Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
September 16, 2016

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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| In re:<br><br>JAVIER MEDINA,<br><br>Debtor. | Case No.: 10-33712-MKN<br><br>Chapter 7 |
| JAVIER MEDINA,<br><br>Plaintiff,<br><br>v.<br><br>NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-2, et al.,<br><br>Defendants. | Adv. Proc. No.: 15-01175-MKN<br><br>Date: August 18, 2016<br>Time: 1:30 p.m. |

**MEMORANDUM DECISION ON DEFENDANTS' NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-2, NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-2, NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-3 AND NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-3'S MOTION FOR SUMMARY JUDGMENT; AND ON PLAINTIFF'S COUNTER-MOTION FOR SUMMARY JUDGMENT[1]**

On August 18, 2016, the court heard the Defendants' National Collegiate Student Loan Trust 2004-2, National Collegiate Student Loan Trust 2005-2, National Collegiate Student Loan

[1] In this Memorandum, all references to "AECF No." are to the numbers assigned to the documents filed in the above-captioned adversary proceeding ("Adversary Proceeding") as they appear on the adversary docket maintained by the clerk of the court. All references to "ECF No." are to the numbers assigned to the documents filed in the above-captioned bankruptcy case. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure. All references to "FRCP" are to the Federal Rules of Civil Procedure.

Trust 2005-3 and National Collegiate Student Loan Trust 2006-3's Motion for Summary Judgment ("MSJ"). A counter-motion for summary judgment ("CMSJ") brought by plaintiff Javier Medina ("Debtor") also was heard. The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND**

On December 22, 2010, Debtor filed a voluntary Chapter 7 petition along with his schedules of assets and liabilities. (ECF No. 1). On his Schedule "F," Debtor listed six separate unsecured claims being held by AES/National Collegiate Trust in various amounts. The case was assigned for administration to Joseph B. Atkins as Chapter 7 trustee ("Trustee").

On December 22, 2010, a notice was issued to all creditors that a meeting of creditors would be held on January 28, 2011, and that the deadline to file objections to the dischargeability of any debt would expire on March 29, 2011. (ECF No. 6).

On March 30, 2011, Debtor received his Chapter 7 discharge ("Bankruptcy Discharge") inasmuch as no objections to his discharge had been filed. (ECF No. 14).

On August 18, 2011, the Trustee issued a notice of assets scheduling a deadline of November 16, 2011, for creditors to file proofs of claim. (ECF No. 16). The claims register maintained by the clerk of the court reflects that three proofs of claim were filed by the claims bar date.

On April 25, 2012, a final decree was entered closing the Debtor's bankruptcy case. (ECF No. 26).

On October 14, 2015, Debtor commenced the above-captioned adversary proceeding by filing an adversary complaint ("Complaint") seeking a declaration that certain loans held by the named defendants either are not qualified educational loans encompassed by Section 523(a)(8), or, that Debtor's repayment of such loans constitutes an undue hardship under Section 523(a)(8). Defendants named in the Complaint are National Collegiate Student Loan Trust 2004-2, National Collegiate Student Loan Trust 2005-2, National Collegiate Student Loan Trust 2005-3 and National Collegiate Student Loan Trust 2006-3, Delaware Statutory Trusts ("Defendants"). Paragraph 4 of the Complaint alleges that on January 15, 2014, Defendants commenced a lawsuit

in Clark County, Nevada, seeking to collect the aforementioned loans ("Collection Suit").[2]

On November 16, 2015, Defendants filed an answer to the Complaint. (AECF No. 6).

On January 13, 2016, a joint discovery plan was filed setting a bar date of August 4, 2016, for discovery to be completed. (AECF No. 7).

On June 9, 2016, an order was entered scheduling a two-day trial to commence on February 6, 2017, with a pretrial conference scheduled to be held on January 19, 2017. (AECF No. 11).

