

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

KEVIN RENSHAW

Debtor

CASE NO. 97-60985

Chapter 7

CAZENOVIA COLLEGE

Plaintiff

vs.

ADV. PRO. NO. 97-70114A

KEVIN RENSHAW

Defendant

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Presently before this Court is a motion filed on September 22, 1997, by the Plaintiff, Cazenovia College ("Cazenovia"), pursuant to Rule 56(c) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), as incorporated by reference in Federal Rule of Bankruptcy Procedure

("Fed.R.Bankr.P.") 7056, for an order granting summary judgment. Cazenovia seeks summary judgment on the grounds that there is no issue of any material fact and it is entitled to judgment as a matter of law pursuant to § 523(a)(8) of the United States Bankruptcy Code (11 U.S.C. §§ 101-1330)("Code").

The Court heard oral argument on the motion on October 7, 1997, in Syracuse, New York and adjourned the matter to October 21, 1997, to allow the parties an opportunity to file supplemental memoranda of law. On October 21, 1997, at the request of the Defendant, Kevin Renshaw ("Debtor"), additional time was provided in order for him to respond to a memorandum of law filed on behalf of Cazenovia. The matter was submitted for decision on November 19, 1997.

JURISDICTIONAL STATEMENT

The Court has core 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 or about February 8, 1992, Cazenovia and the Debtor entered into a Reservation Agreement ("Agreement"). *See* Exhibit "E" of the Affidavit of Frances Mezzanini ("Mezzanini's Affidavit"), filed on September 22, 1997, in support of Cazenovia's motion. Cazenovia is a not-for-profit educational institution. *See* Exhibit "A" of Mezzanini's Affidavit at ¶ 1. The

Agreement provided that the cost of tuition, room and board was \$12,980.00 for the 1992-93 academic year and the costs of summer college for 1992 was \$1,695. *See* Exhibit “E” of Mezzanini’s Affidavit. By signing the Agreement, the Debtor “agrees to pay” the required fees specifically listed in the Agreement as well as additional fees incurred by the Debtor.¹ *See id.* In return, Cazenovia reserved a place for the Debtor to attend classes and receive accommodations for room and board. *See id.* According to the Agreement, the costs of education were due before registration or when billed.² *See id.* The Debtor attended Cazenovia for the fall semester of the 1992-93 academic year and withdrew from Cazenovia before the spring semester. *See* Mezzanini’s Affidavit at ¶ 14. After partially paying some of the tuition and costs, the Debtor owed Cazenovia \$5,356.70.³ *See* Exhibit “F” of Mezzanini’s Affidavit. Cazenovia obtained a default judgment in state court against the Debtor on or about December 4, 1996, in the amount of \$9,999.87 (including interest and attorneys’ fees). *See* Mezzanini’s Affidavit at ¶ 3.

On February 25, 1997, the Debtor filed a voluntary petition (“Petition”) seeking relief under chapter 7 of the Code. In Schedule F attached to the Petition, the Debtor listed Cazenovia

¹The other costs included those specifically contracted by the Debtor and those incurred by the Debtor as provided in the catalog. *See* Exhibit “E” of Mezzanini’s Affidavit.

²A payment schedule is provided in Cazenovia’s catalog stating that 50% of the total family contribution is due no later than September 1. Also, the payment schedule indicates that there is a service charge of 1.6% per month with an annual rate of 19.2% on accounts that are not paid by the due date provided in the bill.

³This amount covers tuition, room and board for the summer of 1992 as well as the fall of 1992. *See* Exhibit “F” of Mezzanini’s Affidavit. The Debtor contends that he only attended Cazenovia for the fall semester without offering any support documentation. While there is a dispute as to this fact, the Court finds that it is not essential to a determination of the issue before it.

as an unsecured creditor in the amount of a \$10,000.

Cazenovia filed a complaint on May 8, 1997, commencing an adversary proceeding against the Debtor. For a first cause of action, Cazenovia alleges that the debt owed to it by the Debtor is nondischargeable. Also, Cazenovia alleges that the Debtor is responsible for its attorneys' fees and other costs pursuant to the Agreement.

ARGUMENTS

Cazenovia argues that pursuant to the Agreement, it extended credit to the Debtor for tuition, room and board and other charges for the summer of 1992 and for the 1992-93 academic year. Cazenovia asserts that the extensions of credit for tuition and other school charges constitute an "educational loan" excepted from discharge by Code § 523(a)(8). Cazenovia urges the Court to adopt a broad definition of a loan to encompass extensions of credit if a three-factor test is satisfied.⁴ Cazenovia points out that the test does not require an actual transfer of cash so long as there is evidence of an absolute agreement to repay the extension of credit. Cazenovia contends that the Agreement satisfies the three-factor test because it (1) sets forth the exact charges owed to Cazenovia for tuition and other educational expenses, (2) states that the charges are due at registration and thereafter billed on a monthly basis and (3) evidences the Debtor's promise to pay tuition, room and board, fees and other charges. Therefore, Cazenovia asserts that

⁴The factors are the following: (1) the student was aware of the credit extension and acknowledges the money owed, (2) the amount owed was liquidated, (3) the extended credit was defined as a sum of money due to a person. See *Andrews Univ. v. Merchant (In re Merchant)*, 958 F.2d 738, 741 (6th Cir. 1992).

the Agreement shows an absolute agreement to repay credit advances and therefore these extensions of credit are a loan.

Alternatively, Cazenovia argues that the extensions of credit by it for tuition and other educational expenses constitutes nondischargeable “educational benefits.” Cazenovia contends that Code § 523(a)(8) was expanded in 1990 to include both educational benefits and overpayments in order to expand the categories of obligations excepted from discharge.

Cazenovia argues that a loan made by a non-profit institution of higher education does not have to be part of a “financial aid program” in order to be nondischargeable. Cazenovia contends that one of Congress’ purposes in enacting Code § 523(a)(8) was to protect the resources of non-profit institutions of higher education so that they are not economically burdened by a discharge of student obligations. Therefore, Cazenovia argues that educational loans made by institutions of higher education do not have to be government insured or part of a guaranteed financial aid program because it is enough that the loans are owed to a non-profit educational institution. Cazenovia argues that according to case law non-profit institutions, which do not facilitate access to education, are required to make loans pursuant to a program.

Additionally, Cazenovia contends that under the terms of the Agreement, the Debtor is required to pay its collection costs including reasonable attorneys’ fees in this adversary proceeding as well as any subsequent collection costs. Cazenovia argues that the collection costs are nondischargeable.

The Debtor argues that the debt owed to Cazenovia is not an educational loan subject to the exceptions to discharge provision of the Code. The Debtor notes that he never received any funds and, therefore, no loan exists between Cazenovia and himself. The Debtor points out that

the interest rate on the debt is 19.2% which is a much higher rate of interest than Congress contemplated for student loan programs. Further, the Debtor notes that the debt was to be paid before he finished at Cazenovia while usually student loan programs allow students to attend college and pay their loans after graduation. The Debtor argues that these factors support his argument that the Agreement is not an educational loan. The Debtor argues that the purpose of Code § 523(a)(8) is to deter students from defaulting on their obligations after they have completed their education because taxpayers pick up the bill when students default. Due to the fact that there was no transfer of funds between the parties, the Debtor argues that there is no bill for taxpayers to cover. Therefore, the purpose of Code § 523(a)(8) is not furthered by allowing for extensions of credit to constitute a loan.

The Debtor contends that the Agreement was simply an informal reservation of admission; in other words, the Agreement constitutes a confirmation between the parties of the costs of attending the college. The Defendant argues that the Agreement is not a valid promissory note. The Debtor points out that the Agreement provided that the charges would be “paid as billed” and were accepted under the terms of the catalog. Thus, the Debtor contends that a court could not determine what terms were violated or defaulted upon because there are no specific terms in the Agreement. The Debtor argues that according to Code § 523(a)(8) a loan must be made under a program funded in whole or in part by a government unit or a non-profit institution. Thus, the Debtor contends that a loan given by a non-profit institution such as Cazenovia must be part of a financial aid program. The Debtor points out that there is no evidence that the debt was made pursuant to a program. Therefore, the Debtor argues that the motion by Cazenovia should be denied and the complaint should be dismissed.

DISCUSSION

Fed.R.Civ.P. 56(c), incorporated by reference in Fed.R.Bankr.P. 7056, provides that summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled, as a matter of law, to judgment in its favor. Local Rule 913.1(i)⁵ requires that a party moving for summary judgment submit a short statement of material facts to which the party believes there is no genuine issue. In turn, the party opposing the motion must submit a statement of facts which it contends there exists a genuine issue. The parties in this proceeding agree that there are no disputes as to the material facts.⁶ The Court will determine if the moving party, Cazenovia, is entitled to judgment as a matter of law.

