IT IS ORDERED as set forth below:

Date: November 26, 2012

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	Case No.:
WILLIAM ARTHUR GOLDSTEIN,	:	11-81255-MGD
Debtor.	:	Chapter 7
THE RABBI HARRY H. EPSTEIN SCHOOL, INC.,	:	
Plaintiff,	:	
v.	:	Adversary Proceeding No.: 12-5186
WILLIAM ARTHUR GOLDSTEIN,	:	
Defendant.	:	

ORDER (1) GRANTING PLAINTIFF'S MOTION TO RECONSIDER; (2) VACATING SEPTEMBER 18, 2012 ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS; AND (3) GRANTING PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff, The Rabbi Harry H. Epstein School, Inc., filed a motion to reconsider this Court's

September 18, 2012 Order that denied its Motion for Judgment on the Pleadings. (Docket Nos. 8 & 10). The September 18, 2012 Order was based on the Motion not being served properly on attorney Barbara Ann Cole pursuant to BLR 5005-8(b), N.D. Ga.

The basis for Plaintiff's request for reconsideration is a mistake of fact. Rule 59 of the Federal Rules of Civil Procedure, which is applicable to this proceeding pursuant to Rule 9023 of the Federal Rules of Bankruptcy Procedure, governs reconsideration of an order. Reconsideration is necessary when there is: "(1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact." *Bryan v. Murphy*, 246 F.Supp. 2d 1256, 1258–59 (N.D. Ga. 2003). Here, Plaintiff asserts that the Court mistakenly overlooked proper service on Debtor's co-counsel, Mr. E. Martin Putney, when it denied the motion for judgment on the pleadings on procedural grounds.

Plaintiff is correct that the Court's September 18, 2012 order was based solely on improper service on attorney Barbara Ann Cole, who the Court believed to be Debtor's counsel. The case docket reflected that Ms. Cole was the sole attorney of record, and in review of the motion for judgment on the pleadings, the Court failed to consider than Mr. Putney also signed the answer on behalf of Debtor (Docket No. 5) and was the sole representative for Debtor in the Rule 26(f) report (Docket No. 6). Plaintiff's request for reconsideration and accompanying affidavit in support present a sufficient basis to correct the Court's mistake of fact that Ms. Cole is Debtor's counsel in this action. In considering Plaintiff's request, it is also noteworthy that Debtor did not file a response to the properly served motion for reconsideration. Therefore, Plaintiff's motion to reconsider will be granted and the September 18, 2012 order denying Plaintiff's motion for judgment on the pleadings will be vacated.

Plaintiff is also entitled to judgment on the pleadings. Judgment on the Pleadings is appropriate under Federal Rule of Civil Procedure 12(c), which is extended to this action by Federal Rule of Bankruptcy Procedure 7012(b), "when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." FED. R. CIV. P. 12(c); FED. R. BANKR. P. 7012(b); *Horsley v. Rivera*, 292 F.3d 695, 700 (11th Cir. 2002). Judgment on the pleadings is appropriate here because there are no material facts in dispute. Debtor's answer only includes denials of legal conclusions or immaterial facts (Docket No. 5).

The following facts are undisputed. The Debtor has three children who attend The Epstein School (the "School"), a private day school in Atlanta for children who are eighteen months old through the eighth grade. In February 2011, the Debtor and the children's mother entered into the Enrollment Contracts with the School for the 2011-12 academic year. The Debtor agreed under the Enrolment Contracts to pay the School's tuition and fees for each child according to the school's standard payment terms. The total for the 2011-12 academic year was $42,270.

At the beginning of the School's academic year in August 2011, the Debtor requested the School make alternative payment arrangements with him because he was financially unable to make the payments required under the Enrollment Contracts. The School agreed to alternative payments terms that allowed the Debtor's children to attend the School in exchange for the Debtor's promise to pay the amount owed to the School under the Enrollment Contracts over time (the "Alternative Terms"). The Alternative Terms included a $200 fee. When the Debtor filed for bankruptcy approximately two months later, he owed the School the balance of $33,576.

In Debtor's answer, Debtor asserts defenses that the Enrollment Contract and Alternative Terms should not be characterized as a loan or the financing of tuition. (Answer, ¶¶ 2 & 35). Debtor

also challenges the applicability of § 523 and the non-dischargeability of the debt. (Answer, ¶¶ 3 & 18). The Answer admits all of the material facts concerning the Alternative Terms and the debt owed to the School. The Debtor did not deny that he incurred the debt from the School, or that he agreed to make payments on the debt over a 10-month period. (Answer,¶¶ 1-2, 13-16, 23-28, 30-33, 39-41). Debtor did not oppose the motion for judgment on the pleadings.

