United States Bankruptcy Court
District of New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
STEPHEN DEVITT and
JULIET DEVITT,
Debtors. No. 7-99-13876 SA

STEVE DEVITT, et al.,
Plaintiffs,
v. No. 99-1168 S

EDUCATIONAL CREDIT MANAGEMENT
CORPORATION,
Defendant.

MEMORANDUM OPINION

This matter came before the Court for trial on the merits of Plaintiffs' complaint to determine dischargeability of student loan and Defendant's counterclaim for judgment on the educational loan debts. Plaintiffs are self represented. Defendant Educational Credit Management Corporation[1] appeared through its attorney Robert St. John. Having considered the evidence presented and the arguments of the parties, the Court issues this Memorandum Opinion. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

FACTS

Plaintiff Steve Devitt received his Bachelor's Degree from Eastern Montana College in 1971. He then received a Masters Degree in journalism in 1987. From 1987 to 1993 he had various

[1]Montana Higher Education Student Assistance Corporation was named as the original defendant. It transferred the claim to Educational Credit Management Corporation, which was then substituted in as defendant.

jobs in the publishing industry. In September, 1993 he started working as an instructor at Little Big Horn College, and his position lasted until April, 1998. At that time he went to Gallup, New Mexico to work at the Gallup Independent newspaper. He then went to work at the Gallup Independent School District as a teacher. He has, on several occasions, worked two jobs simultaneously. Plaintiff testified that he was unemployed during early 1999, during which time his standard of living fell and created a hardship on his family. Defendant's Exhibit C shows that Plaintiff returned to work in late 1999.

Plaintiff Steve Devitt (hereafter "Plaintiff") is separated from his wife[2], and a divorce was pending at the time of trial. Ms. Devitt receives Social Security Disability Income; Plaintiff has no legal obligation to support her, however he must pay $300

[2]The complaint in this case names both Steve and Juliet Devitt as plaintiffs; they both signed the complaint and other filings. Ms. Devitt appeared at several pretrial conferences in the case, but not at the trial. The pleadings, and the evidence and argument at trial, focused almost exclusively on Mr. Devitt, who clearly controlled all the proceedings and drafted all the filings on behalf of both plaintiffs. Although the presentation on behalf of Ms. Devitt was minimal (indeed, it appeared to be merely incidental to the presentation about Mr. Devitt), the most prominent evidence concerning her was that she has been disabled for about a decade, her only income is SSI of $512 per month, she is separated from Mr. Devitt, and she is at least partially supporting her high-school age daughter. These facts justify discharge of the debt as to her, assuming she is liable on the debt. That ruling in turn precludes the award of a judgment against her on Defendant's counterclaim.

per month child support. His daughter has two years of high school remaining.

Plaintiffs filed their chapter 7 proceeding on July 1, 1999. They had no priority or secured debt. The unsecured debt consisted of approximately $30,000 in student loans, $1,000 medical, and $26,000 credit cards. Plaintiffs received a discharge on October 4, 1999. The student loans are the only obligation remaining from the bankruptcy.

The Statement of Financial Affairs lists Plaintiff's income for the prior periods: 1997, $35,914; 1998, $39,504; and January through June 1999, $8,683. Plaintiffs' Exhibit 1, page 1b, shows adjusted gross income for 1999 of $21,543. Plaintiffs also received an earned income credit for 1999 of $1,907. Exhibit 1, page 1c, is a Social Security earnings record. It shows that during the past ten years Plaintiff has earned about 26,000-27,000 for 1990-1995 (except 1993, $11,150), and 35,000-40,000 for 1996 through 1998. Plaintiffs Exhibit 1, page 1c, is a pay stub for the period ending March 24, 2000. It shows year to date income of $7,908, or about $31,600 per year. It also shows a current retirement deduction of $95.42, and $601.02 year to date. Defendant's exhibit C is the pay stub for December 10, 1999, which also shows that this retirement deduction was in place for 1999. There was no evidence presented on whether the retirement contribution was mandatory or optional.

Plaintiff has a contract to teach at Navajo Pines. He expects to continue in that position until his daughter graduates from high school.

