UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In Re: **CASE NO.: 00-02299-3F7**

CHARLOTTE E. LAWSON,

Debtor.
_____/

CHARLOTTE E. LAWSON,

Plaintiff,

v. **ADV. NO.: 00-160**

SALLIE MAE, INC., TEXAS GUARANTEED STUDENT LOAN CORP., and ERIC LAWSON,

Defendants.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Proceeding is before the court upon a Motion for Summary Judgment filed by Charlotte E. Lawson ("Plaintiff") on August 4, 2000 (Doc. 22). Plaintiff filed this Motion for summary Judgment in order to resolve on the pleadings Plaintiff's Complaint to Determine Dischargeability of Debt owed to Sallie Mae, Inc. ("Defendant") and Texas Guaranteed Student Loan Corp. ("TGSL") filed on April 27, 2000 (Doc. 1). The Court entered default judgment against TGSL on June 6, 2000 (Doc. 9). The Court entered default judgment against Eric Lawson on June 15, 2000 (Doc. 13). Upon review of the arguments of counsel made at trial August 15, 2000, and in submissions, the Court concludes that Plaintiff's debt to Defendant is excepted from discharge by § 523(a)(8). The Court concludes that the Plaintiff is not entitled to a "hardship discharge" of Plaintiff's student loan debt to Defendant. Finally, the Court chooses to exercise its

equitable powers under § 105 and grants Plaintiff a partial discharge of debt owed to Defendant, to the extent that Plaintiff received no educational benefit from the accumulation of such debt.

FINDINGS OF FACT

Plaintiff obtained a $7,500 Stafford loan in 1989 to fund medical school at the University of Florida. Defendant held the note. Plaintiff withdrew from medical school after completing less than one year. The United States government guaranteed this loan pursuant to the Higher Education Act of 1965.

Eric Lawson obtained approximately $22,000 in Stafford and SLS loans in 1992 and 1993 to fund his education at the Art Institute of Seattle. Defendant did not hold this note. Eric Lawson graduated with a degree in commercial photography in June 1994. The United States government guaranteed these loans pursuant to the Higher Education Act of 1965.

Plaintiff and Eric Lawson married shortly before Eric Lawson graduated.

On June 23, 1994, Plaintiff and Eric Lawson applied for a "spousal consolidation" of their respective student loans pursuant to the higher Education Act. Plaintiff owed Defendant $4,148.91 prior to consolidation. Eric Lawson owed $21,148.91 to a separate creditor prior to consolidation.

On June 23, 1994, Plaintiff and Eric Lawson signed a promissory note consolidating their student loan debts with Defendant. The United States government guaranteed this new "spousal consolidation" loan pursuant to the Higher Education Act.

The consolidation lowered the Plaintiff and Erci Lawson's monthly student loan payments by $140.00 per month, from approximately $368 to approximately $228.00.

Plaintiff and Eric Lawson made this monthly payment from 1994 until 1999. During 1999 Defendant deferred repayment at the then unemployed Eric Lawson's request.

On September 1999, Plaintiff and Eric Lawson separated. Plaintiff relocated to Jacksonville, Florida in order to be closer to family. Plaintiff has been solely responsible for repayment on the consolidated loan since Eric Lawson's unemployment deferment expired in January 2000.

On March 24, 2000 Plaintiff voluntarily filed a petition for relief under Chapter 7.

On May 25, 2000 Plaintiff divorced Eric Lawson. Plaintiff received custody of two children, ages two years and four years. Pursuant to the terms of the Final Judgment of dissolution of Marriage, Eric Lawson must pay $545 per month in child support.

Eric Lawson has not paid any of this court-ordered support. Plaintiff testified that she believes Eric Lawson is living in Tennessee. Plaintiff testified that she has begun the interstate support enforcement process.

ThermoRetec Consulting Corporation ("ThermoRetec") currently employs Plaintiff full-time as a "contracts administrator." ThermoRetec pays Plaintiff $1,642.03 bi-weekly before taxes. Plaintiff pays $69.53 out of that amount for health insurance, $14.76 for voluntary life insurance for herself and for her children and contributes $20.30 to a 401k plan.

Plaintiff has worked for ThermoRetec for approximately 10 years, first at ThermoRetec's offices in Concord, New Hampshire and, subsequent to her separation from Eric Lawson, from her home in Jacksonville.

