UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
DENISE MCINNIS,	)	CASE NO. **10-83629** - MHM
	)	
Debtor.	)	
	)	
DENISE MCINNIS,	)	
Plaintiff,	)	
v.	)	**ADVERSARY PROCEEDING NO. 10-6583**
	)	
WILLIAM D. FORD DIRECT LOAN, U.S. DEPARTMENT OF EDUCATION, CAMPUS DOOR, INC., THE EDUCATION RESOURCE INSTITUTE,	)	
	)	
Defendants.	)	
U.S. DEPARTMENT OF EDUCATION,	)	
	)	
Counter-Claimant,	)	
v.	)	
	)	
DENISE MCINNIS,	)	
Counter-Defendant.	)	

ORDER ON MOTION FOR SUMMARY JUDGMENT

This adversary proceeding is before the court on Defendant's *motion for summary judgment.* Debtor filed her Chapter 7 petition August 13, 2010, and was granted a discharge November 29, 2010. On October 18, 2010, Debtor filed this adversary proceeding, seeking a discharge of her student loans as an undue hardship pursuant to 11 U.S.C. § 523(a)(8). Defendant filed its motion for summary judgment, arguing that the material facts are undisputed and that Debtor cannot meet the burden of establishing undue hardship as a matter of law. As a preliminary matter, Plaintiff filed a motion for

extension of time to amend its response to Defendant's motion for summary judgment; Plaintiff did not provide any reason for the amendment or for the delay in filing an amendment, nor did Plaintiff file an amended response with the motion. At the time of filing the motion for extension, Plaintiff had already filed its response, and Defendant had filed a reply to Plaintiff's response. Therefore, Plaintiff's motion for extension is analyzed as a motion for leave to file a surreply. Because Plaintiff has provided no valid reason for allowing additional briefing,[1] Plaintiff's motion for extension is denied. For the reasons set forth below, Defendant's motion for summary judgment is ***granted.***

I. STATEMENT OF FACTS

Debtor received a Bachelor's degree in business administration from Baruch College in 1984. Debtor attended Thurgood Marshall School of Law in Houston, Texas for two years, from 1991 to 1992 and from 1994 to 1995, but did not receive a law degree. Debtor financed her years at law school with student loans, and, on May 17, 2000, Debtor executed a promissory note to secure a Federal Direct Consolidation Loan of $37,468.10 from Defendant in order to consolidate her student debt. As of January 14, 2011, Debtor's outstanding indebtedness was $39,967.28, of which $39,218.35 was principal and $748.93 was interest.

Debtor is currently 51 years old, is unmarried, and has no dependents. She suffers no medical conditions which prevent her from working, nor are her hardship claims based on any ongoing medical conditions. Debtor has thirty years of experience working as a legal secretary, but has not worked in that field since 2006. In 2006, Debtor resigned from her position as a legal secretary, where she earned $47,000 per year, to become a full-time real estate agent. However, from 2006 to 2010, Debtor earned a total of approximately $20,000 working as a real estate agent; during that time, Debtor paid living

[1] Surreplies "should generally only be allowed 'when a valid reason for such additional briefing exists[.]'" *First Specialty Ins. Corp. V. 633 Partners, Ltd.*, 300 Fed. Appx. 777, 788 (11th Cir. 2008) (quoting *Fedrick v. Mercedes-Benz USA, LLC*, 366 F. Supp. 2d 1190 (N.D. Ga. 2005)).

expenses by drawing on a home equity line of credit. Debtor also owned two rental properties, which she claims earned $6,513 in three years' rental income from 2006 to 2009. In September 2009, Debtor began working as an administrative assistant, earning $28,000 per year; on October 17, 2011, Debtor started a new job as an administrative assistant at Tallahassee Community College, earning $38,000 per year in addition to health insurance and other benefits. Debtor also owns a dance company which offers dance lessons; as of March of 2012, the dance company had an income of around $50 per month.[2]

Debtor claims that her gross monthly salary is $2,567. Under the Income Contingent Repayment Plan ("ICRP"), Debtor's monthly payment to Defendant would be $373.78 (the "ICRP payment"). Defendant notes that, according to Debtor's December 5, 2011 deposition, Debtor's current monthly expenses total $2,195.22, including a $220 per month car payment. The last car payment was due in September 2012. Thus, starting in October of 2012, Defendant argues that Debtor's expenses total $1,975.22, leaving $591.78 in disposable monthly income, from which Debtor could make the ICRP payment of $373.78. Debtor disputes a number of figures Defendant cites, and states that her monthly expenses total $2,384.79, leaving only $182.21 of disposable income; however, Debtor cites no basis for disputing her own deposition and provides no documentation of same. Debtor further argues that, though her final car payment is due in September of 2012, the $220 budgeted for those payments should be applied to maintenance and repair expenses which are bound to increase as her car ages.[3] On

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[2] Debtor states that she has three students paying $60 per month, and has expenses of between $101.95 and $126.95 per month for advertising, operating a website, and renting a space to hold classes. Debtor's Response at Ex. A, ¶¶ 47-52.

