UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

KAREN L. KIELAR, CASE NO. 93-6l343

Debtor

KAREN L. KIELAR,

Plaintiff

vs. ADV. PRO. NO. 93-70l06

ROCHESTER INSTITUTE OF TECHNOLOGY,
SALLIE MAE LOAN SERVICING CENTER
and NEW YORK STATE HIGHER
EDUCATION SERVICES CORPORATION,

Defendants

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

Before the Court is an adversary proceeding commenced by the Debtor, Karen L. Kielar ("Debtor") against Rochester Institute of Technology ("RIT"), Sallie Mae Loan Servicing Center ("Sallie Mae") and New York State Higher Education Services Corporation ("NYSHESC") seeking a discharge from a student loan pursuant to §523(a)(8) of the Bankruptcy Code. (ll U.S.C. §§101-l330) ("Code").

A trial of the adversary proceeding was held at Utica, New York on November l8, l993. Following the trial, the Court reserved decision and allowed

the parties to submit memoranda of law on or before December l3, l993.[1]

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this adversary proceeding pursuant to 28 U.S.C. §§1334(b), l57(a), (b)(l) and (2)(I).

FACTS

The Debtor is a forty year old, divorced mother of two minor children. She graduated from RIT with a Bachelor of Fine Arts degree in graphic design in May of l99l. Prior to entering RIT, Debtor had earned an associates degree in computer graphics at Tompkins/Cortland County Community College.

While at RIT, Debtor received some scholarship money, income contingent student loans and public assistance. At the time of her enrollment at RIT, Debtor had one daughter, who was then living with her. Debtor's daughter suffered from asthma and allergies, which appear to have been aggravated during the time that Debtor and the child resided in Rochester, New York.

At the time of Debtor's graduation from RIT in the spring of l99l, she was advised by the Institute that her student loans approximated $l5,000 to $l8,000 and that repayment would require some $700.00 per month. Debtor had paid interest only on her income contingent loans while she was a student at RIT, allegedly using the proceeds of other student loans.

During the summer of l99l, Debtor applied for work at Cornell University ("Cornell") in Ithaca, New York and actually began work in November of l99l as a "copy preparation specialist". Her starting salary at Cornell was $7.56 per hour.

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[1] RIT never appeared in this adversary proceeding and at the trial the Court granted Debtor's oral motion for an order by default, discharging all debts due and owing to RIT. An Order to that effect was entered on December l6, l993. With regard to Sallie Mae, Debtor failed to provide an affidavit of service of the summons and complaint on said defendant, and, therefore, the Court is without any personal jurisdiction over Sallie Mae.

In February of l992, while pregnant with her second child, Debtor applied for and received a consolidation loan from Sallie Mae, which loan was guaranteed by NYSHESC. Debtor then paid off some of her pre-existing student loans with the proceeds. As of July l993, the balance due on the consolidation loan was $22,940.00.[2]

At the time of trial, Debtor was still employed by Cornell, earning approximately $9.50 per hour, and working approximately 40 hours per week. Debtor has applied for at least one other position at Cornell since November of l99l; however, at the time of the interview, she was suffering from pneumonia and was unable to attend. Debtor anticipated a possible 2% pay raise in July l994.

Debtor currently is receiving public assistance for housing (Section 8 HUD housing), child care, school lunches and baby formula ("WIC"). As Debtor's wages increase, the amount of her rent subsidy decreases.

Debtor incurs significant medical expenses due to the asthmatic condition of herself, as well as her two children, and at the time of trial, she was not eligible for full Medicaid coverage.

Debtor testified that at the time she obtained the consolidation loan from Sallie Mae, she knew she would be unable to make the minimum payments of $400.00 per month, which at that time would have consumed her entire bi-weekly paycheck. Debtor obtained two six month deferments on the Sallie Mae loan following February l992, but upon expiration of the deferments, she did not attempt to renegotiate the terms or repayment period since she understood that the $400.00 monthly payment was the minimum she could pay. At that time, Debtor chose to file a voluntary petition in bankruptcy pursuant to Chapter 7 of the Code. The filing actually occurred on April 30, l993. The student loans comprised almost l00% of her unsecured debt ($32,330 of $33,366 listed unsecured debt).

Debtor testified that she has not sought a better paying position out of the Ithaca/Cortland, New York area primarily due to the medical condition of her oldest daughter, as well as the fact that while employed at Cornell, she is

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[2] Though the record is devoid of proof as to how NYSHESC became the obligee on the Sallie Mae loan, Debtor does not dispute that her present student loan debt is owed to NYSHESC.

able to take a liberal amount of time off to keep appointments at the various public assistance agencies and physicians' offices.

Finally, Debtor is not receiving any support for either child at present, though apparently the father of her oldest child is subject to an existing order of support. She believes that the statement of income and expenses she filed with the Chapter 7 petition understates her actual expenses, and she will shortly need a new car since the l979 Pontiac she drives daily sixty miles round trip between Cortland and Ithaca, New York, has an odometer reading of l48,000 miles.

ARGUMENTS

Debtor contends that she should be granted a discharge of her student loan debt pursuant to Code §523(a)(8) because if she is required to repay such debt, it will impose undue hardship upon her and her children. She points to the fact that she is barely making ends meet at present and would be unable to do so were it not for various public assistance programs in which she and her children are enrolled. She asserts that her current level of income is not likely to increase significantly in the foreseeable future, and her family situation makes it virtually impossible to obtain better paying employment elsewhere. Finally, Debtor posits that the NYSHESC, or more appropriately Sallie Mae, never counselled her as to the amount of the loan versus her ability to repay it based upon anticipated income.

