UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: THURSDAY
DATE: JULY 6, 2017
CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

ORAL ARGUMENT

For matters that are called, the court may determine in its discretion whether the resolution of such matter requires oral argument. *See Morrow v. Topping*, 437 F.2d 1155, 1156-57 (9th Cir. 1971); *accord* LBR 9014-1(h). When the court has published a tentative ruling for a matter that is called, the court shall not accept oral argument from any attorney appearing on such matter who is unfamiliar with such tentative ruling or its grounds.

COURT'S ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 60(a), as incorporated by Federal Rules of Bankruptcy Procedure 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

1. 16-12615-A-7 WILLIAM/DEBRA NEWMAN
17-1041
SALVEN V. UNITED STATES DEPARTMENT OF TREASURY,
RUSSELL REYNOLDS/Atty. for pl.
RESPONSIVE PLEADING

CONTINUED STATUS CONFERENCE RE: COMPLAINT
4-11-17 [1]

Final Ruling

The status conference is continued to September 19, 2017, at 10:00 a.m. In the event a dismissal is not in the file, not later than 14 days prior to the continued status conference the parties shall file a joint status report.

2. 16-13939-A-7 YVETTE ANTUNA
17-1007
ALVARADO V. ANTUNA
NICHOLAS ANIOTZBEHERE/Atty. for mv.

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
6-6-17 [38]

Final Ruling

Motion: Dismiss Adversary Complaint Objecting to Discharge
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the respondent is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

DISMISSAL UNDER RULE 7041

"Rule 41 [of the Federal Rules of Civil Procedure] applies in adversary proceedings, except that a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee, the United States trustee, and such other persons as the court may direct, and only on order of the court containing terms and conditions which the court deems proper." Fed. R. Bankr. P. 7041. "Most bankruptcy judges require a plaintiff seeking to dismiss a § 727 action to give notice to any trustee appointed in the case, the U.S. Trustee and all creditors, informing the noticed parties they have a right to substitute in as plaintiff in the action instead of having the action dismissed." Kathleen P. March, Hon. Alan M. Ahart & Janet A. Shapiro, *California Practice Guide: Bankruptcy* ¶ 20:264, at 20-37 (rev. 2014); *accord In re Speece*, 159 B.R. 314, 321 (Bankr. E.D. Cal. 1993) (citing Fed. R. Bankr. P. 7041) ("[T]he rules of procedure forbid voluntary dismissal without notice to the case trustee and to the United States trustee, either of whom

were entitled to bring the action in the first instance, so that they may have an opportunity to protect the rights of their constituencies.").

Plaintiff Gabriel Alvarado has moved to dismiss the complaint in the present adversary proceeding. Rule 7041 applies. Notice has been given to all creditors, the trustee, and the U.S. Trustee, and none has objected or requested to be substituted in for the plaintiff. Accordingly, the court will grant the motion and dismiss the adversary complaint.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Plaintiff Gabriel Alvarado's motion to dismiss the complaint objecting to discharge under § 727 has been presented to the court and notice has been provided to all creditors, the case trustee, and the U.S. Trustee. Having entered the default of respondent creditors, the case trustee, and the U.S. Trustee for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted. The court orders that the complaint in this adversary proceeding be dismissed without prejudice under Fed. R. Bankr. P. 7041 and Fed. R. Civ. P. 41(a)(2). A complaint objecting to discharge under § 727 may be re-filed by the plaintiff or another creditor, the case trustee, or the U.S. Trustee, subject to the limitations of Fed. R. Bankr. P. 4004.

3. 16-13454-A-7 MARVIN/MAUREKA DAVIS
16-1108
OCEAN VIEW BIBLE FELLOWSHIP V. DAVIS ET AL
MARY ANN O'HARA/Atty. for pl.
RESPONSIVE PLEADING

RESCHEDULED STATUS CONFERENCE RE: COMPLAINT
12-23-16 [1]

Final Ruling

This matter is continued to August 29, 2017, at 10:00 a.m. Not later than 7 days prior the continued status conference the parties shall file a joint status report. Among other things, the status report shall indicate whether an appeal from the state court judgment was filed.