ThermoRetec originally agreed to employ Plaintiff for only six months after Plaintiff's move to Jacksonville, during which time ThermoRetec would train a replacement. However, ThermoRetec verbally agreed to retain Plaintiff at her current position until a pending sale of the employer is complete. Plaintiff testified that the sale of ThermoRetec will be finalized in October, 2000, thus leaving Plaintiff unemployed at that date with one month's severance pay due. Plaintiff testified that Defendant refuses to install her as the primary debtor on the consolidation, thus preventing her from receiving a deferment or renegotiation for which Eric Lawson, Plaintiff's co-obligor, is entitled.

Plaintiff testified that she has been unable to locate comparable employment in Jacksonville due to her lack of formal education and due to the uniqueness of her position with ThermoRetec. Plaintiff turned down one offer for $35,000 per year because it entailed a $5,000 pay cut and extensive overtime.

Plaintiff's Schedule J indicates that her monthly expenses amount to $3,857.01. That amount includes a $400.00 per month tithe to Plaintiff's church and the monthly payment to Defendant.

Plaintiff additionally makes monthly $100.00 payments on a $12,000 loan to her mother. Plaintiff informally reaffirmed the $4,200.00 balance on this debt after obtaining her Chapter 7 discharge on July 6, 2000.

CONCLUSIONS OF LAW

There are no issues of material fact in dispute. Therefore, the Court proceeds to its holding based solely on its interpretation of the applicable law. Plaintiff contends that the portion of the consolidated loan attributable to her former husband Eric Lawson's

education does not constitute an "educational loan" so as to be excepted from discharge under 11 U.S.C. § 523(a)(8)(A) because Plaintiff received no educational benefit from her ex-husband's portion of the consolidated loan. Plaintiff alternatively contends that she is entitled to a "hardship discharge" of the whole student loan under § 523(a)(8)(B). The Court finally elects to address the unique question of whether or not Plaintiff is entitled to a partial discharge under the Court's § 105 equity powers.

EXCEPTION FROM DISCHARGE OF CONSOLIDATED LOAN UNDER 11 U.S.C. § 523 (a)(8)(A)

The Court first addresses the question of whether or not the debt of a co-obligor on a student loan for another's educational benefit is excepted from discharge under § 523(a)(8)(A). Section 523(a)(8) provides in relevant part:

> (a) Discharge under section 727…of this title does not discharge an individual from any debt –
> (8) for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit…unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

11 U.S.C. § 523(a)(8) (West 2000).

The United States government guaranteed Plaintiff's original loan, Eric Lawson's original loan, and the consolidation loan pursuant to a Federal education financing statute. For the vast majority of courts, the 523(a)(8) inquiry would end the inquiry here, without looking behind the meaning of the phrase "educational benefit" as Plaintiff asks.

A numerous but still vastly minority position proposes that the phrase "educational benefit" should be interpreting as excepting from discharge under § 523(a)(8) only those student loan debts which conferred upon the debtor before the court

some educational benefit. *See e.g. Bawden v. First Southern Fed. Savings and Loan Assoc. (In re Bawden),* 55 B.R. 459 (Bankr. M.D. Ala. 1985).

The courts in the minority would not except from discharge the debt of a co-obligor or guarantor of a loan for another's education. *See Id.* at 460. The *Bawden* court reasoned that co-obligors should be discharged because Congress intended for § 523(a)(8) to apply only to students themselves. *See Id.* The *Bawden* court further declared that there is no need to except the co-obligor or guarantor from discharge if the student who received the "educational benefit" of a federal student loan remains liable and unable to discharge the loan debt in bankruptcy. *See Id.* In the co-obligor and guarantor situations, someone is still on the hook where bankruptcy will not save them even if the guarantor is discharged; therefore, Congress' intent in passing § 523(a)(8), protecting the student loan system from collapse, is not endangered by allowing bankruptcy courts to wipe away the co-obligor's or guarantor's obligation. *See Id.* at 461.

The majority position holds forth that the plain language of the statute does not allow for the discharge of co-obligors, and that Congress' intent to preserve the student loan system demands that co-obligors and guarantors stay liable on student loans after bankruptcy. *See Salter v. Educational Resources Institute, Inc. (In re Salter),* 207 B.R. 272 (Bankr. M.D. Fla. 1997); *see also Kentucky Higher Educ. Assistance Auth v. Norris (In re Norris),* 239 B.R. 247 (M.D. Ala. 1999).

