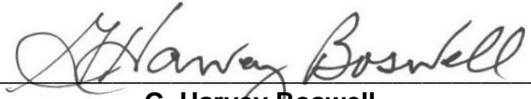




**Dated: September 16, 2004
The following is SO ORDERED.**


G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE:

Jason Smith and Jessica Smith,

Case No. 03-13814

Debtors.

Chapter 7

Bethel College,

Plaintiff,

v.

Adv. Pro. No. 03-5341

Jessica Smith,

Defendant.

**MEMORANDUM OPINION AND ORDER RE (1) MOTION FOR SUMMARY JUDGMENT
FILED BY THE DEBTOR; (2) BETHEL COLLEGE'S OBJECTION TO DEBTOR'S MOTION
FOR SUMMARY JUDGMENT; and (3) MOTION FOR SUMMARY JUDGMENT FILED BY
BETHEL COLLEGE**

The Court conducted a hearing on (1) the Debtor's Motion for Summary Judgment, (2) Bethel College's Objection to the Debtor's Motion for Summary Judgment and (3) Bethel College's Motion for Summary Judgment on August 4, 2004. FED. R. BANKR. P. 9014. Resolution of this matter is a core

proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

At issue in this case is a pre-petition debt Jessica Smith, ("Smith"), owes to Bethel College, ("Bethel") in the amount of \$8,073.75. Bethel alleges that this debt is non-dischargeable under 11 U.S.C. § 523(a)(8). Smith alleges that the debt does not fall within the parameters of § 523(a)(8) and is, therefore, dischargeable. Smith filed a Motion for Summary Judgment on July 7, 2004. Bethel filed an objection to Smith's motion on July 14, 2004. Bethel filed a cross-motion for summary judgment on August 2, 2004, and an Amended Motion for Summary Judgment on August 3, 2004.

The parties in this matter filed a "Joint Stipulations of Fact" on April 28, 2004, and an "Amended Joint Stipulation of Fact" on August 2, 2004. Those stipulations set forth the following:

1. The Debtor, Jessica Smith, filed a Chapter 7 bankruptcy on August 8, 2003.
2. Debtor/Defendant listed Bethel College as a general unsecured creditor for \$8,073.75 in her petition and seeks to have the debt discharged in her Chapter 7 case.
3. Plaintiff, Bethel College, is a non-profit institution.
4. Debtor/Defendant signed a "Financial Contract & Student Agreement for Payment Method" on July 30, 2002.
5. Debtor/Defendant was a participant in the SUCCESS program at Bethel College.
6. The parties agree that total amount due and owing to Bethel College for Jessica Smith's courses is \$8,073.75.

The parties also submitted two exhibits with their stipulation. The first exhibit is a copy of the "Bethel College Degree Completion Program Financial Contract and Student Agreement for Payment Method" signed by the debtor on July 30, 2002. Pursuant to the terms of this agreement, the debtor agreed "to pay the balance she owed for each module (course) according to the Bethel College Payment Policy." The debtor also indicated in this agreement that her employer was Caterpillar in Dyersburg, Tennessee, and that Caterpillar was going to reimburse her for her fees and expenses at Bethel. The following typewritten language appears directly beneath Smith's indication:

I will transfer payment to Bethel College IMMEDIATELY following reimbursement from my employer. Should my employment or reimbursement benefits change, I will be responsible for full payment through alternative payment methods, as set by Bethel College. I also understand that all charges or fees for the SUCCESS Program, which are not covered by my reimbursement benefits, will be my responsibility. I also agree to provide Bethel College with a copy of my benefits. In order to utilize this contract to meet my financial obligations, I further authorize Bethel College to submit to my

employer: a statement of account and the final grade following completion of each module.

Smith did not sign any type of promissory note or loan documents in favor of Bethel.

The second exhibit submitted by the parties is a copy of the “Statement of Account” from Bethel College dated July 7, 2003. The statement shows charges Smith incurred and payments she made in a chronological order beginning with charges for the spring semester of 2001 and ending with charges for the summer semester of 2002. In an effort to make the “Statement of Account” as easy to understand as possible, the Court will set forth the charges and payments on a semester-by-semester basis.

