

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 06-11813)
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PAMELA SUE REVERE)
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Debtor)
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PAMELA SUE REVERE)
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Plaintiff)
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vs.) PROC. NO. 07-1006
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NELNET)
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Defendant)

DECISION ON DISCHARGEABILITY

At Fort Wayne, Indiana, on October 22, 2007.

This matter is before the court following trial of the issues raised in this adversary proceeding, which asks the court to determine the dischargeability of the debtor's obligation to the defendant.¹ That obligation is a student loan and Plaintiff contends that it should be discharged as

¹The defendant has the annoying habit of placing language, in bolded capital letters, on all of its filings (counsel's appearance, a notice of extension of time, the answer, the joint pre-trial order, and stipulations with plaintiff's counsel) stating: "This is an attempt to collect a debt and any information obtained will be used for that purpose" and "This is a communication from a debt collector." At trial the court commented upon this practice and defendant's counsel stated that it was done in order to comply with the Fair Debt Collection Practices Act. After trial, the same language was placed on defendant's post trial brief and counsel justified doing so because the brief was not a formal pleading and so the admonition was required by 15 U.S.C. § 1692e. Defendant's Post-Trial Brief, filed Sept. 24, 2007, n.1. Admittedly, a post trial brief is not a pleading as that term is defined by the applicable rules of procedure. See, Fed R. Civ P. Rule 7. At the same time, however, the statute requiring such warnings applies only to "communications with the consumer," 15 U.S.C. § 1692e(11), and the court is highly doubtful that a legal brief, and the other submissions bearing the legend, constitutes such a communication. Rather, they would seem to be communications directed to the court. Indeed, if these things are supposed to be communications with the consumer, they

an undue hardship pursuant to § 523(a)(8) of the United States Bankruptcy Code. 11 U.S.C § 523(a)(8).

Student loans are not dischargeable in bankruptcy unless they will constitute an “undue hardship” on the debtor. The Bankruptcy Code does not define “undue hardship,” but [the Seventh Circuit] has adopted the Second Circuit’s three-pronged Brunner test for evaluating such a claim. Under this test, the debtor must demonstrate (1) that he cannot maintain, based on current income and expenses, a minimal standard of living for himself and his dependants if forced to repay the loans; (2) that additional circumstances exist indicating that the 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. The debtor has the burden of establishing each element of the test by a preponderance of the evidence. If the debtor fails to establish any one of the elements, the test has not been met and the court need not continue with the inquiry. Goulet v. Educational Credit Management Corp., 284 F.3d 773, 777 (7th Cir. 2002) (citations omitted). See also, Matter of Roberson, 999 F.2d 1132 (7th Cir. 1993).

The debtor first began attending a community college in New Jersey in 1990 after obtaining her GED. She attended that community college off and on for the next few years, studying business management and accounting, before moving to Fort Wayne. Once in Fort Wayne, she attended Indiana University-Purdue University Fort Wayne (IPFW), until the 1999-2000 school year, studying in the same area. At the time she left school, she was nearing the completion of an associate’s degree. Since then, she has taken courses in accounting and business through a correspondence school. Her education in New Jersey and at IPFW was funded with student loans, which were also used to pay living and other expenses with her former husband, that now total more than \$71,000. These loans first came due six months after the 1999-2000 school year, but because of the debtor’s

should not be filed with the court, see e.g. Standards for Professional Conduct Within the Seventh Judicial Circuit, Lawyers Duties to Other Counsel, no. 30, and the court should ignore them. All in all, the practice of including such language in the appearances, briefs, pre-trial orders, motions, stipulations and other filings, made not only by defendant’s counsel but by other creditors’ counsel as well, seems to be exhibiting an advanced and obnoxious state of paranoia.

income have always been, and still are, in deferment. Throughout this time the debtor has been consistently employed, just not at jobs that pay enough to allow her to make payments on her student loans. For the last three years she has been employed with A.J. Wright, a retail clothing store. At Wright, her income has increased by small amounts each year, so that she currently earns \$8.39 per hour. Although there is no reason to believe that these small increases will not continue, a significant increase in pay would require a promotion. The debtor has not sought work with another employer because, during the job search that led to the position with Wright, she was told that she does not have enough education for the type of entry level management/accounting job she would like to hold. While she would like to go back to school to complete her education, she cannot afford to do so. The debtor resides with a male companion who helps with the household finances. She also testified to the many difficulties she has encountered throughout her life and that she suffers from depression.