In *Salter*, the debtor was the sole obligor on a loan taken out for the purpose of debtor's child's education. *See Salter*, 207 B.R. at 273. Thus, the issue was slightly different than the instant case, in that the creditor in *Salter* would have been left with no

recourse against anyone had the debtor been discharged. *See Id.* Judge Paskay ruled that the debtor's debt for his son's education fit within § 523(a)(8) and thus excepted the debt from discharge. *See Id.* at 275. The Court's ruling did not recognize the sole obligor vs. co-obligor or guarantor distinction. *See Id.* Courts folowing the majority position often echo Judge Paskay's summation of his reasoning: "[T]his Court is satisfied that the proper focus should be on the kind of debt involved, rather than how the money was spent, or who was the borrower." *See Id.* The court in *Norris* elucidated the rationale behind the bold statement in overruling a discharge granted by the same bankruptcy judge who ruled in *Bawden* 14 years earlier. First, the court reasoned that the plain language of the statute does not provide for an exception to the § 523(a)(8) exception for non-student debtors. *See Norris*, 239 B.R. at 251. The *Norris* court also asserted that the mass of the legislative history of § 523(a)(8) pointed to a congressional intent to preserve the student loan system at all costs. *See Id.* at 252. The court noted that the discharge of a sole obligor parent places the student loan system in as much peril as the discharge of a student obligor. *See Id.*

But does the discharge of a co-obligor or a guarantor place the system in peril, when a student-obligor remains behind to handle the non-dischargeable responsibility of repaying the loan? The Court does not feel it necessary to rule on the broader co-obligor/guarantor question, as the Plaintiff placed herself in a unique position among educational loan debtors by taking on her husband's debt in consolidation. By doing so, the Plaintiff extinguished the original obligation. Plaintiff received significant consideration for entering into the consolidation, in the form of lower monthly student loan payments. The Defendant took as consideration the additional security of a second

obligor on both spouse's student loans. The Defendant's loan in the instant case, the consolidation loan, would be equally endangered by the discharge of the Plaintiff as it would be by the discharge of Eric Lawson, the recipient of the educational benefit, because Defendant paid for Plaintiff's guarantee. Plaintiff was not merely a gratuitous co-signor to an original student loan for a child or spouse. Plaintiff received tangible benefit from the consolidation. This is the sort of student loan transaction which congress intended to protect by enacting § 523(a)(8). The consolidation allows struggling ex-students to buy more time to succeed and to lower their monthly payments. Repayment becomes more feasible, thus protecting the integrity of the particular loan from default and protecting the system in general by the aggregate effect of those loans that might have defaulted had renegotiation not been undertaken.

Therefore, the Court finds that a co-obligor or guarantor on a consolidated student loan for which such co-obligor or guarantor received consideration may not receive discharge for that obligation even if the co-obligor or guarantor received no educational benefit from some portion of the consolidated loan.

HARDSHIP DISCHARGE UNDER 11 U.S.C. § 523(a)(8(B)

The Court next considers whether Plaintiff, whose student loan debt falls under the § 523(a)(8)(A) exception from discharge, may nevertheless be granted a discharge if repayment of the student loan would constitute an undue hardship on Plaintiff and her two dependent children.

The "garden variety" financial difficulties of every bankruptcy debtor do not constitute "undue hardship" so as to allow discharge of debts found non-dischargeable under § 523(a)(8)(A). *See Cadle Company v. Webb (In re Webb)*, 132 B.R. 199, 201

(Bankr. M.D. Fla. 1991). The "undue hardship" provision is to be read narrowly. *See In re D'Ettore*, 106 B.R. 715, 718 (Bankr. M.D. Fla. 1989). The basis of hardship must be long-term. *See Webb*, 132 B.R. at 201. A court must look to a debtor's future earnings and asset potential as well as current shortfalls. *See Id.* A debtor must show that her financial resources will only allow debtor to live at or below poverty level for the foreseeable future as a consequence of the student loans. *See Id.* A debtor must also show that she will be living in poverty despite efforts to minimize living expenses and efforts to maximize financial resources. *See Id.* A debtor must present some evidence that inability to make the student loan payments without undue hardship is permanent. *See Id.* at 202. Finally, a debtor must bring forth evidence showing that there is a total foreclosure of job prospects in debtor's field of expertise. *See Id.*

Defendant contends that Plaintiff's tithing is not a reasonable expense, and therefore that Plaintiff has not appropriately minimized expenses. Tithes are not automatically necessary expenses for undue hardship purposes, as they are for Chapter 13 plan confirmation purposes to the extent that they constitute less than 15% of debtor's income. *See In re McLeroy*, 2000 WL 974973 (N.D. Tex. 2000). A court may consider tithing a reasonable expense for such purposes, although a court is not constitutionally bound to do so. *See Lynn v. Diversified Collection Service (In re Lynn)*, 168 B.R. 693, 700 (Bankr. D. Ariz. 1994). . The *Lynn* court considered whether or not the debtor received any services from the church which debtor would not receive if tithing ceased. *See Id.*

The Court chooses not to place itself in the situation of judging the sincerity of a debtor's religious beliefs. The Court finds non-justiciable the question of whether or not

the delivery of fellowship, communion, inspiration and education in one's most deeply held belief system constitute sufficient services such that tithing is a reasonable expense for undue hardship analysis. The court is loathe to ask whether the church must provide more, such as child care or valet parking, in exchange for donations in order for such donations to be supported by sufficient "consideration" as to qualify as a reasonable expense.

Plaintiff in the instant case did not show any permanent disability to earn enough to prevent her family from falling near the poverty line. Plaintiff did not bring forth any evidence tending to show that she could not get work in her field in the future at a rate of pay well above the poverty line. In fact, the only evidence on the issue – the job offer Plaintiff turned down – tends to show that Plaintiff's prospects for employment in her more general field of expertise are quite good, though Plaintiff may be unable to find an identical job at an identical salary.

Therefore, the Court finds that repayment of the student loans excepted from discharge under § 523(a)(8)(A) would not constitute such an undue hardship on Plaintiff or her children such that the student loans should be discharged under § 523(a)(8)(B).

PARTIAL DISCHARGE OF NON-DISCHARGEABLE DEBT UNDER 11 U.S.C. § 105(a)

The Court finally comes to the question of whether or not Plaintiff's debt from the consolidation loan may be discharged, under the Court's § 105(a) equity power, to the extent that Plaintiff did not receive any educational benefit from the loan. Section 105(a) provides, in relevant part:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title…[n]o provision of this title

> providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action…necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a) (West 2000).

Student loan debt may not be partially discharged under § 523(a)(8) unless such debt is divisible into multiple loans with separate promissory notes, because § 523 does not empower a court to restructure a loan contract. *See Hinkle v. Wheaton College (In re Hinkle)*, 200 B.R. 690 (Bankr. W.D. Wa. 1996). However, three circuit courts and a number of district and bankruptcy courts have held that indivisible student loan debt which does not qualify for total hardship discharge may nevertheless be partially discharged or repayment delayed under a bankruptcy court's § 105(a) equity power. *See Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 440 (6th Cir. 1998)(remanding case back to bankruptcy court to determine partial discharge); *see also Pennsylvania Higher Education Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 307 (3d Cir. 1995)(holding that two-thirds discharge not warranted because of debtor's complete lack of hardship); *In re Roberson*, 999 F.2d 1132, 1138 (7th Cir. 1993)(upholding bankruptcy court's imposition of a two-year deferment of student loan repayment). The rationale behind these holdings is that an all-or-nothing approach to § 523(a)(8) would encourage student loan debtors to rack up more debt than they could pay in order to get a full discharge. *See Great Lakes Higher Education Corp. v. Brown (In re Brown)*, 239 B.R. 204, 210 (S.D. Cal. 1999). Less reckless borrowers would be punished for their ability to pay some amount of the loans thanks to their frugality or higher earning power. *See Id.*

This Court held that student loan debt excepted from discharge under § 523(a)(8)(A) and not dischargeable as a hardship under § 523(a)(8)(B) may nevertheless be restructured in order to provide a debtor with a fresh start per § 105(a). *See Webb*, 132 B.R. at 202. Judge Proctor declared, "[I]t is within the proper exercise of the equitable power of this Court to set forth a payment schedule which takes into account the defendant's temporary severe difficulties." *See Id.*

Dated August 24, 2000 at Jacksonville, Florida.

JERRY A. FUNK
United States Bankruptcy Judge