IT IS ORDERED as set forth below:

Date: October 6, 2014

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

IN THE MATTER OF:	:	CASE NUMBER: 12-42846-PWB
CARLA DENISE MACON,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE
CARLA DENISE MACON,	:	
Plaintiff	:	
v.	:	ADVERSARY PROCEEDING
	:	NO. 13-4014
UNITED STATES DEPARTMENT OF EDUCATION,	:	
Defendant.	:	

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Debtor, an unemployed 52 year old single mother, obtained a Federal Direct Consolidation Loan of $31,562.43 in 2001 from the United States Department of Education (the

"Defendant"). Despite credits of $21,006.20 in the period since, the Debtor still owes over $34,000. The Debtor seeks a determination that her student loan debt is discharged on the ground that its repayment would constitute an "undue hardship."

The Defendant seeks entry of summary judgment that the Debtor's student loan debt is not dischargeable. The Defendant contends that the Debtor cannot prove that the failure to except her student loan debt from discharge will constitute an undue hardship because, as a matter of fact and law, she cannot satisfy the three part test for undue hardship set forth in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987) (the "*Brunner* test").

A party is entitled to summary judgment only if it can show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. FED. R. CIV. P. 56. Although the burden is on the Debtor to establish that the student loan debt is dischargeable, the burden is on the Defendant as the moving party to establish an entitlement to summary judgment that the debt is excepted from discharge.

The Court concludes disputes of material fact exist that preclude entry of summary judgment. The Defendant's motion for summary judgment is wholly without merit and is denied for the reasons set forth herein.

I. Background

The Debtor received a bachelor's degree in elementary education from Freed-Hardman University in 1987. In 2001, she executed a promissory note to secure a Federal Direct Consolidation Loan of $31,562.43 from the Defendant. From 1995 through June 2013, the Debtor was employed by the Georgia Department of Family Services. The Debtor resigned from her job in June 2013 because she felt she was subject to retaliation by a supervisor for filing a grievance.

Since that time, the Debtor has been unable to secure employment. The Defendant contends that the Debtor is able to work and "there is nothing that prevents [her] from working." [Doc. 16-3, Defendant's Statement of Material Facts, ¶ 24]. The Debtor, however, contends she has searched diligently for a job in any field and is unable to find one. Although her degree is in elementary education, she is no longer accredited to teach and would need to take more college course work to regain accreditation. [Doc. 18-1, Affidavit of Carla Macon].

The Debtor, who is not married, lives in Cohutta, Georgia, in a home owned by her parents. She pays $600 per month in rent when employed. Her only source of household income is food stamps and the $620 per month in social security benefits her sixteen year old son receives.

The Debtor's student loans have been in default since January 9, 2004. As of June 21, 2013, the Defendant has credited $21,006.20 from sources, including wage garnishments and tax refund offsets, to the balance. Notwithstanding these substantial credits, the Debtor's student loan balance is in excess of $34,000.

The Debtor has not sought to repay her loan through the Income Contingent Repayment Plan, a program that would tie the amount of her student loan payment to her income and employment status.

II. Section 523(a)(8) and the *Brunner* test

Section 523(a)(8) provides that a debtor's student loan debt is excepted from discharge "unless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents." Section 523(a)(8) does not define the term "undue hardship." The Eleventh Circuit Court of Appeals has adopted the three-part test set forth in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987) (the "*Brunner* test") for

determining whether a Debtor has met the undue hardship requirement. *Hemar Ins. Corp. v. Cox (In re Cox)*, 338 F.3d 1238, 1241 (11th Cir. 2003).

The *Brunner* test requires that a debtor establishes "undue hardship" under § 523(a)(8) by showing:

> (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 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.

There is no dispute that the Debtor cannot maintain a minimal standard of living given her current income and expenses at this time (prong one). The Defendant contends that the Debtor cannot prove prongs two and three of the *Brunner* test because (1) she cannot prove that her state of unemployment will continue; and (2) she has not made good faith efforts to repay the loans. Because the Debtor carries the burden of proof on dischargeability and she cannot prove these elements, the Defendant contends it is entitled to summary judgment.