Code § 523(a)(8) provides that certain student debt is nondischargeable. For purposes of this proceeding the Court will focus on the portion of the Code providing that “an educational benefit overpayment or loan . . . made under any program funded in whole or in part by a . . . nonprofit institution” constitutes nondischargeable debt. *Id.* In order for the debt owed to Cazenovia to be excepted from discharge, Cazenovia must show by a preponderance of the

⁵The Local Rules of Bankruptcy Practice for the Northern District of New York have since been amended and took effect January 1, 1998. Local Rule 913.1(i) is now found at L.R. 7056-1 and identified as “Summary Judgment.”

⁶Cazenovia submitted a statement of uncontested facts (“Statement”) in support of its motion on September 22, 1997. The Debtor submitted the Affidavit of its attorney, Robert H. Lawler, Esq., on October 3, 1997, in opposition to Cazenovia’s motion which stated that there were no disputes as to the primary facts. *See* Affidavit of Lawler, at ¶¶ 1(a), 2(1). Therefore, the facts set forth in Cazenovia’s statement are deemed admitted. *See* L.R. 7056-1.

evidence that the debt: (1) was an educational “loan” or “educational benefit overpayment”⁷ (2) made as part of a program (3) by a non-profit institution. *See Lee Memorial Hosp.v. McFadyen (In re McFadyen)*, 192 B.R. 328, 331 (Bankr. N.D.N.Y. 1995). It is undisputed that Cazenovia is a non-profit institution; therefore, the Court will focus on the first two requirements.

The first issue is whether the debt owed to Cazenovia is a loan. There is no definition of “loan” provided in the Code and many courts have looked to the Second Circuit’s definition for guidance.⁸ *See, e.g., United States Dep’t of Health and Human Services v. Smith*, 807 F.2d 122, 124 (8th Cir. 1986). Some courts have construed the Second Circuit’s definition liberally and held that if a three-part test is satisfied, then extensions of credit are loans. *See, e.g., Andrews Univ. v. Merchant (In re Merchant)*, 958 F.2d 738, 741 (6th Cir. 1992) (holding that extensions of credit by a university evidenced by promissory notes constituted a loan for educational expenses). Other courts have interpreted the definition more restrictively by concluding that a transfer of funds is a requirement of a loan. *See, e.g., New Mexico Inst. of Mining and Tech. (In re Coole)*, 202 B.R. 518, 519 (Bankr. D.N.M. 1996) (holding that a loan requires a sum of money to change hands).

⁷Cazenovia focuses on the arguments that the debt is an educational benefit or loan in its supporting memoranda of law. Cazenovia also maintains that the debt constitutes “an obligation to repay funds received as an educational benefit, scholarship or stipend[.]” *See* Cazenovia’s Second Supplemental Memorandum of Law, filed December 4, 1997, at 1 n.1. It is undisputed that no funds were forwarded to the Debtor by Cazenovia; therefore, the argument that there is an obligation to repay funds is ungrounded in the facts. *See Alibatya v. New York Univ. (In re Alibatya)*, 178 B.R. 335, 338 (Bankr. E.D.N.Y. 1995).

⁸ “In order to constitute a loan there must be a contract whereby, in substance one party transfers to the other a sum of money which that other agrees to repay absolutely, together with such additional sums as may be agreed upon for its use. If such be the intent of the parties, the transaction will be considered a loan without regard to its form.” *In re Grand Union Co.*, 219 F. 353, 356 (2d Cir. 1914).

The Agreement was signed by both a representative from Cazenovia and the Debtor while he was still in high school. It listed charges for tuition, room and board for the upcoming academic year and the costs for attending summer college. By signing the Agreement, the Debtor agreed to pay the specific charges listed as billed. In turn, Cazenovia agreed to reserve a place for the Debtor to attend the college in the summer and the upcoming fall.

Cazenovia argues that the Agreement shows that it extended credit in the amount of \$12,980.00 for the academic year 1992-93 and \$1,695 for the costs of summer college for the 1992 term.⁹ According to Cazenovia, the Debtor promised to repay the extensions of credit in the Agreement. Cazenovia argues that *In re Peller* is distinguishable because there the form signed by the student did not contain a promise to repay any obligations and it did not specify the amounts of tuition and other charges to be paid. *Peller v. Syracuse Univ. (In re Peller)*, 184 B.R. 663, 664 (Bankr. D.N.J. 1994). Therefore, Cazenovia contends that its holding should only apply in the absence of a specific agreement like the Agreement in this proceeding. Also, it is the contention of Cazenovia that the Agreement constitutes an absolute agreement to repay the extension of credit and, therefore, satisfies the three requirements of *In re Merchant* for an extension of credit to be a loan.

The court in *Peller* held that mere services from a university absent a loan or extension of credit, do not constitute a nondischargeable debt under Code § 523(a)(8). *Id.* at 669. In *Peller* the student signed an Intent to Register form wherein the student agreed to pay the university for all fees and charges during his attendance at the university. *Id.* at 664. The court in *Peller* found

⁹Although in its Statement Cazenovia stated that the Agreement evidenced extensions of credit, the Court finds that whether the Agreement evidenced extensions of credit is simply an argument and not a fact.

that the Letter of Intent did not amount to an extension of credit or a promissory note. *Id.* at 668. The Court finds that the form in *Peller* and the Agreement are very similar. The mere fact that Cazenovia listed the exact charges for tuition and room and board and other costs does not evidence an extension of credit by it for these charges. Also, the Debtor agreed to pay Cazenovia when billed, but there was no agreement to “repay” any obligations. Thus, the Debtor did not incur any sort of indebtedness by signing the form. Similar to the form in *Peller*, the Agreement does not provide that the university forwards funds, extends credit or binds the Debtor to repay any obligations. While both the Debtor and a representative from Cazenovia signed the Agreement, only the student signed the form in *Peller*. *Id.* at 664. The Court finds that the factual difference between the instant proceeding and *Peller* does not make the Agreement a promissory note or an extension of credit; it simply may give Cazenovia a legal remedy for breach of contract against the Debtor which did not exist in *Peller*.

The Court finds *In re Merchant* distinguishable from the proceeding before the Court because there the student signed promissory notes before attending classes evidencing extensions of credit by the university.¹⁰ 958 F.2d at 738. The student in *Merchant* agreed to repay the extensions of credit by the university for a specific sum of money after graduation, and in turn the university provided the student with an education. *Id.* at 741. In the instant proceeding, there is no extension of credit evidenced in the Agreement. Also the Agreement is not a promissory note whereby the student became obligated to repay a debt to Cazenovia upon signing the Agreement. Therefore, the Court finds that the *In re Merchant* test is inapplicable to the facts of

¹⁰The case *In re Johnson*, No. 97-4131-399, 1997 WL 774773, at *1 (Bankr. E.D. Mo. Dec. 3, 1997), is also distinguishable to the extent that there a student also signed a promissory note to pay the extension of credit by the school.

this case.

Based upon an examination of the Agreement, the Court finds that it does not constitute a loan under a broad or restrictive interpretation of the Second Circuit's definition. It is undisputed by the parties that there was no transfer of funds which would satisfy the restrictive meaning of a loan. Also, there is no language in the Agreement showing extensions of credit to the Debtor by Cazenovia for the specifically listed charges or costs of attending the college. Thus, there is no evidence of a promise by Cazenovia to extend credit to the Debtor but simply a promise by Cazenovia to reserve a place for the Debtor. The Court finds that the debt does not constitute a loan because there is no advance of funds or an extension of credit which gives rise to a loan if three requirements are satisfied pursuant to *In re Merchant*.

Alternatively, Cazenovia argues in reliance on *In re Najafi*, that the debt owed to Cazenovia for tuition and other educational expenses constitutes a nondischargeable "educational benefit."¹¹ *Najafi v. Cabrini College (In re Najafi)*, 154 B.R. 185, 190 (Bankr. E.D. Pa. 1993). Cazenovia essentially contends that the Debtor received an "educational benefit" by attending classes and receiving room and board without fully paying for these services as provided in the Agreement. In the case *In re Najafi*, the college allowed the student to attend classes without paying tuition. *Id.* at 188. The court found that the student received an "educational benefit" by attending class for two weeks without paying any tuition. *See id.* at 190. The court in *Najafi* determined that "educational" separately modified "benefit," "overpayment," and "loan" and