1. Spring Semester 2001:

- a. May 14, 2001: Debit of \$2,205.00 in undergraduate tuition for spring 2001.
- b. May 14, 2001: Debit of an “incidental fee” of \$28.66.
- c. June 11, 2001: Debit of four separate book charges for:
 - i. ENG 111 - \$51.00
 - ii. COE 101 - \$89.70
 - iii. REL 111 - \$46.49
 - iv. ENG 101 - \$36.25
- d. August 20, 2001: Credit of \$25.00 with the notation “Pd Late Charge COE 101.”
- e. August 20, 2001: Credit of \$853.36 with the notation “COE 101.”
- f. August 27, 2001: Debit of an add/drop fee of \$5.00
- g. August 27, 2001: Debit of an additional \$735.00 for tuition for spring 2001.
- h. October 16, 2001: Credit of \$796.25 with the notation “ENG 101 & Book.”
- i. November 12, 2001: Credit of \$806.49 with the notation “REL 111 & Book.”
- j. January 23, 2002: Credit of \$811.00 with the notation “ENG 111.”

2. Fall Semester 2001:

- a. September 26, 2001: Debit of a \$25.00 incidental fee.
- b. September 26, 2001: Debit of \$2,940.00 in tuition for the fall 2001.
- c. October 22, 2001: Debit of three separate book charges for:
 - i. SCI 101 - \$12.95
 - ii. HIS 211 - \$85.75
 - iii. ART 212 - \$67.75
- d. July 31, 2002: Credit of \$827.75 with the notation “ART 212 + late fee.”
- e. July 31, 2002: Credit of \$760.00 with the notation “HIS 212 + late fee.”
- f. July 31, 2002: Credit of \$797.95 with the notation “SCI 101 + late fee.”

3. Spring Semester 7-2002:

- a. February 18, 2002: Debit of \$2,940.00 in undergraduate tuition for spring 7-02.
- b. March 13, 2002: Debit of \$5.00 for an “add/drop” fee.
- c. March 18, 2002: Debit of \$12.00 for a book charge for “REL 112.”
- d. March 25, 2002: Debit of \$12.00 for a book charge for “REL 112.”
- e. April 2, 2002: Credit of \$735.00 with a notation “Dropped REL 112.”
- f. April 26, 2002: Debit of three separate book charges for:
 - i. SCI 115 - \$117.00
 - ii. SAT 112 - \$106.50
 - iii. BUS 112 - \$141.00
- g. July 31, 2002: Credit of \$866.50 with the notation “SAT 112 + late fee.”

4. Spring Semester 8-2002:

- a. April 12, 2002: Debit \$735.00 in tuition for Spring 8-2002.
- b. April 26, 2002: Debit of \$59.00 for a book charge for “OMT 490.”
- c. June 6, 2002: Debit of \$96.00 for a book charge for “Telecommunication.”

5. Summer Semester 2-2002:

- a. August 21, 2002: Debit of \$3,430.00 for tuition for summer 2-2002.
- b. September 4, 2002: Five separate debits for book charges for:
 - i. OMT 330 - \$142.50
 - ii. OMT 301 - \$136.50
 - iii. OMT 310 - \$145.00
 - iv. OMT 350 - \$125.00
 - v. OMT 450A - \$12.00
- c. November 8, 2002: Debit of \$5.00 for an “add/drop fee.”

6. Summer Semester 8-2002:

- a. June 17, 2002: Debit of \$735.00 in tuition for summer 8-2002.
- b. August 21, 2002: Debit of \$735.00 in tuition for summer 8-2002.
- c. September 5, 2002: Debit of \$70.00 for a book charge for CIS 349.

On November 14, 2002, Bethel credited \$735.00 to the debtor’s account with the notation “dropped OMT 330.” The “Statement of Account” shows this credit as applying to the Fall 2002 semester; however, Smith stated that she stopped attending Bethel after the summer 2002 semester. In light of this, the Court will assume that the credit actually relates to the summer 2-2002 semester since that is when it appears Smith took that class.

It appears that Smith overpaid for the 2001 spring semester by \$95.00. Beginning with the fall semester of 2001, however, Smith’s account became delinquent. There was a \$745.75 deficiency for the fall 2001 semester, a \$1,732.00 deficiency for spring 7-2002, a \$890.00 deficiency for spring 8-2002, a \$3,261.00 deficiency for summer 2-2002, and a \$1,540.00 deficiency for summer 8-2002.

Bethel College alleges that the debt owed to it from Jessica Smith is non-dischargeable under 11 U.S.C. § 523(a)(8) for several reasons. First, Bethel contends that the debt Smith owes Bethel was an extension of credit by an educational institution and, as such, is non-dischargeable under § 523(a)(8). Bethel cites the Sixth Circuit case of *Andrews University v. Merchant (In re Merchant)*, 958 F.2d 738 (6th Cir. 1992) as support for this assertion. Secondly, Bethel alleges that § 523(a)(8) excepts from discharge any obligation to repay funds received as an education benefit, scholarship or stipend. As support for this, Bethel cites the case of *Roosevelt University v. Oldham (In re Oldham)*, 220 B.R. 607 (Bankr. N.D. Ill. 1998). Finally, Bethel cites the case of *Najafi v. Cabrini College (In re Najafi)*, 154 B.R. 185 (Bankr. E.D. Penn. 1993) for the assertion that a simple bill for tuition where no prior agreement for payment existed is sufficient to except an obligation from discharge under § 523(a)(8). The Court finds it important to point out at this juncture that *Najafi* was abrogated by the Third Circuit in 2002 in the case of *Boston University v. Mehta (In re Mehta)*, 310 F.3d 308 (3rd Cir. 308).

In a memorandum filed with the Court on April 16, 2004, Smith alleged that the money she owes to Bethel is not the type of debt which § 523(a)(8) excepts from discharge. As support for this, Smith cited the cases of *Johnson v. Virginia Commonwealth University (In re Johnson)*, 222 B.R. 783 (Bankr. E.D. Va. 1998), *Peller v. Syracuse University (In re Peller)*, 184 B.R. 663 (Bankr. D.N.J. 1994), and *Hemar Insurance Corp. v. Cox (In re Cox)*, 338 F.3d 1238 (11th Cir. 2003). Although the debtor cited this last case, *In re Cox*, the case which is actually discussed in the memo and attached to the memo as exhibit E is actually *In re Chambers*, 290 B.R. 328 (N.D. Ill. 2003), *aff'd*, *In re Chambers*, 348 F.3d 650 (7th Cir. 2003).

II. CONCLUSIONS OF LAW

“Summary judgment is appropriate when ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.’” *Fogerty v. MCM Group Holdings Corp., Inc.*, 379 F.3d 348, 352 (6th Cir. 2004) (citing FED. R. CIV. P. 56(c).) Because the parties are in agreement as to the facts of this case, one of the parties is entitled to summary judgment as a matter of law. *Tennessee Protection & Advocacy, Inc. v. Wells*, 371 F.3d 342, 345 (6th Cir. 2004).

Section 523(a)(8) of the Bankruptcy Code excepts from discharge any debt:

for an education 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 for an obligation to repay funds received as an educational benefit, scholarship or stipend, 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). When faced with deciding whether or not a particular debt should be excepted from discharge under § 523(a)(8), a court must narrowly construe the exception to promote the central bankruptcy purpose of giving relief to the honest, but unfortunate debtor. *Meyers v. IRS (In re Meyers)*, 196 F.3d 622, 624 (6th Cir. 1999).

In the case of *In re Merchant*, 958 F.2d 738 (6th Cir. 1999) the Sixth Circuit was faced with the task of deciding whether or not credit extensions made by a university to a debtor were loans within the meaning of § 523(a)(8). The debtor in *Merchant* was a student at Andrews University who had obtained a loan from Michigan National Bank to pay a portion of her educational expenses. The bank made the loan to Merchant in connection with a student loan program arranged with the university. The university’s program included a provision which gave the bank full recourse against the university in the event the student defaulted on the loan. Merchant also got assistance for her educational expenses from the university. This assistance was evidenced by promissory notes payable to the university.

After graduating, Merchant defaulted on both the bank loan and the university note. The university paid the debtor's bank loan in full pursuant to the guaranty agreement and took assignment of the note. Merchant filed chapter 7 approximately one year later. After the University refused to give her a copy of her transcript, Merchant filed an adversary proceeding against the school alleging that its refusal violated the automatic stay. The University counterclaimed that the loan and the credit extensions were excepted from discharge under § 523(a)(8).

In analyzing the facts in *Merchant*, the bankruptcy court found that neither the bank loan nor the credit extension was a "loan" within the parameters of § 523(a)(8). The district court affirmed the bankruptcy court's ruling. On appeal, the Sixth Circuit reversed the district court and found that the credit extended to Merchant by the University qualified as a loan under § 523(a)(8). In making this decision, the Sixth Circuit first adopted the definition of the term "loan" as set forth by the Second Circuit in the case of *In re Grand Union Co.*, 219 F. 353 (2nd Cir. 1914):

[A] contract whereby, in substance, one party transfers to the other a sum of money which that other agrees to repay absolutely, together with such additional sums as may be agreed upon for its use. If such be the intent of the parties, the transaction will be considered a loan without regard to its form.

Merchant, 958 F.2d at 741. The Sixth Circuit then relied on the case of *In re Hill*, 44 B.R. 645 (Bankr. D. Mass. 1984) and held that extensions of credit were included within the term "loan" in § 523(a)(8) and were non-dischargeable when the following factors were present:

(1) the student was aware of the credit extension and acknowledges the money owed; (2) the amount owed was liquidated; and (3) the extended credit was defined as a "sum of money due to a person."

Id. at 741. Because Merchant signed the promissory note in favor of the bank, the Sixth Circuit found that the necessary factors were present to find the debt non-dischargeable. *Id.*

In the case of *Roosevelt University v. Oldham (In re Oldham)*, 220 B.R. 607 (Bankr. N.D. Ill. 1998), the issue before the court was whether a debt for unpaid tuition was a "loan" within the meaning of § 523(a)(8). The debtor in *Oldham* attended Roosevelt University under a program similar to the one in the case at bar whereby the debtor's employer would reimburse tuition costs for college courses to its employees. In the *Oldham* case, however, the University required all students participating in the employer reimbursement program to sign a note promising to pay the total cost of the education whether or not the student received reimbursement from his or her employer. Relying on the *Merchant* case, the *Oldham* court held that "an extension of credit for unpaid tuition evidenced by a promissory note constitutes a 'loan' for purposes of § 523(a)(8)." *Oldham*, 220 B.R. 608.

In the case at bar, there is simply no evidence that the three *Merchant* factors were satisfied. The debtor did not sign a promissory note in favor of Bethel. She did sign the “Agreement for Payment Method” form on July 30, 2002, which included the statement “[s]hould my employment or reimbursement benefits change, I will be responsible for full payment through alternative payment methods;” however, the Court finds that this statement does not in any way evidence an understanding by the debtor that Bethel was either extending credit to her or loaning her the money for her education. It simply says that if the employer failed to reimburse Smith, she would be responsible for making some type of payment arrangements with Bethel. It does not specify what those arrangements would be. There is nothing to indicate that, if that situation arose, Bethel would loan Smith the money or extend credit to her. A number of courts faced with similar facts have found this situation to be no different than other unsecured debts. *Feyes v. Spring Arbor College (In re Feyes)*, 228 B.R. 887 (Bankr. N.D. Ohio 1998) (holding that an extension of credit to a student which was not evidenced by a promissory note was dischargeable); *Peller v. Syracuse University (In re Peller)*, 184 B.R. 663 (Bankr. D.N.J. 1994) (finding that because no promissory note was executed, a form signed by the debtor and the debtor’s son which stated “each of them agrees to pay or make arrangements for payment . . . of all fees and charges” did not give rise to a non-dischargeable judgment under § 523(a)(8); *Johnson v. Virginia Commonwealth University (In re Johnson)*, 222 B.R. 783 (Bankr. E.D. Va. 1998) (finding that a failure to pay tuition where no promissory note was executed was dischargeable); *Boston University v. Mehta (In re Mehta)*, 310 F.3d 308 (3rd Cir. 2002) (holding that a university guidebook provision which stated that the student agreed to pay all applicable fees and charges did not evidence an intent by the university to loan a student money nor did it demonstrate an understanding by the student that he was receiving a loan); *Cazenovia College v. Renshaw (In re Renshaw)*, 222 F.3d 82 (2nd Cir. 2000) (finding that a reservation agreement which stated that the student agreed to be bound by various payment provisions did not prove that the college promised to extend credit to the student or that the college reached some sort of agreement with regard to extending credit to the student).

The SUCCESS program at Bethel is an on-going service the college provides to the community. Every student who participates in the SUCCESS program at Bethel signs the “Agreement for Payment Method” form. The Court would assume that by virtue of its organized nature, the program is a profitable and successful one for Bethel. The Court also assumes that Bethel receives full payment from most of the students in the program. If it did not, surely Bethel would have the students sign a promissory note before enrolling for classes rather than having the student sign the payment agreement which indicates nothing more than the students will make arrangements if their employer fails to

reimburse them. A simple promise to make arrangements in the future cannot give rise to a non-dischargeable judgment under the Bankruptcy Code. Had Bethel presented a promissory note to the debtor or made specific payment arrangements with Smith, the outcome of this case would be different.

III. ORDER

It is therefore **ORDERED** that:

- (1) the Debtor's Motion for Summary Judgment is **GRANTED**;
- (2) Bethel College's Objection to Debtor's Motion for Summary Judgment is **OVERRULED**;
- (3) Bethel College's Motion for Summary Judgment is **DENIED**; and
- (4) the debt owing to Bethel College from Jessica Smith in the amount of \$8,073.75 is **DISCHARGED**.

Mailing information:

debtors

Lloyd Utley, attorney for debtors

Matt Maddox, attorney for Bethel College