



IT IS ORDERED as set forth below:

Date: March 24, 2008

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

In re:	:	
	:	
NICOLE F. EVANS-LAMBERT,	:	BANKRUPTCY CASE NUMBER
	:	07-40014-MGD
Debtor.	:	
	:	
NICOLE F. EVANS-LAMBERT,	:	ADVERSARY CASE NUMBER
	:	07-5001-MGD
Plaintiff,	:	
v.	:	CHAPTER 7
	:	
SALLIE MAE SERVICING CORP.,	:	
YALE UNIVERSITY, KENTUCKY	:	
HIGHER EDUCATIONAL	:	
ASSISTANCE AGENCY, and	:	
EDUCATIONAL CREDIT	:	
MANAGEMENT CORPORATION	:	
	:	
Defendants.	:	

**ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT**

The above-styled adversary proceeding is before the Court on Motions for Summary

Judgment filed by Defendants Sallie Mae, Inc. (“Sallie Mae”) (Docket No. 28), Kentucky Higher Educational Assistance Agency (“KHEAA”) (Docket No. 29), and Education Credit Management Corporation (“ECMC”) (Docket No. 30), (collectively referred to as “Defendants”).¹ The issue before the Court on summary judgment is whether Debtor’s student loans are non-dischargeable pursuant to 11 U.S.C § 523(a)(8). For the reasons set forth herein, Defendants’ Motions for Summary Judgment are **GRANTED**.

I. FACTS

The material facts are undisputed. These facts are set forth in Sallie Mae’s Statement of Uncontested Material Facts (Docket No. 28, Attachment No. 1) (the “Statements”) and were substantially adopted by KHEAA (Docket No. 29) and ECMC (Docket No. 30). KHEAA and ECMC also set forth facts relating to the amounts of their outstanding loans to Debtor. Debtor filed her Opposition to Defendant’s Motions, disputing one material fact located in paragraph 38 of the Statements² (Docket No. 32) (“Debtor’s Opposition”) and Sallie Mae filed its Reply (Docket No. 33), acknowledging its misinterpretation of Debtor’s settlement statement regarding the purchase of her home.

The undisputed material facts in the record are as follows: Debtor graduated with a Bachelor of Arts degree from Yale University in 1997 and graduated with a Juris Doctor degree

¹ Yale University is also named as a Defendant in this action, but has not moved for summary judgment and thus is not the subject of this Order.

² Debtor’s Opposition was not filed in paragraph format and did not address the facts on an individual basis. Debtor also submitted additional facts which she believes are relevant to the motion and which were not contested by Defendants.

from Georgetown University in 2000. (Statements, ¶¶ 9 and 11). To fund her education, Debtor took out various loans. On August 27, 1997, Debtor obtained a Law Student Loan ("Loan 1") from Sallie Mae. (Statements, ¶ 4). As of the date of filing, Debtor had made payments on Loan 1, totaling \$716.46, and had an outstanding principal balance of \$12,887.87. (Statements, ¶¶ 4 and 13). On September 15, 1997, Debtor obtained her second Law Student Loan ("Loan 2") from Sallie Mae. As of the date of this filing, Debtor had made payments on Loan 2, totaling \$412.30, and had an outstanding principal balance of \$7,419.26. (Statements, ¶¶ 5 and 14). On July 28, 1998, Debtor obtained another Law Student Loan ("Loan 3") from Sallie Mae. As of the date of filing, Debtor had made payments on Loan 3, totaling \$911.45, and had an outstanding principal balance of \$15,783.22. (Statements, ¶¶ 6 and 15). On September 28, 1999, Debtor obtained another Law Student Loan ("Loan 4") from Sallie Mae. As of the date of filing, Debtor had made payments on Loan 4, totaling \$2,072.94, and had an outstanding principal balance of \$27,912.85. (Statements, ¶¶ 7 and 16). On May 4, 2000, Debtor obtained a Bar Study Loan ("Loan 5") from Sallie Mae in the amount of \$6,500 and has paid it in full. (Debtor's Opposition, § A) The last payment on any of the Law Student Loans was made on September 15, 2005. (Statements, ¶¶ 13-16). As of the date of the last payment, Debtor had paid \$10,613.15 on all of the loans from Sallie Mae, leaving a remaining balance of \$64,003.20.

At some point during her education, Debtor obtained an additional student loan from Ed Financial Services now held by KHEAA. As of September 27, 2007, Debtor has made no payments on this loan and has a remaining balance of \$20,231.15. (Doc. No. 29, ¶¶ 1-2). Also at some point, Debtor consolidated other student loans with ECMC by signing a consolidated student loan note. (Doc. No. 30, ¶ 1). As of July 11, 2007, Debtor had made no payments on the

consolidated loan and had a remaining balance of \$172,159.26. (Doc. No. 30, ¶¶ 1-2).

Debtor filed her Chapter 7 bankruptcy case on January 2, 2007, and on April 2, 2007, instituted this adversary proceeding against named Defendants seeking to discharge her student loan debt pursuant to 11 U.S.C. § 523(a)(8). On September 6, 2007, Debtor received a Chapter 7 discharge of eligible debts. (Bankruptcy Case No. 07-40014-MGD, Docket No. 33).

According to her bankruptcy schedule, Debtor is 32 years old and has been employed as an attorney by the Federal Defender Program in the Northern District of Georgia for 3 years. Her gross income for 2006, the year preceding the filing, was \$75,557.44, which was a 3.2% raise from the previous year.³ (Statements, ¶¶ 2, 22, and 31).

According to the Statements and Debtor's Opposition, Debtor is married and has one child. Debtor's husband, Isaac Kelly, is employed as a teacher for Cobb County Schools and had a net income of \$38,427.76 in 2006. (Statements, ¶¶ 25 and 34). Therefore, the total household income for the year preceding filing for bankruptcy was \$113,985.20. (Statements, ¶ 34).

Debtor's schedules indicate that she has two large fixed monthly payments in addition to the student loan payment. As of January, 2007, Debtor's monthly mortgage payment was \$2,268.57 and the monthly automobile installment payment on her 1998 Mercedes SLK 230 was \$506. (Schedule J). Debtor previously resided in a different residence and had a monthly mortgage payment of \$1230.28. (Statements, ¶ 36). Her current residence was purchased four months prior to this bankruptcy. Thus, Debtor's monthly residential mortgage payment increased by more than \$1,000 per month. After filing her Chapter 7 case, Debtor satisfied the liens on the

³ Debtor's Complaint alleges that she receives salary increases of 2.5% per year. It appears, however, that her raises vary by year. Debtor's salary in 2005 was \$73,205.25, which represents a 7.9% increase over her \$67,964.48 salary in 2004. (Statements, ¶¶ 28-33).

two family vehicles. (Statements, ¶ 42).

Debtor listed the following monthly expenses in her bankruptcy schedules:

Mortgage Payment	\$2,268
Telephone	\$ 250
Utilities	\$ 402
Home Maintenance	\$ 68
Food	\$ 500
Clothing	\$ 50
Laundry and Dry Cleaning	\$ 100
Medical and Dental	\$ 50
Transportation	\$ 240
Charitable Contributions	\$ 600
Auto Installment	\$ 506
Auto Insurance	\$ 150
Student Loans	\$1,850

However, in her interrogatory responses, Plaintiff provided the following current monthly expenses:

Telephone	\$125
Cell Phone	\$170
Outside Meals	\$350
Gas	\$640
Recreation	\$ 80
Clothing	\$120
Direct TV	\$ 55
Chase	\$190
American Express	\$150
Capital One	\$ 40
Macy's	\$ 40
Bank of America	\$ 80
Citifinancial	\$190

Based on the above response, it appears that Debtor no longer makes the \$600 per month charitable contribution nor the \$506 per month auto installment listed on Schedule J.

(Statements, ¶¶ 46-47). Debtor (or her spouse) appears to have accrued monthly credit card obligations of \$690 per month. (Statements, ¶ 47). Debtor calculated her monthly household

expenses to be \$5,184, not including the student loan payments. (Schedule J). In her Response to Sallie Mae's Interrogatories, household expenses are substantially the same total. (Statements, ¶ 47).

Debtor's average monthly household net income is \$6,207. (Schedule J). Despite her substantial net income, Debtor has failed to make any payments on her student loans since September 15, 2005. (Statements, ¶¶ 13-16).⁴ Debtor also has a retirement plan which was valued at \$37, 226 at the time the case as filed. (Schedule B).

II. STANDARD APPLICABLE TO MOTIONS FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure, applicable herein by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See also, Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Maniccia v. Brown*, 171 F.3d 1364, 1367 (11th Cir. 1999). In reviewing a motion for summary judgment, the court must view the record and all inferences therefrom in a light most favorable to the non-moving party. *See WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988). "The party seeking summary judgment bears the initial burden to demonstrate to the [trial] court the basis for its motion for summary judgment and identify those portions of the

⁴ Debtor apparently failed to respond to certain Requests for Admission posed by Defendants. The Court does not reach the issue of whether to set aside these admissions based upon Debtor's conflicting interrogatory responses, because it is unnecessary to rely on the admissions to reach the Court's conclusion.

pleadings, depositions, answers to interrogatories, and admissions which it believes show an absence of any genuine issue of material fact If the movant successfully discharges its burden, the burden then shifts to the non-movant to establish, by going through the pleadings, that there exist genuine issues of material fact.” *Hairston v. Gainesville Sun Publ’g Co.*, 9 F.3d 913, 918 (11th Cir. 1993), *reh’g denied*, 16 F.3d 1233 (11th Cir. 1994). The non-movant may not simply rest on his pleadings, but must show, by reference to affidavits or other evidence, that a material issue of fact remains. Fed. R. Civ. P. 56.

III. APPLICATION OF THE BRUNNER TEST

Student loan obligations may be discharged “if excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor’s dependents.” 11 U.S.C. § 528(a)(8). The dischargeability of the debtor’s student loans is a question of law. The debtor must prove “by a preponderance of the evidence each of the elements needed to establish that repayment of the [student] loans would cause [her] undue hardship.” *Dewey v. Sallie Mae, Inc.* (*In re Dewey*), Nos. 05-00576 and 05-00684, 2008 WL 366004, at *1 (Bankr. W.D. Tenn. 2008). To evaluate undue hardship under § 523(a)(8), the Eleventh Circuit Court of Appeals in *Hemar Ins. Corp. of Am. v. Cox*, (*In re Cox*), 338 F.3d 1238 (11th Cir. 2003), adopted the three-prong test articulated by the Second Circuit Court of Appeals in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987).⁵ To obtain a student loan discharge for

⁵ While “[b]ankruptcy courts use a wide variety of tests to determine whether the debtor has demonstrated undue hardship. . . . [s]everal of our sister circuits have . . . adopted the test set forth by the Second Circuit in *Brunner*.” *Hemar Ins. Corp. of Am. v. Cox*, 338 F.3d 1238, 1241 (11th Cir. 2003).

undue hardship under the *Brunner* three-prong test, a debtor must show:

(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 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 loan.

Since the debtor carries the burden of proving each element of the *Brunner* undue hardship test, if the debtor fails to prove just one element, the inquiry ends and the student loan will not be discharged. However, the matter before the Court involves a motion for summary judgment. As noted above, the moving party carries the initial burden of proof. The Defendants must show that the undisputed facts preclude Debtor from prevailing as to just one prong of the *Brunner* test supporting Debtor’s undue hardship claim. *See White v. United States Dep’t of Educ. (In re White)*, 243 B.R. 498, 506 (Bankr. N.D. Ala. 1999).

A. Minimal Standard of Living

The first prong of the *Brunner* test requires a debtor to show that repayment of the student loan would not allow her to maintain a minimal standard of living. In determining whether the debtor can maintain a minimal standard of living, the Court must examine the debtor and her spouse’s earnings to evaluate the quality of the debtor’s lifestyle. *See id.* at 509. Debtors cannot satisfy the test “merely because repayment would require some major personal or financial sacrifices.” *Elmore v. Massachusetts Higher Educ. Assistance Corp. (In re Elmore)*, 230 B.R. 22, 26 (Bankr. D. Conn. 1999). Thus, the debtor must prove that she cannot afford the basic living necessities if forced to repay the loan. *See Ivory v. United States (In re Ivory)*, 269 B.R.

890, 899 (Bankr. N.D. Ala. 2001); *Rutherford v. William D. Ford Direct Loan Program (In re Rutherford)*, 317 B.R. 865, 878 (Bankr. N.D. Ala. 2004) (opining that the “minimal standard of living” relates to the smallest degree of income necessary to cover all expenses essential for daily existence).

The Bankruptcy Court for the Northern District of Alabama identified six factors that it deemed necessary for a minimal standard of living in America, including shelter, basic utilities, food and personal hygiene products, vehicles and the costs associated with a vehicle, health insurance, and some source of recreation. *Ivory v. United States (In re Ivory)*, 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001). The Bankruptcy Court for the Middle District of Georgia utilized these factors in its analysis of a student loan dischargeability filing and prior to its analysis of the facts, added: “[T]he Court must apply its common sense knowledge gained from ordinary observations in daily life and general experience to determine whether Debtor’s expenses are reasonable and necessary. If Debtor expends funds for items not necessary for the maintenance of a minimal standard of living or if Debtor expends too much for an item that is needed to maintain that minimal standard of living, then it is unlikely that, given Debtor’s present circumstances, the first prong of the *Brunner* test is satisfied where such overpayment would permit Debtor to cover the expense of her student loan debt without sacrificing a minimal standard of living” *Douglas v. Educ. Credit Mgmt. Corp. (In re Douglas)*, 366 B.R. 241, 253-54 (Bankr. M.D. Ga. 2007).

Based on the undisputed material facts in this case, it cannot be said that Debtor maintains only a “minimal” standard of living. *Four months* prior to filing for bankruptcy, Plaintiff purchased a new home for \$274,162.10 and substantially increased her monthly

mortgage payment from \$1,230 to \$2,268.57.⁶ On Schedule J of the bankruptcy petition, Debtor lists her current monthly expenditures at \$7,034, including the student loan payments of \$1,850, and her average monthly income at \$6,207.⁷ Subtracting the difference between the two amounts, Debtor has a negative monthly net income of \$827. It is clear that but for the monthly mortgage increase of \$1,038.57, Debtor would be able to pay her monthly student loan payments. Moreover, even the lower mortgage payment exceeds the IRS Allowance Standards of \$943 per month. Although it appears that Debtor had sufficient income to pay her student loans prior to purchasing her new residence, Debtor had ceased making any payments to Sallie Mae almost a year earlier and never made a single payment to KHEAA or ECMC.

Although Sallie Mae does not take issue with Debtor's monthly basic utilities payments, the Court finds Debtor's reported \$250-\$295 per month expense for phone service to be above a "minimal" standard of living. In her Response to Sallie Mae's Interrogatories, Plaintiff listed monthly expenses for outside meals (\$350), clothing (\$120), and credit card payments (\$690). Although it is unclear to the Court whether the \$690 in credit card payments are covering necessary costs reported on Schedule J that are not included in Debtor and Defendants' statements of fact, these amounts, including \$350 for outside meals, are obviously in excess of the basic necessities for food, clothing, and personal hygiene products.

The only fact as to which Debtor asserts there is a dispute is with regard to the financing

⁶ By comparison, the applicable housing expense for rent or mortgage payments for means testing purposes for a three-person family in Paulding County, Georgia, is \$943 per month. Thus, Debtor's mortgage expense exceeds the Local Expense for Housing published by the IRS by \$1,325 per month.

⁷ Debtor's monthly income is well above the median monthly income for a three-person household in Georgia (\$4,907) U.S. Census Bureau.

for the purchase of Debtor's new home. Defendants subsequently acknowledged and adopted this fact and the Court, thus, finds no genuine issue of material facts exists as to Debtors's ability to make student loan payments while maintaining a minimal standard of living. Defendants are entitled to a judgment of nondischargeability of the student loan debt pursuant to § 523(a)(8) as a matter of law.

B. Additional Circumstances

Having determined that Debtor has not met her burden in opposing summary judgment under the first prong of the *Brunner* test, Debtor's student loans are nondischargeable under *Brunner*. However, an analysis of the facts as they relate to the second and third prongs of the *Brunner* test confirms that Debtor has also failed to satisfy the second and third prongs of the *Brunner* test.

The second prong of the *Brunner* test requires a debtor to prove that additional circumstances exist indicating that she cannot maintain a minimal standard of living for a significant portion of the repayment period if the loans are not discharged. A debtor must show "a total incapacity . . . in the future to pay [her] debts for reasons not within her control." *In re Mallinckrodt*, 274 B.R. 560, 566-67 (S.D. Fla. 2002) (quoting *Brightful v. Pa. Higher Educ. Assistance Agency (In re Brightful)*, 267 F.3d 324, 328 (3d Cir. 2001)). Further, satisfaction of the second prong should be based on a "certainty of hopelessness." *In re Douglas*, 366 B.R. 241, 256 (Bankr. M.D. Ga. 2007); *see also Downey v. Sallie Mae, Inc. (In re Downey)*, 255 B.R. 72, 76-77 (Bankr. N.D. Fla. 2000) (Plaintiff, a public defender, presented no evidence to suggest that her financial position was unlikely to improve).

With a household income of \$113,985.20 in 2006, approximately twice the median

income for a three-person Georgia household, Debtor does not have a present financial hardship, and has shown no additional circumstances indicating that any alleged financial hardship will continue. Debtor is currently 32 years old. She has an undergraduate degree from Yale University and a law degree from Georgetown University. She is young, has excellent educational credentials, and has alleged no physical or mental illness. As a Federal Public Defender, Debtor earns a substantial annual salary and has not received less than a 3.2% raise yearly. Debtor has chosen a career in public service, but has the credentials and experience to obtain employment in the private sector which could lead to higher levels of responsibility and a higher monthly salary.

As noted earlier, Debtor is no longer required to make an auto installment payment. On Schedule J, Debtor listed her monthly auto installment payment at \$506. Notwithstanding any vehicle maintenance issues, the lack of a monthly auto installment payment should free up an extra \$506 per month to be applied to the student loan debt. The evidence shows that Debtor could significantly reduce her monthly expenses going forward, thus reducing or eliminating any perceived hardship endured by having to repay her loans. Absent proof of additional, exceptional circumstances, Debtor cannot meet the standard of the second prong of the *Brunner* test.

C. Good Faith Effort

Under the third and final prong of the *Brunner* test, a debtor must act in good faith to repay the loan. The good faith analysis requires the Court to consider the debtor's efforts to obtain employment, maximize income, and minimize expenses. *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 402 (4th Cir. 2005). Furthermore, "the debtor may not willfully or negligently cause [her] own default, but rather [her] condition must result from

‘factors beyond [her] reasonable control.’” *In re Roberson*, 999 F.2d 1132, 1137 (7th Cir. 1993).

Whether the debtor has made or attempted to make payments is not itself dispositive, but the Court should evaluate the debtor’s conduct in the broader context of her entire financial picture. *Nary v. Complete Source (In re Nary)*, 253 B.R. 752, 768 (N.D. Tex. 2000).

The Court finds that Debtor’s actions do not evidence a good faith effort to repay her student loans. Debtor has a student loan balance in excess of \$250,000 and other unsecured debt in the amount of \$18,000. The Court views Debtor’s evasion of her student loan obligation as a motive for seeking relief. Her rationale for discharge is evidenced by her filing a “NOTICE TO TRUSTEE” in Schedule E, claiming that “even given the benefit of discharge of other debt, Debtor would be rendered unable to meet basic family necessities.” She states that she cannot sustain her student loan requirements because she intends to continue her career in public service. From 2001 through 2005, Plaintiff managed to make payments to Sallie Mae totaling \$10,613.50. She stopped making payments to Sallie Mae in September, 2005, and has failed to make any payments on her other loans at any time. Allowing well-paid public service employees to discharge their student loans without a bona fide effort of repayment jeopardizes the financial integrity of student loan programs.

Debtor has not maximized her income nor minimized expenses. She has been employed with the Federal Defender’s Program for three (3) years and has made no allegation that she has sought alternative employment. Her financial choices display that she prefers to live a comfortable lifestyle in an expensive home at the expense of the student loan creditors. Debtor alleges that she cannot make the student loan payments because of a shortfall between her expenses and income. This ignores the remaining income of more than \$1,000 not utilized for

monthly expenses which could have been applied to pay off some of the student loan balances.⁸ Furthermore, since making her last student loan payment, Debtor purchased a new home that increased her monthly residential payments by over \$1,000. Debtor has consistently devoted considerable resources to accumulating valuable real and personal property, but has not made an effort to maximize her income in the process.

These facts lead to the Court's conclusion that any perceived hardship by Debtor was self-imposed because Debtor's payments of less than \$11,000 on over \$250,000 in student loan debt over a seven-year period, in light of her substantial income and high living expenses, do not evidence a good faith effort to repay her student loans.

Having found that Debtor has not met her burden under the first, second, or third prong of the *Brunner* test, Defendants are entitled to a judgment of nondischargeability of the student loan debt pursuant to § 523(a)(8) as a matter of law.

IV. CONCLUSION

_____ "Congress enacted 11 U.S.C. § 523(a)(8) in an effort to prevent abuses in and protect the solvency of educational loan programs." *Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 302 (3d Cir. 1995); *Andrews Univ. v. Merchant (In re Merchant)*, 958 F.2d 738, 742 (6th Cir. 1992). Here, Debtor failed to make a showing sufficient to raise genuine

⁸ In Schedule J, Debtor calculated her average monthly expenses, including her student loan payment, to be \$7,034. By subtracting the student loan payment from this amount, the new average monthly expense total is \$5,184. The difference between the new average monthly expense total and average monthly household income is \$1,023. Thus, Debtor, on average, had this amount remaining every month to pay back her student loans and failed to do so since September, 2005.

issues for trial demonstrating that repayment of her student loans imposes an undue hardship on her and her dependents. Defendants have shown that Debtor has the ability to make payments on her student loan debt and maintain a minimal standard of living. Additionally, Debtor has failed to produce any evidence to support her claims that additional circumstances exist indicating she would be unable to maintain a minimal standard of living if she was required to repay her student loan and that she made a good faith effort to repay her student loan. Accordingly, it is

ORDERED that Defendants' Motions for Summary Judgment with respect to Debtor's claim to a discharge of her student loans under § 523(a)(8) are hereby **GRANTED**.

The Clerk shall serve a copy of this Order upon the parties on the attached distribution list.

END OF DOCUMENT

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