

NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 14-12743)	
)	
ANDREW N. JOHNSON)	
)	
Debtor)	
)	
)	
ANDREW N. JOHNSON)	
)	
Plaintiff)	
)	
vs.)	PROC. NO. 15-1017
)	
U.S. DEPARTMENT OF EDUCATION,)	
et. al.)	
)	
Defendants)	

DECISION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

At Fort Wayne, Indiana, on August 6, 2015

The debtor filed this adversary proceeding in order to obtain a declaration that his continuing liability on student loans owed to the defendants would constitute an undue hardship and, therefore, the obligations should be discharged. See, 11 U.S.C. § 523(a)(8). Although not originally named as a party, Educational Credit Management Corporation (ECMC) requested and was permitted to intervene. The matter is before the court on the ECMC’s motion for summary judgment and the plaintiff’s response thereto.

Rule 56 requires the moving party to inform the court of the basis of the motion and to identify “those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91

L.Ed.2d 265 (1986). Once it does so, the non-moving party must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact requiring trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct 1348, 1356 (1986). The non-moving party is required to come forward and identify “specific facts” that are in issue and then, through the use of affidavits or other admissible evidence, affirmatively demonstrate the existence of genuine issues concerning them. In ruling on the motion, the court accepts the non-moving party’s evidence as true, draws all inferences in favor of the non-moving party, and does not weigh the evidence or credibility of the witnesses. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986).

In order to more quickly identify any meaningful factual disputes, the court’s local rules require the moving party to submit a “statement of material facts.” In this statement, the movant is to identify the critical facts upon which its motion is based and those facts are to be “supported by appropriate citations to discovery responses, depositions, affidavits, and other admissible evidence.” N.D. Ind. L.B.R. B-7056-1. If the non-moving party disputes any of the those facts, it is required to file a “statement of genuine issues” in which it identifies the material facts that it claims are in dispute, supporting that contention “with appropriate citations to discovery responses, depositions, affidavits, and other admissible evidence, together with any affidavits or other documentary evidence controverting the movant’s position.” Id. The rule then goes on to emphasize the importance of observing these requirements:

In determining the motion for summary judgment, the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the “Statement of Genuine Issues” filed in opposition to the motion, as supported by the depositions, discovery responses, affidavits and other admissible evidence on file.

Id.

The rule thus clarifies the moving party's need to first identify and come forward with the facts supporting its position and, once it has done so, the non-moving party's obligation to identify which facts are in dispute and to come forward with evidence confirming the dispute. Waldrige v. American Hoechst Corp., 24 F.3d 918, 921-22 (7th Cir. 1994). See also, Vukadinovich v. Board of School Trustees, 278 F.3d 693, 699 (7th Cir. 2002) ("The non-movant will successfully oppose summary judgment only when it presents 'definite, competent evidence to rebut the motion.'").

Educational Credit Management served a request for admissions upon the plaintiff on April 23, 2015. Most of these requests were directed to issues concerning the execution of the promissory notes representing the obligations in question, the amount due and the rate at which interest continued to accrue. Three of them, however, were directed towards the plaintiff's ability to repay and the burden repayment would impose. The plaintiff was asked to:

- 1) admit or deny that the Plaintiff, Andrew N. Johnson, can afford to make payment of a reasonable amount until the debts are paid in full;
- 2) admit or deny that Plaintiff, Andrew N. Johnson, is not permanently disabled, and
- 3) admit or deny that excepting the Notes from discharge under 11 U.S.C. 523(a)(8) will not impose an undue hardship on the Plaintiff.

Despite having been served with a copy of these requests, the plaintiff did not respond to them. He did not object to the request, admit or deny any of the factual statements it contained, or ask for more time to do so. As a result, those facts were deemed admitted. See, Fed. R.Civ. P. Rule 36(a).

The motion for summary judgment is based upon the facts which had been "conclusively established," Fed. R. Civ. P. Rule 36(b), by the plaintiff's failure to respond to the request for admissions. By failing to respond, the plaintiff admits that he can pay, he is not disabled and not

excepting the debts from the debtor's discharge will not impose an undue hardship – all requirements that the debtor was required to satisfy to the contrary.

Plaintiff's response to the motion¹ fails to controvert any of these facts. He did not file a "statement of genuine issues." Instead, the response says that plaintiff's counsel requested an electronic copy of the request for admissions (in addition to the hard copy served upon the plaintiff), because the one he received was not in a format compatible with the software he uses; he requested a copy in a different format and has not received one despite having asked. It then goes on to say that once he receives the file in a format he can use, the plaintiff is prepared to respond to the request for admissions. Any responses to the defendant's request were due 30 days after having been served with them, Fed. R. Civ. P. Rule 36(a)(3), and if the plaintiff encountered any problems responding, he was required to seek an extension of time or object. Doing nothing was not an option.

Having considered the motion, together with the materials submitted in support thereof, the court concludes that there is no genuine issue of material fact, Plaintiff's continued liability to the defendant, Educational Credit Management Corporation, is not an undue hardship and that defendant is entitled to the entry of judgment in its favor as a matter of law.

IT IS THEREFORE ORDERED that Educational Credit Management Corporation's motion

¹Once a motion for summary judgment is filed, the opposing party has thirty days within which to file a response, after which the moving party's time to reply begins to run. See, Fed. R. Civ. P. Rule 56(c); N.D. Ind. L.B.R. B-7056-1, B-7007-1(a). The plaintiff's response was filed on July 29, 2015 – two days late. As a result, ECMC argues that the response should be stricken; something the court is not inclined to do. See, Knudsen v. Liberty Mutual Ins. Co., 411 F.3d 805 (7th Cir. 2005) ("we hope that in the future [parties] will address the issues directly rather than move to strike the [opponent's] papers."); Colodny v. Iverson, Yoakum, Papiano & Hatch, 838 F. Supp. 572, 575 (D. M.D. Fla. 1994). The argument does not matter because, even when the court considers the response (and it has done so in connection with this decision), the plaintiff has still failed to establish any genuine issue of material fact.

for summary judgment is granted and the debtor's obligation to it is non-dischargeable.²

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

²This decision and order appears to resolve all issues as to Educational Credit Management, but the issues regarding the other defendants have not yet been resolved, and so the court cannot yet enter a final judgment. See, Fed. R. Civ. P. Rule 54(b).