On June 9, 2016, Defendants filed the instant MSJ, to which is attached the Defendants' Statement of Undisputed Facts ("SUF"), the Declaration of Shannon G. Splaine ("Splaine Declaration"), and the Declaration of James H. Cummins ("Cummins Declaration") to which is attached Defendants' Exhibits "A" through "F." (AECF No. 9).

On July 15, 2016, Debtor filed an opposition to the MSJ ("Opposition") that included the instant CMSJ. (AECF No. 19). Along with the Opposition, Debtor filed a Statement of Disputed Facts ("SDF"). (AECF No. 20).

On July 29, 2016, Defendants filed a combined reply ("Reply") and opposition to the CMSJ. (AECF No. 21).

**APPLICABLE LEGAL STANDARDS**

A motion for summary judgment filed in an adversary proceeding is governed by FRCP 56, which is applicable in adversary proceedings pursuant to FRBP 7056. See Silva v. Smith's Pac. Shrimp, Inc. (In re Silva), 190 B.R. 889, 891 (B.A.P. 9th Cir. 1995).

The party moving for summary judgment bears the burden of demonstrating the absence of any genuine dispute of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A motion for summary judgment should be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FRCP 56(a). For

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[2] The Complaint seeks only a determination of whether the loans were discharged. If the Debtor prevails, he presumably would file a separate motion seeking damages for violation of the Bankruptcy Discharge, see Barrientos v. Wells Fargo Bank, N.A., 633 F.3d 1186, 1190 (9th Cir. 2011), asserting that commencement of the Collection Suit violated the discharge injunction imposed by Section 524(a)(2).

summary judgment purposes, a fact is "material" if it might affect the result of the suit under the governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. The moving party's evidence is judged by the same standard of proof applicable at trial. See Celotex Corp., 477 U.S. at 323; see also Southern Calif. Gas Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003).

The burden of proof is on the party seeking the summary judgment, but the inferences are viewed in favor of the opposing party. See Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 456 (1992); see also Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 987 (9th Cir. 2006). A trial court may not weigh the evidence in resolving such motions; rather, it determines only whether a material factual dispute remains for trial. See Covey v. Hollydale Mobilehome Estates, 116 F.3d 830, 834 (9th Cir.), as amended by 125 F.3d 1281 (9th Cir. 1997).

**DISCUSSION**

As previously mentioned, the Complaint asserts that for a variety of reasons the loans held by the Defendants are not qualified educational loans that are excepted from discharge under Section 523(a)(8). First, Debtor alleges that the loans "are not held or funded by a governmental or non-profit entity." Complaint at ¶ 12. Second, he asserts that the proceeds of the loans "were not used solely for educational purposes." Id. at ¶ 13. Third, Debtor alleges that either the school he attended "was not properly certified" and/or that the programs in which the Debtor enrolled "were not properly certified." Id. at ¶ 14. Finally, he argues that the programs that were funded by the loans were either "shams," or, as applied the Debtor, were "shams" because the Debtor "was not given a legitimate opportunity to complete his program of instruction ...to earn income as a licensed aviator." Id. at ¶ 15. Because the subject loans are not educational loans encompassed by Section 523(a)(8) at all, Debtor maintains that his personal liability for the loans were included in the Chapter 7 discharge he received on March 30, 2011.

In the alternative, Debtor alleges that even if the loans are qualified educational loans, they should not be excepted from discharge because requiring him to repay the loans would impose an undue hardship. Id. at ¶ 16.

In the instant motions, the parties initially seek determinations in their respective favor on the threshold question of whether the six loans are educational loans within the meaning of Section 523(a)(8).

"Under Section 523(a)(8), the lender has the initial burden to establish the existence of the debt and that the debt is an educational loan within the statute's parameters." Roth v. Educ. Credit Mgmt. Corp., 490 B.R. 908, 916 (B.A.P. 9th Cir. 2013). Once the lender meets its burden, the burden shifts to the debtor to prove "undue hardship." Id. at 916-17. See also Hedlund v. Educ. Res. Inst., Inc. (In re Hedlund), 718 F.3d 848, 851 (9th Cir. 2013); Rifino v. United States (In re Rifino), 245 F.3d 1083, 1087-88 (9th Cir. 2001).

