UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

In re:
CHRISTOPHER BOLEN,
Debtor.

Chapter 7 Case
 # 94-10640

CHRISTOPHER BOLEN,
Plaintiff,
v.
SALLIE MAE SERVICING CORP.,
Defendant.

Adversary Proceeding
 # 00-1060

Appearances: *Christopher Bolen*
Pro Se
Cambridge, Vermont

Tavian M. Mayer, Esq.
Mayer & Mayer
South Royalton, Vermont

MEMORANDUM OF DECISION
GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
DENYING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

In this proceeding the Court has already determined that the loans made by the Defendant to the Debtor are "student loans" within the meaning of 11 U.S.C. § 523(a)(8).[1] See Memorandum of Decision dated October 11, 2002 (doc. #56). However, the Court has not yet determined whether the Debtor is entitled to discharge these loans pursuant to § 523(a)(8). The Debtor has filed a Motion for Summary Judgment, seeking a determination that repayment of the loans would impose an undue hardship on him. See Motion (doc # 87). In response, Defendant Sallie Mae Serving Corp. (hereinafter, "the Defendant") cross-moved for summary judgment seeking a determination that the Debtor cannot establish undue hardship and, thus, that these student loans are excepted from discharge and will continue to be due notwithstanding the Debtor's chapter 7 discharge. See doc #96.

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(I) and 1334. For the reasons stated below, the Debtor's Motion for Summary Judgment is granted and the Defendant's Cross-Motion for Summary Judgment is denied.

[1] All statutory references herein refer to Title 11 of the United States Code ("the Bankruptcy Code") unless otherwise indicated.

I. THE ISSUE PRESENTED

The issue presented is whether the Debtor has met his burden of proof, pursuant to § 523(a)(8), for the discharge of the student loans he owes to the Defendant. In order to make that determination, the Court must determine whether the Debtor has established "undue hardship" as defined by the Second Circuit in Brunner v. New York State Higher Educ. Serv. Corp., 831 F.2d 395 (2d Cir. 1987).

II. PROCEDURAL CONSIDERATIONS

A. Summary Judgment Standard

Summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); FED. R. BANKR. P. 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 (1986); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986). 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. See Anderson, 477 U.S. at 247. Factual disputes that are irrelevant or unnecessary are not material. See 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. See id. The court must view all the evidence in the light most favorable to the nonmoving party and draw all inferences in the nonmovant's favor. See Cruden v. Bank of New York, 957 F.2d 961, 975 (2d Cir. 1992). 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 Anderson, 477 U.S. at 249; see also Delaware & Hudson Ry. Co. v. Conrail, 902 F.2d 174, 178 (2d Cir. 1990).

B. Summary Judgment Under the Local Rules and the Procedural Nuances of the Instant Case

Pursuant to the Local Rules of this Court, all material facts in a movant's statement of undisputed facts are "deemed to be admitted unless controverted by a statement of disputed material facts filed by the opposing party." Vt. LBR 7056-1(a)(3); cf., Vescio v. NCS 1, L.L.C. (In re Vescio), Adv. Pro. No. 02-1005, slip op. at 4 (Bankr. D. Vt. Apr. 22, 2003) (accepting the movant's statement of undisputed facts as true where the nonmovant failed to file a statement of disputed facts). Here, the Debtor filed Plaintiff's Affidavit of Indisputable [sic] Facts in Support of Motion for Summary Judgment on His Claim of Hardship (doc. #87).

The Defendant did not file a Statement of Disputed Facts to rebut the Debtor's Statement; instead, it filed its own Statement of Undisputed Facts in Support of Motion for Summary Judgment (doc.#98[2]). In turn, the Debtor filed a Supplemental Affidavit in Support of Motion for Summary Judgment on His Claim of Hardship and in Opposition to Defendant's Cross Motion for Summary Judgment (doc. #104). Due to the potential procedural glitch caused by the parties filing competing Statements of Undisputed Facts, in conjunction with both parties' failure to file Statements of Disputed Facts, the Court, using its equitable powers, shall compare these documents and determine which facts are disputed and which are not.[3] In the same vein, the Court shall construe the Debtor's Supplemental Affidavit as an opposition to the Defendant's Cross Motion for Summary Judgment and, where warranted, as a Statement of Disputed Facts.

