UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In Re: CLARE CREEK (LEDUFF) KELSEY,
Debtor,

Chapter 7 Case
#94-10415

CLARE CREEK (LEDUFF) KELSEY,
Plaintiff
v.

Adversary Proceeding
#00-01034

GREAT LAKES HIGHER EDUCATION CORPORATION; A.M. MILLER; USA GROUP GUARANTEE SERVICES, INC.; STUDENT SERVICES, INC.; GRADUATE LOAN CENTER; ZWICKER AND ASSOCIATES, P.C; NEVADA DEPARTMENT OF EDUCATION; VAN RU CREDIT CORP.; NCO FINANCIAL SYSTEMS, INC.; DIVERSIFIED COLLECTION SERVICES, INC.; CITIBANK (SOUTH DAKOTA), N.A.; AMAN COLLECTION SERVICE, INC.; THE ED FUND/CALIFORNIA STUDENT AID COMMISSION; AMERITRUST OF CLEVELAND; CITIBANK NY STATE; MELLON BANK MARYLAND; MELLON BANK NA; PHILADELPHIA HIGHER EDUCATION ASSISTANCE ADMINISTRATION; STUDENT LOAN MARKETING ASSOC. and KEYBANK USA
Defendants/Respondents.

Appearances of Counsel:

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Montpelier, VT
Attorney for Debtor/Plaintiff

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Attorney for TERI

Gary L. Franklin, Esq.
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MEMORANDUM OF DECISION DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, Clare Creek (LeDuff) Kelsey, has filed a Motion for Summary Judgment (Dkt. #81-1) seeking an Order of this Court determining that she is entitled to a discharge of the student loan obligations she owes to the defendants based upon her claim of undue hardship pursuant to Title IV of the Higher Education Resources and Assistance Act, 20 U.S.C. 1070, *et seq*. ("the Higher Education Act"), and 11 U.S.C. § 523(a)(8) as a matter of law. This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. For the reasons set forth below, the plaintiff's summary judgment motion is denied.

BACKGROUND

On July 14, 1994, the plaintiff / debtor, filed a voluntary petition for relief under chapter 7 of Title 11 U.S.C. ("the Bankruptcy Code"). An Order Discharging the Debtor and a Final Decree were entered thereafter and the case was closed on November 8, 1994. On February 15, 2000, the debtor filed a Motion to Reopen Case in order to seek an undue hardship discharge of certain undergraduate and post graduate student loans. The motion was granted on March 28, 2000 and the debtor initiated this adversary proceeding on June 1, 2000 by filing "Debtor's Petition for Hardship Discharge" [Dkt. #1-1] seeking a hardship discharge based solely upon § 523(a)(8). The petition contained allegations regarding the plaintiff's inability to maintain a minimal standard of living, her medical condition involving a psychiatric and emotional disability, and her good faith efforts to repay her school loans. A motion to amend the initial pleading to conform with certain requirements of the Local Rules was unopposed and granted thereafter. The defendants NCO Financial Systems, Inc. and Philadelphia Higher Education Assistance Graduate Loan Center filed their answers, denying the allegations of the petition [Dkt. # 8-1; 10-1]. In its Answer and Affirmative Defenses, the defendant The Educational Resources Institute ("TERI")

denies the material allegations of undue hardship and asserts a counterclaim for payment of its loans and attorneys fees [Dkt. #17-1; 17-2]. The plaintiff filed her answer to the counterclaim on August 15, 2000 [Dkt. # 21-1] opposing the requested relief.

A succession of motions and related papers were filed thereafter by the parties. On September 11, 2000, the plaintiff filed a Motion for Leave to Amend Complaint seeking certain non-substantive changes in the initial pleading, including recasting the pleading as an Amended Complaint rather than a petition. The motion was unopposed and the defendants filed their Answers to Debtor's Amended Complaint for Hardship Discharge, with each defendant denying the material allegations of the Amended Complaint. While the Amended Complaint reconfigured the original allegations and the title of the pleading, there were no substantive changes; the sole basis for relief remained the undue hardship discharge provisions of § 523(a)(8) of the Bankruptcy Code. There are no allegations of breach of contract or prayers for relief pursuant to Title IV of the Higher Education Act set forth in the Amended Complaint.