**A. The Language of the Loan Documents.**

As evidence to establish that the subject loans constitute educational loans "made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in party by a governmental unit or nonprofit institution," see 11 U.S.C. § 523(a)(8)(A)(i) (emphasis added), or, educational loans "that [are] qualified educational loan[s], as defined in section 221(d)(1) of the Internal Revenue Code," see 11 U.S.C. § 523(a)(8)(B), Defendants have submitted as Exhibits "A" through "F," copies of all six loans through their custodian of record. See Cummins Declaration at ¶ 4.[3] For all six loans, the lender is identified as Bank of America, N.A. ("BOA") and the School is identified as Spartan College of Aeronautics ("Spartan College"). Defendants rely on common provisions included in the loan documents signed by the Debtor. See Cummins Declaration at ¶ 11. Paragraph L(11) of five of the loan agreements signed by the Debtor states as follows:

> I acknowledge that the requested loan may be subject to the limitations on dischargeability in bankruptcy contained in Section 523(a)(8) of the United States Bankruptcy Code. Specifically, I understand that you have purchased a guaranty of this loan, and that this loan is guaranteed by The Education Resources Institute, Inc. ("TERI"), a non-profit loan guaranty agency.

[3] Included with each of these exhibits is a "Deposit and Sale Agreement" between The National Collegiate Funding LLC (as seller) and one of the named Defendants. Presumably, these documents are intended to provide evidence of Defendants' standing to pursue collection of the subject loans. Nothing in these agreements nor the Cummins Declaration, however, explains the role played by these entities in the funding of the loans made by BOA.

Cummins Declaration, Exhibits "A," "B," "C," "D," and "E." (Emphasis added.).[4] In this paragraph, TERI is identified as a non-profit loan guaranty agency.

The language of Paragraph L(11) of the sixth loan agreement signed by the Debtor is different, however, and states as follows:

> I understand and agree that this loan is an education loan and certify that it will be used only for costs of attendance at the School. I acknowledge that the requested loan may be subject to the limitations on dischargeability in bankruptcy contained in Section 523(a)(8) of the United States Bankruptcy Code because either or both of the following apply: (a) this loan was made pursuant to a program funded in whole or in part by The Education Resources Institute, Inc. ("TERI"), a non-profit institution, or (b) this is a qualified education loan as defined in the Internal Revenue Code. This means that if, in the event of bankruptcy, my other debts are discharged, I will probably still have to pay this loan in full.

Cummins Declaration, Exhibit "F."[5] (Emphasis added).[6] In this paragraph, TERI is identified as a non-profit institution.

For the 2004-2006 Loans, Defendants rely on Paragraph L(11) to establish that those loans are educational loans under Section 523(a)(8). Even if the first sentence of that paragraph constitutes an evidentiary admission by the Debtor, however, the admission is simply that the obligation may be subject to the dischargeability limitation of Section 523(a)(8) and not that it is subject to that limitation. More important, the second sentence of that paragraph reflects only the Debtor's understanding that BOA purchased a guaranty of the loan and his understanding that the loan is guaranteed by TERI. Despite the Debtor's alleged understanding, there is simply no evidence in the record indicating that BOA in fact purchased a loan guaranty from TERI for the 2004-2006 Loans. Likewise, there is no evidence in the record that TERI is a "governmental unit" under Section 523(a)(8)(A)(i) that has guarantied the BOA loans.

For the 2007 Loan, there is nothing in the language of Paragraph L(11) that refers to a

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[4] These loans reflect signatures by the Debtor dated June 21, 2004, May 10, 2005, August 18, 2005, April 6, 2006, and June 17, 2006 ("2004-2006 Loans").