A budget for the month of January, 2000 is in evidence as part of Plaintiffs' exhibit 1. It includes expenses for both Mr. and Ms. Devitt, and includes both of their income. Plaintiff also submitted a budget, but it reflects both his income and expenses and Ms. Devitt's and does not take into consideration their separation or his child support obligation. Plaintiff testified that he averages $237 per month[3] in repairs for his car. His bankruptcy schedules listed two vehicles, both 1987 model years, valued at $400 and $1000 respectively. While the Court is not unsympathetic, it finds that it is not reasonable to budget $237 per month indefinitely into the future as repairs for cars not worth the cost of the repairs.[4] Plaintiff also testified about some medical expenses for himself and his daughter. He admitted having insurance, but did not discuss insurance reimbursements or why insurance would not cover these expenses. He also testified that he was budgeting $100 per month for tuition for courses related to his job, but did not testify

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[3]The Exhibit 1 budget lists the amount as $250 per month.

[4] Although Plaintiff testified that he purchased another vehicle to replace one of the vehicles which was no longer running, he did not alter the monthly allocation of auto repairs.

how long he would have to continue taking courses. The pay stubs indicate dental insurance coverage, but the budget includes $125 per month dental, probably based on estimates he obtained for needed dental work. Those items, however, are nonrecurring.

Defendant's Exhibit A is a consolidation loan application dated September 3, 1991. It shows that Plaintiff had four outstanding student loans. The loan information was verified on October 21, 1991, at which time the outstanding balance was $22,446.20. Exhibit B shows that this amount was disbursed on November 1, 1991. Between November 1, 1991 and October, 1999 Plaintiff had 9 deferments lasting 51 months, and made 37 payments. He paid a total of $10,241.53 and had $9,253.63 of interest capitalized, leaving a balance owing as of his bankruptcy of $31,699.83.

CONCLUSIONS

Section 523(a)(8) provides that a discharge does not discharge an individual for any debt –

> for an educational ... loan made, insured or guaranteed by a government unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

In Woodcock v. Chemical Bank, NYSHESC (In re: Woodcock), 45 F.3d 363, 367-68 (10th Cir.), cert. denied 116 S.Ct. 97 (1995), the

Court of Appeals for the Tenth Circuit affirmed (with little discussion) the Bankruptcy and District Courts' application of three tests for a determination of undue hardship under section 523(a)(8). Those tests were the "mechanical test", as set forth in Craig v. Pennsylvania Higher Educ. Assistance Agency (In re Craig), 64 B.R. 854, 856 (Bankr. W.D. Pa.) appeal dismissed 64 B.R. 857 (W.D. Pa. 1986); the "good faith and policy test", as set forth in North Dakota State Bd. of Higher Educ. v. Frech (In re Frech), 62 B.R. 235, 241, 244 n.9 (Bankr. D. Mn. 1986); and the "objective test", as set forth in In re Bryant, 72 B.R. 913, 915-16 (Bankr. E.D. Pa. 1987). In Woodcock, the debtor was found not to meet the tests for discharge of his student loans. Woodcock, 45 F.3d at 367-68. The Tenth Circuit did not, however, address the issue of whether meeting all three tests was necessary, or whether satisfaction of one test would allow discharge.[5]

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[5]Nor did the Tenth Circuit expressly limit future decisions to these three tests.

See e.g., Brunner v. New York State Higher Education Services Corp. (In re Brunner), 831 F.2d 395, 396 (2nd Cir. 1987):

> "Undue hardship" requir[es] a three part showing: (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.

In Frech, 62 B.R. at 240, the Minnesota Bankruptcy Court applied all three tests, and explained "The Debtor bears the burden of proof on each test; if the Court finds against the Debtor at any particular stage, its inquiry ends and the debt will not be dischargeable in bankruptcy." Therefore, the Court will review the facts of this case in light of all three tests stated above.

A. Mechanical Test.

In Craig, 64 B.R. at 857, the Court set forth the mechanical test as:

> Will the Debtor's future financial resources for the longest foreseeable period of time allowed for repayment of the loan, be sufficient to support the Debtor and her dependent at a subsistence or poverty standard of living, as well as to fund repayment of the student loan?

