

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

ERIC P. RETZLAFF and
PATRICIA A. RETZLAFF,

Chapter 7
Case No.: 99-15649

Debtors.

ERIC P. RETZLAFF,

Plaintiff,

Adv. Pro. No.: 03-90135

v.

NEW YORK STATE HIGHER EDUCATION
SERVICES CORPORATION and
AFSA DATA CORPORATION,

Defendants.

APPEARANCES:

Laura L. Silva, Esq.
Attorney for the Plaintiff
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Schenectady, NY 12305

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John J. Henry, Esq.

Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

Memorandum-Decision and Order

The Plaintiff-Debtor, Eric P. Retzlaff (“Plaintiff”), initiated this adversary proceeding by filing a complaint dated April 24, 2003 (“Complaint”) seeking a final judgment of this court discharging his student loan obligations based upon undue hardship pursuant to 11 U.S.C. § 523(a)(8)(B). The Complaint contains three separate and distinct causes of action for: (1) an undue hardship discharge of his student loan obligations; (2) invocation of the collateral estoppel doctrine to prevent the Defendant, Educational Credit Management Corporation (“ECMC”), the current holder of the student loans at issue here, from denying the dischargeability of the student loan obligations or, alternatively, collecting postpetition interest thereon; and

(3) a laches determination. This matter was tried before the court on its merits on April 5, 2004, and the following constitute the court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

Jurisdiction

The court has jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(I).

Facts

On September 9, 1999, Plaintiff and his wife, Patricia A. Retzlaff ("Mrs. Retzlaff"), filed a Chapter 7 petition ("Petition") listing AFSA Data Corporation as a Schedule F creditor holding an unsecured nonpriority claim in the amount of \$12,342.92, together with other Schedule F indebtedness in the amount of \$38,872.79 (Pl.'s Ex. A at 11). On February 3, 2000, Plaintiff and Mrs. Retzlaff received a general discharge pursuant to Bankruptcy Code (11 U.S.C. §§ 101 *et. seq.*) ("Code") § 727. (Pl.'s Ex. B.) Prior to filing bankruptcy, Plaintiff had obtained guaranteed student loans for the purpose of attending the Albany Memorial Hospital School of Nursing.¹ Plaintiff subsequently defaulted and the loans were purchased by NYSHESC. On or about June 9, 2003, NYSHESC assigned the loans to ECMC. (Def.'s Ex. 6.)

In April 2002, NYSHESC made a determination to garnish Plaintiff's wages, which he appealed. Edward S. Haddad, Administrative Law Judge, issued a Decision and Order on April 19, 2002 ordering Plaintiff to make monthly payments of \$50 per month beginning on May 19, 2003 for a period of twelve months, and thereafter \$216 per month, commencing on May 19, 2003 and continuing until satisfaction of the payoff amount of \$15,190.94, plus interest. (Def.'s Ex. 5.) On March 13, 2003, this court issued an order pursuant to Code § 350(b) and Fed. R. Bankr. P. 4007(b) which reopened the case to allow Debtors to institute the adversary proceeding *sub judice*. (Pl.'s Ex. C.) The parties have stipulated that, as of November

¹ The record is unclear with respect to how many separate, government-guaranteed loans were obtained by Plaintiff. The Complaint states that Plaintiff obtained only two guaranteed loans (Compl. ¶ 2), but ECMC contends that there were five guaranteed loans (Houff Aff. ¶ 6, Def.'s Ex. 13). The original principal amount of the loans, if consolidated, totaled \$21,450.50. (*Id.*)

17, 2003, the balance of Plaintiff's student loan obligations was \$16,432.90. (Joint Stip. of Facts ¶ 12 (hereafter "Stipulation").)

The relevant facts are not in dispute. Based upon the submitted pleadings, including Plaintiff's Responses to Interrogatories of June 2003 (Def.'s Ex. 7) and the Stipulation, Exhibits, and trial testimony, the following facts were established.

Plaintiff is fifty-six years old; Mrs. Retzlaff is fifty-two years old. They have four children: Elizabeth (age 23); Bernadette (age 21); Therese (age 19); and Bridget (age 15). (Stip. ¶ 7.) Therese and Bridget reside with Plaintiff and Mrs. Retzlaff; as a full-time college student, Bernadette resides at home during school vacations only; Elizabeth has graduated from college and has established her residence elsewhere.

At trial, Plaintiff testified at length regarding his educational, professional, medical, and financial histories. He provided a complete and seemingly accurate picture of his current circumstances, which the court heavily relies upon in reaching its decision.