4. 16-14562-A-7 SUSAN SCHOLZKEYTON
17-1017 USA-1
SCHOLZ-KEYTON V. DEPARTMENT OF EDUCATION
JEFFREY LODGE/Atty. for mv.

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
6-5-17 [15]

Tentative Ruling

Motion: Dismiss Complaint for Failure to State a Claim
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied
Order: Civil minute order

Defendant U.S. Department of Education moves under Federal Rule of Civil Procedure 12(b)(6) to dismiss plaintiff Susan A. Scholtz-Keyton's complaint for failure to state a claim. Plaintiff's complaint requests an order determining that her student loans are dischargeable under section 523(a)(8) of the Bankruptcy Code. The plaintiff's complaint alleges that she has consolidated student loan debt with an outstanding balance of approximately $17,184.00.

RULE 12(b)(6) STANDARDS

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121–22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint,

and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curium) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

CLAIM FOR DISCHARGEABILITY UNDER SECTION 523(a)(8)

Legal Standards

The Ninth Circuit has formally adopted the three-prong test from *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987), *aff'g* 46 B.R. 752 (S.D.N.Y. 1985), to determine whether a debtor can discharge a student loan for undue hardship. *See U.S. Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108, 1112 (9th Cir. 1998). The *Brunner* test requires that the debtor establish the following:

(1) That the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;

(2) That additional circumstances exist indicating that the debtor's 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 a good faith effort to repay the loans.

Id. at 1111. The debtor's failure to prove any of these prongs will preclude discharge of the student loan. *Carnduff v. U.S. Dep't of Educ. (In re Carnduff)*, 367 B.R. 120, 127 (B.A.P. 9th Cir. 2007).

Minimal Standard of Living

For the first prong, the debtor must prove that she cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans. *Pena*, 155 F.3d at 1111. "To meet this requirement, the debtor must demonstrate more than simply tight finances. In defining undue hardship, courts require more than temporal financial adversity, but typically stop short of utter hopelessness." *Rifino*, 245 F.3d at 1088 (citation omitted) (internal quotation marks omitted). "Application of the first prong of the undue hardship test requires an examination of a debtor's current finances[, and] [t]he meaning of a 'minimal standard of living' must be determined in light of the particular facts of each case." *Educ. Credit. Mgmt. Corp. v. Howe (In re Howe)*, 319 B.R. 886, 890 (B.A.P. 9th Cir. 2005) (citations omitted) (internal quotation marks omitted).

The plaintiff alleges that her current income is $2,393.71. Compl. ¶ 24. Multiplied by 12 months, this equates to an annual income of $28,724.52. Her expenses total about $2278. The plaintiff's disposable income is about $115 after expenses. The plaintiff also contends, moreover, that her living expenses have been severely limited. Am. Compl. ¶ 37. She does not maintain a cell phone, and she purchases groceries and supplies at discount stores. Am. Compl. ¶ 37.

The court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. Reasonable inferences drawn from the facts alleged include the inference that the plaintiff's income is substantially lower than the median family income for a single earner in California. The court takes judicial notice of the U.S. Trustee's website page containing data from the Census Bureau Median Family Income by Family Size. Fed. R. Evid. 201. Though the median family income is not definitive in construing the phrase *minimal standard of living*, the court takes this data into account as merely a guide. The median family income for a family size of one in California is currently $52,416. On the petition date in the underlying bankruptcy case, the median family income for a single earner in this state was $51,763. The plaintiff's annual income is approximately 45.2% less than the median income for a single earner in this state.

Moreover, with only $115.00 per month of disposable income, the court may reasonably infer that the plaintiff has a razor thin financial cushion. Based on the facts alleged and inferences drawn in her favor, she will not likely have sufficient funds to cover unexpected or extraordinary expenses that commonly arise in an individual's life, such as major car repairs or large medical expenses uncovered by insurance.

In short, the plaintiff has sufficiently pleaded facts showing that she cannot maintain a minimal standard of living based on current income and expenses if forced to replay her student loans.

