In the United States Bankruptcy Court

for the Northern District of Iowa

KENNETH ARNOLD HOLMES
Debtor.

BANKRUPTCY NO. 86-01222C

UNIVERSITY OF IOWA
Plaintiff

vs.

KENNETH ARNOLD HOLMES
Defendant.

ADVERSARY NO. 86-0522C

MEMORANDUM OF OPINION AND ORDER

The matter before the Court is a complaint filed by University of Iowa (University) to determine the dischargeability under 11 U.S.C. section 523(a)(8)(A) of two student loans made to Kenneth A. Holmes, debtor (Holmes). By consent of both parties, the matter was submitted to the Court without hearing for a decision based on the record. The Court now issues this ruling which shall constitute Findings and Conclusions as required by F.R.B.P. 7052. This is a core proceeding pursuant to 28 U.S.C. section 157(b)(2)(I).

I.

The parties stipulated to the following relevant facts[(1)]:

1. Holmes obtained National Direct Student Loans, numbered 10473 and 96498.

2. These loans were issued between June 22, 1977 and January 23, 1979, for the 1977-78 and 1978-79 academic years.

3. The loans entered repayment status on March 1, 1980, nine months after Mr. Holmes was awarded the Bachelor of Science degree in May 1979, in accordance with the nine-month grace period provided for National Direct Student Loans.

4. Until January 1, 1987, students who were enrolled for more than six hours at the University of Iowa automatically received deferment according to the University's standard procedure. By meeting this criterion, Mr. Holmes' loans were in deferment status from February through May 1984 and from September 1985 through January 1986.

5. In April 1985, Mr. Holmes requested a deferment of both retroactive and prospective effect to run from September 1984 through August 1985. On the basis of that request, Mr. Holmes was granted a deferment from September 1984 through May 1985.

6. By rule, deferment is granted for summer months when a deferment is granted for the adjacent spring and fall semesters. On that basis, Mr. Holmes received a deferment for June, July and August 1984 and June, July and August of 1985.

7. In total, National Direct Student Loans numbered 10473 and 96498 were in deferment from February 1984 through January 1986.

8. Subtracting the period of deferment (24 months) from the period of time between March 1980 when the loans entered repayment status and May 1986 when Mr. Holmes filed for bankruptcy (75 months) leaves a balance of 51 months, which is less than 5 years.

See Joint Pre-trial Statement, Admitted or Uncontested Facts, filed October 15, 1987, p. 4-5.

II.

Both parties seek judgment as a matter of law pursuant to 11 U.S.C. section 523(a)(8)(A)[(2)]. That section provides:

> Exceptions to discharge.
>
> 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 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 a non-profit institution, unless--
>
> A. such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition[.]

University, as a post-discharge student loan creditor which asserts a right to repayment on the basis that the loans were not discharged under terms of 11 U.S.C. section 523(a)(8)(A), has the burden of proving that the loans became due less than five years prior to the date the petition was filed. Connecticut Student Loan Foundation v. Keenan (In re Keenan), 53 B.R. 913, 915-16 (Bankr. D. Conn. 1985). It follows that the burden of proof is also on University to establish the validity of any suspension of that five-year period. Id.

III.

University argues that the loans are not dischargeable because the period between the date the loans first became due and the date the petition for bankruptcy was filed (75 months), less the period that repayment was suspended (24 months), is not more than five years from the date the loans first became due. Holmes counters that the period when repayment was suspended was only sixteen months since University billed him and he paid (and was not refunded) the installments due from September 1984 to April 1985, a period of eight months[(3)] that was retroactively deferred in April 1985 at Holmes' request.[(4)] According to Holmes' calculations then, the period of time in question under 11 U.S.C. section 523(a)(8)(A) is apparently 59 months (75 months less a 16-month suspension period). Since 59 months is less than 5 years, his argument obviously falls short. However, the matter is not so easily resolved in University's favor. A more accurate calculation of the applicable suspension period addressed in 11 U.S.C. section 523(a)(8)(A) is required.

There is apparently no disagreement that University had authority to establish the repayment schedule for the loans. Moreover, the Court will assume arguendo that University was authorized under the various laws and regulations governing National Direct Student Loans to defer these loans for periods when Holmes was enrolled for more than six hours and for summer months when a deferment was granted for the adjacent spring and fall semesters. University, for purposes of determining the period of time in question under 11 U.S.C. section 523(a)(8)(A), was not, however, free to unilaterally suspend the repayment period.

Authority to unilaterally establish the repayment schedule is not comparable to a right to unilaterally defer or suspend repayment for a period of time. Whitehead v. Ohio (In re Whitehead), 31 B.R. 381, 383-85 (Bankr. S.D. Ohio W.D. 1983); Crumley v. Hope College (In re Crumley), 21 B.R. 170, 172 (Bankr. E.D. Tenn. 1982). "Absent a contractual right to unilaterally suspend the repayment for a period of time, repayment should not have been suspended for any period of time other than the period . . . requested by the [borrower]." Crumley, 21 B.R. at 172. Under this line of reasoning, the deferment period of 24 months calculated by University should be reduced by those months in which University unilaterally deferred repayment, i.e., those months for which Holmes did not request suspension.

Accordingly, if the "applicable suspension of the repayment period" under 11 U.S.C. section 523(a)(8)(A) is not more than fifteen months, these student loans are dischargeable because the date the loan first became due, excluding the applicable suspension period, is more than five years from the date Holmes filed for bankruptcy (75 months less not more than a 15-month suspension period). The dispositive question thus becomes whether University ever unilaterally suspended payment of the note during the 75 months between the date the loans first became due and the date the petition was filed.

The elements essential to extending the repayment of a note are the same as those for a valid contract: adequate consideration and mutual consent. Whitehead, 31 B.R. at 384. "The existence of the mutual understanding, the proposal, and acceptance may be implied from conduct and circumstances. Siebring Manufacturing Co, v. Carlson Hybrid Corn Co., 246 Iowa 923, ___, 70 N.W.2d 149, 153 (1955)(quoting In re Estate of Newson, 206 Iowa 514, 518, 219 N.W. 305, 307 (1928))(emphasis added). "Anything that amounts to a manifestation of a formed determination to accept, communicated ... to the party making the offer, will complete the implied contract." Siebring, 246 Iowa at ___, 70 N.W.2d at 153 (1955) (quoting 12 Am. Jur. "Contracts", section 39, p.532); see also Palmer v. Albert, 310 N.W.2d 169, 172 (Iowa 1981)(contractual obligations may arise from implication as well as from an express writing). "[Mlere forbearance from exercising a legal right, without any request to forbear or [absent] circumstances from which an agreement to forbear may be implied, is not a consideration which will support a promise." Whitehead, 31 B.R. at 384 (quoting 1 Williston on Contracts, 3d Ed. section 135)(emphasis added).

The burden of proof is appropriately on the one who seeks recovery under the contract. Roland A. Wilson and Associates v. Forty-O-Four Grand Corp., 246 N.W.2d 922, 925 (Iowa 1976). Accordingly, University must establish that Holmes impliedly consented to the unilateral deferments allowed by University.

The record provided to the Court is wholly inadequate to determine that Holmes impliedly consented to all suspension periods identified by University. While Holmes may in fact have acquiesced to University's action, e.g., by not making payments during those several months of suspension in question, the record shows[(5)] only that Holmes "automatically" received deferment for several months according to the University's standard procedure for students enrolled for more than six hours and that Holmes was granted deferment "[b]y rule" for summer months when deferment was granted for adjacent spring and fall semesters. See Joint Pre-Trial Statement, Admitted or Uncontested Facts, filed October 15, 1987, P.4. Ultimately, the record establishes an applicable suspension period under 11 U.S.C. section 523(a)(8)(A) of, at most, nine months--those months it which Holmes requested and University granted a deferment (September 1984 through May 1985).[(6)] When this deferment period is subtracted from the 75 months between the date the loans first became due and the date the petition was filed, it is clear that more than five years has elapsed since the loans first became due. Accordingly, the loans are not excepted from discharge under 11 U.S.C. section 523(a)(8)(A).

ORDER

IT IS THEREFORE ORDERED that based on the record provided and the foregoing analysis, the two National Direct Student Loans of Kenneth A. Holmes are not excepted from discharge under 11 U.S.C. section 523(a)(8)(A) and, therefore, were discharged by the September 11, 1986 order of discharge. A declaratory judgment may enter accordingly.

SO ORDERED THIS 11th DAY OF DECEMBER, 1987.

William L. Edmonds
Bankruptcy Judge

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1. Uncontested facts offered by the parties not relevant to this matter are not restated here. Those presented have been renumbered.

2. Holmes does not pursue discharge under the hardship clause of 11 U.S.C. section 523(a)(8)(B). See Joint Pre-Trial Statement, Admitted or Uncontested Facts, filed October 15, 1987, p. 5.

3. The record does not clarify whether payments were made by Holmes in September and April of 1985 as well as the months in between. At most, however, he paid for eight months and this calculation is reasonable for discussion purposes.

4. Holmes does not specifically question the validity of the other suspension periods.

5. Neither the notes of indebtedness nor a record of the payments actually made by Holmes were made a part of the record in this proceeding.

6. Holmes' argument that he actually made payments for eight of these nine months does not alter the result.