Plaintiff obtained his Bachelor's Degree in history magna cum laude from the State University of New York in 1970. In December 1994, Plaintiff obtained his Diploma in Professional Nursing summa cum laude from the Albany Memorial Hospital School of Nursing. (Pl.'s Ex. F.) Plaintiff is a licensed registered nurse in the State of New York. (Stip. ¶ 8.) Aside from a brief two-month period of unemployment from February to April 2004, Plaintiff has steadily worked full-time in that capacity. In addition, from 1999-2002, he has held various part-time and free lance jobs as an editor, media relations coordinator, medical writer, and public relations director. (Pl.'s Ex. F.) Mrs. Retzlaff is also licensed in the State of New York as a registered nurse, but she is unable to work due to a back injury for which she receives fixed monthly Worker's Compensation payments of approximately \$1,000 and lifetime medical coverage. (*Id.*)

In 1995, Plaintiff began his nursing career at St. Clare's Hospital, where he was employed full-time in the cardiopulmonary progressive care and medical-surgical/orthopedic units from 1995-1997. Plaintiff

testified that cardiac nursing was an “exciting start to [his] career,” but he experienced difficulties at St. Clare’s because of the stress associated with his financial situation, profession, and marriage. He resigned from St. Clare’s in order to find “less strenuous” employment. In 1998, he began working as an acting nurse manager at the Guilderland Center Nursing Home, but he “ran into trouble and got demoted” to the position of charge nurse. As a charge nurse, he was responsible for administering medication and treatment. Because of the job pressure, Plaintiff had a hypertensive crisis and began taking medication for high blood pressure. In addition, Plaintiff suffered a work-related back injury, which resulted in an Administrative Decision from the State of New York Worker’s Compensation Board authorizing necessary related medical care, but denying lost wage benefits because the medical reports did not show more than seven days of disability. (Pl.’s Ex. G.) Plaintiff’s third position was at the Albany County Nursing Home, where he began as an acting nurse manager in 2001, but was again demoted to the position of a charge nurse and subsequently terminated. Plaintiff next accepted employment at the Villa Mary Immaculate Nursing Home, where he worked as a charge nurse from 2002-2003. Again, Plaintiff experienced difficulty meeting the administration’s demands, and the situation exasperated his hypertension to the point where he had to be taken to the St. Peter’s Hospital Emergency Room for treatment at the end of one shift. By his own admission, he began frequently making mistakes on duty which led to his termination. Plaintiff’s fifth position was as a charge nurse at the Eden Park Health Care Center from 2003-2004. Plaintiff testified that he was fired in February 2004 because he neglected to administer Tylenol to a patient. Plaintiff is most recently employed as a charge nurse by the Hallmark Nursing Centre (“Hallmark”).²

With each new position, Plaintiff’s salary has increased. Plaintiff and Mrs. Retzlaff reported adjusted gross income on their federal tax returns of \$36,549 in 1998 (Def.’s Ex. 12), \$43,110 in 1999, \$48,326 in 2000, \$63,278 in 2001, and \$53,186 in 2002 (Stip. ¶ 10; Pl.’s Ex. I; Def.’s 9, 10, 11). Plaintiff’s

² At the time of trial, Plaintiff had accepted an offer of employment from Hallmark, but he was not scheduled to begin this position until the following week.

current position pays \$20.80 per hour, which is slightly less than his previous wage of \$23 per hour at the Eden Park Health Care Center. Plaintiff will, however, eventually be able to work overtime for \$31 per hour, and anticipates working between 40 and 60 hours per week on average.

For health reasons, Plaintiff testified that nursing is not his ideal occupation, although he did not indicate that he plans to leave the field in the near future. He testified that he suffers from a back injury, hypertension, Depressive Disorder, Anxiety Disorder, sleep apnea, and Attention Deficit Hyper-Activity Disorder (“ADHD”). He is under the care of a chiropractor, psychiatrist, and general practitioner, and is taking several prescription medications for treatment of high blood pressure and assistance with depressive and anxious symptoms. In addition to the medication, he receives psychiatric medication management and minimal counseling. Plaintiff further testified that his psychiatrist and general practitioner have advised him to abandon his nursing career in search of a less demanding profession, but neither appeared to testify at trial. Moreover, Plaintiff did not introduce written documentation from either of these physicians at trial.