C. Establishing "Undue Hardship"

The Second Circuit case, Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987), established the standard the Court must apply in this proceeding. Under Brunner, in order for a debtor to have his or her student loans discharged as an undue hardship, the debtor must establish:

(a) that the debtor cannot maintain, based upon his or her current income and expenses, a "minimal" standard of living if forced to repay the student loans (the "minimal standard");

(b) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the loan repayment period ("future prospects"); and

(c) that the debtor has made a good faith effort to repay the student loans ("good faith").

See id. at 396. It is the debtor's burden to prove each of the three prongs of the Brunner test. See In re Lehman, 226 B.R. 805, 808 (Bankr. D. Vt. 1998). The debtor must prove his or her case by a preponderance of the evidence. See In re Maulin, 190 B.R. 153 (Bankr. W.D.N.Y. 1995); see also Elmore v. Massachusetts Higher Educ. Assist. Corp. (In re Elmore), 230 B.R. 22, 26 (Bankr. D. Conn. 1999). If a debtor cannot satisfy each and every prong of the Brunner test, he or she is not entitled to a hardship discharge. See Williams v.

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[2] By reference, the Defendant incorporated its prior Statement of Undisputed Facts (doc. #34).

[3] Further, the Court notes that although the Debtor labeled his Statement of Undisputed Facts as an "affidavit," in fact, it is not. There is no indication that this document was made on the Debtor's personal knowledge. See FED. R. BANKR. P. 7056(e). Nor does it show "affirmatively that the affiant [i.e., the Debtor] is competent to testify to the matters stated therein." Id.; see also BLACK'S LAW DICTIONARY 58 (6th ed. 1990) (defining an affidavit as "A written or printed declaration or statements of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation."). Moreover, although the Debtor appears *pro se* in this proceeding, he is a law school graduate and, as his papers in this proceeding abundantly evidence, he is familiar with the requirements of the Bankruptcy Code and Rules, as well as the Local Rules. Thus, the Debtor knew or should have known that in order for the Court to consider his filing as an affidavit sufficient to defeat a motion for summary judgment, it needed to be made on personal knowledge and sworn to before a notary or other party designated to administer oaths. Therefore, the Court will not treat the Debtor's Affidavit of Indisputable Facts as an affidavit.

New York State Higher Educ. Servs. Corp. (In re Williams), 296 B.R. 298, 302 (S.D.N.Y. 2003) (quoting Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish), 72 F.3d 298, 306 (3d Cir. 1995)); see also In re Thoms, 257 B.R. 144, 148 (Bankr. S.D.N.Y. 2001); Lehman, 226 B.R. at 808. The determination of undue hardship, by nature, is case and fact-specific. See, e.g., Maulin, 190 B.R. at 156. Further, "[a] determination of whether a student loan debt falls under the hardship provision of § 523(a)(8)[] for discharge is discretionary with the Bankruptcy Judge." In re Lohman,79 B.R. 576, 580 (Bankr. D. Vt. 1987).

III. FACTUAL FINDINGS IN THE INSTANT CASE

Both the Debtor and the Defendant present facts that the other does not dispute. Therefore, these facts will be deemed admitted. See Vt. LBR 7056-1(a)(3). The Court bases its findings on the parties' respective undisputed facts, unless otherwise indicated, and notes that its decision is limited to the following facts annunciated by the parties in their pleadings and the papers filed in connection with their dueling summary judgment motions.

The Debtor was born on April 9, 1950; he is currently 53 years old. He graduated from Pace University School of Law, where he obtained a *juris doctor* degree in 1990. To finance his legal education, the Debtor took out, *inter alia*, two loans through the Law Access Program for which Norwest Bank South Dakota was the lender (hereinafter, "the subject loans"). See Court's October 11, 2002 Memorandum of Decision at 1-2 (doc. #56). The subject loans were subsequently sold to the Defendant, who currently owns them. After graduation, the Debtor began making payments on all of his student loans, including the subject loans. Many of the Debtor's student loan payments were funded by monies from his 401k and IRA accounts. The Debtor stopped making payments on the subject loans in September 1994 and is presently in default on them. The Debtor did not consolidate, or make any effort to consolidate the subject student loans. The Debtor filed for bankruptcy relief on October 14, 1994.

