NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MW 05-010

Bankruptcy Case No. 03-46417-JBR
Adv. No. 03-4560

TERRENCE J. JOYCE,
Debtor.

TERRENCE J. JOYCE,
Appellant,

v.

MOUNTAIN PEAKS FINANCIAL SERVICES, INC.,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Joel B. Rosenthal, U.S. Bankruptcy Judge)

Before
de Jesús, Vaughn, and Deasy,
United States Bankruptcy Appellate Panel Judges.

Terrence J. Joyce, *pro se*, on brief for Appellant.

Kevin D. O'Leary, Esq., on brief for Appellee.

July 29, 2005

Vaughn, U.S. Bankruptcy Appellate Panel Judge.

Terrence J. Joyce (the "Debtor") appeals from the March 3, 2005 bankruptcy court judgment (the "Judgment") deeming nondischargeable the Debtor's student loan debt owed to Dartmouth College, Dartmouth Educational Loan Corporation ("Dartmouth"). For the reasons set forth below, we AFFIRM the bankruptcy court's Judgment.

BACKGROUND

The Debtor filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code.[1] Thereafter, he initiated an adversary proceeding against several student loan creditors seeking a discharge of his loan obligations on the grounds that repayment constitutes an undue hardship pursuant to 11 U.S.C. § 523(a)(8).[2] The Debtor's Schedule F reflects that in 2003 his total student loan obligation was well over $100,000. The Debtor's student loan obligation to Dartmouth is approximately $60,000. The Dartmouth obligation appears to be comprised of multiple discrete loans that have not been consolidated. The subject of this appeal pertains only to the debt held by Dartmouth. The following facts were established at trial.

The Debtor is a 38 year old single male who earned a Bachelor of Science degree from Bates College in 1989, entered Dartmouth College Medical School in 1989, and received a

[1]All references to the "Bankruptcy Code" and all references to specific statutory sections are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. § 101, et seq.

[2]The defendants initially were comprised of an Assignee of Landmark America Insurance, Bates College, Brazos Student Finance Corp., American Educational Services, Suntec, Inc., Dartmouth College, Dartmouth Educational Loan Corporation and U.S. Bank National Trust. Educational Credit Management Corp. ("ECMC") was later added as a defendant. The Debtor received his educational loans under the Health Education Assistance Loans program ("HEAL"), which he used to fund his education at Dartmouth Medical School. The HEAL loans were later consolidated and the Court entered an order holding that the HEAL loans were nondischargeable. The matter on appeal involved only those non-HEAL loans owed to Dartmouth College, Dartmouth Educational Loan Corp.; the complaint against ECMC remains to be litigated.

medical degree from Dartmouth in 1998. While in medical school, the Debtor also engaged in graduate study through Dartmouth's MD/PhD program; after medical school, he completed one year of a five year residency in Pathology at Yale University.

At the time of trial, the Debtor was living rent-free with his parents, and was employed on a contract basis by Verizon delivering phone books and on a part-time basis by his mother for a variety of tasks in her flower shop. The Debtor started his own company, Molecular Gene Therapy, which has failed to make any profits. The Debtor has been unsuccessful in his attempts to obtain full-time employment, despite assistance from professional employment agencies and a willingness to take a position outside the medical field or to relocate within the United States. Other than assisting with his placement in the residency program at Yale, the Debtor alleges that Dartmouth has not assisted with his attempts to get placed in a residency program or a job.

JURISDICTION

A bankruptcy appellate panel may hear appeals from "final judgments, orders and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Id. at 646 (citations omitted). An interlocutory order "'only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.'" Id. (quoting In re American Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985). A bankruptcy appellate panel is duty-bound to determine its jurisdiction before proceeding to the merits even if not raised by the litigants. See In re George

E. Bumpus, Jr. Constr. Co., 226 B.R. 724 (B.A.P. 1st Cir. 1998). A bankruptcy court's order regarding the dischargeability of a debtor's student loan obligations is a final order. Education Credit Mgmt. Corp. v. Kelly (In re Kelly), 312 B.R. 200, 204 (B.A.P. 1st Cir. 2004).

STANDARD OF REVIEW

Appellate courts generally apply the clearly erroneous standard to findings of fact and *de novo* review to conclusions of law. See TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995); Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.), 43 F.3d 714, 719-20, n.8 (1st Cir. 1994). We review an undue hardship determination as a question of law reviewed *de novo*, and the underlying factual findings for clear error. Kelly, 312 B.R. at 204 (adopting approach of other circuits in absence of First Circuit precedent).