On January 4, 2001, the plaintiff filed a Motion for Summary Judgment [Dkt. # 81-1], including Plaintiff's Designation of Materials with voluminous exhibits and attachments [Dkt. # 83-1] and a supporting Memorandum of Law [Dkt. # 82-1]. The plaintiff filed a Statement of Undisputed Facts [Dkt. # 92-1] on January 17, 2001. In opposition, defendants Educational Credit Management Corporation ("ECMC") and TERI filed a Joint Opposition to Plaintiff's Motion for Summary Judgment [Dkt. # 94-1] with various exhibits and attachments, a Joint Statement of Material Disputed Facts in Opposition to Plaintiff's Motion for Summary Judgment [Dkt. # 108-1], and Defendants' Joint Supplemental Opposition to Plaintiff's Motion for Summary Judgment [Dkt. #149-1]. Thereafter, the parties continued to file additional papers related to the pending summary judgment motion, including Plaintiff's Brief/ Memorandum in Reply to Defendants Joint Trial Brief and Defendants Joint Opposition

to Plaintiff's Motion for Summary Judgment [Dkt. # 97-1] and Defendants' Joint Reply to Plaintiff's Brief/ Memorandum [Dkt. #109-1]. All the while, the parties have engaged in a variety of protracted disputes, including *inter alia* the nature and extent of additional pretrial discovery, the case schedule, the availability and materiality of certain documentary evidence, motions to suppress, motions for sanctions, motions for expedited summary judgment relief, a motion to require amended statements of material disputed facts and a motion for additional time prior to expedited summary judgment relief to conduct further research. As indicated above, no motions for summary judgment have been filed by any of the defendants and this case remains scheduled for trial on April 19, 2001. While this Court had granted the parties' request for expedited consideration of the plaintiff's summary judgment motion based upon the Higher Education Act, the interim filings by the parties has served to delay an expedited resolution of the matter.

This Court has considered the entire record in determining the merits of the pending summary judgment motion.

ISSUE

The issue presented is whether the record shows that there is no genuine issue as to any material fact regarding the plaintiff's claims for relief against the defendants pursuant to Title IV of the Higher Education Act and 11 U.S.C. § 523 (a)(8), and whether the moving party is entitled to judgement as a matter of law pursuant to Rule 56, Fed.R.Civ.P.; Fed. R. Bankr. Pr. 7056.

SUMMARY JUDGMENT STANDARD

It is well settled that summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c);

Bankr. R. 7056. A genuine issue exists only when "the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)(movant need only illustrate by reference to record plaintiff's failure to introduce evidence in support of essential element of claim). "The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Liberty Lobby, 477 U.S. at 247, 106 S.Ct. at 2509. Factual disputes that are irrelevant or unnecessary are not material. Id. Furthermore, materiality is determined by assessing whether the fact in dispute, if proven, would satisfy a legal element under the theory alleged or otherwise affect the outcome of the case. Id.

The court must view all the evidence in the light most favorable to the nonmoving party, Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 659 (7th Cir.), *cert. den.*, 484 U.S. 977 (1987), and draw all inferences in the nonmovant's favor. Santiago v. Lane, 894 F.2d 218, 221 (7th Cir. 1990). However, if the evidence is merely colorable, or is not significantly probative or merely raises "some metaphysical doubt as to the material facts," summary judgment may be granted. Liberty Lobby, 477 U.S. at 249-50, 106 S.Ct. at 2510-11; Matsushita Electric Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986). In making its determination, the court's sole function is to determine whether there is any material dispute of fact that requires a trial. *See* Waldridge v. American Hoechst Corp., 24 F.3d 918 (7th Cir. 1994). Credibility determinations, weighing evidence, and drawing reasonable inferences are jury functions, not those of a judge deciding a summary judgment motion. Liberty Lobby, 477 U.S. at 255, 106 S.Ct. 2513-14. Lastly, the court is not obligated in our adversary system to "scour the record" in search of a factual dispute on behalf of a nonmoving party. *See* Waldridge v. American Hoechst Corp., 24 F.3d at 922; *see also* Monahan v. New York

City Department of Corrections, 214 F.3d 275, 292 (2d Cir. 2000)(while trial court has discretion to conduct an assiduous review of the record in determining if summary judgment warranted, "it is not required to consider what the parties fail to point out").

