardship is long-term, or that the Debtor has exhausted all avenues available to him to accommodate for his situation. Further increase in the Debtor's income seems highly promising, and he will have further opportunities to increase his income as his children are getting older. The Debtor argues that the median salary for a solo practitioner is low, but if the Debtor finds self-employment difficult, his experience and number of years as a practicing attorney provide unlimited prospects for employment. Moreover, the Debtor has two degrees - architecture and law - and has no known physical disabilities.

Additionally, the Debtor's updated Schedules I and J from the trial through the date of this opinion are misleading and inconsistent with the evidence on record. The Debtor calculates his support obligations based on his gross income, even though the Debtor's divorce decree specifically notes the existence of the Debtor's student loan obligations and allows deduction of the loans from gross income

before determining the Debtor's child support obligations. Also, the Debtor lists an extremely large child related expense of $800 per month for travel and visitation that is other than the court ordered support expenses. This is a self-imposed expense as the Debtor chose to live in California though the Debtor's children live in Maine. Moreover, the Debtor is no longer responsible for support payments as to one child, and another child is expected to reach the age of majority within two years. While the Debtor argues that his divorce decree mandates a minimum payment of $650 per month, the decree also provides that such "obligation shall be reviewed at any subsequent review of child support or custody issues." Ex. 109. The Debtor has had several opportunities to plead his case with the divorce court to lower his child support payments to the statutory minimum $50 per month. Yet, the Debtor provides no evidence of any attempt to do so. This Court ordered the Debtor to pay $200 per month in August of 2004, which has essentially given the Debtor a substantial deferment for an additional five years.

Though the Debtor provided various sample calculations for loan repayment under the William D. Ford Direct Loan repayment program (the "Ford program"), no record has been provided showing that the Debtor attempted to enroll in the program. See Allen v. Am. Educ. Servs. (In re Allen), 324 B.R. 278, 281 (Bankr. W.D. Pa. 2005) (debtor's failure to take advantage of an alternative repayment plan can be a factor in the good faith determination for undue hardship). The Ford Program offers several options with respect to repayment of loans, one of which is the Income Contingent Repayment Plan (the "ICR plan). The ICR plan determines monthly payments based on the borrower's income, amount borrowed, and family size. If the Debtor qualifies, his payment can be as low as zero. Monthly payments would vary each year based on the Debtor's adjusted gross income. Although the Debtor has already used his forbearance and deferment options under the original loan agreements, upon enrollment in the Ford program, the Debtor would be re-eligible for those options based on changes to his financial condition. The ICR plan also allows for cancellation of any remaining balance on loans at the end of twenty-five years.

The Court is not without sympathy for the Debtor's difficult position. Currently, the Debtor is required to pay a total of $1,292.96 per month toward his student loan obligations. Since the Debtor has already been paying $200 per month per this Court's order, the Debtor would have to adjust his expenses to provide an additional $1,092.96 per month. However, with adjustments to the Debtor's expenses, the ability to request lower child support payments, the options available for loan repayment, and employment prospects available to someone with the Debtor's education and experience, the Court does not find that the Debtor faces a lasting undue hardship should he be required to pay his student loan obligations.

CONCLUSION

For the reasons set out herein, the Court grants judgment in favor of the Defendants. 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 29th day of December, 2009, at Manchester, New Hampshire.

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