[5] In his declaration, Cummins attests in Paragraph 11 that this language appeared in all six loan agreements. That clearly is not correct. The inaccuracy in the Cummins Declaration is repeated as fact in the Defendants' written argument. See Reply at 3:28 to 4:2.

[6] This loan reflects a signature by the Debtor dated July 16, 2007 ("2007 Loan").

guaranty of any sort. Instead, Defendants apparently rely on the language of the first sentence reflecting the Debtor's understanding and agreement that it is an educational loan. If that sentence of the paragraph constitutes an evidentiary admission, its force is diminished by the second sentence indicating only that the obligation may be nondischargeable under Section 523(a)(8). In other words, an admission that the debts are educational loans does not establish that Section 523(a)(8) necessarily applies. The third sentence of the same paragraph also has limited evidentiary value because it only admits a probable outcome, not a necessary outcome.

Other than the limited language of Paragraph L(11), Defendants have not offered any evidence that the 2007 Loan was funded in whole or part by TERI, or that it is a qualified education loan under the Internal Revenue Code. As to the first alternative, the lender is identified as BOA in the loan agreement, but TERI is not identified as the source of the funding for the loan. By contrast, Defendants' exhibits in connection with the last of the 2004-2006 Loans includes a copy of a check dated June 21, 2006, in the amount of $30,000, from TERI payable directly to the Debtor.[7] If the 2007 Loan was funded in whole or part by TERI, there presumably would be a similar check payable to the Debtor or some explanation provided. As to the second alternative, the evidence provided by the Defendants does not otherwise establish that the 2007 Loan is a qualified education loan under the Internal Revenue Code.

Defendants argue that the instant case is directly on point with Rizor v. Acapita Educ. Fin. Corp. (In re Rizor), 2016 WL 3435837 (Bankr. D. Alaska June 13, 2016) (Ross, J.), because the loans in Rizor were made under a program partially or fully funded by a nonprofit institution like TERI and fell within the discharge exception for student loan debt regardless of the accreditation of the institution. See Reply at 4:7-12. Unlike the instant case, however, the record on summary judgment before the court in Rizor was much different. There, the uncontradicted affidavit of the nonprofit defendants' chief financial officer explained the defendants' business of funding and purchasing of student loans on the national secondary market. See Rizor, at *1. Additionally, the record before the Rizor court included copies of

[7] That check is found at page 169 of 240 of the exhibits accompanying the Cummins Declaration.

letters from the Internal Revenue Service granting nonprofit status to each of the defendants. Id. The record also included further undisputed testimony that the loans were part of a program between the defendants and the for-profit lender "to provide long term funding to eligible borrowers for education purposes." Id. at *4 & n. 14. In the instant case, neither the Splaine Declaration, nor the Cummins Declaration offered by the Defendants come remotely close to supplying an evidentiary record similar to that provided in Rizor.

Based on the record before this court, there is a genuine dispute of material fact as to whether the 2004-2006 Loans were supported by guaranties purchased by BOA from TERI and as to whether TERI is a governmental unit within the meaning of Section 523(a)(8)(A)(i). Likewise, there is a genuine dispute of material fact as to whether the 2007 Loan was funded in whole or part by TERI, and as to whether that loan otherwise constitutes a qualified education loan under the Internal Revenue Code.

Under these circumstances, summary judgment in favor of the Defendants or the Debtor simply cannot be granted.

**B. Debtor's Use of the Loan Proceeds.**

Paragraph L(2) of all six of the loans included Debtor's agreement to use the proceeds of each loan "only for my educational expenses at the School." Notwithstanding his express agreement, Debtor argues that the loans were not obtained for an educational benefit or purpose because a different set of loans were used to pay for tuition, and that the balance was disbursed without restrictions. See Opposition at 3:15-22. Debtor's argument fails, however, because the *purpose* of the loan and not how the funds were used determines whether the loan is considered to be "educational." See Sokolic v. Milwaukee Sch. of Eng'g (In re Sokolik), 635 F.3d 261, 266 (7th Cir. 2011); see also, Murphy v. Penn. Higher Educ. Assistance Agency (In re Murphy), 282 F.3d 868 (5th Cir. 2002). "The 'purpose' test avoids this potential problem by refocusing the inquiry on the nature and character of the loan. For example, rather than trying to determine whether a computer purchased with loan money was used for schoolwork, personal use or some combination of both, we need only ask whether the lender's agreement with the borrower was predicated on the borrower being a student who needed financial support to get through school."

Sokolic, 635 F.3d at 266.[8] Thus, how the Debtor used the funds from the six loans is immaterial.

**C. The Quality of the Education Received From Spartan College.**

Debtor also argues that an audit by the United States Department of Education ("DOE") found that Spartan College improperly disbursed student loan money to ineligible programs. Debtor therefore argues that the loans funded a sham program at a sham school. See Opposition at pp. 2-6. Debtor fails to explain, however, how this ad hominem attack on Spartan College alters the characterization of his six loans. Moreover, Defendants maintain that the DOE audit only addresses federal loan programs under Title IV of the Higher Education Act of 1965, rather than student loans funded by nonprofit entities. See Reply at 4:3-6.

Regardless of the Debtor's perception of the quality of the education provided by Spartan College, or the relevance of the DOE audit, those considerations do not change the purpose of the Debtors' six loans. Debtor does not suggest that he was forced to attend Spartan College or that he was forced by a "sham college" to spend money that he did not have. Instead, he alleges that he did not get the quality of education he thought he would receive. Debtor's satisfaction with the education he received, however, does not determine the nature of his loans. As the court observed in Kidd v. Student Loan Xpress, Inc. (In re Kidd), 458 B.R. 612 (Bankr. N.D. Ga. 2011):

> The student loan exception to discharge focuses on the kind of debt involved without regard to the student's satisfaction of the educational services provided or the identity of the borrower . . . Plaintiff's focus on the acts of Silver State is akin to the losing arguments advanced by co-signors on a student loan debt where they received no direct educational benefit. The statute provides that the nondischargeability provisions apply regardless of whether the debtor is the beneficiary of the education.

[8] Perhaps a better explanation is that most student borrowers do not have the creditworthiness to qualify for a conventional loan. As a result, many lenders arguably rely on the nondischargeability of student loans in making funds available to otherwise unqualified borrowers. If a student borrower could avoid the lender's protection of the nondischargeability provision by simply misrepresenting the purpose of the loan, or using the proceeds for an unanticipated purpose, then lenders might hesitate to commit funds to educational loan programs.

458 B.R. at 620-21 (citations omitted; emphasis added).[9] See also American Airlines Federal Credit Union Trustee v. Cardona (In re Cardona), 2015 WL 9459883, at *2 (Bankr. S.D. Fla. Dec. 23, 2015)("Courts have found debts nondischargeable even when the Debtor does not receive the education."). If Spartan College was a "sham" operation that defrauded him into enrolling there, the Debtor arguably could have pursued any claims against that institution and asserted his liability under the six loans as evidence of his damages.[10] Protesting the quality of the classes after the fact, however, is akin to borrowing money to gorge yourself at an all-you-can-eat buffet, and then refusing to repay the loan because you didn't like the food. In this instance, Debtor apparently attended Spartan College for nearly four years and only now complains that his six loans did not result in the quality of education he wanted. While the benefit of his experience at Spartan College may impact the undue hardship inquiry, it does not affect whether the obligations constitute educational loans within the meaning of Section 523(a)(8). Like the Debtor's purported use of the loan proceeds, the quality of the education he received from Spartan College is immaterial.

