UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF IOWA

IN RE:)
) Chapter 7
RICHARD CHRIS HOOTMAN)
) Bankruptcy No. 01-01088
Debtor.)
_____) RICHARD CHRIS HOOTMAN)
) Adversary No. 03-9011
Plaintiff,)
)
vs.)
) UNITED STATES OF AMERICA) DEPARTMENT OF EDUCATION)
)
Defendant.)

ORDER RE DISCHARGEABILITY COMPLAINT

This matter came before the undersigned on September 29, 2004. Debtor/Plaintiff Richard Chris Hootman was represented by attorney Joseph Peiffer. Defendant U.S. Department of Education was represented by assistant U.S. Attorney Martin McLaughlin. After the presentation of evidence and argument, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

STATEMENT OF THE CASE

Debtor seeks a determination that his student loans should be discharged for undue hardship. The Department of Education asserts Debtor is able to pay and the loans should not be discharged.

FINDINGS OF FACT

Richard Chris Hootman ("Debtor") filed for Chapter 7 protection on April 3, 2001. Debtor's total student loan debt is $85,218 as of February 11, 2004, with interest of $12.52 accruing daily. As of the date of filing, Debtor had $235,770.43 in liabilities, 36% of which was from the student loans. He is a divorced, fifty year-old man, has six minor children, and is unemployed. He owes $200 a month in child support to his former wife for four of his children, and has two children in his present relationship.

Debtor's Expenses

Expense	Amount
Rent	$600.00
Cable TV	$79.00
Food	$342.28
Clothing	$100.00
Medical/Dental Expenses	$126.00

Transportation	$80.00
Auto Insurance	$36.50
Support Payments	$200.00
Total	$1,563.78

Debtor dropped out of high school in the eleventh grade, and worked on the docks and as a galvanizer until age 19, when he entered the Navy. In 1976, after three years in the Navy, Debtor attended Kirkwood Community College and received his GED. He then enrolled at Mount Mercy College to study teaching, left to study printmaking at Drake University, and returned to Mount Mercy College, where he earned his bachelor's degree in Fine Arts in 1988. Debtor had various jobs during this period, including teaching assistant, nightclub owner, and study skills instructor. He went on to earn his Master of Fine Arts degree from the University of Iowa in 1991. Debtor specialized in the field of printmaking, where he earned high praise and several awards. During his time at the University of Iowa, he worked as a teaching assistant, an adjunct lecturer, and a night stock manager.

After graduating from the University of Iowa, Debtor sought employment in teaching positions at universities across the country. His search was unsuccessful. Several of the rejection letters made reference to the difficult job market for Fine Arts academic positions. Since 1992, debtor has worked at a steel plant, as a folder and cutter operator, and
in construction. He has been employed roughly six of the last ten years. During periods of these employments, he demonstrated considerable ability. However, several employments were terminated because of Debtor's conduct.

Debtor has not worked in the last 2 years. He has been diagnosed with a degenerative arthritic condition in both hands. He has rheumatoid arthritis and has osteoarthritis in both hands. The present diagnosis concludes that the condition is mild, but it will eventually deteriorate. Debtor has no health insurance. He claims that any relocation for employment purposes would place an undue hardship on his dependents. Debtor's vocational expert opined that future opportunities were limited due to the nature of printmaking work in this area of the country, the misdemeanor assault on Debtor's record, and physical limitations presented by the arthritis. Debtor testified that he is financially supported by his girlfriend.

CONCLUSIONS OF LAW

Debtor seeks a determination that excepting the student loan obligation from his discharge would impose an "undue hardship" on him within the meaning of 11 U.S.C. § 523(a)(8). Debtor must prove the existence of undue hardship by a preponderance of the evidence. In re Ford, 269 B.R. 673, 675 (B.A.P. 8th Cir. 2001).

UNDUE HARDSHIP

"Undue hardship" is not defined by the Bankruptcy Code.
To determine whether undue hardship exists, the Eighth Circuit has established a "totality of the circumstances" test. In re Long, 322 F.3d 549, 553 (8th Cir. 2003) (rejecting the Brunner test as too restrictive and adopting the Andrews

test); In re Andrews, 661 F.2d 702 (8th Cir. 1981). The 8th Circuit held in Long that:

> [i]n evaluating the totality-of-the-circumstances, our bankruptcy . . . courts should consider: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case. Simply put, if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt--while still allowing for a minimal standard of living--then the debt should not be discharged. Certainly, this determination will require a special consideration of the debtor's present employment and financial situation--including assets, expenses, and earnings--along with the prospect of future changes--positive or adverse--in the debtor's financial position.

Long, 322 F.3d at 554 (citations omitted).

In considering Debtor's past, present, and reasonably certain future financial resources, the court examines his employment, work history, and earnings capability. In re Cheney, 280 B.R. 648, 661 (N.D. Iowa 2002). Debtor's physical condition should be taken into consideration when evaluating his financial prospects. "The Eighth Circuit Court of Appeals has observed that it is appropriate to consider a debtor's disease or disability as a factor in the determination of undue hardship because [it] may effect an individual's ability to work." Ford, 269 B.R. at 675. Long-term physical infirmities may prevent the debtor from securing or sustaining gainful employment. In re Meling, 263 B.R. 275, 279 (Bankr. N.D. Iowa 2001), aff'd, 2002 WL 32107248 (N.D. Iowa 2002).

Debtor's total living expenses should not exceed what is reasonable and necessary. In re Long, 292 B.R. 635, 638 (B.A.P. 8th Cir. 2003) (on remand from 8th Circuit). To be reasonable and necessary, expenses must be modest and commensurate with the debtor's resources. Meling, 2002 WL 32107248, at 5. Provided that total expenses remain minimal, the debtor is not expected or required to implement every conceivable cost-saving measure. Id. at 5.

In addition, the Court examines other relevant factors and circumstances of each individual bankruptcy case. Other relevant factors may include: (1) the debtor's good faith effort to repay the loan, or a debtor's bad faith in non-repayment, (2) whether the debtor has made a good faith effort to obtain employment, maximize income, and minimize expenses., and (3) whether the debtor is suffering truly severe, even uniquely difficult financial circumstances, not merely severe financial difficulty. Faktor v. United States, 306 B.R. 256, 264 (Bankr. N.D. Iowa 2004); In re Wilson, 270 B.R. 290, 294 (Bankr. N.D. Iowa 2001). A good faith inquiry may include whether the debtors caused their own financial condition. Faktor, 306 B.R. at 264.

INCOME CONTINGENT REPAYMENT PLANS

An Income Contingent Repayment Plan, or ICRP, is a program that the Department of Education created to resolve the problem of student loan payments

that would force families and individuals into poverty. An ICRP will adjust the payment of the loan debtors according to their adjusted gross income over a 25 year payback period. At the end of the period, any remaining debt is forgiven, leaving the loan debtor with only a tax to be paid on the debt forgiveness income. See Lawrence P. King, Collier Bankruptcy Manual ¶ 523.13(2) (3d ed. 2004).

While the Department of Education believes the IRCP is a solution for debtors in bankruptcy, this Court holds that lack of participation in an IRCP does not preclude a debtor from an undue hardship discharge. In re Limkemann, 319 B.R. 190, 197 (Bankr. N.D. Iowa 2004). Requiring debtors to participate in the IRCP, instead of receiving discharge, discounts the totality of the circumstances test, leaving a per se rule that ignores the Congressional mandate of § 523(a)(8). Id. at 196.

ANALYSIS

Debtor meets the first prong of the Andrews test. His financial situation is poor. His employment record and work history are spotty at best. Debtor has not worked for several years and his earning capability is difficult to evaluate.

Debtor's physical limitations may be a factor. Debtor's rheumatoid arthritis and osteoarthritis may affect his future employment outlook. Debtor's physician stated the condition is in its early stages, and the degeneration, while present, is minor. The physician also stated that the limited medical treatment has been positive. At present, Debtor's diagnosis does not prevent him from securing or sustaining gainful employment.

The second prong of the test involves an analysis of Debtor's living expenses. Debtor's living expenses are not unreasonable. The Court notes that Debtor's current scheduled expenses are paid by Debtor's girlfriend. Debtor's lack of a job for the last two years has made him unable to pay these

himself. The only expense which may be excessive is a $75 monthly cable bill.

The third prong of the totality of the circumstances test requires the Court to assess present circumstances to determine if the hardship is truly "undue". Debtor does not present a compelling case in satisfying this prong. He has expended little effort to gain employment or maximize income and has made no attempts to repay the student loan. He has not held a job for two years and has been supported by his girlfriend during that time. She has paid the child support that he owes on his four other children. She has paid for his cigarettes. She has not paid any student loan payments.

Debtor has failed to maximize his income. The only evidence presented by Debtor as to his inability to work was by a vocational expert who stated that his employment outlook was limited in this area. The expert used Social Security and other federal labor and employment tables to make her determination. Debtor argues his job prospects are limited by geography due to his dependent children living here. He claims that looking for employment outside the local area would be a hardship on them. However, Debtor looked for jobs elsewhere after graduating from the MFA program when he had three young children. He presently provides no financial support for his children. Debtor's self-imposed geographical limitation

on any job search is unrealistic and unjustifiable in today's economy. Particularly in light of the evidence which indicates Debtor has not been particularly active in seeking local employment.

Debtor argues that there are few jobs in the local area which he can perform due to his medical condition, but Debtor presented little, if any, evidence of looking locally for a job he can perform. While Debtor has a diagnosis of degenerative rheumatoid arthritis, the disease is in its early stages and is not incapacitating in a broad sense. What is shown is that he has a lack of commitment in finding employment for the last two years. While Debtor's work options have diminished somewhat, there is no compelling reason for not looking for a job which he can perform.

Debtor has made no serious attempts to make student loan payments. The only payments against the student loan debts were tax refunds the government withheld. Debtor, since graduating in 1991 from the MFA program, did not make a single voluntary payment on his student loans. There were years where he had enough income to make minimal payments, but he decided against it.

CONCLUSION

While Debtor may be in the early stages of an arthritic condition, he has arbitrarily limited his geographic employment options, shown no real effort to gain employment, and intentionally elected not to make attempts to repay his student loans. The standards which must be satisfied to discharge educational debt, based upon undue harship, are intentionally difficult to satisfy. Debtor has not presented facts which satisfy this high standard. Clearly, Debtor has not established by a preponderance of the evidence that an undue hardship discharge is warranted. The student loan is excepted from Debtor's discharge. His dischargeability complaint is denied.

WHEREFORE, Debtor's dischargeability complaint is DENIED.

FURTHER, the student loan debt owing to the Department of Education is excepted from Debtor's discharge.

SO ORDERED this 25th day of October, 2004.

PAUL J. KILBURG
CHIEF BANKRUPTCY JUDGE