The court is satisfied that the debtor has met the first prong of the undue hardship test – demonstrating a current inability to pay. The fact that her student loans have been in deferment for seven years indicates even the defendant acknowledges that much. Instead, the issues in the case involve the second and third parts of the test.

The second part of the undue hardship test requires the plaintiff to show “that additional circumstances exist indicating that the [inability to pay] is likely to persist for a significant portion of the repayment period of the student loans.” Goulet, 284 F.3d at 777. This is often characterized as requiring the debtor to demonstrate a “certainty of hopelessness” where repayment is concerned. Roberson, 999 F.2d at 1136. It is important to note, however, that it is not enough for the debtor to prove that the inability to pay will persist into the foreseeable future. Instead, the continued

inability to pay must be associated with “additional exceptional circumstances.” Roberson, 999 F.2d at 1136. The decision from which the Seventh Circuit drew the certainty of hopelessness formulation of the concept put it this way:

Congress meant the extinguishment of student loans to be an available remedy to those severely disadvantaged economically as a result of unique factors which are so much a part of the bankrupt’s life, present and in the foreseeable future, that the expectation of repayment is virtually non-existent unless by the effort the bankrupt strips himself of all that makes life worth living. In re Briscoe, 16 B.R. 128, 131 (Bankr. S.D. N.Y. 1981)(quoting Matter of Kohn, 5 B.C.D. 419, 424 (Bankr. S.D. N.Y. 1979)).

This is a tough standard to meet and satisfying it generally involves “factors beyond [the debtor’s] reasonable control,” Roberson, 999 F.2d at 1136, such as some type of debilitating physical or mental condition. Moreover, to qualify as “additional exceptional circumstances” these problems should arise after the loans have been obtained, not before. Goulet, 284 F.3d at 779. One thing that will not constitute “additional exceptional circumstances” is the possibility that the debtor may not be able to find a job which pays enough to allow repayment of the loans which financed the debtor’s education.

[T]he government does not guarantee the student’s future financial success. If the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow. Roberson, 999 F.2d at 1137.

The debtor has offered little beyond the fact that she does not earn enough in her current position to be able to afford to repay her student loans, and her perception that her skills do not qualify her for a better paying job, in an attempt to satisfy the second prong of the undue hardship test. That is not enough. While the debtor did testify that she suffers from depression and frequent headaches, she offered no evidence to corroborate her testimony. Admittedly, a debtor is not

necessarily required to produce expert testimony in order substantiate its health claims, In re Barrett, 487 F.3d 353, 360 (6th Cir. 2007), but claims of undue hardship based upon emotional or psychological problems should be scrutinized carefully because they are so susceptible to fabrication and exaggeration. See, In re Burton, 339 B.R. 856, 874-75 (Bankr. E.D. Va. 2006). The debtor should be able to come forward with something, even something as simple as medical records, to corroborate its testimony. In re Hoskins, 292 B.R. 883, 887-88 (Bankr. C.D. Ill. 2003). Here, there is no corroborating evidence concerning the debtor's condition. She is not being treated for depression and apparently has not been since 2000. Furthermore, "depression" describes something that covers a lot of territory. It can be as simple as a feeling of ennui or totally debilitating. The court has no clear idea where the debtor may fall on this spectrum of severity. Additionally, depression may not be permanent and it can often be treated or at least managed successfully. In light of this, the debtor has failed to prove the requisite "additional exceptional circumstances" needed to discharge her obligation to the defendant.

Given that the debtor has failed to satisfy the second part of the undue hardship analysis, the court does not need to consider whether the debtor has made a good faith effort at repayment.

Much of the undue hardship analysis is dependant upon the court's ability to predict the debtor's future, but judges, like other mortals, are much better at determining what happened in the past than they are at predicting what will happen in the future. What happens if their predictions turn out to be incorrect? What are the debtor's options if the bankruptcy court envisions a brighter future for the debtor, and refuses to discharge the debt, but that brighter future never comes to be? Is the debtor then precluded from again raising the issue of undue hardship at a later date, say as an affirmative defense to an action by the student loan creditor to collect the debt? These questions

prompted the court to ask the parties to address, in their post-trial briefs, the preclusive effect of a decision that the loans from the defendant might not be discharged in this action. The defendant concedes that such a decision would not preclude the debtor from raising the issue again, at a later time. As a result, this action will be dismissed, without prejudice.

Judgment will be entered accordingly.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court