DISCUSSION

The plaintiff seeks summary judgment relief in her favor and discharging her student loan obligations in favor of the defendants based essentially upon two theories: (1) that the defendants have already granted her a discharge or release under the Higher Education Act and in accordance with the related provisions of 34 CFR 682.402(c)(2) or, alternatively, that the defendants are precluded from any further attempts to collect the subject debts thereunder; and (2) that the record establishes that the plaintiff has met the test for establishing an undue hardship as a matter of law pursuant to § 523(a)(8) of the Bankruptcy Code and Brunner v. New York State Higher Education Services Corp., 831 F.2d 395 (2nd Cir. 1987). Each basis for relief will be addressed separately.

1. The Higher Education Act Claim

A substantial portion of the plaintiff's summary judgment motion and supporting papers is dedicated to seeking a determination of dischargeability or release regarding the subject student loans under the terms of the Higher Education Act and, specifically, 34 CFR 682.402(c)(2)[1]. The plaintiff argues that she was discharged or effectively released from her student loan repayment obligations upon her submission of her Physician's Certification of Total and Permanent Disability and certain related correspondence from her physician, Dr. Christine A. Barney, M.D., to these defendants and their predecessors in interest. The plaintiff asserts that these submissions adequately satisfied the requirements for discharge or release under the terms of the applicable

[1] While the parties reference and quote differing language of the applicable provisions of 34 CFR 682.402(c)(2), this inconsistency is immaterial to a resolution of the pending summary judgment motion.

regulations. In response, the defendants object to the plaintiff seeking summary judgment relief pursuant to the Higher Education Act and the aforementioned regulatory provision on the grounds that the plaintiff fails to allege a basis for relief under the Act or the regulation anywhere in her pleadings, amended or otherwise. In addition to pointing out that this claim appears for the first time in the plaintiff's Motion for Summary Judgment, the defendants argue that the TERI loans are not governed by the Higher Education Act, that the plaintiff never submitted the appropriate forms, that a discharge based upon a total and permanent disability under the Act is not mandatory, and that the validity of Dr. Barney's medical opinion is suspect because of the plaintiff's alleged scheme to orchestrate a discharge of these obligations.

Plaintiff responds that the undisputed facts support her claim of discharge under the Act because she complied with the requirement of submitting the appropriate forms, that the defendants are either bound by her Certificates directly or as assignees of The Ed Fund, and that knowledge imparted to the defendant's counsel is imputed to the defendant clients. [*See Plaintiff's Joinder in Motion for Expedited Hearing*, dated March 2, 2001, at p. 2.]. Furthermore, the plaintiff asserts that the defendants are bound by contract law to forgive the underlying loans attributed to Great Lakes Higher Education Corporation ("Great Lakes") because on October 28, 1999 Great Lakes purportedly offered to discharge the subject loans in exchange for a Total and Permanent Disability Certificate from the plaintiff's physician, which the plaintiff asserts was provided. The plaintiff contends that her ultimate "acceptance" of that "offer" on October 3, 2000 "completed a binding contract" pursuant to well established Vermont law. [*See Plaintiff's Joinder in Motion for Expedited Hearing,* dated March 2, 2001, at p. 4.] However, the plaintiff does not assert that the relief she seeks either pursuant to the Higher Education Act or pursuant to a breach of contract theory is pled in her Amended Complaint.