Plaintiff also testified extensively about his monthly expenses; however, because the parties have stipulated as to his expenses, the court will recite them here without significant detail. They are as follows:

Mortgage	\$710
Property Taxes	\$180
Gas/Electric	\$300
Telephone	\$120
Food	\$650
Car Payment	\$280
Insurance	\$95
Gas/oil/repairs	\$290
Public Transportation	\$10
Medical/Dental	\$550
Clothing	\$200
Computer	\$40
Postage	\$15
Laundry/Dry-cleaning	\$65
Insurances (Life/home)	\$130
Home Maintenance/Repair	\$150
Trash	\$30
Books/subscriptions	\$25
Religious/dues/charity	\$30
Birthdays/gifts	\$135

Supplies/Misc.	\$75
Children's Activities	\$190

(Stip. ¶ 9.) Accordingly, Plaintiff's estimated monthly household expenses are \$4,270. Plaintiff advised that he is current on his monthly expenses with the exception of the gas/electric bill, which has an outstanding balance of approximately \$150.

Plaintiff stated that his family's 2003 medical expenses were approximately \$8,000, and his medical care accounted for roughly two-thirds of that cost. Although Plaintiff was not covered by medical insurance at the time of trial, he testified that medical insurance would be provided through Eden Park Health Care Center when he began employment within one week of trial. He would then be responsible for co-pays only. In addition to the stipulated expenses, he pays approximately \$8 per month for nursing malpractice insurance. Both Bernadette and Therese are working to provide for their own educational expenses and receive only minimal assistance from Plaintiff. (Pl.'s Ex. K, Interrog. Resp. No. 20; Def.'s Ex. 7.) The only other unaccounted for expense, as of the date of filing of the adversary proceeding, was Plaintiff's monthly student loan payment in the amount of \$216. (Stip. ¶ 12.) With the inclusion of the nursing malpractice insurance, Plaintiff's monthly expenses total \$4,278.

Plaintiff further testified that his family does not have any savings. As for retirement, Plaintiff has accumulated approximately \$20,000, and he allegedly cannot afford additional contributions so long as he has dependent children.

During direct examination, Plaintiff's counsel elicited the following response when she asked whether he had room in his budget to pay the student loans:

I don't see that I could put that [sic], I mean, unless I wasn't going to live a normal life. Plus, if the student loan starts now, and at this age, then how old am I going to be when it ends. What kind of income am I going to have during the retirement period? I can't put money aside for retirement the way I should because I have kids that [sic], because we got married late, because I had kids late and where other people are having grandchildren, we have children, so we still have a lot of the expenses that people [our age] don't have anymore. We have four of them, well 3 now, so there isn't a lot of leeway, if you cut this thing out, that thing out, it is still not going to be sufficient to cover another payment besides.

Plaintiff stated that he and Mrs. Retzlaff filed for bankruptcy relief because they calculated that they could not pay either their general unsecured debt or his student loan obligations. Plaintiff acknowledged that he did not commence an adversary proceeding to discharge his student loans in 1999 when the Petition was filed, but he claimed that his former attorney incorrectly advised that student loan obligations fell within the general discharge.

By letter dated November 19, 2003 (Def.'s Ex. 15), ECMC informed Plaintiff that he was eligible to participate in the William D. Ford Direct Loan Repayment Program. Under this program, Plaintiff could have chosen one of four repayment plans: (1) Standard Repayment Plan, requiring payments of \$145.16 per month for 120 months; (2) Extended Repayment Plan, requiring payments of \$106.34 per month for 180 months; (3) Graduated Repayment Plan, requiring an initial payment of \$72.58 per month, with gradually increasing payments over the 180-month life of the loan; or (4) Income Contingent Repayment Plan, requiring payments of \$131.32 per month based on the Plaintiff's current gross income of \$53,186 annually, with future payments contingent upon income. (Stip. ¶ 15.) Plaintiff did not avail himself of any of these options.

Arguments

Plaintiff claims that repayment, in any amount, of the student loan debt would impose an undue hardship on himself and his dependents. He argues that he lacks sufficient income to repay the loans while maintaining a minimal standard of living and that his financial circumstances are unlikely to change due to his deteriorating health. "Because his family is already living on the financial edge, . . . [p]laintiff cannot envision how he can physically and emotionally handle any more work than he is working, maintain a minimum standard of living for his family, properly care for his home, and have what passes for a reasonable family life if he is forced to repay his student loans." (Pl.'s Ex. K, Interrog. Resp. No. 20; Def.'s Ex. 7.) "[G]iven his wife's debility, his dependent children's ages, and his inability to set aside sufficient money for retirement, he believes he may not be able to retire at 65 if he is still in good health." (*Id.*) For these reasons,

Plaintiff feels that repayment of his student loan obligations is an “unacceptable hardship.” (*Id.*)

In opposition, ECMC argues that Plaintiff is able to maintain a minimal standard of living as defined by bankruptcy law. ECMC further alleges that Plaintiff did not make a good faith effort to repay the loans, and he has not demonstrated such exceptional circumstances which would indicate that his current financial state will continue for a significant portion of the repayment period. ECMC does not dispute that Plaintiff’s health is a factor in this dischargeability determination, but it does dispute the significance and reliability of Plaintiff’s work history, as well as the impact of Plaintiff’s health on both his ability to work and his efforts to repay the loans.

