UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

BARBARA L. VEZINA,
Debtor.

Chapter 7 Case
 # [03-10345

BARBARA L. VEZINA,
Plaintiff,

v.

Adversary Proceeding
 # 03-1025

SALLIE MAE and
NHHEAF,
Defendants.

ORDER
Granting Debtor's Complaint to Determine NHHEAF Student Loan Dischargeable

In May of 2003, the Debtor filed a Complaint to determine the dischargability of her NHHEAF student loan debts. After considering the papers filed by the Parties in this case and a half-day of testimony, the Court hereby determines that the outstanding student loans the Debtor owes to NHHEAF are dischargeable under 11 U.S.C. § 523 (a)(8), based upon an application of the standards set forth in Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir.1987).

The Brunner Standard

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 adversary 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").

Id. at 396.

It is the debtor's burden to prove each of the three prongs of the Brunner test. 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. 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. Williams v. 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).

A. The "Minimum Standard" Test

To prove the "minimum standard" component of the test, the Debtor had an obligation to show she cannot maintain, based upon her current income and expenses, a "minimal" standard of living if forced to repay the two student loans she received from NHHEAF. The Court finds that the Debtor has established that based upon her current income and expenses, if forced to re-pay her student loans, she could not maintain a minimum standard of living. Based upon the uncontroverted evidence presented, the Debtor's current expenses exceed her current income without payments to NHHEAF. After examining the Debtor's list of current expenses, it is difficult for the Court to find any expenses which could be eliminated to allow the Debtor enough income to meet her student loan obligations. As conceded by counsel for NHHEAF, the Debtor does not have a lavish lifestyle. In sum, the Court finds that the Debtor could not maintain and a minimal standard of living she had to repay any portion of the NHHEAF student loan. Thus, the Debtor has established the first, or "minimal standard," prong of the Brunner test.

B. The "Future Prospects" Test

To prove the "future prospects" prong of the Brunner test, the Debtor argues that because she is 57 years old and suffers from many chronic and debilitating ailments, she is unable to work more than 30 hours per week or to work a second job as a means of increasing her income so she could meet her monthly expenses. The uncontroverted evidence presented by the Debtor's physician and the other medical records admitted establishes that the Debtor's medical condition is unlikely to improve over time. As a social worker with a non-profit organization, her yearly increases in salary are minimal and only take into account changes in the cost of living. Further, the Debtor testified that her rent increases annually. While the record contains no evidence as to how much the Debtor's salary may increase in time, the Court is persuaded that it would be a de minimus amount and would be likely to be offset by expected incremental increases in the Debtor's rent obligation.

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. 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. Id. at 758. The same is not true in this case. Here, the Court has been presented with a work history spanning over 10 years.

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.

*7) 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. 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 presented ample evidence of additional circumstances that will likely impact the debtor's future earnings. The Debtor suffers from chronic fatigue syndrome, fibromyalgia, uncontrolled Diabetes 2, depression, hypertension, acid reflux, and arthritis. She currently works 30 hours per week and according to her doctor, is unlikely to ever be able to work a 40 hour work week. Based upon the testimony presented, the Court finds that it is extremely likely that the Debtor's present financial condition will persist for a significant portion, if not all, of the loan repayment period. Therefore, the Court finds that the Debtor has satisfied the second prong of the Brunner test.

C. The "Good Faith" Test

The Court finds that the Debtor has also 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). The Debtor took out student loans in 1992 and 1993 for her Bachelor's degree. The Debtor currently owes NHHEAF $13,121.00 for two student loans, which in the aggregate had an original principal of balance of less than $8,000. The Parties stipulate that she made payments totaling $4,034.47, on these two loans. Based upon Defendant's Exhibit 1, it appears that the Debtor made 36 payments totaling $2,038.49 between July 22, 1994 and February 21, 2001 on the loan with a principal balance of $3,992; there is no comparable loan breakdown in evidence regarding the loan which had a principal balance of $4,000.00. The Debtor filed bankruptcy in March of 2003.

The Court finds the Debtor's conduct prior to filing bankruptcy clearly demonstrated a good faith effort. The Debtor made payments on the subject loans totaling over half of the original principal owed on her student loans. Hence, the Court finds that the Debtor also meets the third prong of the Brunner test.

The Court has considered the possibility of discharging only a portion of the student loans in question but has rejected that option since it finds that the Debtor cannot afford to pay any portion of the remaining balance.

Conclusion

For the reasons articulated above, the Court finds that the Debtor has met the standards set forth by the Second Circuit in Brunner and that compelling the Debtor to re-pay her student loan obligations would impose an undue hardship on the Debtor. Consequently, the Court orders that the outstanding loan obligations to NHHEAF are discharged.

SO ORDERED.

December 6, 2004
Burlington, Vt

Colleen A. Brown
United States Bankruptcy Judge