UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:	)	
	)	
Doretha Belinda Perkins	)	Case No. 03-80777C-7D
	)	
Debtor.	)	
	)	
Doretha Belinda Perkins,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 03-9075
	)	
Pennsylvania Higher Education Assistance Agency,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This adversary proceeding came before the court on May 6, 2004, for hearing upon a motion for summary judgment filed by the defendant Pennsylvania Higher Education Assistance Agency ("PHEAA") as to all issues in this proceeding. The plaintiff appeared pro se and Brian Darer and Christopher J. Fernandez appeared on behalf of the defendant. Having considered the motion, the materials submitted in support of and in opposition to the motion, the briefs filed by the parties and the arguments of counsel, the court finds and concludes as follows:

JURISDICTION

The court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334, and the General Order of Reference entered by the United States District

Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(I) which this court may hear and determine.

DISCUSSION

A. Summary Judgment Standard.

Under Rule 56 of the Federal Rules of Civil Procedure which is incorporated into Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. "Where the moving party has carried its burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial, entry of summary judgment is appropriate." Gutierrez v. Lynch, 826 F.2d 1534, 1536 (6th Cir. 1987)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)). See also In re Specialty Retail Concepts, Inc. 108 B.R. 104, 106-07 (W.D.N.C. 1989); In re Caucus Distributors, Inc. 83 B.R. 921, 926 (Bankr. E.D. Va. 1988).

In determining whether the evidence is sufficient to establish the claim, the evidence must be viewed in the light most favorable to the nonmoving party, and inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. See In re Graham, 94 B.R. 386, 388

(Bankr. E.D. Pa. 1988); In re Trauger, 101 B.R. 378, 381 (Bankr. S.D. Fla. 1989). However, the existence of a factual dispute is material and precludes summary judgment only if the disputed fact is determinative of the outcome under applicable law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The party seeking summary judgment bears the initial responsibility of informing the court of the basis of its motion, and also must identify those portions of the record that it believes demonstrates the absence of a genuine issue of material fact. Only after the movant has sustained the initial burden of production does the burden shift to the non-movant to show the court that there is a genuine issue for trial. However, once this is done, the opposing party must set forth the specific facts showing there is a genuine issue for trial. Only when the entire record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, can the court find there is no genuine issue for trial. See In re Trauger, 101 B.R. at 380, citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 2513, 89 L.Ed.2d 538 (1986). However, the "existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury [or judge in a nonjury case] could reasonably find for the [nonmovant]." Harleysville Mutual Insurance Co. v. Packer, 60 F.3d 1116, 1120 (4th Cir. 1995)(citing Anderson v.

Liberty Lobby, Inc., 477 U.S. at 244 (1986).

B. Application of the Standard.

An action brought by a debtor to discharge educational debts pursuant to § 523(a)(8) involves three issues: (1) whether student loan debt exists, (2) whether the debt is owed to, insured by, or guaranteed by a governmental agency or non-profit institution, and (3) whether the repayment of the student loan debt would impose an undue hardship on the debtor and the debtor's dependants. See In re Segal, 57 F.3d 342, 347-50 (3d Cir. 1995); In re Sheer, 245 B.R. 236, 239-41 (D. Md. 1999), aff'd 229 F.3d 1143 (4th Cir. 1999); In re Roe, 226 B.R. 258, 268 (Bankr44. N.D. Ala. 1998); In re Halverson,189 B.R. 840, 841 (Bankr. N.D. Ala. 1995); In re Koch, 144 B.R. 959, 963 (Bankr. W.D. Pa. 1992); In re Webb, 132 B.R. 199, 201 (Bankr. M.D. Fla. 1991). For the reasons that follow, the court has concluded that summary judgment is appropriate as to the first two issues but not as to the third.

1. Existence of an educational debt

Having considered the motion, the materials submitted in support of and in opposition to the motion, the briefs filed by the parties, and the arguments of counsel, this court has determined that there is no question of fact regarding the existence of an educational loan debt. Section 523(a)(8) of the Bankruptcy Code was enacted to curb abuse of the Code's fresh start policy by students who filed for bankruptcy and obtained a discharge of their

educational loans without making any significant attempts at repayment. See Sheer, 245 B.R. at 239. While consolidation loans, such as the loan at issue in this case, do not directly pay for education, the majority of courts addressing the issue have held that Congress "intended that consolidation loans...be considered 'educational loans' within the meaning of § 523(a)(8)." See id. at 239-40. See also Segal, 57 F.3d at 349 n. 8; Hiatt v. Ind. State Student Assistance Comm'n, 36 F.3d 21, 23 (7th Cir. 1994); In re Rudnicki, 228 B.R. 179, 181 (6th Cir. B.A.P. 1999); In re Flint, 238 B.R. 676, 678 (E.D. Mich. 1999); In re Cobb, 196 B.R. 34, 37-38 (Bankr. E.D. Va. 1996); In re Martin, 137 B.R. 770, 772-73 (Bankr. W.D. Mo. 1992).

The record contains a copy of a promissory note for a consolidation loan signed by Plaintiff in February 1995, and Plaintiff has admitted signing such a promissory note. The affidavit of Ms. Diane Perneta, an Administrative Officer with PHEAA, states that the promissory note evidences the consolidation loan that Plaintiff received on May 3, 1995 in the amount of $44,205.46. Plaintiff argues that the consolidation loan was never made as she never received proof of the consolidation. However, the record contains a disclosure statement sent by the lender, which Plaintiff admits to receiving, that included a copy of the check used to pay off the Plaintiff's pre-consolidation student loans, a list of such pre-consolidation student loans, and a

statement of the amounts paid on each of the consolidated student loans. Although Plaintiff now questions whether the consolidation loan occurred, Plaintiff sent a letter to the lender on October 27, 1995, requesting that the consolidation of her student loans be rescinded. When her request was denied, she requested and was granted the first of several forbearances on the consolidation loan.

Plaintiff's argument that the consolidation loan was not made in May 1995 appears to rest on the fact that she received a copy of a promissory note for one of her original student loans marked paid in full on 3-21-96, and on the fact that an unnamed "disgruntled employee" of PHEAA informed Plaintiff that her student loans had not been properly consolidated. While Plaintiff contends that the consolidation loan was never made, Plaintiff admits that she has never been contacted by any lender regarding payment on the multiple student loans she took out to finance her legal education. Even when the facts are taken in the light most favorable to the plaintiff, this court has concluded that there is insufficient evidence to raise a disputed issue of material fact as to whether an educational loan exists. This court finds that there is an existing educational loan for the purposes of § 523(a)(8)

2. Governmental unit

The second issue is whether the consolidation loan was "made, insured or guaranteed by a governmental unit." The defendant in

this action, PHEAA, was created by Pennsylvania statute as a "public corporation and government instrumentality." 24 P.S. § 5101 et seq.. Pennsylvania courts have determined pursuant to this statute that PHEAA is a governmental agency of the Commonwealth of Pennsylvania. See Richmond v. Pa. Higher Educ. Assistance Agency v. Reid, 15 Pa. D. & C.3d 661 (1980); Richmond v. Pa. Higher Educ. Assistance Agency, 6 Pa. Commonwealth Ct. 612, 614, 297 A. 2d 544 (1972). As Pennsylvania courts have determined the Defendant to be a government agency, and Plaintiff has failed to offer any contradictory evidence that there is a genuine issue for trial, summary judgment is appropriate. This court therefore concludes that the consolidation loan was guaranteed by PHEAA, a government agency.

3. Undue burden

In order to demonstrate that repayment of student loans would constitute an "undue hardship," a debtor must establish (1)that based upon the debtor's current income and expenses, the debtor cannot maintain a minimal standard of living for themselves and any dependents if the debtor repays the student loan; (2) that there are additional circumstances indicating that the inability to maintain a minimal standard of living is likely to continue for a significant portion of the loan repayment period; and (3) that the debtor has made good faith efforts to repay the loan. See In re Ekanasi, 325 F.3d 541, 546 (4th Cir. 2003); Brunner v. New York

State Higher Educ. Servs. Corp., 831, F.2d 395, 396 (2d Cir. 1987). assert. Taken as a whole and considered in the light most favorable to the Plaintiff, the voluminous record in this case reflects a material question of fact regarding whether Plaintiff can maintain a minimal standard of living if she repays the student loan and whether any such limitation is likely to continue. Likewise, there is evidence in the record sufficient to raise a factual issue as to whether Plaintiff has made good faith efforts to repay the student loan. The existence of such material factual disputes precludes summary judgment on this issue. Thus, the issue of whether repaying the student loan would be an undue burden on the Plaintiff must proceed to trial.

CONCLUSION

In accordance with the foregoing, an order will be entered contemporaneously with the filing of this memorandum opinion granting the Defendant's motion for summary judgment as to the issues of whether an educational debt exists and whether that debt was made, insured or guaranteed by a governmental unit, and denying Defendant's motion for summary judgment on the issue of undue hardship. Remaining for trial will be a determination of the amount of student loan indebtedness, and the portion of the debt, if any, which is dischargeable under § 523(a)(8).

This 18th day of May, 2004.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

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	)	
Pennsylvania Higher Education Assistance Agency,	)	
	)	
Defendant.	)	

ORDER

In accordance with the memorandum opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) Defendant's motion for summary judgment is granted as to the issues of whether a educational loan exists and whether such loan was made, insured or guaranteed by a governmental unit;

(2) Defendant's motion for summary judgment is denied as to the remaining issues.

This 18th day of May, 2004.

William L. Stocks
WILLIAM L. STOCKS
United States Bankruptcy Judge