[3] In her December 5, 2011 deposition, Debtor stated that she paid $600 for repairs to her car in 2011. *Debtor's Response* at Ex. C (McInnis Deposition) 29:6-13. Even if Debtor's unsupported statement that she actually paid $800 in 2011 is true, her monthly car expenses in that year would total $67. Starting in October of 2012, Debtor would have her budget provide $287 per month for car repairs.

August 30, 2012, Debtor filed a motion to update her financial records to account for $95 in monthly pre-tax contributions to the Florida Retirement System and $200 in monthly pre-tax contributions to her American Century 403(b) retirement plan, leaving a gross monthly income of $2,397.00.

II. CONCLUSIONS OF LAW

Pursuant to FRCP 56(c), incorporated in Bankruptcy Rule 7056, a party moving for summary judgment is entitled to prevail if no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. The burden of proof is on the moving party to establish that a genuine issue of material fact is absent. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Clark v. Coats & Clark, Inc.*, 929 F. 2d 604 (11th Cir. 1991). Evidence is to be construed in the light most favorable to the nonmoving party. *Id.*; *Rollins v. TechSouth, Inc.*, 833 F. 2d 1525 (11th Cir. 1987). However, "[a] party asserting that a fact ... is genuinely disputed must support the assertion by (A) citing to particular parts of materials on the record ...; or (B) showing that the materials cited do not establish the absence ... of a genuine dispute[.]" FRCP 56(c)(1) (applicable pursuant to Bankruptcy Rule 7056); *Accord, Jeffery v. Sarasota White Sox, Inc.*, 1995 U.S. App. Lexis 26089 (11th Cir. 1995) (nonmoving party must go beyond the pleadings and present evidence and designate specific facts to show a genuine issue for trial.).

A Chapter 7 discharge does not discharge a debtor from an educational loan made or insured by a governmental unit or nonprofit institution "unless excepting such debt from discharge would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8). "Undue hardship" is not defined in the statute. The 11th Circuit analyzes § 523(a)(8) using the test enunciated in *Brunner v. New York State Higher Education Services Corp,* 46 B.R. 752 (S.D. N.Y. 1985), *aff'd* 831 F. 2d 395 (2d Cir. 1987); see, also Mosley v. Gen. Revenue Corp. (In re Mosley), *330 B.R. 832 (Bankr.*

N.D. Ga. 2005)(Mullins, J.), *aff'd, In re Mosley*, 494 F.3d 1320 (11th Cir. 2007). Under the *Brunner* test, the burden of proof is upon the debtor to establish: (1) that the debtor cannot, based upon current income and expenses, maintain a "minimal" standard of living for herself and 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 educational loans; and (3) that the debtor has made a good faith effort to repay the loans.

III. DISCUSSION

Debtor has not raised a genuine issue of material fact as to her income and expenses, and therefore cannot meet the first prong of the *Brunner* test as a matter of law. Defendant, citing to Debtor's deposition, states that Debtor's monthly expenses total $1,975.22 now that she has no more vehicle payments. Debtor disputes that figure, stating that her expenses are $2,384.79 and that the monthly funds that were used for car payments should now be budgeted for car maintenance. However, Debtor fails to cite any evidence in support of her assertions that her budget is different from that asserted by Defendant (and established in her deposition taken December 5, 2011) or that her car expenses are significantly increasing, as required by FRCP 56(c). Without reaching the issue of whether Debtor's retirement contributions may be considered necessary expenses under *Brunner*,[4] Debtor's income exceeds expenses by more than the $373.78 monthly payment required under the ICRP.[5] Therefore, Debtor can make payments on the loans while maintaining a minimum standard of living.

Debtor argues that her expenses are increasing, and that, due to her age, her income will eventually decline. Defendant, on the other hand, argues that Debtor's past

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[4] Some courts have stated that a debtor's inability to plan for retirement is not "undue hardship" for the purposes of discharging a student loan. *See, e.g. Dolan v. American Student Assistance*, 256 B.R. 230.

[5] The ICRP is a recent change in the prior all-or-nothing approach taken by the government when a debtor could afford to pay less than all of the contractual payments.

employment and her recent increase in salary indicate that Debtor's income will (or could) increase in the future. The first prong of the *Brunner* test, however, is whether Debtor's current income and expenses preclude a minimal standard of living while paying the student loan debt. They do not. Nor can the second prong be satisfied, because the state of affairs – Debtor's inability to pay – cannot "persist" when it does not exist in the first place.

As a matter of law, Debtor cannot establish that the student loan debt creates an undue hardship; therefore, the loans are not dischargeable under §523(a)(8); accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment is ***granted***.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendants' attorney, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 2nd day of November, 2012.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE