In the United States Bankruptcy Court

for the Northern District of Iowa

GERALD CORNWELL
Debtor.

Bankruptcy No. L91-01380C
Chapter 7

GERALD CORNWELL
Plaintiff

vs.

DHHS,
HEALTH RESOURCES & SERVICES,
LOAN SERVICE CENTER STUDENT LOAN
MARKETING ASSOC.,
and HILLS BANK AND TRUST CO.
Defendants.

Adversary No. L91-0259C

ORDER RE: COMPLAINT TO DETERMINE DISCHARGEABILITY

The matter before the court is the Motion for Summary Judgment by the Department of Health and Human Services (DHHS) in Debtor's action to determine student loans dischargeable for hardship. The matter came on for hearing on October 15, 1992 in Cedar Rapids, Iowa. The court took the matter under advisement and ordered briefs filed by November 16, 1992. Attached to the brief of DHHS were copies of loan documents relating to the loans at issue. The documents were not in the form of affidavit. The court allowed Debtor 10 days to object to these documents since they were submitted after the hearing and were not in compliance with Fed.R.Civ.P. 56. Debtor has not filed an objection. Therefore, after considering the oral arguments and the briefs as filed, including the exhibits, the court now issues the following findings of fact and conclusions of law as required by Fed.R. Bankr.P. 7052. This is a core proceeding under 28 U.S.C. 157(b)(2)(I).

FINDINGS OF FACT

During the years 1983-1986, Debtor attended the Palmer School of Chiropractic in Davenport, Iowa. He received four student loans under the Health Education Assistance Loans (HEAL) program, on various dates and in amounts as follows:

Date of Application	Date of Prom. Note	Date of Award	Amt. Applied for & Rec'd.
1/17/84	2/29/84	3/6/84	$ 6,816.00
11/14/84	12/10/84	12/4/84	10,325.00
4/9/85	5/13/85	5/16/85	12,500.00
11/5/85	2/11/86	2/13/86	11,030.00

Declaration of Anthony J. Ditoto, Jr., attached to Statement of Material Facts in Support of Motion for Summary Judgment.

Debtor graduated with a Doctor of Chiropractic degree in October, 1986. Debtor originally was to begin repaying his loans on March 10, 1988, however, he requested a number of deferments before any payments were due. The requests were granted and Debtor was not required to make payments between March 1, 1988 and August 31, 1990. Debtor was first required to repay the loans on August 31, 1990.

The Student Loan Marketing Association (SLMA) purchased Debtor's HEAL loans. Debtor did not make any payments on his loans. Debtor filed his Chapter 7 petition on July 26, 1991. The DHHS, guarantor of the loans, paid SLMA $77,531 on its insurance claim after Debtor filed his bankruptcy petition.

SLMA assigned all of its rights in the notes to DHHS. The total amount Debtor borrowed under the HEAL program was $40,671. The balance on this obligation as of March 3, 1992 was $81,138.67 plus interest accruing at a variable rate. Declaration of Ditoto, paragraph 9.

Debtor is a Vietnam veteran and claims disability from post-traumatic stress syndrome. He has received a determination letter from the Social Security Administration finding that he became disabled as of August 29, 1988 and is entitled to disability benefits.

Debtor received a discharge in this bankruptcy case on November 13, 1991 (Docket No. 11).

DISCUSSION

Summary judgment is appropriate only if there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Bell v. Stigers, 937 F.2d 1340, 1342 (8th Cir. 1991).

Loans made under the HEAL program are governed by 42 U.S.C. 294 et seq. and regulations at 42 C.F.R. Part 60.

Dischargeability of HEAL loans in bankruptcy is controlled by 42 U.S.C. 294f(g) and regulations at 42 C.F.R. 60.8(b)(5), rather than 11 U.S.C. 523(a)(8). In re Johnson, 787 F.2d 1179 (7th Cir. 1986); In re Battrell, 105 B.R. 65, 67 (Bankr. D. Ore. 1989); In re Gronski, 65 B.R. 932, 935-36 (Bankr. E.D. Pa. 1986). As both parties point out, Debtor has an administrative

remedy under 42 C.F.R. 60.39(b), which allows the DHHS to discharge Debtor's liability on a finding that he is permanently and totally disabled. However, Debtor's complaint is to discharge the debt in bankruptcy; the governing law is 294f(g).

Section 294f(g) provides:

> A debt which is a loan insured under the authority of this subpart may be released by a discharge in bankruptcy under any chapter of Title 11 only if such discharge is granted--
>
> 1. after the expiration of the 5-year period beginning on the first date . . . when repayment of such loan is required;
>
> 2. upon a finding by the Bankruptcy Court that the nondischarge of such debt would be unconscionable; and (3) upon the condition that the Secretary shall not have waived the Secretary's rights to apply subsection (f) of this section to the borrower and the discharged debt.

The requirements of 294f(g) are in the conjunctive. All three must be met before the obligation on HEAL loans will be discharged in bankruptcy. United States v. Wood, 925 F.2d 1580, 1582 (7th Cir. 1991).

DHHS argues that it is entitled to summary judgment because Debtor cannot meet the five-year requirement of 294f(g)(1). Since repayment of the loans was first required on August 31, 1990, DHHS argues, Debtor would not be eligible to have the HEAL loans discharged until August 31, 1995.

Debtor replies that summary judgment is not appropriate since the amount of debt and extent of dischargeability are in

dispute. Debtor argues that the regulations at 42 C.F.R. 60.10 governing lending limits on HEAL loans were not followed.

Since DHHS has not enforced its own rules in making the loans, he claims, it should not be allowed to enforce the strict letter of 294f(g) in a bankruptcy discharge proceeding. Debtor asserts that student loan discharge need not be an "all or nothing" matter and that the court has the power to adjust the terms of the debt or make a finding of partial discharge on the basis of the regulation violation.

Debtor also argues that rather than granting DHHS's motion for summary judgment, the court should delay entry of Debtor's discharge until the five years have passed and determine the unconscionability issue of 294f(g)(2) at that time. Debtor argues the purpose of 294f(g) would not be served by granting the motion for summary judgment since Debtor is disabled, has been unable to pursue a career in chiropractic, and execution on a judgment against him would be unconscionable.

HEAL loan regulations limit loans to students enrolled in a school of chiropractic to $12,500 "per academic year" for a total of up to $50,000. 42 C.F.R. 60.10(a)(2). An academic year is considered to be nine months in length for students who attend longer than the traditional September to June academic year. 42 C.F.R. 60.10(a)(3).

The attachments to DHHS's supplemental brief in support of the motion for summary judgment show that Debtor did attend school continuously and that loans were made for academic years as follows:

Date of Application	**Academic Year (months)**	**Amount**
1/17/84	July 11, 1983--June 8, 1984 (11)	$6,816.00
11/14/84	July 10, 1984--March 18, 1985 (8)	10,325.00
4/4/85	March 26, 1985--Dec. 19, 1985 (9)	12,500.00
11/5/85	January 6, 1986 - Oct. 3, 1986 (9)	11,030.00

Brief Exhibits A-D, items 11, 15, 27. The four loans were made for "academic years" that approximate nine-month periods. No loan was over the $12,500 limit. The lender was clearly mindful of the lending limits since in the third loan application the "net cost of education" (item 22) was $13,048, yet the lender approved the maximum amount of $12,500. Brief Exhibit C. For the four nine-month periods between July 11, 1983 and October 3, 1986, Debtor could have been eligible for loans up to $50,000 in compliance with the lending limits in the regulations.

Debtor has not shown that there was a violation of the regulations. Therefore, there is no genuine issue as to the amount of debt. DHHS is entitled to judgment as a matter of law.

Debtor argues, however, that the court has the equitable power to postpone the discharge of the Debtor until August, 1995, when the five years required under 294f(g)(1) will have passed. In support of his argument, Debtor cites two Chapter 13 HEAL loan cases: In re Williams, 96 B.R. 149 (Bankr. N.D. Ill. 1989) and In re Cleveland, 89 B.R. 69 (9th Cir. BAP 1988), in which both courts dismissed the government's motion for summary judgment as premature and stated that the dischargeability issues should be determined after the five years have passed. Resistance to Motion for Summary Judgment, pages 8-10. In a Chapter 13 case, performance of the plan and entry of the discharge ordinarily consume an additional three to five years after filing the petition. Unlike 11 U.S.C. 523(a)(8), dischargeability of a HEAL loan is not tied to the date of the bankruptcy petition. The five year period continues to run during the bankruptcy case. In re Green, 82 B.R. 955, 958 (Bankr. N.D. Ill. 1988). Therefore, in a Chapter 13 case, it may be appropriate for the court to defer 294f(g) issues until the time of discharge.

However, there is no similar extra time in the usual Chapter 7 case to defer the dischargeability decision. Moreover, the discharge has already entered in this case. The court concludes there is no basis for taking the extraordinary measure of setting aside and deferring the discharge until 1995 to decide an issue it need not reach. This case is indistinguishable from United States v. Putzi, 91 B.R. 42 (S.D. Ohio 1988). See also In re Hampton, 47 B.R. 47 (Bankr. N.D. Ill. 1985). In Putzi, the Chapter 7 debtor had already received a discharge. The court granted the government summary judgment on the HEAL loan issue because the debtor had not met the fiveyear requirement of 5 294f(g)(1).

Debtor has other remedies available. He may pursue an administrative remedy under 42 C.F.R. 60.39(b) or bankruptcy proceedings either in Chapter 13 or in Chapter 7 at a later date.

Because the court has not been provided a method for calculating the interest accruing on the loans at issue, judgment will enter for the amount owing stated in the Declaration of Ditoto, $81,138.67.

CONCLUSIONS OF LAW

Debtor's HEAL loans are not discharged. DHHS is entitled to judgment on the amount owed.

ORDER

IT IS ORDERED that Defendant Department of Health and Human Services' Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that judgment shall enter in favor of Defendant DHHS in the amount of $81,138.67.

SO ORDERED this 18th Day of December, 1992.

William L. Edmonds
Chief Bankruptcy Judge