

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In Re:

GLENN DAVID BOYER,
Debtor,

CASE NO.:01-26204-BKC-RBR
Chapter 7

GLENN DAVID BOYER,
Plaintiff,

Adv. Pro. No.: 01-2299 BKC-RBR-A

v.

FLORIDA DEPARTMENT OF EDUCATION,
Defendant.

OPINION

This adversary proceeding came before the Court for trial on March 14, 2005 on the Adversary Complaint filed by Debtor, Plaintiff Glenn David Boyer (“Boyer”) against the Florida Department of Education (“FDOE”) to determine the dischargeability of a student loan pursuant to 11 U.S.C. §523(a)(8) of the Code. The Court heard testimony, admitted documents into evidence and considered legal argument of the parties. At the conclusion of the trial, the Court took this matter under advisement. After reviewing the record, the relevant statutory and precedential authority, and being otherwise fully advised in the premises, the Court makes the following determinations.

FINDINGS OF FACT

Boyer is 49 years old who has no legal dependents and does not suffer from any medical conditions that forces him to be unemployed. From 1980 though 1984 Boyer attended chiropractic college and financed his college education, in part with students loans. Shortly after

graduation, Boyer was licensed to practice chiropractic medicine in Florida and began paying his student loans from 1985 through 1994. After graduation from Chiropractic college, Boyer was employed in his capacity as a chiropractic physician. In 1991, Boyer established his own chiropractic practice and operated independently from 1991 until 1996. Boyer attributes the failure of the practice to the rise of the managed health care industry and his inability to become an approved provider for any health care maintenance organization. Boyer then obtained employment as a chiropractic physician in other doctors' offices. Boyer changed jobs several times and tried to open his own practice in northern Florida in 1996 and 1999.

In April 1999, Boyer fell and injured his left arm. Boyer testified that he underwent surgery to repair the injury to the arm. As a result of the injury, Boyer did not work for a year. In June 2000, Boyer obtained employment as a chiropractic physician and clinic director. However, in January 2001, due to an automobile accident, Boyer was unable to work. Boyer attributes difficulty controlling his moods due to the auto accident. Then in May 2001, Boyer was involved in an incident which resulted in his arrest and conviction of a criminal misdemeanor. As a result of the conviction of the misdemeanor, The Board of Chiropractic Medicine filed an administrative action against Boyer and his license to practice chiropractic medicine is currently restricted. The restriction prohibits Boyer from serving as a clinic director. This restriction on his license may be terminated in two years. Even though his license is restricted, Boyer has worked as a chiropractor as recently as December of 2004, earning between \$900 to \$1,200 weekly with Alliance Chiropractic. Boyer's services with Alliance were terminated on December 3, 2004 (\$10,000 in severance was paid to Boyer) due to anger problems exhibited to both the staff and patients of Alliance.

On August 27, 2001, Boyer filed his petition under Chapter 7 of the code. Prior to filing this adversary proceeding, Boyer did not exhaust his forbearance and deferment opportunities and while he did apply for the Income Contingent Repayment Plan which is offered by the FORD Program, that determination of his application is still pending and has not been approved. This adversary proceeding was filed on September 1, 2001 to determine the dischargeability of the student loan.

Boyer alleges that he does not receive sufficient income to repay his student loans, and he cannot find full time employment as a chiropractor. Boyer has conducted a limited employment search. Boyer testified that he has applied for some positions, but he has not received any interviews. Boyer has thought about alternative work such as employment as a housing construction inspector, but he has taken no steps to pursuing this field or any other type of employment outside of his field.

Boyer alleges that his student loans are an undue hardship. Boyer has (3) student loans which are now held by FDOE. The student loans were made under a program funded in whole or in part by a governmental unit or nonprofit institution. The student loan debt that is subject to this action was transferred and assigned to FDOE as guarantor by American Education Services. The loan numbers are 76942, 127575, and 173002. The Application/Promissory Notes constitute the underlying basis for Boyer's indebtedness to FDOE. The parties have stipulated that the Boyer's student loans were for an educational purpose, were funded by a governmental unit and qualify as student loans as defined by 11 U.S.C. § 523(a)(8)

Boyer does not dispute the amount remaining on the loan. The total claim principal due and owed to FDOE through March 1, 2005 under the student loan promissory notes is

\$45,593.27 including principle and capitalized interest. Interest on the loan accrues at nine percentum (9%) per annum.