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[9] The school involved in the Kidd proceeding in the Northern District of Georgia had filed voluntary Chapter 7 liquidation proceedings in the District of Nevada entitled In re Silver State Services Corporation, Case No. 08-10935-MKN and In re Silver State Helicopters, LLC, Case No. 08-10936-MKN. In a subsequent Ninth Circuit proceeding regarding the enforceability of an arbitration clause in the Silver State Helicopters student loan agreements, the dissent observed that the enforcement of the arbitration clauses was particularly harsh because the students' private loans to attend the defunct institution would be subject to the nondischargeability provisions of Section 523(a)(8). See Kilgore v. Keybank, N.A., 718 F.3d 1052, 1063 (9th Cir. 2013) (Pregerson, J., dissenting). In other words, if the loan originally was for educational purposes, the quality of the education, if any, delivered by the institution is largely immaterial to the characterization of the loan.

[10] See In re Kidd, 458 B.R. at 621 ("There is no basis to create an equitable exception to § 523(a)(8) as Plaintiff argues. Any current or former causes of action against Silver State or Defendants are not the subject of this action. Plaintiff, along with other similarly situated students, initiated the State Court Suit and entered into the Confidential Settlement Agreement to resolve these claims. The outcome of that suit will be discussed in more detail below; however, claims against an educational provider or related entity are distinct from the strict requirements of § 523(a)(8)'s exception to discharge."). In this instance, however, Debtor did not disclose a claim against Spartan College on his personal property Schedule "B." As a result of not scheduling the claim, he may be judicially estopped from asserting it. See, e.g., Ah Quin v. Cnty. of Kauai Dep't of Transp., 733 F.3d 267, 271 (9th Cir. 2013).

**D. Undue Hardship Determination.**

The Bankruptcy Code does not define "undue hardship." See Educ. Credit Mgmt. Corp. v. Nys (In re Nys), 446 F.3d 938, 942 n.3 (9th Cir. 2006). To determine if excepting student loans from discharge will create an undue hardship on a debtor, the Ninth Circuit has adopted the three-part test established by the Second Circuit in In re Brunner, 46 B.R. 752 (S.D. N.Y. 1985), aff'd, Brunner v. New York State Higher Educ. Serv. Corp., 831 F.2d 395 (2d Cir. 1987). See United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108, 1112 (9th Cir. 1998).

Under the Brunner test, the debtor must establish that: (1) based on current income and expenses, the debtor cannot maintain a minimal standard of living for the debtor and debtor's dependents if forced to repay the loan; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and (3) the debtor has made good faith efforts to repay the student loan. See In re Pena, 155 F.3d at 1111. See also In re Hedlund, 718 F.3d at 851; Carnduff v. United States Dep't of Educ. (In re Carnduff), 367 B.R. 120, 127 (B.A.P. 9th Cir. 2007). The debtor has the burden to prove all three prongs of the Brunner test, and if the debtor fails to prove any one of the three prongs, the loan will not be discharged. See In re Pena, 155 F.3d at 1111-12. The debtor's good faith efforts to repay a student loan is a factual inquiry where the court's findings based on substantial evidence is reviewed for clear error. See In re Hedlund, 718 F.3d at 854. Accord, Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 884 (7th Cir. 2013).

In this instance, the parties have devoted significant attention to whether the Debtor can meet all three prongs of the Brunner test. As previously discussed, however, there is a genuine dispute of material fact as to whether the 2004-2006 Loans were supported by guaranties purchased by BOA from TERI and as to whether TERI is a governmental unit within the meaning of Section 523(a)(8)(A)(i). Likewise, there is a genuine dispute of material fact as to whether the 2007 Loan was funded in whole or part by TERI, and as to whether that loan otherwise constitutes a qualified education loan under the Internal Revenue Code. Until it is determined whether the Defendants' loans are even encompassed by Section 523(a)(8), it is inappropriate and possibly unnecessary for the court to resolve the factual issues underlying each

prong of the Brunner test.

**CONCLUSION**

For the reasons discussed above, summary judgment is unavailable to either side of this adversary proceeding. A separate order denying the motions of the respective parties has been entered contemporaneously with this Memorandum.

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