The Alternative Terms agreed to by the Debtor and School created a non-dischargeable debt under § 523(a)(8)(A)(ii). Section 523 provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title 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—
>
> (A)
>
> (i) 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
>
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
>
> (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

The Alternative Terms agreed to by the School and Debtor constitutes an educational "loan" for the purposes of § 523(a)(8)(A). Several courts have determined that because the Bankruptcy Code does not define the term "loan," they will interpret the term as used in § 523(a)(8)(A) according to "its settled meaning under the common law." *In re Renshaw*, 222 F.3d 82, 88 (2d Cir. 2000); *In re Mehta*, 310 F.3d 308, 313 (3d Cir. 2002). Under the common law, a loan must be "(i) a contract, whereby (ii) one party transfers a defined quantity of money, goods, or services, to another, and (iii)

the other party agrees to pay for the sum or items transferred at a later date." *Mehta*, 310 F.3d at 313; *Renshaw*, 222 F.3d at 88. The Alternative Terms satisfies these criteria and specifically constitutes "an obligation to repay funds received as an educational benefit" under subsection (ii) of § 523(a)(8)(A). *Id.*; *In re Micko*, 356 B.R. 210, 216 (Bankr. D. Ariz. 2006) (defining the phrase "obligation to repay funds received" in § 523(a)(8)(A)(ii) to mean a "loan," more generally).

First, the Alternative Terms constitute a valid contract. The Alternative Terms created a legal obligation between the parties where the Debtor agreed to pay the School the remaining balance of the tuition and fees, plus a $200 financing fee, over a 10-month period in exchange for his children attending the School for the 2011-12 academic year before he completed his payments. In fact, Debtor admitted in his Answer "[t]he Enrollment Contracts, as modified or supplemented by the Alternative Terms, constitute contracts between Epstein, on one hand, and Mr. Goldstein and [the children's mother], on the other hand." (Answer,¶ 31).

Second, the School provided a "defined quantity of" educational services, namely one academic year of private schooling, to the Debtor's children under the Alternative Terms. It is undisputed the Debtor's children consumed these educational services by attending the accredited School. (Answer, ¶¶ 4, 11). Therefore, the second requirement of a common law loan - that one party transferred "a defined quantity of money, goods, or services, to another" - is satisfied. *Mehta*, 310 F.3d at 313; *Renshaw*, 222 F.3d at 88. Third, the Debtor agreed under the Alternative Terms to pay the remaining tuition and fees "at a later date" through an installment payment plan that extended over several months.

Section 523(a)(8) is applicable to this debt, irrespective of whether Debtor personally obtained the educational benefit of the loan. *In re Kidd*, 458 B.R. 612, 621 (Bankr. N.D. Ga. 2011)

(§ 523(a)(8)(A) "provides that the nondischargeability provisions apply regardless of whether the debtor is the beneficiary of the education."). Although the Debtor did not receive the associated educational benefits himself, § 523(a)(8)(A) nevertheless prevents the Debtor from discharging the loan. *In re Pelkowski*, 990 F.2d 737, 741 (3d Cir. 1993); *In re Selmonosky*, 93 B.R. 785, 787 (Bankr. N.D. Ga. 1988).

Section 523(a)(8)(A) exempts from discharge all educational loans, not just loans for higher education. Even though the loan incurred by Debtor financed his children's primary education from a private day school, it is still excepted from discharge under § 523(a)(8)(A). Congress expanded the scope of § 523(a)(8) over the years, broadening its application from higher education loans exclusively to educational loans generally. *Renshaw*, 222 F.3d at 87-88; *In re Segal*, 57 F.3d 342, 346-47 (3d Cir. 1995). Congress deleted the clause "higher education" from § 523(a)(8) in 1984, "eliminat[ing] the inference that the section applied only to nonprofit institutions associated with higher education." *Segal*, 57 F.3d at 346. Congress amended the section again in 2005 as part of The Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") by separating clauses § 523(a)(8)(A)(i) and (ii), broadening again the "range of educational benefit obligations" covered by the section due to the expansive language of § 523(a)(8)(A)(ii). *In Re Roy*, No. 08-33318, 2010 WL 1523996, at *1 (Bankr. D.N.J. Apr. 15, 2010); *In re Baiocchi*, 389 B.R. 828, 831-32 (Bankr. E.D. Wis. 2008) ("BAPCPA's separation of the phrase 'obligation to repay funds received as an educational benefit' [in § 523(a)(8)(A)(ii)] from the phrases 'loan made, insured or guaranteed by a governmental unit' and 'program funded in whole or in part by a nonprofit institution' in § 523(a)(8)(A)(i), must be read as encompassing a broader range of educational benefit obligations .

. ."); *see also In re Skipworth*, No. 09-83982-JAC-7, 2010 WL 1417964, at *2 (Bankr. N.D. Ala. Apr. 1, 2010) (citing *Baiocchi*).

The *Roy* court exempted under § 523(a)(8)(A)(ii) a loan for a private tutor for the debtor's child, reasoning "it is enough that the debt at issue be 'an obligation to repay funds received as an educational benefit.'" *Roy*, 2010 WL 1523996, at *1. Here, the undisputed facts, the unopposed motion, and the applicable law support judgment in favor of the Plaintiff. Accordingly, it is

ORDERED that Plaintiff's Motion for Reconsideration is **GRANTED.** It is **FURTHER ORDERED** that the **SEPTEMBER 18, 2012 Order** is hereby **VACATED.**

It is **FURTHER ORDERED** that Plaintiff's Motion for Judgment on the Pleadings is hereby **GRANTED** and the debt owing to Plaintiff is non-dischargeable pursuant to 11 U.S.C. § 523(a)(8)(ii).

Judgment against Debtor-Defendant will be entered separately.

The Clerk is directed to mail a copy of this Order to the parties on the below distribution list.

END OF DOCUMENT

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