UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
MICHAEL CARTER HOUGH	§	**Case No. 02-31622 HDH-7**
	§	
Debtor	§	

MICHAEL CARTER HOUGH	§	
	§	
Plaintiff/Counter Defendant	§	
	§	
v.	§	**Adversary No. 02-3156**
	§	
PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, THE EDUCATION RESOURCES INSTITUTE, KEY BANK USA, KEYCORP TRUST/AES, AES GRADUATE LOAN CENTER	§	
	§	
Defendants	§	
	§	
PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY	§	
	§	
Counter Plaintiff	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Debtor filed a voluntary Chapter 7 petition on or about February 26, 2002.

2. Debtor brought this adversary proceeding seeking to discharge certain student loans.

3. Debtor suffers from bipolar disorder.

4. Debtor has had a number of episodes which resulted from his bipolar disorder. Such episodes started in 1980.

5. Debtor attended law school and graduate school many years after his bipolar disorder surfaced. He completed law school and graduate school. He passed the bar examination on his second try.

6. Debtor obtained the student loans in question years after his bipolar disorder became known.

7. Debtor represented himself in this adversary proceeding. He filed a number of briefs and other pleadings with the Court. Debtor obtained and examined his expert witness. Debtor cross-examined Defendants' expert psychiatrist admirably. Debtor made and defended a number of evidentiary objections during the trial. He offered and excluded evidence. Debtor faced not one, but two, experienced counsel. Debtor maintained good courtroom decorum, and was quite respectful to the Court and opposing counsel. In sum, he did a good job in this adversary proceeding, both in and out of the courtroom.

8. Defendant Pennsylvania Higher Education Assistance Agency ("PHEAA") counterclaimed for attorneys' fees pursuant to the terms of the Promissory Note between PHEAA and Plaintiff. Although PHEAA attached a copy of the Note to its Answer and Counterclaim, the terms thereof are illegible. PHEAA offered evidence of its reasonable attorneys' fees.

9. Any conclusion of law may also be a finding of fact.

B. Conclusions of Law

1. This Court has jurisdiction under 28 U.S.C. § 1334 and 157.

2. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

3. Section 523 of the Bankruptcy Code provides, in relevant part, that:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of 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 governmental unit or nonprofit institution, or *for an obligation to repay funds received as an educational benefit*, scholarship or stipend, unless excepting such debt form 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 2003) (emphasis added).

4. Although the statute does not define "undue hardship," the United States Bankruptcy Court for the Northern District of Texas has utilized the three-part standard for dischargeability based on an undue hardship originally set forth by the Second Circuit and commonly referred to as the *Brunner* test. *See Education Credit Mgmt. Corp. v. McLeroy (In re McLeroy)*, 250 B.R. 872, 878 (N.D. Tex. 2000); *Complete Source [United States of America] v. Nary (In re Nary)*, 253 B.R. 752, 761 (N.D. Tex. 2000); *Brunner v. New York State Higher Educ. Servs. Corp.(In re Brunner)*, 831 F.2d 395, 396 (2nd Cir. 1987).

5. Under the *Brunner* test, in order to warrant discharge of student loans based on undue hardship, the Debtor is required to make a three-part showing:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [him]self and [his] dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

Id.; *see also Illinois Student Assistance Comm'n v. Roberson (In re Roberson)*, 999 F.2d 1132 (7th Cir. 1993); *Cheesman v. Tennessee Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356, 359-60 (6th Cir. 1994).

6. The parties agreed and argued that this Court should follow the *Brunner* test.

7. The burden of proof for the *Brunner* factors is placed on the Debtor to establish discharge of the student loan debt is justified. *See Kettler v. Great Lakes Higher Educ. Serving Corp.*

(In re Kettler), 256 B.R. 719, 722 (S.D. Tex. 2000); *see also Coveney v. Costep Servicing Agent (In re Coveney)*, 192 B.R. 140, 142 (W.D. Tex. 1996).

8. The purpose of § 523(a)(8) is to ensure the credibility and stability of the student loan program and to ensure that future generations of students will have a viable loan program available to them. *Lynn v. Diversified Collection Serv., (In re Lynn)*, 168 B.R. 693 (Bankr. D. Ariz. 1994) (*citing*, S. REP. NO. 230, 96th Cong., 2d Sess. 1-3 (1979)). Through § 523(a)(8), Congress has specifically elevated repayment of student loan debt above the debtor's interest in a fresh start. *In re Sullivan*, 195 B.R. 649, 654 (Bankr. W.D. Tex. 1996).

9. The parties stipulated that Debtor met the first prong of *Brunner*, financial condition.

10. The second prong of the *Brunner* test was adopted to further the "clear congressional intent exhibited in section 523(a)(8) to make the *discharge of student loans more difficult* than that of other nonexcepted debt." *Brunner*, 831 F.2d at 396 (emphasis added). The Second Circuit reasoned that requiring "additional, exceptional circumstances, *strongly suggestive of continuing inability to repay*" more reliably guaranteed that the hardship truly was "undue." *Id.* (emphasis added). The Bankruptcy Court for the Western District of Texas even opined in *Stebbins-Hopf v. Texas Guar. Student Loan Corp. (In re Stebbins-Hopf)*, 176 B.R. 784, 786 (Bankr. W.D. Tex. 1994), that there must be a "certainty of hopelessness" before a debtor's burden can be met on the second prong. *See also Goulet v. Education Credit Mgmt. (In re Goulet)*, 284 F.3d 773, 778 (7th Cir. 2002) (holding debtor failed to establish second prong of *Brunner* test where condition that allegedly created hardship pre-existed graduate school and student loans obtained to pay for graduate school). A debtor that relies on a mental or emotional disorder to satisfy the second prong, has the burden of

demonstrating how the disorder impairs the debtor's ability to work. *See Brightful v. Pennsylvania Higher Educ. Assistance Agency*, 267 F.3d 324 (3rd Cir. 2001) (holding that mere existence of mental illness without a nexus to the debtor's inability to work was insufficient to satisfy the second prong of *Brunner*).

11. Debtor had bipolar disorder before he incurred his student loans. Such preexisting condition precludes a finding by this Court of an additional, exceptional circumstance required under the second prong of the *Brunner* test. *See In re Goulet*, 284 F.3d at 773.

12. Debtor's expert and other evidence concerning his future employment prospects was questionable at best. The evidence was certainly belied by Debtor's laudable courtroom activities. Debtor has legal, evidentiary, and organizational skills. If he is not able to, or not interested in, work as a lawyer, he may be able to use his skills in debt collection, or as a paralegal, where the stress level would be less. Such a finding also precludes a finding by the Court of the second prong of the *Brunner* test.

13. Debtor was offered several proposals by his student loan lenders. However, Debtor did not consider alternatives with his student loan lenders. In addition, he did not show, by a preponderance of the evidence, that he made payments to the lender Defendants. Defendant PHEA's witness testified that Debtor has not made a payment on the consolidated loan of PHEAA. Debtor did obtain deferrals. These conclusions might preclude a finding of the third prong of the *Brunner* test. However, because prong two is clearly not met, the Court will refrain from deciding whether the third prong of the *Brunner* test is met.

14. Debtor did not establish "undue hardship" as required by 11 U.S.C. § 523(a)(8).

15. Defendant PHEAA claims attorney fees. PHEAA is not entitled to fees under any statute that

this Court could locate. Instead, PHEAA claims attorneys' fees under the Note. This is a dischargeability action in which the Debtor did not dispute the amount owed or even that the Note existed. In this action, PHEAA does not seek to collect upon the Note. Therefore, this is not a breach of the Note action. Under these circumstances, the Court believes that PHEAA has failed to establish that it is entitled to attorneys' fees. PHEAA's counterclaim, then, is denied.

16. On credibility issues, the Court finds the testimony of Defendants' expert's, Dr. Dunn, credible and persuasive. The Court finds the Debtor's expert's testimony less persuasive than Dr. Dunn's. Debtor appears to the Court to have testified honestly. However, his testimony regarding his impairment was seriously undercut by this ability to handle this somewhat complicated lawsuit.

17. Any finding of fact may also be a conclusion of law.

SIGNED: 7/2/03

/s/ Harlin D. Hale

The Honorable Harlin D. Hale
United States Bankruptcy Judge