Discussion

Before delving into the substance of this case – whether Plaintiff has shown undue hardship – the court must first address Plaintiff’s second and third causes of action. “The effect of Code § 523(a)(8)(B) is to make student loan debts presumptively nondischargeable until a complaint is filed to determine whether dischargeability is proper” *In re Wetzel*, 213 B.R. 220, 224 (Bankr. N.D.N.Y. 1996) (citations omitted). “Code § 523(a)(8) is self-executing, and thus the burden is on the debtor to initiate a proceeding to determine the dischargeability of the debt.” *Id.* (citations omitted). Contrary to Plaintiff’s assertions, it is not incumbent on the creditor to file a complaint to determine whether its debt is nondischargeable. For these reasons, Plaintiff’s second and third causes of action are without merit.

Code § 523(a)(8) provides, in relevant part, as follows:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt –

. . . .

(8) for an educational 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 organization, 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.

11 U.S.C. § 523(a)(8).³

As a preliminary matter, the court notes that this section creates a rebuttable presumption that certain educational loans are nondischargeable; thus, it is the debtor who bears the burden of proof on the issue of undue hardship. *In re Elmore*, 230 B.R. 22, 26 (Bankr. D. Conn. 1999) (citing *In re Stein*, 218 B.R. 281, 286-287 (Bankr. D. Conn. 1998); see also *In re Williams*, 296 B.R. 298, 302 (S.D.N.Y. 2003) (“A debtor carries a heavy burden when she seeks to establish an undue hardship under section 523(a)(8).”). A debtor who wishes to proceed under § 523(a)(8) faces a daunting task because policy dictates that this remedy be “in all but extreme circumstances.” *In re Brunner*, 46 B.R. 752, 756 (S.D.N.Y. 1985), *aff’d*, 831 F.2d 395 (2d Cir. 1987); see also *In re Williams*, 296 B.R. at 303 (“Discharge based on undue hardship is reserved for extreme circumstances where a debtor is living in poverty or near poverty with little possibility of supplemental income.”).

In the Second Circuit, the three-prong *Brunner* test provides the exclusive authority that bankruptcy courts must utilize in deciding whether to grant a debtor an undue hardship discharge. *In re Kelsey*, 287 B.R. 132, 143 (Bankr. D. Vt. 2001). Under *Brunner*, discharge is permissible only if the court finds:

(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 v. New York State Higher Educ. Services Corp., 831 F.2d at 396. “All three parts of this test must be satisfied individually before a student loan debt can be discharged.” *In re Wetzel*, 213 B.R. at 225 (citing *Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 306 (3d Cir. 1995)). If any of the three prongs is not satisfied by the debtor, the court’s inquiry must terminate with a finding of nondischargeability. *Id.* (citations omitted).

³ There is no dispute among the parties that the student loans obtained by the Plaintiff in this case fall within the parameters of the statute.

The first prong of the *Brunner* test requires a debtor to show that, given the debtor's current income and expenses, a minimal standard of living cannot be maintained for the debtor and his dependents if he is compelled to repay his student loans. This minimal standard of living test "requires more than a showing of tight finances." *Pa. Higher Educ. Assistance Agency v. Faish*, 72 F.3d 298, 306 (3d Cir. 1995). "The debtor must show more than that the repayment of the loan will require him or her to forbear significantly in personal and financial matters or that the debtor will endure a restricted budget." *In re Thoms*, 257 B.R. 144, 148 (Bankr. S.D.N.Y. 2001) (citing *In re Elmore*, 230 B.R. at 26). There is no objective criteria for defining what passes as "minimal." Rather, the court must "examine current income and expenses and determine, through the application of common sense, a minimal standard of living which is sensitive to the particular circumstances of each case." *In re Elmore*, 230 B.R. at 26; see also COLLIER ON BANKRUPTCY ¶ 523.14[2] at 523-100 (15th ed. 2003) (the court should take into account the debtor's needs for care, including food, shelter, clothing, transportation, medical treatment, and a small amount of recreation). In conducting this inquiry, although it is not within the court's province to impose a standard of living upon the debtor or to advise the debtor how to best formulate his budget, the court should review the reasonableness of the debtor's budget as it pertains to his capability to pay his student loans without undue hardship. *In re Pincus*, 280 B.R. 303, 317 (Bankr. S.D.N.Y. 2002).