(Citing In re Johnson, 5 B.C.D. 532 (E.D. Pa. 1979)).

The Court cannot find that Plaintiff is unable to make any loan payments at this time. He has earned well above the "subsistence or poverty standard of living" regularly for the past ten years. Furthermore, his obligation for child support will terminate in approximately 2 years, freeing up an additional

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See also In re Johnson, 5 B.C.D. 532 (E.D. Pa. 1979)(Court used 3 tests: "undue hardship", "mechanical" and "good faith" tests.)

Judge Rose has cited the Brunner, Bryant, and Johnson tests as the three leading tests for determining §523(a)(8) issues. Garcia v. New Mexico Student Loan Guarantee Fund, Adv. No. 96-1317R (Bankr. D. N.M. Aug. 9, 1999).

$300 per month, some of which could be applied to making loan payments. The Court also questions whether the retirement contributions are required, and whether it is good faith to budget $237 or $250 per month for car repairs. The debtor does not meet the Mechanical Test.

B. Good Faith and Policy Test.

The Frech Court, cited by the Tenth Circuit in Woodcock, described the good faith and policy test as two separate tests. First, it described the "good faith test" as a showing by the debtor that he is actively minimizing current household living expenses and maximizing his personal and professional resources. 62 B.R. at 241. Then, if so, the "policy test" would apply:

> The Court must determine whether allowing discharge of a given educational loan would constitute the abuse of bankruptcy remedies with which Congress was concerned. Basically, the Court must determine the relative magnitude of the debtor's educational loan obligations as a component of his or her total debt structure, and in conjunction must consider the personal, professional, and financial benefit which the debtor has derived and will derive from the education financed by the loans in question.

Id.

The Court finds that the Debtor does not meet the "good faith" test. There is no showing that he is minimizing expenses; the car repairs listed above is one example. Plaintiff has also failed to provide the Court with an up-to-date budget, so has failed to meet his burden of proof on other expenses. Evidence

in the record further indicates that his liability for child support will terminate shortly. Furthermore, it appears that the long term trend for his income is on the upside. Also relevant to the inquiry of good faith is the Plaintiff's prior repayment history. A Comparison of Exhibit B and Exhibit 1, page 1c shows that Plaintiff used deferments for 19 months when unemployed, but also 32 months when he was fully employed. In all, he paid 37 monthly payments and deferred 51.

C. The Objective Test.

In Bryant, the United States Bankruptcy Court for the Eastern District of Pennsylvania constructed an "objective test" for determining dischargeability of student loan obligations. 72 B.R. at 913. This test is "objective" because it is tied to federal poverty guidelines:

> "Undue hardship" exists (1) Where the debtor has net income which is not substantially greater than federal poverty guidelines, because a debtor so living perforce is unable to maintain a minimal standard of living and make payments on student loans; or (2) Where the debtor has income substantially above the aforesaid poverty guidelines, but there is a presence of "unique" or "extraordinary" circumstances which render it unlikely that the debtor will be able to repay his or her student loan obligations.

Id.

Plaintiff earns significantly above the federal poverty guidelines. He has not presented unique or extraordinary circumstances that would convince the Court he is unable to make payments on his student loan obligations. Furthermore, there is

substantial evidence to the contrary; his income will likely increase and his child support will decrease within two years.

Summary

The Court finds that under the tests acknowledged in Woodcock v. Chemical Bank, NYSHESC (In re: Woodcock), 45 F.3d 363, 367-68 (10th Cir. 1995) the Plaintiff's student loan should not be discharged. The Court will enter judgment for the defendant on both the complaint and the counterclaim against Steve Devitt, and will enter judgment for Juliet Devitt against defendant on both the complaint and the counterclaim.

Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the listed counsel and parties.

Juliet Devitt
204 E. Hill
Gallup, NM 87301

Steve Devitt
PO Box 4693
Gallup, NM 87305

Robert M. St. John
P. O. Box 1888
Albuquerque, NM 87103

Office of the United States Trustee
PO Box 608
Albuquerque, NM 87103-0608