The Court will examine each argument in turn.

A. Whether 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.

The second prong of the *Brunner* test requires the Debtor to establish that additional circumstances exist indicating that her inability to maintain a minimal standard of living is likely to persist for a significant portion of the repayment period of the student loans.

The Defendant contends that, although the Debtor *currently* cannot repay the loan, she cannot demonstrate that her unemployment and inability to pay will continue. The Debtor counters that she is 52 years old, has diligently sought employment in multiple fields, has received no call backs or offers, lives in an area with limited job prospects, is no longer accredited in elementary education and would have to go back to school and incur expense to continue in the field, and that all of these circumstances demonstrate that her circumstances will continue unchanged.

Analysis of prong two of the *Brunner* test requires the Court to apply the facts of the present (existing additional circumstances) to the unknown future (whether they will persist). This is a factual determination.

Brunner does not set forth what "additional circumstances" a Court should consider. One court has observed that the additional circumstances "need not be exceptional, except in the sense that they are tenacious and demonstrate insurmountable barriers to the debtor's financial recovery and ability to pay for a significant portion of the repayment period." *In re Nys*, 308 B.R. 436, 446 (9th Cir. B.A.P. 2004), *aff'd*, 446 F.3d 938 (9th Cir. 2006). The *Nys* court compiled a nonexhaustive list of "additional circumstances" that include: whether the debtor suffers from a disability; her obligations to care for dependents; the quality and degree of education; nature of job skills; underemployment; number of years remaining in work life to repay the loan; age and ability to relocate; lack of assets which could be used to pay the loan; probability of increasing expenses; and whether better financial options exist elsewhere. *Id*., at 446-447.

The Defendant's argument at its core is that the Debtor is able to work and is seeking work and, therefore, she cannot show that her inability to repay the loan will continue. This is too simplistic an argument because it ignores the basic fact that an individual can look for work, but

unless she gets work, she cannot repay the debt. This Court is unable to predict the future without the assistance of the Debtor's own testimony and other relevant evidence regarding her job prospects, past work history, health, current financial circumstances, and any other relevant factors that go to answering the question of whether her inability to pay will continue.

The Court also observes that the *Brunner* test requires the Debtor to prove that her circumstances will persist for a "significant portion of the repayment period of the student loans." Neither the Debtor nor the Defendant has identified "the repayment period" at issue and, therefore, the Court cannot begin to predict whether her circumstances will persist such that she would be unable to repay the loan.

For the foregoing reasons, the Court concludes that disputes as to material fact preclude entry of summary judgment on prong two of the *Brunner* test.

B. Whether the debtor has made good faith efforts to repay the loans

The Defendant contends that the Debtor has not made good faith efforts to repay her loans. Specifically, the Defendant contends that the Debtor has failed to avail herself of the Income Contingent Repayment Plan ("ICRP") or any other voluntary method of repayment of the loans. The Defendant contends that the Debtor rejected an offer that would have taken her student loans out of default and renewed her eligibility for the ICRP wherein she would have had no payment while unemployed or on a limited income. Her rejection of this offer, the Defendant asserts, demonstrates a lack of good faith.

The Court concludes that the Defendant has asserted no facts that demonstrate, as a matter of law, that the Debtor has not made good faith efforts to repay the loans that would entitle it to summary judgment.

The Debtor's failure to avail herself of an income contingent repayment program, standing alone, does not demonstrate a lack of good faith. In *Educational Credit Management Corp. v. Mosley (In re Mosley)*, 494 F.3d 1320 (11th Cir. 2007), the Eleventh Circuit rejected the creditor's contention that the good faith requirement obligated the debtor to attempt to negotiate a repayment plan under the ICRP. Instead, the Court explained, "While a debtor's effort to negotiate a repayment plan certainly demonstrates good faith, courts have rejected a per se rule that a debtor cannot show good faith where he or she has not enrolled in the [ICRP]." *Mosley*, 494 F.3d at 1327 *(citing Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett)*, 487 F.3d 353, 364 (6th Cir. 2007); *In re Tirch*, 409 F.3d 677, 682 (6th Cir. 2005); *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 402-403 (4th Cir. 2005)).

Whether the Debtor has made good faith efforts to repay the student loans is a factual matter. In the good faith context, courts consider a number of factors including the debtor's effort to obtain and maintain employment, her household budget, and her loan payment history. One factor, among many, in the good faith analysis is whether the debtor has made an effort to negotiate a payment plan to repay the student loan debt.

But a requirement that an unemployed debtor with little to no income must try to negotiate a repayment plan under the ICRP just to be told that her payment will be zero serves no purpose. It requires her to engage in a meaningless exercise, but, more troubling, it exacts a punishment - nondischargeability without regard to any other circumstance - if she does not do so. *See Roth v. Educ. Credit Mgmt Corp. (In re Roth)*, 490 B.R. 908, 920 (9th Cir. B.A.P. 2013) ("[w]hen absolutely no payment is forecast, the law should not impose negative consequences for failing to sign up for the program. This is consistent with the general maxim that the law does not

require a party to engage in futile acts. Congress could not have intended such a lengthy, empty commitment as a requirement for a determination of undue hardship") (citations omitted).

Moreover, it grafts a regulatory requirement (participation in an administrative program) on to § 523(a)(8) that simply does not exist in the statute and undermines this Court's ability to examine whether all of the Debtor's circumstances support a finding of "undue hardship." If "good faith" requires a continuous effort to repay the student loans through an administrative program, then the absurd result is that student loan debt is never dischargeable. *See Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013) (rejecting conclusion that good faith contemplates future effort to repay because "if this is so, no educational loan ever could be discharged, because it is always possible to pay in the future should prospects improve.").

The issue is not whether the Debtor's failure to participate in the ICRP demonstrates a lack of good faith; the issue is whether this factor, among the totality of circumstances such as her age, job prospects, her income, expenses, and repayment history, demonstrates good faith or the lack thereof.

The Court also rejects the Defendant's argument that her failure to voluntarily pay the debt back for a significant period of time precludes her from ever establishing good faith for purposes of this element. Although the *Brunner* test's use of the term "effort[] to repay" appears to contemplate the Debtor taking action to repay the loan, this is not a case of the Debtor *evading* repayment. It is undisputed that the Defendant has credited over $21,000 to the repayment of the loans. Much of that appears to have come from a wage garnishment and the seizure of tax refunds. It would be an inequitable result to conclude that a debtor's acquiescence to a garnishment for significant sums (possibly more than she would have been required to voluntarily pay on a monthly

basis) would amount to a finding of bad faith for purposes of dischargeability.

Ultimately, good faith is a factual determination. The Defendant's argument hinges solely on the Debtor's failure to avail herself voluntarily of repayment plan. That alone cannot serve as a basis for summary judgment.

Conclusion

Chief Judge Mullins observed in *In re Mosley*, 330 B.R. 832, 842 (Bankr. N.D. Ga. 2007), *aff'd*, 494 F.3d 1320 (11th Cir. 2007), that an "unduly rigid application of the *Brunner* test, especially the second and third prongs, may prejudice debtors who are destitute" and that "[w]here the debtor lives in abject poverty and cannot maintain even a minimal standard of living even without repaying his student loans, flexibility with regard to the last prongs of *Brunner* may be equitable."

At a minimum, the Court must afford the Debtor the opportunity to make her case for the dischargeability of this debt at trial. No basis exists, as a matter of law, at this time for concluding that the Debtor cannot establish that repayment of her student loans would be an undue hardship. Based on the foregoing, it is

ORDERED that the Defendant's motion for summary judgment is denied. The Court shall schedule a pretrial conference by separate Order and Notice.

End of Order

NOT INTENDED FOR PUBLICATION

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