"The determination of whether repayment of student loans would result in undue hardship is a question of fact to be determined by the court after consideration of the evidence." *In re Wetzel*, 213 B.R. at 225 (citing *Burton v. Pa. Higher Educ. Assistance Agency*, 117 B.R. 167, 169 (Bankr. W.D. Pa. 1990)). The court now turns to the factual circumstances and evidence presented by Plaintiff in this case.

For several reasons, the court finds that Plaintiff has not satisfied the minimal standard of living test under the first prong of *Brunner*. First, with a household income of roughly \$63,000, see *In re Elmore*, 230 B.R. at 27 (a non-borrower spouse's income may be considered in determining undue hardship when both

spouses have sought bankruptcy protection under the Code by filing a joint petition),⁴ Plaintiff's expenses do not significantly exceed his income.⁵ As pointed to by ECMC, there appears to be some room for rebudgeting; certain expenses such as life insurance premiums for seven policies (Pl.'s Ex. K, Interrog. Resp. No. 11; Def.'s Ex. 7), cellular phone, internet, and cable television charges could be eliminated or reduced. As discussed *supra*, Plaintiff must make reasonable sacrifices in order to repay his student loans. For this reason, the court finds Plaintiff's arguments that he cannot afford to make home repairs or save for retirement unpersuasive. At present, Plaintiff is able to meet the basic needs of himself and his family, including food, shelter, clothing, and medical care.

Second, Plaintiff has not convinced the court that he lacks the skills, ability, or opportunity to generate supplemental income. Plaintiff testified that he has simultaneously held part-time and full-time positions in order to do so in the past. Although he may not prefer to work multiple jobs, he is capable of earning sufficient income to maintain a minimal standard of living even while repaying his student loans.

Third, although the 2004 U.S. Department of Health and Human Services federal poverty guidelines are but one factor to be considered under the first prong of *Brunner*, the court notes that the established poverty guideline for a family of four⁶ is \$18,850. (Def.'s Ex. 14). Plaintiff's income is over three times that amount. An annual income of \$63,000 may not afford a family of four a lavish lifestyle, but in any case permits a family of four to live above a minimal standard. Therefore, Plaintiff and his family are clearly not

⁴ All references to Plaintiff's income, therefore, refer to household income and include Mrs. Retzlaff's non-taxable yearly contribution of \$12,000.

⁵ Plaintiff's current monthly net income is not included in the record. However, while employed at the Eden Park Health Care Center, Plaintiff received a base monthly gross pay of \$4,974.08, which amounted to a monthly net pay of \$3,979.69. Using these figures, Plaintiff's gross yearly income for 2003 could be estimated at \$59,688.96, approximately \$3,000 less than his current income. Thus, it is fair to say that Plaintiff's monthly net pay will not be less than \$3,979.69. Plaintiff's current expenses are \$4,278, leaving a gap of only \$298.31.

⁶ The court does not include Elizabeth or Bernadette because, at the ages of 23 and 21, they are emancipated for purposes of a poverty guideline calculation.

living at a sub-minimal level.

Finally, ECMC's challenge to Plaintiff's first prong showing is substantial in light of the various payment plan options available to Plaintiff through the federal loan repayment program. ECMC has acknowledged that Plaintiff finds his current loan obligations too burdensome, and has advised Plaintiff that he is eligible for participation in the program. Included are extended and graduated repayment programs, which could immediately lower Plaintiff's monthly payment to as little as \$106.34 or \$72.58. Plaintiff could, therefore, restructure his monthly payment to accommodate his financial situation.

In sum, while it is true that Plaintiff lives modestly, this consideration is offset by Plaintiff's income of \$63,000, his ability to supplement this income through overtime or part-time employment, and ample room in his budget for economizing. Plaintiff has not demonstrated that, given his current income and expenses, the necessity of making the monthly loan payment will cause his and his dependents standard of living to fall below a "minimal" level. Accordingly, examination of the second and third prongs under *Brunner* is unnecessary. See *In re Brunner*, 46 B.R. at 754 (debtor must at least satisfy the minimal standard of living test before a discharge of his or her student loans will be granted).

Conclusion

For the reasons stated above, Plaintiff's student loan obligations cannot be discharged and the Complaint is dismissed in its entirety.

Dated:
Albany, New York

Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge