

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE: : CASE NO. 08-82836  
:  
STEVEN ANTHONY RODRIGUEZ :  
and JENNIFER DIANA RODRIGUEZ, :  
:  
Debtors. :  
:  
CHAPTER 7  
\_\_\_\_\_  
STEVEN RODRIGUEZ, :  
:  
Plaintiff, :  
:  
UNITED STATES DEPARTMENT :  
OF EDUCATION, :  
:  
Defendant. :

**ORDER**

In this closed Chapter 7 case, debtor filed a *pro se* request to discharge a student loan debt due to an alleged undue hardship (Docket No. 26). The Court construes debtor's request as a motion to reopen this case to allow debtor to file an appropriate complaint to determine the dischargeability of student loan debt. The motion is granted, but debtor must file and serve a proper complaint and summons within ninety (90) days of the entry of this Order. If nothing is filed, the Clerk is authorized to close the case. Debtor would be well advised to consult an attorney regarding the legal standards and procedures governing an undue hardship discharge claim.

Section 523(a)(8) of the Bankruptcy Code restricts the dischargeability of a government-guaranteed student loan "unless excepting such debt from discharge under

this paragraph will impose an undue hardship on the debtor and the debtor's dependents . . ." 11 U.S.C. § 523(a)(8). The determination of whether a student loan debt imposes an undue hardship involves a proceeding to determine dischargeability of a debt, and any proceeding to determine the dischargeability of a debt is an adversary proceeding pursuant to Bankruptcy Rule 7001. Adversary proceedings are commenced by the filing of a complaint pursuant to Bankruptcy Rule 7003, and a complaint and summons must be served pursuant to Bankruptcy Rule 7004. Debtor's request is not styled as a complaint and does not appear to be properly served on the United States Department of Education. If there are additional lenders on any of debtor's student loans, they must also receive proper service of the complaint and summons.

The undue hardship exception is a narrow one. Imposition of an undue hardship is "not the mere inability to pay, but an inability to pay that is likely to continue for a significant time." *Hemar Ins. Corp. of Am. v. Cox (In re Cox)*, 338 F.3d 1238, 1242 (11th Cir. 2003), *reh'g en banc, denied*, 82 Fed.Appx. 220 (11th Cir. 2003), *cert. denied*, 541 U.S. 991 (2004). The Eleventh Circuit adopted the undue hardship test denominated in *Brunner v. N.Y. State Higher Educ. Serv. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). *Educ. Credit Mgt. Corp. v. Mosley (In re Mosley)*, 494 F.3d 1320, 1324 (11th Cir. 2007) (quoting *Cox*, 338 F.3d at 1241). The *Brunner* factors require the debtor to prove by a preponderance of the evidence:

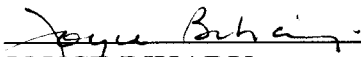
"(1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [himself] and [his] dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the

loans.”

*Brunner*, 831 F.2d at 396. Under the first prong, the debtor must demonstrate that if required to make a monthly student loan payment, given current income and living expenses, he cannot maintain a minimal standard of living for himself and his dependents. *Mosley v. Gen. Revenue Corp. (In re Mosley)*, 330 B.R. 832, 840-842 (Bankr. N.D.Ga. 2005), *aff'd Educ. Credit Mgt. Corp. v. Mosley (In re Mosley)*, 494 F.3d 1320 (11th Cir. 2007). The second prong requires the debtor to prove that: (1) the debtor has a problem or condition preventing the debtor from securing and maintaining permanent full-time employment; and (2) the problem or condition would persist for a significant portion of the student loan repayment period. *Id.* at 842. Lastly, the third prong requires a debtor to prove that a good faith effort has been made to repay the student loans and that the failure to make payments results from factors beyond his reasonable control. *Id.* at 847.

In accordance with the above, debtor’s case is reopened for ninety (90) days from the entry of this Order to allow debtor to file and serve a proper adversary proceeding.

IT IS SO ORDERED, this 13<sup>th</sup> day of May, 2009.

  
\_\_\_\_\_  
JOYCE BIHARY  
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

A copy of the foregoing Order was mailed to the following:

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