

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
JAMES T. BOCK, ) CASE NO. BK97-80499  
)  
DEBTOR ) A97-8072  
\_\_\_\_\_)  
JAMES T. BOCK, )  
) CH. 7  
Plaintiff )  
vs. )  
)  
HIGHER EDUCATION ASSISTANCE )  
FOUNDATION, VAN RU CREDIT CORP., )  
and NEBRASKA STUDENT LOAN PROGRAM,) )  
INC., substituted defendant )  
for NEBHELP and UNIPAC SERVICE )  
CORPORATION, )  
)  
Defendant )

MEMORANDUM

Hearing was held on the adversary complaint on February 14, 1998. Appearances: Radley Clemens for the debtor and Paul Peter for the defendant. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

**The Case**

This adversary proceeding concerns the dischargeability under Section 523(a)(8)(B) of student loans owed by plaintiff, James T. Bock (hereinafter "Bock"), to Nebraska Student Loan Program, Inc., (hereinafter "NSLP").

**Factual Background**

On March 19, 1990, Bock obtained three student loans from qualified lenders in the amounts of \$1,300.00, \$2,625.00 and \$2,625.00. The loans were acquired for educational expenses owed to Gateway Electronics Institute (hereinafter "Gateway"), a school at which Bock had commenced a study of computer

programming in February of 1990. Bock completed the prescribed program of study at Gateway and received a diploma in computer programming in late 1990. The loans went into repayment in approximately January of 1991. Bock was granted two requests for forbearance in 1995 and one request for forbearance in 1994. Bock has made only one payment of approximately \$143.00 on the loans. The amount currently due as of the trial date is \$10,020.30.

Bock filed a petition for Chapter 7 relief on March 5, 1997. On May 29, 1997, Bock filed an adversary proceeding under Section 523(a)(8)(A) and (B) against the United States Department of Education, Unipac Service Corporation, Nebhelp, and Van Ru Credit Corporation. NSLP, as guarantor for Bock's student loans and real party in interest, was subsequently substituted as defendant in this adversary proceeding. At trial, Bock conceded that he is not eligible for relief under Section 523(a)(8)(A) and now goes forward solely on the Section 523(a)(8)(B) ("undue hardship") claim.

Bock is a twenty-seven-year old man who is employed on a full-time basis as a "computer operator" for Werner Enterprises (hereinafter "Werner"), a trucking company. Bock lives with his father, to whom he pays rent, in a house his father owns. He has one child, a four-year old daughter, who lives nearly full-time with the child's mother. While Bock has no legal joint custody of his daughter, she stays with him on weekends during the school year and for two to three weeks at a time during the summer months. In addition, Bock makes monthly child support payments of \$371.00 to the child's mother and maintains health insurance for the child (through Werner), as ordered by the District Court of Douglas County. Bock suffered a miniscus tear in his knee while on active duty with the United States Air Force and was discharged honorably for that reason. Bock is ineligible for disability benefits, however, because the injury does not affect his ability to work on a full-time basis.

While Bock earns an income of approximately \$24,000.00 a year and has ordinary monthly expenses, he claims to be eligible for an "undue hardship" discharge for his student loan debt owed to NSLP. In addition to his debt to NSLP, Bock owes a debt of approximately \$5,000.00 to the Internal Revenue Service. Bock believes that he would be under an "undue hardship" if forced to repay both his student loan debt and his debt to the Internal Revenue Service. Bock apparently

believes that he would not be able to maintain a minimal standard of living if forced to repay his obligations to NSLP and the Internal Revenue Service. Bock claims that although he has received salary raises on an almost yearly basis since starting his current position with Werner Enterprises, he does not foresee a further raise or promotion in position in the immediate future. In addition, Bock testified that he believes (there is no evidence that an actual attempt was made) that he cannot get the amount of what he currently pays in child support adjusted for three years.

### **Issue**

Will excepting the student loan debt from discharge impose an undue hardship on debtor or debtor's dependent?

### **Decision**

The student loan debt is excepted from discharge because the requirement to pay the debt does not impose an undue hardship on debtor or his dependent.

### **Law**

The bankruptcy code, at 11 U.S.C. § 523(a)(8)(B), provides that a student loan obligation is generally nondischargeable unless "excepting such debt from discharge. . . will impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. Section 523(a)(8)(B). Regina v. Nebraska Student Loan Program, Inc., Neb.Bkr. 95:176,177 (Bankr. D. Neb. 1995). While "undue hardship" is not defined in the bankruptcy code, various tests have been developed by the case law of other jurisdictions to determine if repayment of a student loan obligation would constitute an "undue hardship". Id. In recent years, the judges of the bankruptcy court for the District of Nebraska have applied two tests for "undue hardship" adopted from other jurisdictions. The tests for "undue hardship" adopted in the cases of In Re Johnson, 5 BCD 532 (Bankr. E.D. Pa. 1979), and Brunner v. New York State Higher Education Services Corp., 831 F.2d 395 (2d. Cir. 1987), were considered in Regina v. Nebraska Student Loan Program, Inc., Neb.Bkr. 95:176 (Bankr. D. Neb. 1995). The Brunner test alone was used in Hart v. Nebraska Student Loan Program, Inc., Neb.Bkr. 93:430 (Bankr. D. Neb. 1993).

The Brunner test was adopted over the Johnson test by the Third Circuit as more logical, workable and consistent with the policy of Section 523(a)(8)(B). Faish v. Pennsylvania Higher Education Assistance Agency, 72 F.3d. 298,305-306 (3d. Cir. 1995). Brunner provides the most appropriate test for determining "undue hardship" in student loan cases and will be applied here. The three-part Brunner test requires a showing:

- (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [him]self 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. . .and
- (3) that the debtor has made good faith efforts to repay the loans

Brunner at 396 (emphasis added)

"Student loan debtors have the burden of establishing each element of the Brunner test. All three elements must be satisfied individually before a discharge can be granted." Faish at 306, citing In Re Roberson, 999 F.2d. 1132 (7th Cir. 1993). NSLP has conceded that Bock satisfies the good faith portion of the Brunner test, so the first and second portions of the Brunner test will be considered.

Although Brunner does not provide specific factors to consider in determining whether the debtor can maintain a "minimal" standard of living, the case does advise that the, "analysis requires more than a showing of tight finances." Id at 306. The necessary first step in making this determination is a consideration of the income and expenses of the debtor and his dependents.

From Bock's testimony, it can be calculated that he has approximately \$681.00 in income remaining on a monthly basis after his expenses are paid. Bock's monthly net salary is approximately \$1,932.00 and his monthly living expenses amount to approximately \$1,251.00, leaving a surplus of nearly \$700.00. As of late 1995, Bock's combined monthly payments for the loans appear to have been approximately \$150.00. Assuming that Bock's current combined monthly payments would

not greatly exceed \$150.00, it is apparent that Bock's claim that he would not be able to maintain a minimal standard of living if forced to repay his debt to NSLP is insupportable. After payment on the loans, Bock would still have over \$400.00 in surplus income monthly.

Bock is living well above the poverty guidelines issued by the United States Department of Health and Human Services. In 1996, the Department of Health and Human Services issued a \$10,360.00 guideline for a family of two. (ex. 107) Bock earns approximately \$24,000.00 a year and has only one part-time dependent. Bock's financial situation, state of health and ability to work is significantly different from that of the debtors granted a Section 523(a)(8)(B) discharge in the recent local decisions in Regina v. Nebraska Student Loan Program, Inc., Neb.Bkr. 95:176 (Bankr. D. Neb. 1995), and Hart v. Nebraska Student Loan Program, Inc., Neb.Bkr. 93:430 (Bankr. D. Neb. 1993). Bock would be well able to maintain a minimal standard of living if forced to repay his debt to NSLP.

Because it has been determined that Bock has failed the "minimal standard of living" prong of the Brunner test for "undue hardship", there is no need to proceed to the second prong of the test. Accordingly, Bock should be denied relief under Section 523(a)(8)(B).

Some bankruptcy courts have used their discretion and equitable power granted by 11 U.S.C. § 105(a) to impose a temporary stay of the debtor's obligation to repay student loan debt and/or the allowance of a partial discharge of the student loan indebtedness. See Cheeseman v. Tennessee Student Loan Assistance Corp., 25 F.3d. 356 (6th Cir. 1994), and Gammoh v. Ohio Student Loan Commission, 174 B.R. 707 (Bankr. N.D. Ohio 1994). Assuming, without deciding, that this use of Section 105(a) is permissible when the bankruptcy code contains an express provision dealing with the issue of the dischargeability of student loan debt, [Section 523(a)(8)], such equitable power should not be exercised in this case to grant a partial discharge. Because of Bock's monthly surplus income, his situation does not represent even a "close case" for "undue hardship" and because he is so clearly ineligible for relief under Section 523(a)(8)(B), there is no need to consider equitable relief under Section 105(a).

**Conclusion**

Bock has failed to demonstrate that he would not be able to maintain a minimal standard of living if forced to repay his student loan debt to NSLP. Accordingly, Bock's request for discharge of the debt under Section 523(a)(8)(B) is denied.

Separate journal entry to be filed.

DATED: April 17, 1998

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

PETER, PAUL 402-475-8328

Copies mailed by the Court to:

Radley Clemens, 6404 N. 91st Plaza, Omaha, NE 68134  
United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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) CH. 7  
JAMES T. BOCK, ) Filing No.  
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Plaintiff(s) )  
vs. ) JOURNAL ENTRY  
HIGHER EDUCATION ASSISTANCE )  
FOUNDATION, VAN RU CREDIT )  
CORP., and NEBRASKA STUDENT )  
LOAN PROGRAM, INC., )  
substituted defendant for )  
NEBHELP and UNIPAC SERVICE )  
CORPORATION, ) DATE: April 17, 1998  
Defendant(s) ) HEARING DATE: February 14,  
1998

Before a United States Bankruptcy Judge for the District of  
Nebraska regarding Adversary Complaint.

APPEARANCES

Radley Clemens, Attorney for debtor  
Paul Peter, Attorney for defendant

IT IS ORDERED:

Bock has failed to demonstrate that he would not be able  
to maintain a minimal standard of living if forced to repay  
his student loan debt to NSLP. Accordingly, Bock's request  
for discharge of the debt under Section 523(a)(8)(B) is  
denied. See Memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
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