

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JODI J. STOCKTON,

CASE NO. 88-01611

Debtor

JODI J. STOCKTON,

Plaintiff

vs.

ADV. PRO. NO. 89-0015

NEW YORK STATE HIGHER EDUCATION
SERVICES CORPORATION,

Defendant

APPEARANCES:

JAMES F. SELBACH, ESQ.
Attorney for Debtor
505 Wilson Building
306 South Salina Street
Syracuse, New York 13202

FREDERICK J. SCHREYER, ESQ.
Attorney for New York State Higher
Education Services Corporation
99 Washington Avenue
Albany, New York 12255

STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

This case comes before this Court for a determination of the dischargeability of a student loan debt based upon the undue hardship exemption of §523(a)(8)(B) of the Bankruptcy Code, 11 U.S.C.A. §§101-1330 (West 1979 and Supp. 1989) ("Code"). The Debtor, Jodi J. Stockton, commenced the instant adversary proceeding on February 6, 1989 against the New York State Higher

Education Services Corporation ("NYSHESC"). A trial was conducted on June 29, 1989 in Utica, New York after which the Court reserved decision and gave the parties leave to submit memoranda of law.

JURISDICTION AND PROCEDURE

The Court has jurisdiction of the subject matter and parties by virtue of 28 U.S.C.A. §§1334(b) and 157(a) (West Supp. 1989). This is a core proceeding arising under a Title 11 case, 28 U.S.C.A. §§157(b)(1), (b)(2)(I), and the following findings of facts and conclusions of law are governed by Federal Bankruptcy Rules ("Bankr.R.") 4007, 7001(6), 7004, 7005, 7052 and 9017.

FACTS

The Debtor filed a Chapter 7 petition on November 1, 1988 claiming \$17,122.11 in unsecured debt, and \$1,257.00 in property. Schedule A-3 of Debtor's Petition includes NYSHESC, 1 Commerce Plaza, Albany, N.Y. 12255, as a creditor holding an unsecured claim in the amount of \$12,665.62 arising out of a student loan. Item thirteen of her Statement of Financial Affairs For Debtor Not Engaged In Business indicates that during the year immediately preceding the filing she made unspecified payments on loans. According to Debtor's testimony, one of her tax returns was seized by the government to partially satisfy her debt to NYSHESC. However, the record is silent on its actual amount and when it was seized. It is also unclear whether the debt to NYSHESC of

\$12,665.62 set forth on Debtor's Schedule A-3 is the balance after or before the seizure.

On February 6, 1989 the Debtor commenced the instant adversary proceeding claiming that excepting her student loan from discharge would impose an undue hardship on her and her dependents. In its answer filed March 16, 1989, NYSHESC denied the Debtor's allegations that undue hardship would result if the debt was excepted from discharge.

On May 25, 1989 an Order of Discharge relating to all other debts was entered.

At the trial the Debtor, testifying on her own behalf, was the only witness called by either party. At the time of trial, the Debtor, thirty-three years of age, was a single mother living in the Utica area with her two daughters aged seven and ten. All three were in good health and not receiving public assistance.

The student loan was issued to finance the Debtor's college education in the study of Criminal Justice/Human Services. The Debtor completed three years of college before withdrawing in January, 1982, due to pregnancy, with an Associates Applied Sciences Degree in Criminal Justice.

The Debtor testified to holding numerous jobs paying \$3.40 to \$5.00 per hour, some unrelated to her educational background. At the time of trial she had secured employment as an assistant coordinator with Blue Cross/Blue Shield, Utica, New York. She was earning \$7.66 per hour or about \$900.00 per month and testified that no raises were currently due but that a promotion was possible. The Debtor testified that she received no support from

the fathers of her children and that any attempt to obtain support would be futile or too expensive. The Debtor also testified that she already owed her parents money, that they are not capable of lending her additional sums and that her wages were her only source of income.

The Debtor's testimony at trial, which differed slightly from the Schedule of Current Income and Current Expenditures filed with her petition, listed the following monthly expenditures:

Rent	\$ 300.00
Utilities	70.00
Phone	25.00
Food	390.00
Clothing	30.00
Laundry	20.00
Medical and drug	15.00
Car Insurance	23.00
Life Insurance	12.00
Pension Insurance	17.00
Transportation	65.00
Child care	<u>60.00</u>
Total	\$1,027.00

Debtor also disclosed insurance from her employer covering eighty percent of medical expenses with a two hundred dollar deductible limitation.

The Debtor further testified that the original amount of her monthly student loan payment to NYSHESC was \$130.00 per month. She admitted making no payments, but alleged that she had offered to pay \$40.00 per month to NYSHESC. The Debtor's partial repayment offers were denied by NYSHESC.

ARGUMENTS

The Debtor's complaint is summed up in an answer to interrogatory number fourteen. "[B]ased upon current income and

current expenditures, there is no disposable income to pay any creditors." See Plaintiff's Answers to Interrogatories.

NYSHESC asserts that the Debtor is employed and likely to advance since she is intelligent and hard working. It concedes that her income is currently inadequate, but states that within a few years the Debtor should have much less trouble meeting her obligations. NYSHESC claimed that denying a discharge of the student loan would not cause the Debtor undue hardship and that if undue hardship exists with respect to the entire debt, the Court should reduce the debt and only allow a partial discharge.

ISSUE

Has the Debtor demonstrated "undue hardship" within the meaning of Code §523(a)(8)(B) so as to entitle her to a discharge of her student loan debt?

DISCUSSION

The Debtor seeks relief under Code §523(a)(8)(B) which provides for discharge of an educational student loan only where excepting the debt from discharge would impose "undue hardship" on the debtor and the debtor's dependents. The Court assumes Code §523(a)(8)(A) is inapplicable since the parties have neither raised it nor submitted evidence of when the loan first became due.

The burden of proof on the issue of "undue hardship"

rests with the Debtor. Courtney v. Gainer Bank (In re Courtney), 79 B.R. 1004, 1010 (Bankr. N.D.Ind. 1987); Alliger v. Pennsylvania Higher Education Assistance Agency (In re Alliger), 78 B.R. 96, 99 (Bankr. E.D.Pa. 1984).

In the Second Circuit, the standard for proving "undue hardship" was set forth in Brunner v. New York State Higher Education Services Corp., 831 F.2d 395, (2d Cir. 1987). This Court has also had occasion to employ the Brunner test in Cahill v. Norstar Bank of Upstate New York (In re Cahill), 93 B.R. 8, 11 (Bankr. N.D.N.Y. 1988). The three part standard is:

- (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, supra, 831 F.2d at 396.

This standard reflects a "clear congressional intent exhibited in section 523(a)(8) to make the discharge of student loans more difficult than that of other excepted debt." Brunner, supra, at 396.

In the instant proceeding, it is clear that at the present time the Debtor is suffering a hardship. She is barely maintaining a minimal standard of living. From the undisputed evidence presented, Debtor and her family have few, if any, luxuries and none of her current expenditures could be eliminated.

It is also undisputed that her monthly expenses exceed her income and that her student loan debt to NYSHESC comprises approximately seventy-four percent of her aggregate debt. The Court finds that,

because the Debtor would not be able to maintain a "minimal" standard of living if required to repay the student loan, the first part of the Brunner standard is satisfied.

While current inability to pay debts may prompt an individual to seek discharge of those debts through bankruptcy, this current condition of the Debtor is not sufficient to discharge educational loans. Educational loans may be discharged only in rare cases based on "exceptional circumstances". See Lohman v. Connecticut Student Loan Foundation (In re Lohman), 79 B.R. 576, 581 (Bankr. D.Vt. 1987).

Exceptional circumstances are incorporated in the second part of Brunner's three part standard. The Brunner court elaborated that the second part requires a showing by the debtor of a "continuing inability to repay over an extended period of time." In re Brunner, supra, 831 F.2d at 396. Thus, as stated in Connor v. Illinois State Scholarship Commission (In re Connor), 89 B.R. 744 (Bankr. N.D. Ill. 1988), "the Debtor must show that any repayment of the loan would be more than an inconvenience, cause a reduction in lifestyle or work a hardship on the Debtor or his/her family". Id. at 747.

While the Debtor currently may not be able to maintain a "minimal" standard of living if forced to repay the student loan, it is unlikely that this state of affairs will persist for a significant portion of the repayment period of the student loans.

The Debtor is presently employed by a major insurance company.¹

¹ Notwithstanding any indirect benefit from education, for the purposes of this analysis it is irrelevant that this employment is unrelated to the Debtor's education for which the student loans

She is intelligent and agrees that she is likely to be promoted. She is confident enough in her future to move from an apartment where she paid \$310.00 per month for rent and utilities to one in a better neighborhood with a larger yard where she will pay approximately \$370.00 per month.

The court in In re Lohman, supra, 79 B.R. 576 noted that;

Exceptional circumstances have been found most frequently as a result of illness, e.g., In re Norman, 25 B.R. 545 (Bankr. S.D.Cal. 1982); as result of lack of usable skills, e.g., In re Seibert, 10 B.R. 704 (Bankr. S.D.Ohio 1981); the existence of a large number of dependents, e.g., In re Clay, 12 B.R. 251 (Bankr. N.D.Iowa 1981); or a combination of these circumstances, In re Matter of Diaz, 5 B.R. 253 (Bankr. W.D.N.Y. 1980)

Id. at 581. See also In re Alliger, supra, 78 B.R. 96 (student loan debt discharge allowed where debtor had back injury, no marketable skills, and an inability to hold a job).

The facts at bar are distinguishable from the exceptional circumstances cited above. The Debtor's situation is likely to improve over time. While she currently expends from five to eleven percent of her monthly income on child-care, this expense will decrease as her children become older. All members of her family are in good health. She makes no claim that any injuries or sicknesses in her family will prevent her from working. Thus, the Debtor has not established any physical disability, lack of marketable skills or history of inability to hold a job which rise to a level sufficient to support a finding

were provided. See Smith v. New York State Higher Education Services Corporation (In re Smith), Case No. 83-01317, Adv. Pro No. 87-0013, slip op. at 14-15 (Bankr. N.D.N.Y. July 12, 1989).

by this Court of exceptional circumstances.

Due to the conjunctive nature of the Brunner test, it is necessary for the Debtor to satisfy each of its three prongs.² The Debtor's failure to sufficiently establish exceptional circumstances requires this Court to make a finding that "undue hardship" does not exist in the case at bar. Because the Debtor has not met the second prong of the Brunner standard, the Court need not address the "good faith" prong of the standard.

In conclusion, the Debtor has not met her burden of proof that excepting the student loan from discharge would impose an "undue hardship" on her and her dependents. In re Alliger, supra, 78 B.R. at 99. While the Debtor may currently be facing in excess of "garden-variety hardship", See Smith, supra, slip op. at 14, this hardship is unlikely to continue "for a significant portion of the repayment period of the student [loan]". See In re Brunner, supra, 831 F.2d at 396.³

Thus, the Court determines that the Debtor's student loan obligation in the sum of \$12,665.62 is nondischargeable and that she is not entitled to the return of her tax refund that was

² See e.g., In re Smith, supra, (student loan nondischargeable where debtor had \$700.00 per month surplus and, therefore, failed to satisfy the "minimal standard" prong of the test despite multiple illnesses and ongoing custody battle).

³ NYSHESC urges that had the Debtor met all three parts of the Brunner standard, the Court, pursuant to Code §105(a), could reduce the debt or create a repayment schedule that would not lead to undue hardship for the Debtor. The case law is clear that had the three prongs been met, the entire debt will be found dischargeable. Any subsequent partial repayment schedule must be by agreement of the parties. See also In re Courtney, supra, 79 B.R. at 1013 (such an order is tantamount to conversion to Chapter 13).

seized for the benefit of NYSHESC. This obligation, however, is to be reduced by the amount of tax refund actually received by NYSHESC, if it has not already done so.

IT IS SO ORDERED.

Dated at Utica, New York

this day of September, 1989

STEPHEN D. GERLING
U.S. Bankruptcy Judge