Additional Circumstances

For the second prong, the debtor must prove additional circumstances exist indicating that the debtor's state of affairs is likely to persist for a significant portion of the repayment period of the student loans. *Pena*, 155 F.3d at 1111. In other words, "the determinative question is whether the debtor's inability to pay will, given all we know about the salient features of her existence, persist throughout a substantial portion of the loan's repayment period." *Educ. Credit Mgmt. Corp. v. Nys (In re Nys)*, 446 F.3d 938, 946 (9th Cir. 2006).

The court must "presume that the debtor's income will increase to a point where she can make payments and maintain a minimal standard of living; however, the debtor may rebut that presumption with 'additional circumstances' indicating that her income cannot reasonably be expected to increase and that her inability to make payments will likely persist throughout a substantial portion of the loan's repayment period." *Nys*, 446 F.3d at 946.

There is no "requirement that additional circumstances be 'exceptional' in the sense that the debtor must prove a 'serious illness, psychiatric problems, disability of a dependent, or something which makes the debtor's circumstances more compelling than that of an ordinary person in debt. Undue hardship requires only a showing that the debtor will not be able to maintain a minimal standard of living now and in the future if forced to repay her student loans." *Nys*, 446 F.3d at 946. Therefore, these "circumstances need be 'exceptional' only in the sense that they demonstrate insurmountable barriers to the debtors' financial recovery and ability to pay." *Id.* (internal quotation marks omitted).

The Ninth Circuit has provided a non-exhaustive list of some of the additional circumstances that a debtor can prove. *Nys*, 446 F.3d at 947. "These 'additional circumstances' are meant to be objective factors that courts can consider when trying to predict the debtor's future income." *Id.* at 945.

In this case, the plaintiff has alleged facts that constitute an additional circumstance when considered in the light most favorable to her. At paragraph 23 of the complaint, the plaintiff claims that she has a vision problem that has existed since her childhood. After surgeries, she has developed cataract problems and scar tissue. She has been advised that her vision is going to worsen and that her ability to work will terminate at some unspecified point. At the current time, she must use a special lens in order to read documents.

It is reasonable to infer from these facts that her employment as a nursing assistant, like most modern employment, requires an ability to read quickly and accurately for at least some of her job duties. Her current ability to read would likely be hampered by her current vision condition, including the need for a special lens. And with medical advice that her vision will worsen further over time, affecting her ability to remain employed, the court draws the inference that her vision problem demonstrates an insurmountable barrier to her financial recovery and ability to pay her student loans.

Additionally, the plaintiff has alleged another additional circumstance that appears on the non-exhaustive list provided in the Ninth Circuit decision in *Nys*. First, she has had a severely limited education, as detailed in the complaint. After failing to provide her with an education and certification that would qualify her to work as an optometric technician, her school closed and filed bankruptcy. The second institution she attended closed the program in which she was studying (computerized accounting) before she completed it.

The other additional circumstance is the plaintiff's limited number of years remaining in her work life. The plaintiff's age is 53, and her vision problem is alleged to terminate her ability to be employed at some point. Construing this fact in the light most favorable to the plaintiff, her vision could worsen to the point of not being employed within a few short years.

The defendant argues that speculation is required to conclude anything about the effect of the plaintiff's vision problem on her future income. The court recognizes that the complaint does not provide the precise time at which the plaintiff's vision will deteriorate to the point of being unable to remain employed. Nor does the complaint foreclose every possible source of income that would remain viable to the plaintiff without her vision. But the plaintiff should be provided an opportunity during discovery and at trial to retain an expert on this issue.

For pleading purposes, the court accepts as true (1) that the plaintiff has a significant vision problem that requires special accommodations at the present time, and (2) that the plaintiff's vision will terminate her ability to remain employed at some point in the future. From these facts, the court may reasonably infer that the plaintiff's reading is an essential skill in her field of nursing and any other field for which she may be presently qualified. The court may also infer that the loss of her vision in the future will preclude meaningful employment.