¹¹Cazenovia also argues that the extensions of credit as evidenced in the agreement constitute "educational benefits." Due to the fact that the Court concluded that the Agreement did not evidence an extension of credit, this argument is irrelevant.

therefore “educational benefit” is a distinct category of obligation incurred by a student.¹² However, the court assumed *arguendo* that there was an “educational benefit overpayment” which it defined as the receipt by a student of an educational benefit in excess of what the student paid. *See id.* at 190. Therefore, the court in *Najafi* concluded that an “educational benefit overpayment” would encompass the situation before it where the student received an educational benefit without making any payment. *Id.*

In 1990 Code § 523(a)(8) was amended to include among other things the phrase “educational benefit overpayment.” Crime Control Act of 1990, Pub. L. No. 101-647, § 3631(a), 104 Stat. 4865 (1990). The legislative history of the amendment indicates that Code § 523(a)(8) “extends the Bankruptcy Code’s nondischargeability of student loans to debts which are similar in nature to student loans.” 136 CONG. REC. H13288 (daily ed. October 27, 1990) (statement of Rep. Brooks). Based on a plain reading of Code § 523(a)(8), the Court finds that the first phrase provides for two categories of obligations: educational benefit overpayments and loans. *See Seton Hall Univ. v. Van Ess (In re Van Ess)*, 186 B.R. 375, 380 (Bankr. D.N.J. 1994). This interpretation is consistent with the legislative history of the 1990 Amendment because mere attendance at an educational institution is not a nondischargeable debt. *See In re Peller*, 184 B.R. at 669. Code § 523(a)(8) “has not been expanded to include all financial obligations owed to educational institutions.” *See In re Van Ess*, 186 B.R. at 379. An “educational benefit overpayment” does not cover nonpayment or underpayment by a student but instead covers a

¹²Cazenovia points out that a principle of statutory construction states that a statute should be read as a whole. Cazenovia argues that based upon Code § 523(a)(8), the term “benefit” is intended to be a category of obligation and intended to be a noun.

receipt of funds by a student as evidenced by the word “overpayment.”¹³ Cazenovia simply allowed the Debtor to attend classes without paying all the required tuition and other charges. Therefore, the debt which the Debtor incurred by not paying his bill is not an “educational benefit overpayment.”

A loan or educational benefit overpayment must have been made pursuant to a program in order to fall under the protection of Code § 523(a)(8). Cazenovia argues that while a non-profit institution must make a loan to a student pursuant to a program with an educational purpose, there is no such requirement that a non-profit institution of higher education make a loan pursuant to a program. Regardless of whether the nonprofit institution is an educational institution or otherwise, the debt must be funded by the non-profit institution or a government unit. *See Sante Fe Med. Services (In re Segal)*, 57 F.3d 342, 348 (3d Cir. 1995). A program means there is “a sum of money or other resources set apart for a specific objective or activity.” *In re Alibatya*, 178 B.R. at 339. There is no evidence of a funded program whereby Cazenovia permitted attendance at the school without the payment of tuition. *See In re Van Ess*, 186 B.R. at 380. Thus, the debt owed to Cazenovia by the Debtor is not excepted from discharge pursuant to Code § 523(a)(8).¹⁴

Since there are no disputed material facts and the nonmoving party, the Debtor, is entitled

¹³If a student pursuant to a program receives periodic payments while not in school, then those funds constitute an “educational benefit overpayment.” *See New Mexico Inst. of Mining and Tech. (In re Coole)*, 202 B.R. 518, 519 (Bankr. D.N.M. 1996).

¹⁴Cazenovia claims that the Agreement provides for the costs of collection of the debt owed to Cazenovia and reasonable attorneys’ fees and argues that these costs are nondischargeable. The Court need not reach the issue of whether the Agreement provides for these fees and costs.

to judgment as a matter of law, the Court grants *sua sponte* summary judgment in favor of the Debtor. *See Tillman v. Mason (In re Mason)*, 191 B.R. 50, 55 (Bankr. S.D.N.Y. 1996).

Based on the foregoing, its is hereby

ORDERED that Cazenovia's motion for summary judgment is denied, it is further

ORDERED that Cazenovia's complaint is dismissed for failure to state a claim.

Dated at Utica, New York

this 9th day of March 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge