UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

In Re: **WILLIAM M. HOOKER, JR.** **Debtor**	)	**Chapter 7** **Case No. 05-51169**
WILLIAM M. HOOKER, JR. **Plaintiff** **v.** **EDUCATIONAL CREDIT MANAGEMENT CORPORATION,** **Defendant**	)	**Adversary Proceeding** **No. 05-05047**

DECISION AND ORDER

At Harrisonburg in said District this 21st day of August, 2008:

In a decision and order dated August 14, 2006, this court denied William Hooker's (herein "Debtor") request for a discharge of his student loan debt for undue hardship pursuant to 11 U.S.C. § 523(a)(8). On appeal by the Debtor, the District Court for the Western District of Virginia remanded the case back to this court "for further proceedings in order to determine whether Hooker has demonstrated an undue hardship that would justify the discharge of his student loan debt." Hooker v. Educ. Credit Mgmt. Corp., 368 B.R. 502, 503 (W.D. Va. 2007).

Pursuant to this court's understanding of the initial remand order from the district court, an evidentiary hearing was held on September 26, 2007. Following the hearing, this court again denied the Debtor's request for a hardship discharge by a decision and order dated January 30, 2008, in which the court found that the Debtor had failed to

prove the good faith requirement of the Brunner test by a preponderance of the evidence.

Following an appeal of this court's January 30, 2008 decision and order, the District Court for the Western District of Virginia again remanded the case for "further findings of fact by the bankruptcy court ... necessary to determine the relationship between Hooker's illnesses and his inability to pay his student loans." Hooker v. Educ. Credit Mgmt. Corp., No. 5:08-CV-00023 (W.D. Va. July 16, 2008).

After further findings of fact as delineated by the district court, the Debtor's request for a hardship discharge is denied.

BACKGROUND

The Debtor took out student loans between 1989 and 1997, which he consolidated in 2001.[1] Educational Credit Management Corporation presently holds the Debtor's educational loan debt that was originally disbursed by Citibank. (Trial Tr. at 29, 45). At the time of the August 3, 2006 trial on the matter, the Debtor owed over $80,000 in student loans and had paid a total of $1,549.31 over the life of the loans on the following dates:[2]

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[1] The Debtor also testified to having paid in full in 1989 a $900 student loan owed to the University or Oregon. No evidence was presented containing further details of the loan or a payment history of the loan.

[2] The payments shown are for student loans that were held by Citibank for which payment histories were presented into evidence. (Plaintiff's Ex. #4). The Debtor referenced seven years of regular payments to AFSA Data Corporation at trial, (Trial Tr. at 15, Aug. 3, 2006), but did not present any supporting evidence of this separate loan or payments made on the loan. Furthermore, the Debtor tendered a loan payment history from Collegiate Funding Services into evidence, but the court is unable to decipher the transaction history report and this loan history document was never referenced during the trial on the matter.

Date of Payment	Amount of Payment
December 31, 1991	$20.00
April 6, 1992	$30.00
April 27, 1992	$12.00
January 21, 2000	$60.00
January 27, 2000	$120.32
March 7, 2000	$60.32
March 30, 2000	$60.16
May 12, 2000	$60.16
May 31, 2000	$60.61
June 23, 2000	$60.61
July 21, 2000	$59.71
September 12, 2000	$50.00
October 17, 2000	$50.00
June 28, 2001	$445.62
July 10, 2001	$400.00

Chart A

The Debtor was eligible at the time of his bankruptcy filing to participate in an income contingent repayment option for his loans through the Ford Federal Direct Loan Program, which would have required him to pay an estimated $163.70 each month according to his estimated income at the time of filing for bankruptcy protection. (Def.'s Ex. J-1). The Debtor never considered this possibility for repayment of his student loans even after the income contingent option was brought to his attention. (Trial Tr. at 71).

Sometime during 1996, the Debtor had a nervous breakdown, was subsequently diagnosed with paranoid schizophrenia, and was prescribed several

medications to treat the condition. (Trial Tr. at 9). The Debtor continues to take those medications and expects to continue taking them in the foreseeable future. The Debtor never returned to school full-time following his breakdown. (Trial Tr. at 10). In 1999, the Debtor tested HIV positive and was placed on a regimen of medication, which is currently being paid for by the AIDS Drug Assistance Program. (Trial Tr. at 11, 16). The Debtor has to get blood tests every three to four months that cost the Debtor around $600.[3] (Trial Tr. at 18).

For the past ten years, the Debtor has worked eight months of the year in a seasonal restaurant in the Shenandoah National Park. (Trial Tr. at 25). In the past, the Debtor has worked other table waiting jobs or drawn unemployment benefits when the park restaurant was closed during the four month off-season. (Trial Tr. at 27-28). The Debtor's 2005 tax return showed a gross income of $19,622.15. (Def.'s Ex. I). At trial, the Defendant entered evidence to suggest that the Debtor's after tax monthly income was $1,359.00.[4] (Trial Tr. 53-59). His schedule J filed in 2005 listed $1,161.50 in monthly expenditures including $250 per month in medical expenses. (Def.'s Ex. F).

DISCUSSION

[3] In interrogatories answer by the Debtor and entered into evidence by the Defendant, the Debtor explained that he has "approximately $650 of medical bills every four months that are covered by the Ryan White II Grant through the AIDS Response Effort." (Def. Ex. G).

[4] Inconsistencies became apparent in the Debtor's scheduled income and expenses at trial with regard to monthly payments being paid to the Virginia Department of Taxation and the Internal Revenue Service, (Trial Tr. at 63-64), dorm room fees paid to the Shenandoah National Park that were marked as a payroll deduction in Schedule I and included as an expense in Schedule J, (Trial Tr. at 58-60), and the Debtor's food expenses, (Trial Tr. at 62-63).

The controlling case on student loan discharge under 11 U.S.C. § 523(a)(8) in the Fourth Circuit is Education Credit Management Corp. v. Frushour (In re Frushour), 433 F.3d 393 (4th Cir. 2005). In Frushour, the Fourth Circuit adopted the three-part Brunner test for evaluating the dischargeability of student loan debt under § 523(a)(8).[5] Id. at 400 (applying Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987)). The Brunner test requires a debtor to show that (1) the debtor cannot maintain a minimal standard of living and repay the loans, (2) circumstances exist that illustrate debtor will be unable to repay the loans for a substantial part of the repayment period, and (3) the debtor attempted to repay the loans in good faith. Id. at 398 (citing Brunner, 831 F.2d at 396). Under the Brunner test, if any one of the three requirements is not established by a preponderance of the evidence, the debtor will be denied a discharge under § 523(a)(8). Id. at 400.

In remanding this case for a second time, the district court directed this court to make further findings of fact from the evidence already on the record "to determine the relationship between Hooker's illnesses and his inability to pay his student loans." The district court explains that:

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[5] § 523(a)(8) states:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title [11 U.S.C. § 727, 1141, 1228(a), 1228(b), or 1328(b)] does not discharge an individual debtor from any debt . . . (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for an educational benefit overpayment or 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 nonprofit institution; or an obligation to repay funds received as an educational benefit, scholarship, or stipend; or any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986 [26 U.S.C. § 221(d)(1)], incurred by a debtor who is an individual.

11 U.S.C. § 523(a)(8) (2006).

> If Hooker's claims are true and he made regular payments when he could but the progression of his illnesses substantially interfered in his ability to earn income and realistically retire his indebtedness, the court sees nothing in circuit precedent that should burden him with his student loan debt until he dies.

Hooker v. Educ. Credit Mgmt. Corp., No. 5:08-CV-00023 (W.D. Va. July 16, 2008).

The chart of the Debtor's payments on his Citibank student loans as presented in evidence shows that the Debtor made a total of fifteen payments on his student loans held by Citibank between 1991 and 2001.[6] See supra Chart A. Three payments were made in 1991 and 1992 while the Debtor was still in school. Ten payments were made in 2000, the year after the Debtor was diagnosed with HIV. Two payments were made in 2001 within the two month period preceding the Debtor's consolidation of his student loans held by Citibank.

Neither the number nor sequence of the Debtor's student loan payments support the Debtor's contention that he regularly paid his loans between 1996 and 2001. The one year in which it could be argued that the Debtor made regular payments on his student loans (Debtor made payments in seven months of 2000), was the year after the Debtor was diagnosed with HIV. The Debtor made no payments between 1996 – the

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[6] There is no other evidence before the court of the Debtor having made any other payments on his student loan debts other than the Debtor's own self-serving testimony that he regularly made payments for seven years on a loan for which the Debtor was unable to produce a repayment history. (Trial Tr. at 15). Furthermore, in an unpublished decision by the Court of Appeals for the Fourth Circuit, the court suggested that payment of one student loan does not demonstrate a good faith effort to repay a separate student loan. See Spence v. Educ. Credit Mgmt. Corp., No. 06-2114 (4th Cir. July 30, 2008) ("[H]er choice to repay some of the Perkins Loans does not demonstrate a good faith effort to repay the student loans held by ECMC.").

year he quit school and was diagnosed with paranoid schizophrenia – and 1999 – the year he was diagnosed with HIV – even though his paranoid schizophrenia was under control and he held full time employment at least eight out of twelve months of the year.[7] Other than a period in 1998 during which the Debtor began to hallucinate again due to an alteration in his medication, (Trial Tr. at 10),[8] the Debtor failed to present evidence indicating that his illness substantially affected his ability to work and retire his debt between 1996 and 1999. The Debtor's evidence fails to reflect any relation between the Debtor's failure to make payments and the onset of his illnesses.

In addition to the lack of evidence suggesting that the Debtor's failure to make payments on his student loans coincided with the onset of his illnesses and the Debtor's refusal to consider an income contingent repayment plan as noted by the court in its previous order and decision of January 30, 2008, the Debtor's schedules and tax returns reflect an income cushion with which to make payments on his student loan debts. Review of the Debtor's monthly income and expenditures suggests that the Debtor in fact has an income cushion of $197.50 per month that would cover the Debtor's loan payments under an income contingent repayment plan. The apparent ability to pay under the income contingent repayment plan further supports the court's finding that the Debtor does not meet the good faith prong of the Frushour test.

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[7] At trial on the matter in 2006, the Debtor testified to having worked at the Shenandoah National Park for ten years, suggesting the Debtor had worked there since 1996. (Trial Tr. at 10). Additionally, the Debtor testified to having worked at a factory and a gas mart for short periods prior to starting work at the Shenandoah National Park. (Trial Tr. at 10).

[8] The Debtor did not indicate that the hallucinations during 1998 affected his ability to remain employed at the Shenandoah National Park.

CONCLUSION

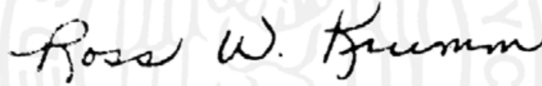
By instruction of the district court on the remand of this case, this court conducted further fact-finding concerning the Debtor's payment history and the onset and interplay of his illnesses. Other than self-serving testimony of the Debtor, there is no evidence to support the Debtor's contention that he made regular payments on the student loans, which are the subject matter of this litigation, between 1996 and 2001. The Debtor never established a history of regular payments and is unable to support a position that it was his illnesses that prevented him from making further payments after 2001. Therefore, the court finds that there is insufficient evidence to prove by a preponderance of the evidence that there is a nexus between the onset and ongoing nature of the Debtor's illness and his failure to make payments on his student loans. Because the Debtor fails to prove good faith by a preponderance of the evidence under the Brunner test, see In re Frushour, 433 F.3d at 400, the debt does not qualify for a hardship discharge. Accordingly, it is:

ORDERED:

That the relief requested in the Debtor's complaint for discharge of student loan

debt for undue hardship pursuant to 11 U.S.C. § 523(a)(8) is **DENIED**.

Copies of this Order are directed to be sent to the Counsel for the Debtor, Marilyn Ann Solomon, Esq., 130 East Cork Street, Winchester, VA 22601; and to the Counsel for the Defendant, James C. Joyce, Jr., 1502 Franklin Rd., Suite 201, Roanoke, VA 24016.



Ross W. Krumm
United States Bankruptcy Judge