CONCLUSIONS OF LAW

The issue before the Court to determine is whether Boyer's student loans are dischargeable pursuant to 11 U.S.C. §523(a) (8). The controlling provision of the Bankruptcy Code in this action, 11 U.S.C. § 523(a)(8) provides in relevant part:

A discharge under...this title does not discharge an individual debtor from any debt---

(8) for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a government unit or non-profit 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.

Courts have previously determined that in a student loan dischargeability action the burden of proof is divided between the parties. The student loan creditor must first establish the existence of the debt owed to or insured or guaranteed by a governmental agency or a nonprofit institution. The debtor must then prove "undue hardship". See Holmes v. Sallie Mae Loan Servicing Center, 205 B.R. 336, 339 (Bankr. M.D. Fla. 1997). The debtor has the burden of establishing each element of the Brunner test by a preponderance of the evidence. In re Mallinckrodt, 274 B.R. 560 (Bankr. S.D. Fla. 2002) quoting In re Brightful, 267 F.3d 324, 326 (3rd Cir. 2001).

In this matter, FDOE has met its burden of proof. The parties have stipulated that Boyer's student loans were for an educational purpose, were funded by a governmental unit and qualify as student loans as defined by 11 U.S.C. Section 523(a)(8). In addition, the parties have

stipulated that the Boyer's student loan obligation is \$45,593.27 as of March 1, 2005. The burden now shifts to Boyer to prove repayment of the loans is an "undue hardship".

"Undue hardship" is not defined in the Bankruptcy Code itself, and is a term of art to be interpreted by the court based upon the particular circumstances of the debtor. In re: D'Ettore, 106 B.R. 715, 718 (Bankr. M.D. Fla. 1989). The undue hardship exception applies narrowly. Holmes v. Sallie Mae Loan Servicing Center, 205 B.R. 336, 339 (Bankr. M.D. Fla. 1997). The mere fact that repayment of the student loan imposes hardship on the debtor is not enough to permit dischargeability under Section 523(a)(8). Id. The court must find the existence of additional circumstances that make it unreasonable to expect that the debtor and dependents are likely for the foreseeable future to effect an improvement in their present needful circumstances. Id.

The Eleventh Circuit has adopted the Brunner Test to determine undue hardship. The standard for "undue hardship" requires 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 loan;
- (2) That additional circumstances exist indicating that this state of affairs is likely to persist for a significant period..., and,
- (3) That the Debtor has made good faith efforts to repay the loans.

In re Cox, 338 F.3d 1238 (11th Cir. 2003); *citing* Brunner v. New York State Higher Education Services Corp., 831 F.2d 395 (2d Cir. 1987). *See also*, In re: Garcia, 135 B.R. 437 (Bankr. S.D. Fla. 1992).

The first prong of the Brunner test requires that the Debtor show that repayment would

not allow him to maintain a minimal standard of living. This showing requires more than merely establishing tight finances. In re Rifino, 245 F.3d 1083, 1088 (9th Cir. 2001). The bankruptcy court must ascertain what amount is minimally necessary to ensure that the dependents' needs for care are met. In re Hornsby, 144 F.3d 433, 438 (6th Cir. 1998). A minimal standard of living has been described by the courts as one that allows the Debtor to live only at a poverty level standard for the foreseeable future if obligated to repay the student loan. *See*, In re Vazquez, 194 B.R. 677, 679-80 (Bankr. S.D. Fla. 1996) *citing* In re: Webb, 132 B.R. 199, 202 (Bankr. M.D. Fla. 1991). The debtor must also demonstrate that he is attempting to minimize living expenses and maximizing financial resources. Id. Boyer's current income figures and expenses satisfy the first prong of the Brunner test, although Boyer could certainly minimize or eliminate many of his expenses.

Under the second prong of the Brunner test in order for a case of "undue hardship" to be made, the hardship must be long term, and the Court must look to the debtor's future prospects as well as his current condition. The second Brunner prong requires an assessment of whether additional circumstances make it likely that this inability to pay will persist for the life of the loans. In re Murphy, 305 B.R. 780, 797 (Bankr. E.D. Va. 2004). In order for a case of "undue hardship" to be made, the hardship must be long term, and the Court must look to the debtor's future prospects as well as his current condition. In re: Bowen, 37 B.R. 171, 172-173 (Bankr. M.D. Fla. 1984). As one court described this part of the test "...dischargeability of student loans should be based upon the certainty of hopelessness, not simple present inability to fulfill financial commitment." In Re Dennehy, 201 B.R. 1008, 1012 (Bankr. N.D. Fla. 1996) *citing* In Re Briscoe, 16 B.R. 128 (Bankr. S.D.N.Y. 1981). The time period which must be construed is

whether Debtor's current financial condition is likely to extend over a large portion of the repayment period of the student loans. In The Matter of Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993). Boyer fails to meet his burden of evidence as to the second prong of Brunner.

Boyer has the burden to prove he *cannot* earn more money in the years to come. In re Mallinckrodt, 274 B.R. at 567. Boyer has not presented sufficient evidence that there is a total foreclosure of job prospects causing him to be unable to obtain employment in the future. While Boyer's license is currently restricted that restriction only prohibits Boyer from servicing as a clinic director and that restriction will not continue forever. In addition, even though his license is restricted, Boyer was able to obtain a job as a chiropractor as recently as December 2004.

A debtor who did not attempt to supplement his income by taking on additional work outside of his desired field did not establish that he is making a strenuous effort to maximize his income. See Healey v. Massachusetts Higher Education, 161 B.R. 389, 395 (Bankr. E.D. Mich. 1993). Boyer has not presented sufficient evidence that he has aggressively searched for employment. Boyer has not demonstrated that he has conducted an extensive job search. Boyer has failed to demonstrate that there are no employment opportunities for a person with his background. He has not met his burden and proven that he cannot find one or more jobs either within or outside his desired field which would provide him with sufficient income to repay his student loan debt. Boyer has submitted no proof that he cannot relocate or seek employment in a neighboring county.

Boyer recently lost his position at Alliance Chiropractic due to anger problems with staff and patients. The debtor cannot meet the second prong of Brunner when his financial stress

is self imposed. In Re Grigas, 252 B.R. 866 (Bankr. D.N.H. 2000). In Grigas, the debtor desired to be employed in the field of art because that is what she went to school for. The court stated that it appeared that there were few opportunities in the debtor's field of expertise. The court determined that the debtor did not have the luxury of remaining underemployed when saddled with student loan debt and should find work in another field. The debtor in Grigas took a voluntary chance in incurring significant debt in seeking an art career much like Boyer did when he chose his degree path.

Student loan lenders do not guarantee success in a given field when they provide student loans. Congress's intent to make it harder for a student to shift his debt responsibility to the taxpayer is clear from the 1998 amendments. Furthermore there is no evidence of an intent [by Congress] to permit judicially created exceptions to [the undue hardship requirement of] section 523(a)(8) via the fresh start principle. In re Boykin, 313 B.R. 516 (Bankr. M.D. Ga. 2004) citing In re Cox, 338 F.3d at 1243.

The government is not twisting the arms of potential students. The decision of whether or not to borrow for a college education lies with the individual; absent an expression to the contrary, the government does not guarantee the student's future financial success. If the leveraged investment of an education does not generate the return the borrower anticipated, the student and not the taxpayers, must accept the consequences of the decision to borrow. In re Cox, 338 F.3d 1238, 1242 (11th Cir. 2003) *citing* Matter of Roberson, 999 F.2d 1132 (7th Cir. 1993).

The third prong of the Brunner test requires a showing that the debtor has acted in good faith to repay the loan. Good faith is measured by the debtor's effort to obtain employment, maximize income and minimize expenses. In re Mallinckrodt, 274 B.R. 560 (Bankr. S.D. Fla. 2002) *quoting* Roberson, 999 F.2d at 1136. Boyer fails the third prong of Brunner. Boyer's

lack of good faith is evidenced by many facts including: his limited efforts to secure employment, and his failure to make payments on his student loan debt.

In addition, while Boyer's license is currently restricted, he still has the opportunity to participate in the William D. Ford Direct Loan Consolidation Program in which his application is pending. One of the options under that program is The Income Contingent Repayment Plan which permits a student loan debtor to pay 20% of the difference between his adjusted gross income and the poverty level for his family's size or the amount the debtor would pay if the debt were repaid in 12 years, whichever is less.

IT IS HEREBY ORDERED that the student loan obligations of the Plaintiff/Debtor Glenn David Boyer to the Defendant Florida Department of Education be, and are hereby, determined to be nondischargeable debts pursuant to 11 U.S.C. §523(a)(8).

This Opinion is to serve as Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

See written Order.

LARRY L. LESSEN
U.S. BANKRUPTCY JUDGE

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