Both during law school and after graduation from law school, the Debtor worked for the New York law firm Lord Day & Lord, Barret Smith. His employment there ended in the beginning of April 1993. Soon thereafter, the Debtor returned to Vermont. Since his return to Vermont, the Debtor has not been able to secure legal employment. However, the Debtor had generally been employed in Vermont, with intermittent periods of unemployment. The Debtor began working as a ski instructor in December 1993. From June 1994 to September 1995, he worked alternately as a landscaper/groundskeeper, ski instructor, cook and store clerk. These jobs all paid at or near minimum wage. From September 1994 through January 2001, the Debtor worked for Smugglers' Notch Management Co., Ltd. earning a higher salary. When he started there, the Debtor's salary was $28,000 per year; when he ended his employment with Smugglers' Notch he was earning

$33,467.20 per year. The Debtor was released from employment with Smugglers' Notch in January 2001 with a severance package. On June 29, 2001, the Debtor exhausted the severance package. The Debtor was unemployed for 11 of the 12 months of 2001. He began working again on January 2, 2002; his employer was Planned Parenthood of Northern New England ("PPNNE"). At PPNNE, the Debtor was a Collection Specialist who earned $11.13 per hour. The Debtor's employment with PPNNE was terminated on November 18, 2002. The Debtor's gross income for 2002 was $19,516.09. Since that time, the Debtor has been unemployed. He has received unemployment benefits and currently is on Medicaid. The Debtor actively continues to seek employment.

Since 1994, the Debtor has suffered from clinical depression, which requires pharmacologic treatment. Medicaid pays for only half of the cost of the anti-depression medication the Debtor needs. There is nothing in the record to indicate whether the Debtor is currently taking anti-depression medication and, if so, what the Debtor's cost is for that medication. The Debtor's depression does not make him unemployable, but from time to time it has affected his work, sometimes requiring him to take sick leave, and sometimes affecting his ability to maintain positive interactions with others in the workplace.

The Debtor has one child who is nine years old. The Debtor is required to make court-ordered child support payments for the child in the amount of $50 per month. The child support order also requires the Debtor to include his child on his medical insurance plan when he is employed.

The Debtor owns two automobiles: an unregistered, non-functioning 1972 Volvo and a 1976 Volvo station wagon with over 305,000 miles on it. When his job required him to travel to Williston, Vermont, the Debtor spent approximately $108.35 per month on gasoline. Since he no longer works in Williston, that figure does not represent the Debtor's current monthly gasoline expense. Presumably, this cost is now lower, but the Debtor has not provided any evidence of his current monthly gasoline expense.

In the fall of 1998, the Debtor refinanced his other federally-backed student loans (hereinafter, "the Direct Loans"). He immediately sought and received a deferment on the repayment of the Direct Loans. The Debtor began making reduced payments of $260 per month on the Direct Loans in August 2000. Those payments are currently in forbearance. See Financial Affidavit - Form 813, Christopher Bolen, Jan. 29, 2003, at § IV(8), attached as Depo. Ex. 2 to Def.'s Mem. Supp. Cross-Mot. Summ. J. (doc. #97) (hereinafter, "Bolen's Financial Affidavit").

The Debtor's present monthly income from unemployment *after* payment of his child support obligation is $914.26; annualized that amounts to $10,971.12. According to the State of Vermont Agency of Human Services, for calculating child support, the Office of Child Support has established the "Self-support reserve" to be $865.00 per month as of February 1, 2003. Annualized, this figure is $10,380. The Court takes judicial notice that "Self-support reserve" means:

> the needs standard established annually by the commissioner of prevention, assistance, transition, and health access which shall be an amount sufficient to provide a reasonable subsistence compatible with decency and health. The needs standard shall take into account the available income of the parent responsible for payment of child support."

15 V.S.A § 653(7). The Court also takes judicial notice of the 2003 Poverty Guidelines issued by the Secretary of the Department of Health and Human Services.[4] According to those guidelines, a family of one with an annual income of less than $8,980.00 is subsisting below the federally recognized "poverty level".[5]

IV. APPLYING THE LAW TO THE INSTANT CASE

As noted above, the Debtor carries the burden of persuasion to establish each prong of the three-pronged Brunner undue hardship test. See Armesto v. New York State Higher Educ. Servs. Corp. (In re Armesto), 298 B.R. 45, 47 (Bankr. W.D.N.Y. 2003); In re Doherty, 219 B.R. 665, 667 (Bankr. W.D.N.Y. 1998). If he cannot establish each prong of the test, he is not entitled to a finding of undue hardship or to a discharge of the subject loans pursuant to § 523(a)(8).

A.. The"Minimal Standard" Prong of the Brunner Test

To prove the "minimum standard" component of the test, the Debtor must show he cannot maintain, based upon his current income and expenses, a "minimal" standard of living if forced to repay the student loans. The Court finds that although the income the Debtor receives for unemployment benefits exceeds the State's "self-support reserve" minimum and the federal poverty minimum for a family of one, it is only barely over those thresholds. Having examined Bolen's Financial Affidavit, it is clear that the Debtor's expenses exceed his income: the Debtor's current monthly income is $1,130.91, and his current monthly expenses equal $1,209.02.[6] Arguably, some of the Debtor's expenses, such as gasoline, may fluctuate, but given the Debtor's

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[4] See In re Doherty, 219 B.R. 665, 669 (Bankr. W.D.N.Y. 1998) ("Thus, a great deal is left to judicial notice in dischargeability litigation.").

[5] The Court notes that, per the Department of Health and Human Services, Administration on Aging, Information Memorandum AoA-IM-03-02, the 2003 Poverty Guidelines represent income standards expressed in 2002 dollars.

[6] There is an apparent discrepancy between the income listed on Bolen's Financial Affidavit and his Supplemental Affidavit. According to Bolen's Financial Affidavit, dated January 29, 2003, the Debtor's monthly income as of that date, prior to payment of child support, was $1,130.91. However, in his Supplemental Affidavit, dated March 17, 2003, which the Court has construed as a Statement of Disputed Facts, the Debtor indicates his current monthly income, after payment of child support, is $914.26. Adding back $50 for child support, the Debtor's current, adjusted monthly income would be $964.26. The difference between the January monthly figure and the

tight budget, the Court finds that these possible fluctuations would not be enough to allow the Debtor to maintain a minimal standard of living if forced to repay the subject student loans. Moreover, according to the state court child support order to which he is subject, the Debtor will need to pay his child's medical insurance costs when he secures employment. The record indicates that the last time he was employed, providing his child with medical coverage cost the Debtor over $400 per month. It is prudent to assume this could increase the Debtor's expenses by approximately $5,000 per year.[7] Cf., In re Goranson, 183 B.R. 52, 57 (Bankr. W.D.N.Y. 1995) (finding a debtor's costs will necessarily increase because of added child-related costs). Further, the Debtor is obligated to repay another set of student loans, the Direct Loans, that total approximately $65,000. The record indicates that when the Debtor was making monthly payments on the Direct Loans, the *reduced* monthly payment was $260 per month (or, $3,120 annually). The Debtor is not currently making these payments. Since there is no evidence in the record that the Direct Loans have been discharged, the Court finds it must include these in the Debtor's monthly obligations when assessing the Debtor's financial situation. This, necessarily, will increase the Debtor's monthly expenses above their current level. Hence, based upon the evidence in record, the Court finds the Debtor cannot maintain, based upon his current income and expenses, a minimal standard of living if forced to repay the subject student loans. See, e.g., In re Armesto, 298 B.R. at 47-48 (finding the debtor met the "minimal standard" prong of the Brunner test). The Debtor has thus established the first, or "minimal standard," prong of the Brunner test.

B. The "Future Prospects" Prong of the Brunner Test

To prove the "future prospects" prong of the Brunner test, the Debtor argues that because he is 53 years old the likelihood of his obtaining professional employment in the future minimal. The Court finds the Debtor's general circumstances are compelling on this point. In particular, the Court finds the circumstances of the instant case are sufficiently different from the facts presented in Brunner to warrant a different result.

In the Brunner case, the debtor filed her bankruptcy case just seven months after completing her master's degree and sought to discharge her educational loans only nine months after completing her degree. See In re Brunner, 46 B.R. 752, 753 (S.D.N.Y. 1985). It is not surprising that the court found that the debtor had no basis at that time to project a long-term inability to repay the subject loans. See id. at 758. The same is not true in this case; here, the Court has been presented with a work history spanning over 12 years.

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adjusted March month figure is $166.65. The Court finds this discrepancy irrelevant as the expenses shown in Bolen's Financial Affidavit, i.e., $1,209.02, exceed both income figures.

[7]The Court takes judicial notice that medical insurance premiums are not decreasing.

In applying the Brunner test, one must focus on precisely what is meant by "undue hardship." The Brunner district court provides clear guidance on this point, which was not disturbed by the Second Circuit:

> The phrase "undue hardship" was lifted verbatim from the draft bill proposed by the Commission on the Bankruptcy Laws of the United States ("the Commission"). The Commission's report provides some inkling of its intent in creating the exception, intent which in the absence of any contrary indication courts have imputed to Congress. The Commission noted the reason for the Code provision: a "rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of educational loan debts." Report of the Commission on the Bankruptcy Laws of the United States, House Doc. No. 93-137, Pt. I, 93d Cong., 1st Sess. (1973) at 140 n.14, *reprinted in* Collier, *supra,* Appendix 2, at PI-I. This "rising incidence" contravened the general policy that "a loan . . . that enables a person to earn substantially greater income over his working life should not as a matter of policy be dischargeable before he has demonstrated that for any reason he is unable to earn sufficient income to maintain himself and his dependents and to repay the educational debt." *Id.* at 140, n.15. The Commission implemented this policy by delaying dischargeability for five years, a time period which, it was anticipated, "gives the debtor an opportunity to try to meet his payment obligation." After five years, the exception is lifted in recognition of the fact that "in some circumstances the debtor, because of factors beyond his reasonable control, may be unable to earn an income adequate both to meet the living costs of himself and his dependents and to make the educational debt payments." *Id.* at 140, n.16. As a calculation of "undue hardship," the Commission envisioned a determination of whether the amount and reliability of income and other wealth which the debtor could reasonably be expected to receive in the future could maintain the debtor and his or her dependents at a minimal standard of living as well as pay off the student loans. *Id.* at 140-41, n.17.

In re Brunner, 46 B.R. 752, 754 (S.D.N.Y. 1985). The district court went on to point out that the discharging of a student loan, "required more than a showing on the basis of current finances that loan repayment will be difficult or impossible. . . . '[D]ischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment.'" Id. at 755 (quoting In re Briscoe, 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981)), aff'd 831 F.2d 395 (2d Cir. 1987). In adopting the district court's three-pronged "undue hardship" test, the Second Circuit stated: "Requiring evidence not only of current inability to pay but also of additional, exceptional circumstances, strongly suggestive of continuing inability to repay over an extended period of time, more reliably guarantees that the hardship presented is 'undue.'" Brunner, 831 F.2d at 396.

This Court has previously been presented with "an example of an additional circumstance impacting on the debtor's future earnings would be if the debtor experienced an illness, developed a disability, or became responsible for a large number of dependants after receiving the [student] loan." In re Thoms, 257 B.R. at

149. In Kelsey v. Great Lakes Higher Educ. Corp. (In re Kelsey), 287 B.R. 132 (Bankr. D. Vt. 2001), this Court found that the debtor suffered from significant medical and emotional maladies and that she would continue to suffer with these conditions. See id. at 142. Thus, the Court found that the debtor's conditions made it unlikely that she would be able to repay her student loans at any point in the foreseeable future without undue hardship. See id. at 144.

Here, the Debtor has not demonstrated any particular new, exigent circumstances. However, the Court is persuaded that there is no hope that he will find a job in the legal field and that it is extremely likely that his present financial condition will persist for a significant portion of the loan repayment period The Debtor completed law school over twelve years ago and, since leaving New York City in the spring of 1993, has not been able to secure a position in the field of law. So, he has worked in other fields in order to support himself and meet his expenses.[8] In his ten-plus years in Vermont, the Debtor has generally held low-level, low-paying positions. There is nothing in the record to suggest that the Debtor has been less than diligent in his search for employment or in his search for the highest paying job available to him. The Debtor's obtaining an advanced degree simply has not resulted in his being able to earn substantially greater income over his working life. The Debtor has been unable to find a job despite almost a year of job-hunting. And, although his last position paid him better than most positions he held previously, he had been unemployed for one year prior to obtaining the PPNNE position. It is, therefore, reasonable to project that the Debtor will not soon find employment that will pay a wage equal to or higher than what he earned in his last position. Likewise, the Court finds that for reasons beyond his control, e.g., a difficult job market, it is highly unlikely that the Debtor's job prospects will improve to a level where the Debtor will be able to earn an income that is adequate both to meet his living costs and to make payments on the subject loans, during the loan repayment period.[9]

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[8] This situation is to be contrasted with the case where a debtor argues he or she cannot find a job in the field for which one has trained in order to meet the "future prospects" prong. See Borrero v. Connecticut Student Loan Found. (In re Borrero), 1997 WL 695515, *2 (D. Conn. 1997) (finding debtor did not provide sufficient evidence to support the "future prospects" prong where his only evidence was that he could not secure a job in his field of training, i.e., he could not secure a job as a physician).

[9] The Court finds that when the Debtor does find employment, both his income and expenses will increase. The record supports a finding that the Debtor will be obligated to provide his child with medical insurance, which the Court has noted will be approximately $5,000 per year. In addition, the Debtor will have to repay his Direct Loans, which the Court has noted will equal an additional $3,120 per year. Assuming Debtor's other expenses remain constant ($1,209.02, as stated on Bolen's Financial Affidavit), the Debtor's base expenses, on an annualized basis are approximately $14,508. Thus, as illustrated below, the Debtor can expect his expenses to increase to approximately $22,628 upon finding a job.

	$14,508	Debtor's base expenses (from Bolen's Financial Affidavit)
plus	$ 5,000	Medical insurance premium for Debtor's child
plus	$ 3,120	Direct Loans repayment
	$22,628	Adjusted Expenses for Debtor

Therefore, the Court finds that the Debtor has satisfied the second prong of the Brunner test.

C. The "Good Faith" Prong of the Brunner Test

The also Court finds that the Debtor has met the "good faith" prong of the Brunner test. "Good faith is a moving target that must be tested in light of the particular circumstances of the party under review." In re Maulin, 190 B.R. 153, 156 (Bankr. W.D.N.Y. 1995). Here, the Debtor made payments on the subject loans until September 1994. In October 1994, the Debtor filed for bankruptcy relief. Subsequent to his filing, the Defendant sought to collect on the subject loans from the Debtor; the Debtor responded with a letter indicating that the loans had been discharged through his bankruptcy case. There is nothing in the record to indicate that the Defendant responded to that letter disputing the Debtor's contention. Apparently, in reliance upon his understanding that the loans were no longer due, the Debtor did not make further payments, did not attempt to consolidate or refinance the loans, and did not obtain a deferment of the payments on the subject loans. It is not unreasonable for a borrower not to take any of these steps if the borrower believed the obligation had been discharged. Therefore, the Court will not find that the Debtor failed to act in good faith by reason of his failure to make payments or seek a deferment or consolidation, under these circumstances.

Moreover, the Court finds the Debtor's conduct prior to filing bankruptcy clearly demonstrated a good faith effort. The Debtor took jobs for which he was educationally overqualified, in order to have an income and made payments on the subject loans for four years. Furthermore, the Debtor liquidated both his 401k account and IRA account to make his payments due on the student loans, which, in turn, caused him to incur significant tax liabilities. Taken together, these efforts demonstrate that the Debtor has made a good faith effort to repay the student loans. Hence, the Court finds that the Debtor also meets the third prong of the Brunner test.

V. CONCLUSION

Finding no genuine issue as to any material fact, the Court holds that entry of summary judgment is appropriate in this proceeding. The Court further finds the Debtor has met his burden of proving each of the three prongs of the Brunner test for undue hardship. Therefore, the Debtor is entitled to summary judgment

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Note: This calculation does not take into consideration other expenses that may need to be incurred, such as increased automobile-related expenses. The Debtor's most recent job, which ended approximately one year ago, was a position paying a little over $11 per hour. Assuming the Debtor could secure a job paying at that level, he would gross approximately $22,880. Thus, after taxes, the Debtor would not be able to meet his Adjusted Expenses.

as a matter of law. Accordingly, the Debtor's Motion for Summary Judgment is granted and, the Defendant's Cross-Motion for Summary Judgment is denied.

This Memorandum of Decision constitutes the Court's findings of fact and conclusions of law.

October 8, 2003
Rutland, Vermont

Colleen A. Brown
United States Bankruptcy Judge