DISCUSSION

I. Arguments Raised for First Time on Appeal

The Debtor raises several arguments for the first time on appeal:

(1) the Debtor alleges that Dartmouth failed to comply with discovery attempts, and that such failure hindered the Debtor's ability to prove "unique circumstances";[3]

(2) the Debtor alleges that Dartmouth has interfered with the Debtor's ability to secure employment by refusing to provide letters of support, assist him with residency placement, or release his school transcripts, and the Debtor alleges that Dartmouth's refusal to release his transcripts violated the automatic stay;[4]

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[3] The Debtor cites to certain correspondence between the Debtor's counsel and Dartmouth regarding discovery requests. However, the Debtor does not cite to anywhere in the record where he argued this point to the bankruptcy court, and review of the trial transcript indicates that the argument was in fact not made below. Indeed, the correspondence to which the Debtor refers in his brief are not included in the trial exhibit list. For clarity, exhibits 2 and 7, titled "Letters Regarding Employment" are letters between the Debtor and prospective employers.

[4] Although the Debtor testified at trial about some of these instances of Dartmouth's alleged interference, it was in the context of explaining his inability to increase income (by securing employment as a physician) rather than alleging a stay violation. The Debtor has not identified where in the record

(3) the Debtor argues that the court's finding his student loan obligations nondischargeable frustrated his ability to make a "fresh start" as an unfortunate but honest debtor, and that the court employed an overly harsh standard in assessing whether repayment of his educational loans would create an undue burden on the Debtor;[5]

(4) the Debtor argues that his living expenses are "likely to increase substantially in the future" with expenses such as rent, utility bills, car payments, credit card bills, and possibly a spouse and dependants to support.[6]

As these arguments are raised for the first time on appeal, they will not be considered by the Panel. See McCoy v. Massachusetts Inst. of Technology, 950 F.2d 13, 22 (1st Cir. 1991) (explaining that theories not raised "squarely" with the trial court cannot be raised for the first time on appeal).

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any allegation of stay violation was made below, and review of the record indicates that it was not.

[5] The Debtor has not identified where in the record any argument regarding frustration of his ability to make a "fresh start" was made below, and review of the record indicates that it was not. Moreover, the Debtor affirmatively consented to the totality of the circumstances test at trial and in his appellate brief, and therefore cannot argue that the standard is too harsh. See Savage, 311 B.R. at 840. Lastly, the Code does not guarantee debtors a "fresh start" in all circumstances, and educational loans are among the most notable exceptions. See Grogan v. Garner (In re Garner), 498 U.S. 279, 286 (1991). In Grogan, the Supreme Court stated:

> in the same breath that we have invoked this 'fresh start' policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.' The statutory provisions governing nondischargeablity reflect a congressional decision to exclude from the general policy of discharge certain categories of debts–such as child support, alimony, and certain unpaid educational loans and taxes [. . .].

Id. (citation omitted).

[6] The Debtor has not identified where in the record any argument regarding a likely increase in expenses was made below, and review of the record indicates that it was not.

II. Establishing Undue Hardship

Under § 523(a)(8), a debtor is not permitted to discharge educational loans unless excepting the loans from discharge will impose an undue hardship on the debtor and the debtor's dependants. See 11 U.S.C. § 523(a)(8). The creditor bears the initial burden of proving that the debt exists and that the debt is of the type excepted from discharge under § 523(a)(8). See Savage, 311 B.R. at 838-39. Once the threshold showing has been made, the burden shifts to the debtor to prove by a preponderance of the evidence that excepting the student loan from discharge will cause the debtor and his dependants "undue hardship." See id.

In the First Circuit, courts determine undue hardship by applying either a totality of the circumstances test or the Brunner test.[7] See Lamanna v. EFS Servs., Inc. (In re Lamanna), 285 B.R. 347 (Bankr. D.R.I. 2002); McClain v. American Student Assistance (In re McClain), 272 B.R. 42 (Bankr. D.N.H. 2002); see also Brunner v. New York State Higher Educ. Serv. Corp., 831 F.2d 395, 395 (2d Cir. 1987). Here, the bankruptcy court applied the totality of the circumstances test. At trial, the Debtor and Dartmouth agreed that the totality of the circumstances test was the test to apply. Therefore, we shall review the bankruptcy court's decision based upon that test.[8] See Savage, 311 B.R. 835, 840.

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[7]The Brunner test requires a "three part showing (1) that the debtor cannot, based on current income and expenses, maintain a 'minimal' standard of living for herself or her dependents if forced to repay the loans; (2) 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 loans." Savage, 311 B.R. 835, 840 n.6 (quoting Brunner v. New York State Higher Educ. Serv. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

[8]To be clear, we are not deciding whether the bankruptcy court should have applied the totality of the circumstances test or the Brunner test.

Under "totality of the circumstances" analysis, a debtor seeking discharge of student loans must prove by a preponderance of the evidence that (1) his past, present, and reasonably reliable future resources; (2) his and his dependants' reasonably necessary living expenses; and (3) other relevant facts or circumstances unique to the case prevent her from paying the student loans in question while still maintaining a minimal standard of living, even when aided by a discharge of other pre-petition debts. Savage, 311 B.R. at 839.

A. Past, Present and Reasonably Reliable Future Income

The Debtor has the burden of proving not only that his current income is insufficient to pay his student loans, but also that his prospects for increasing his income in the future are too limited to afford him sufficient resources to repay the student loans and provide himself and his dependents with a minimal (but fair) standard of living. Id. at 839-40. Here, the bankruptcy court found that although the Debtor's past and present income are insufficient to pay his student loans while still maintaining a minimal standard of living, the Debtor had failed to prove that his prospects for increasing his future income warrant discharge of his student loans. More specifically, the court found that the Debtor possesses an "excellent and marketable education," is in good health, has no dependents, is willing to relocate, and therefore has the education and skills to increase his earnings. The court opined that a more extensive job search would yield more positive results. Lastly, the court found that the Debtor had failed to offer credible evidence of unique circumstances, such as physical or emotional maladies, limiting his ability to increase his earnings. The court concluded that there was no indication that the Debtor's future prospects would remain the same or decline.

The Debtor argues that the court erred in its interpretation of "reasonably reliable future income," and asserts that the court's task is to find what is most probable, or to ascertain the Debtor's likely future prospects. However, First Circuit case law reflects that the standard for reasonably reliable future income is not what is "most probable," but rather whether the Debtor's prospects for increasing his income in the future are too limited to afford him sufficient resources to repay the student loans and provide himself and his dependents with a minimal (but fair) standard of living. See Savage, 311 B.R. at 839-40. Although it used slightly different language, the court clearly concluded that the Debtor had failed to demonstrate such limitation. Therefore, the bankruptcy court did not apply an erroneous standard.

The Debtor also argues that the bankruptcy court erred in requiring him to prove that exceptional circumstances exist that preclude an improved future financial status. However, the First Circuit has stated in dicta that the hardship alleged in a § 523(a)(8) action must be undue and attributable to truly exceptional circumstances, such as illness or an unusually large number of dependents. Delbonis, 72 F.3d at 927 (deciding issues of whether creditor should have been allowed to amend agreed statement of fact and whether credit union was "government unit").

The Debtor further argues that he has no reliable future income due to the limited nature of his Verizon contract, the eventual sale of his mother's floral business, and his lack of marketable skills. As the court's optimism regarding the Debtor's future earnings focused on the Debtor's educational background and not on his current employment, the circumstances of his Verizon contract and the eventual sale of his mother's floral business are not relevant. The question remains, therefore, whether the court's finding that the Debtor possesses a "marketable education" is clearly erroneous. Based on the record before us, we conclude that it is not.

The Debtor argues that his medical degree is not marketable because he has not completed his residency, many years have passed since he left the medical field, and the degree overqualifies him for lower caliber positions in or outside the medical field. The Debtor further argues that his unsuccessful attempts to find work through several professional placement organizations proves that he has no viable employment opportunities in the United States compatible with his background and skills. The Debtor further argues that because he is unable to pursue a career in the medical field, he will need to invest in more education to develop new marketable skills. Lastly, the Debtor argues that even if he were able to obtain a lower caliber position in or outside the medical field, such position would not sufficiently increase his earnings to allow him to pay his monthly student loan payments of over $1,000 a month while still maintaining a minimal standard of living.

The bankruptcy court noted that the Debtor had attempted to find employment compatible with his undergraduate and medical degrees, but nonetheless found that "a more extensive employment search would yield more positive results." Based on the record when viewed in its entirety, we cannot conclude that such a finding is implausible. Although the Debtor has applied for a number of positions since departing his residency program at Yale, the Debtor has failed to demonstrate that he exhausted all opportunities available to someone with his educational background and professional experience. We therefore conclude that the bankruptcy court's finding is not clearly erroneous. Kelly, 312 B.R. at 207.

B. Reasonably Necessary Living Expenses

The Debtor must show that his reasonably necessary expenses leave him with too little to afford repayment. Savage, 311 B.R. at 840. A reasonably necessary living expense is one that a

debtor cannot cut from his budget and continue to maintain a minimal standard of living. See id. at 840 n.7. When calculating a debtor's reasonably necessary living expenses, courts have considered evidence regarding future changes to those expenses. See id. at 842 (noting that debtor's son would reach majority in a few years and thereby considerably reduce debtor's expenses); Kopf, 245 B.R. at 746 (noting that debtor's day care expense will decrease in near future, but also noting that savings would be off-set by reduction in earnings).

Here, the bankruptcy court found that the Debtor's expenses are "relatively minimal," and did not find that any expenses were not reasonably necessary. The court concluded, however, that the Debtor's future income prospects would enable the Debtor to pay his reasonably necessary living expenses as well as his student loan obligations, and that the Debtor's reasonably necessary expenses did not warrant discharge of his Dartmouth loans. The court did not discuss anticipated increases in the Debtor's living expenses, and the record does not reflect any evidence of definite future changes in the Debtor's expenses. We conclude, therefore, that the bankruptcy court's finding that the Debtor's reasonably necessary expenses do not warrant discharge of the Dartmouth loans is not clearly erroneous.

C. Other relevant circumstances

Under the totality of the circumstances test, the court "also looks to see if there are facts or circumstances unique to the Debtor's case that warrant granting a discharge of [his] student loans." In re Bloch, 257 B.R. 379 (Bankr. D. Mass. 2001). The Debtor argues that Dartmouth's refusal to provide him with a Dean's letter or letters of support has prevented him from returning to a residency program, and thereby prevent him from obtaining his medical license. The Debtor

asserts that the situation is "a unique circumstance beyond his control." The bankruptcy court made no finding or conclusion on this point.

We reject the Debtor's argument for several reasons. First, the Debtor has failed to provide legal support for his argument that a creditor's alleged interference with a debtor's career constitutes a unique circumstance for purposes of § 523(a)(8). Second, the Debtor has failed demonstrate that Dartmouth has in fact prevented him from obtaining his medical license. Third, the record reflects that Dartmouth did assist the Debtor in securing the Yale residency, and that the most significant factor that prevented the Debtor from obtaining his medical license was the Debtor's own decision to leave the Yale residency. Finally, even without a medical license, there were other career avenues available to the Debtor. Accordingly, we conclude that the bankruptcy court's finding that there are no unique circumstances in this case that warrant granting the Debtor's discharge is not clearly erroneous.

III. Determination of Partial Loan Dischargeability

The Debtor states that it is unclear whether the bankruptcy court appropriately considered partial discharge of the Debtor's educational loan. The Debtor argues that the court should have applied the hybrid approach and determined that the Debtor's student loans were at least partially dischargeable. The Debtor raised the issue of partial dischargeability below, albeit rather briefly and late in the proceedings, and therefore preserved the issue on appeal. See McCoy, 950 F.2d at 22.

Many bankruptcy courts have addressed the question of partial loan dischargeability under § 523(a)(8), and three different approaches have emerged. See Grigas v. Sallie Mae Servicing Corp. (In re Grigas), 252 B.R. 866 (Bankr. D.N.H. 2000) (analyzing the three

approaches to partial loan dischargeability). Courts applying the "strict approach" hold that the plain language of § 523(a)(8) requires an all or nothing treatment regarding student loan dischargeability – a debtor's student loans are either dischargeable *in toto,* or they are not. See Grigas, 252 B.R. at 871 (citing United Student Aid Funds, Inc. v. Taylor (In re Taylor), 223 B.R. 747 (B.A.P. 9th Cir. 1998)). Courts adopting an opposing view conclude that § 523(a)(8) does allow a partial discharge, and that a debtor's student loans may be partially discharged in a variety of ways, including the discharge of a partial principal amount. Grigas, 252 B.R. at 871 (citing Hornsby, 144 F.3d at 440). Courts within the hybrid camp apply § 523(a)(8) to a debtor's educational debt on a loan-by-loan basis, with the result that some of a debtor's student loans may be discharged while others may be found nondischargeable. Id. at 873.

In the instant case, however, the Panel need not reach the issue of whether the bankruptcy court should have applied the hybrid approach, because application of the hybrid approach requires detailed loan information that is not in the record. Accordingly, we conclude that the bankruptcy court did not err in denying the Debtor's discharge of the Dartmouth loan *in toto*.

CONCLUSION

For the reasons discussed above, we AFFIRM the bankruptcy court's Judgment.