In short, the plaintiff has a provided a plausible additional circumstances that would cause her inability to pay to persist for a substantial portion of the loan repayment period, whatever that period may be. *Educ. Credit Mgmt. Corp. v. Mason (In re Mason)*, 464 F.3d 878, 883–84 (9th Cir. 2006) (holding that bankruptcy court did not clearly err in finding that debtor's learning disability was an additional circumstance indicating debtor's inability to pay would persist for a significant period of time).

Good Faith

For the third prong, the debtor must prove that she has made a good faith effort to repay the loans. *Pena*, 155 F.3d at 1111. The court should consider the debtor's efforts (or lack thereof) in the following: (1) obtaining employment, (2) maximizing income, and (3) minimizing expenses. *Mason*, 464 F.3d at 884.

The court should also consider the debtor's efforts (or lack thereof) to negotiate a repayment plan (such as by exploring the ICRP option). *Hedlund v. Educ. Res. Inst. Inc.*, 718 F.3d 848, 852, 855 (9th Cir. 2013); *Mason*, 464 F.3d at 884. Yet, "failure to negotiate or accept an alternative repayment plan is not dispositive," and [a]ny offered repayment plan's terms, duration, and consequences need to be examined." *Roth*, 490 B.R. at 917. Additionally, a debtor's refusal to apply for or enroll in a repayment plan (such as the IBRP) does not necessarily indicate lack of good faith where the plan would not have required any payment from her since the debtor should not be obligated to engage in futile acts. *Id.* at 919–20.

The court can also consider whether the debtor has made any voluntary payments on the student loan, "although a history of making or not making payments is, by itself, not dispositive." *Hedlund*, 718 F.3d at 852, 855. Additionally, "lack of even minimal voluntary payments is not lack of good faith if the debtor did not have the financial wherewithal to make them." *Roth*, 490 B.R. at 918.

Lastly, the court may also take into account the length of time that the debtor has waited before filing bankruptcy and seeking discharge of the loan. *Hedlund*, 718 F.3d at 855-56. And it should consider "whether the debtor's financial condition resulted from factors beyond her reasonable control, as a debtor may not willfully or negligently cause her own default." *Roth*, 490 B.R. at 917.

The complaint pleads sufficient factual content to state plausibly that she has made a good faith effort to repay. The plaintiff alleges that she worked for at least 12 years, perhaps more. Her wages were garnished for approximately 12 years by the defendant, so a reasonable inference may be drawn that she has worked for at least that number of years. Working for this number of years could plausibly constitute "maximizing income," especially when considered in light of the sub-standard education she received.
She also continued to earn income despite having her wages garnished. In other words, the plaintiff did not frustrate the garnishment by ceasing her employment and drawing disability or welfare benefits that may or may not be subject to garnishment.

Although a garnishment by definition is not a voluntary payment, the plaintiff did continue earning wages over many years that were used to fund the garnishment. Her wages eventually paid the defendant over $21,500.

The plaintiff has minimized her expenses by foregoing a cell phone and shopping for groceries at discount stores. She has maximized her income by working in a field for which she was not trained, despite having a sub-par education. In 2005, the plaintiff contacted and negotiated with the defendant to set the garnishment at a level that she could afford, and as a result, the garnishment was lowered from $104.31 per paycheck to $69.63 per paycheck. Recently, she negotiated an income-based repayment plan that set her payment at zero. Despite her payment being zero at this time, the plaintiff nonetheless still owes the student-loan obligation and has been unable to repay it in full after working for at least 12 years, possibly more.

Lastly, the plaintiff alleges that her education, for which the student loans were incurred, was in 1990, 1991, and 1992. This means that the length of time between incurring the student loans and seeking discharge of them is approximately 25-26 years.

Considered in the light most favorable to the plaintiff, these allegations plausibly state the element of good faith effort to repay under the *Brunner* test.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

The defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim has been presented to the court. Having reviewed the papers filed in support, and having reviewed the complaint and heard the arguments of counsel, if any,

IT IS ORDERED that the motion is denied.

IT IS FURTHER ORDERED that the defendant shall serve an answer no later than 21 days after service of the court's order on this motion.