Upon a review of the record, this Court finds that plaintiff is not entitled to receive a discharge or release of the subject student loan obligations as a matter of law. Even assuming *arguendo* that the plaintiff indeed submitted the appropriate forms to one or more of these defendants in compliance with 24 CFR 682.402 and that a contract was created between the parties by the exchange of certain communications, the Amended Complaint is still devoid of any reference to the asserted facts, federal regulations or transactions. There is nothing in the pleadings that even remotely suggests a breach of contract claim or other relief based upon any compliance or noncompliance with the regulatory scheme under the Higher Education Act. Moreover, the defendants have made it abundantly clear that they object to such a claim being asserted for the first time at this late stage of the proceedings solely in a summary judgment motion. Accordingly, the issue of any breach of contract or regulatory relief pursuant to the Higher Education Act and related regulations is not properly before the Court at this time. *See* Grain Traders, Inc. v. Citibank, N.A., 160 F.3d 97, 105 (2nd Cir. 1998)(court cannot grant relief based on matters not pled); Atlas Chemical Industries, Inc. v. Moraine Products, 509 F.2d 1, 7-8 (6th Cir. 1974)(award vacated where basis for relief was not included in pleading); *cf*. Simonton v. Runyon, 232 F.3d 33 (2nd Cir. 2000)(no relief where plaintiff failed to sufficiently plead statutory basis for relief). While a failure to fully or properly assert a claim may ordinarily constitute a basis for seeking leave to amend a pleading, *see* Alley v. Resolution Trust Corp., 984 F.2d 1201, 1206 (DC Cir. 1993), no motion for leave to amend Plaintiff's Amended Complaint to assert substantive changes has been filed and this Court declines to grant such relief *sua sponte* without a proper request and an opportunity for response by the effected parties. To allow the plaintiff to prevail on summary judgment based upon grounds not pled would constitute unfair prejudice and implicate various fundamental due process concerns on behalf of the defendants. Therefore, the plaintiff's Motion for Summary Judgment based upon the Higher Education Act or any related breach of contract claim not pled is denied.

2. Undue Hardship Claim Under §523(a)(8)

A debtor seeking an undue hardship discharge under § 523(a)(8) has the burden of proof that the requirements for discharge are met. *See* In re Doherty, 219 B.R. 665 (Bankr. W.D.N.Y. 1998). To obtain an "undue hardship" discharge of her student loan obligations as a matter of law, the debtor must establish each prong of the three-prong test set forth in Brunner v. New York State Higher Education Services Corp., 831 F.2d 395 (2nd Cir. 1987). Under Brunner, a debtor must establish (1) that the debtor cannot maintain, based upon her current income and expenses, a "minimal" standard of living if forced to repay the student loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the loan repayment period; and (3) that the debtor has made a good faith effort to repay the student loans. Brunner, 831 F.2d at 396. The three-prong Brunner test provides the definitive, exclusive authority that bankruptcy courts must utilize in this Circuit in deciding whether to grant a debtor an undue hardship discharge. *See* In re Lehman, 226 B.R. 805 (Bankr. Vt. 1998). Moreover, Congress clearly intended to make a discharge of student loan obligations under §523(a)(8) more difficult than that of other nonexcepted debts. Brunner, 831 F.2d at 396; *see also* In re Saburah, 136 B.R. 246, 252 (Bankr. C.D.Cal. 1992)(discussing legislative history and observing that "there is a strong public policy in favor of repaying student loans").

In this instance, the plaintiff has failed to establish the absence of any genuine issue of material fact regarding her entitlement to relief under §523(a)(8) and the Brunner test. The debtor has not only failed to show the absence of any genuine issue of material fact concerning good faith attempts to pay these loans, but the entire issue of her emotional and psychiatric disability claim is infused with factual disputes. The defendants have unequivocally challenged the underpinnings and scope of Dr. Barney's medical opinion and have raised genuine issues of material fact regarding the validity and integrity of the plaintiff's claim of disability. They have raised

various questions regarding the plaintiff's good faith in researching and presenting symptoms of her disability claim to Dr. Barney and others, and her role in the development of Dr. Barney's disability opinion. Furthermore, the defendants assert that the plaintiff's current minimal standard of living is calculated and self imposed, thereby precluding the requested relief. *See* In re Lehman, 226 B.R. at 808; In re Saburah, 136 B.R. 246, 252 (Bankr. C.D.Cal. 1992); In re Erickson, 52 B.R. 154 (Bankr. N.D. 1985).

While this Court is not determining or weighing the credibility or sufficiency of the defendants' assertions or purported evidence regarding their defenses to the plaintiff's claim for a discharge of her student loan obligations, it cannot fail to observe that genuine issues of material fact exist concerning, *inter alia*, the nature and extent of the plaintiff's disability, her earning capability and her good faith efforts to repay these loans. Therefore, because the plaintiff has failed to demonstrate the absence of any genuine issue of material fact entitling her to a discharge under § 523(a)(8) as a matter of law, the Court must deny the request for summary judgment.

Based upon the foregoing, the plaintiff's Motion for Summary Judgment is denied. The trial set for April 19, 2001 will proceed as scheduled.

Dated this 13th day of April, 2001.

/s/Colleen A. Brown
Hon. Colleen A. Brown
United States Bankruptcy Court