NYSHESC argues that Debtor has never made a good faith effort to repay any portion of her consolidation loan, even though she did request and was granted two six month deferments in repayment. It further asserts that Debtor has made no reasonable effort to seek out the best available employment, arguing simply that her children's medical condition prevents a relocation out of the Ithaca/Cortland, New York area. Finally, NYSHESC contends that Debtor's sole motivation in filing a Chapter 7 bankruptcy petition was to avoid repayment of her student loans as evidenced by the fact that these loans comprise approximately l00% of her outstanding debt, and that given the relatively short time between the receipt of the loan and the date of filing, she has failed to

establish any "certainty of hopelessness" that she will be unable to repay the debt.

DISCUSSION

There is no dispute that within the Second Circuit, a bankruptcy court must approach the dischargeability of a student loan pursuant to Code §523(a)(8)(B) from the perspective of the three prong test announced by the Court of Appeals in Brunner v. New York State Higher Eduction Services Corp., 83l F.2d 395, 396 (2d Cir. l987).

The test provides that a debtor seeking a Code §523(a)(8)(B) hardship discharge must prove (l) 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.

Some factual similarities exist between Marie Brunner and the Debtor herein. The Second Circuit Court of Appeals noted that Brunner had failed to present evidence "indicating a total foreclosure of job prospects in her area of training". Id. at 396. Here the Debtor has, in this Court's opinion, failed to present evidence indicating that her employment at the time of filing was the best available to her, given the level of her education. Brunner filed her bankruptcy petition only ten months after her college graduation and only one month after the date on which her first loan payment came due. The Debtor here filed her petition approximately two years after her college graduation and from the evidence, it appears that the petition was filed on the heels of the expiration of Debtor's second repayment deferment.

A more factually similar case was that which confronted former Bankruptcy Judge Edward Hayes in In re Harris, l03 B.R. 79 (Bankr. W.D.N.Y. l989). In the Harris case, the debtor had graduated from college with a bachelors degree in economics, but later, unable to find work in her chosen field, completed a one year course in respiratory therapy, and obtained

employment as a respiratory practitioner. Ms. Harris was a single mother, twice divorced, with three minor children, and expecting a fourth at the time of the bankruptcy filing. She filed her petition after receiving one deferment on her student loans, but without seeking to renegotiate same, which loans comprised approximately 86% of her total scheduled debt.

Unlike the Debtor herein, however, Harris appeared to have sufficient income to support herself and her children while making payments on her student loans. During the repayment period, Harris apparently purchased a new car, repaid family members debts as well as a credit union loan.

Judge Hayes concluded that as Harris had the financial ability to support her family and still repay the loan, she should be denied a discharge from the student loan debt because she had failed to make a showing of a good faith effort to repay. He noted also that "But for the student loans, it is doubtful that she would be in bankruptcy at all." Id. at 82.

While there are factual similarities between this Debtor, Brunner and Harris,the dissimilarities suggest that factually neither case is dispositive here. Here the equities would seem to weigh more heavily in the Debtor's favor. There is little dispute that while the Debtor sought no additional deferments in repayment, nor any renegotiation of payments, she was financially incapable of supporting her children and repaying the loans in any significant increments, thus rendering such renegotiation or further deferment an exercise in futility. Debtor is portrayed as a single mother, trapped in a near poverty level environment, whose day begins before sunrise and ends well beyond sunset. She appears to be a woman who struggles daily just to make ends meet, doing so only after receiving various forms of public assistance, allegedly with little or no prospect for a brighter future. When questioned by NYSHESC as to what efforts she has made to seek a better paying position, she responded that assuming such positions even exist, the non-monetary benefits of being employed by Cornell far outweigh any increase in salary that might be found in employment elsewhere.

In addition to establishing an inability to maintain a minimal standard of living if forced to repay the loans, however, the Debtor also has the burden of showing that there are additional circumstances which are likely to persist for a significant portion of the repayment period and which would

negatively impact on her ability to meet her loan obligations. This Court must be mindful of the conclusion of the Second Circuit Court of Appeals in Brunner, supra, 831 F.2d at 396, "The further showing required by part two of the test is also reasonable in light of the clear Congressional intent exhibited in §523(a)(8) to make the discharge of student loans more difficult than that of other nonexcepted debt." (emphasis supplied)

During the repayment period, the Debtor will continue to have the responsibility for providing for health coverage for herself and her two minor children. Apparently, her current position at Cornell affords her a certain amount of flexibility to see to the family's medical needs. However, that fact alone does not convince this Court by a preponderance of the evidence that there are no better paying positions elsewhere to which she might successfully relocate her family and that on that issue she has failed to sustain her burden of proof. She simply has made no cognizable effort to find better paying employment in her career field, albeit outside the Cortland/Ithaca, New York area, that would demonstrate to this Court that her employment opportunities are, indeed, limited and that her current financial situation is likely to continue, making repayment difficult.

Nor has she demonstrated a good faith effort to repay the student loan, as required by the third prong of the test applied in Brunner. It is undisputed that she obtained in excess of $20,000 in student loans to obtain a Bachelor of Fine Arts degree. That at the time Debtor obtained the consolidation loan from Sallie Mae, she knew, given her current income and expenses, she would be unable to repay it. That, in reality, she has made no good faith effort to repay the loan because she has chosen to accept employment that is inadequate to even enable her to meet the day to day financial needs of her family. While the Court is sympathetic to the Debtors' plight, it must conclude that she, and she alone, is the architect of that plight.

Having failed to meet either the second or the third prong of the Brunner test, and having evidenced an intent to file a bankruptcy petition solely to discharge the student loan obligation, it is

ORDERED that the relief sought in the complaint herein as against New York State Higher Education Services Corp. is denied, and the complaint is

dismissed.

Dated at Utica, New York

this day of l994

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STEPHEN D. GERLING
U.S. Bankruptcy Judge