UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE:

WILLIAM L. PHILLIPS,
THERESA A. PHILLIPS,

DEBTORS.

CASE NO. 09-22762-PJD
(formerly 90-30934-D)
Chapter 7

WILLIAM L. PHILLIPS
Plaintiff,

V.

Adversary Proceeding No. 09-00122

TENNESSEE STUDENT ASSISTANCE CORPORATION, EDUCATIONAL CREDIT MANAGEMENT CORP., NCO FINANCIAL SYSTEMS, INC. and GC SERVICES, L.P.
Defendants.

ORDER ON COMPLAINT
COMBINED WITH RELATED ORDERS AND NOTICE OF THE ENTRY THEREOF

The matter before the court arises out of the Complaint filed by Chapter 7 debtor William L. Phillips ("Debtor") against Tennessee Student Assistance Corp., Educational Credit Management

Corp., NCO Financial Systems, Inc., and GC Services, L.P. (collectively "Defendants"). By virtue of 28 U.S.C. § 157(b)(2)(A) and (I), this is a core proceeding. The following shall constitute the court's findings of fact and conclusions of law in accordance with FED. R. BANKR. P. 7052.

Debtor filed a voluntary joint Chapter 7 petition on December 4, 1990. A final decree closing the case and granting Debtor a discharge from all dischargeable debts was entered on June 17, 1991. The debt owed Defendants arose out of educational loans obtained by Debtor between 1980 and 1983 for a total principal amount of $8,400.00. The debt owed Defendants was scheduled in the 1990 case, but no complaint seeking a determination of the dischargeability of that debt was filed by Debtor or the Defendants during the pendency of the case.

Nearly nineteen years later, on March 12, 2009, Debtor filed a Motion to Reopen Case for the sole purpose of filing a complaint to determine whether the debt for educational loans owed the Defendants is dischargeable.[1] That motion was granted, and on March 16, 2009 a Complaint was filed seeking the dischargeability of the student loan debt. Defendants filed an Answer and Amended Answer to the Complaint. This court conducted a hearing on the Complaint on September 11, 2012 during which the Debtor and Diana Hale, Assistant Registrar-Student Records/Custodian of Records, University of Memphis, testified.

The parties in open court orally stipulated to these documents: Tennessee Educational Records as Evidence Act, Records Custodian's Affidavit and Certification of Domestic Documents Not Under Seal; Course of Change Application; Transcript of Debtor; and Transcript Guide. The parties stipulated as to all issues except the date on which the Debtor ceased to carry, at an eligible

[1] The Motion to Reopen Case was prompted when Defendants recently contacted Debtor seeking repayment of the debt. Although Debtor told Defendants' representative about the 1991 discharge, Defendants took the position that the discharge did not affect the debt owed to them, and continued the collection efforts.

institution, at least one-half the normal full-time academic work load. Pursuant to the terms of the notes evidencing the debt owed Defendants, "repayment of the outstanding principal and interest shall be made over a period commencing nine months after the date which the maker ceases to carry, at an 'eligible institution,' at least one-half the normal full-time academic work load, as determined by such institution." The parties stipulated that a normal full-time academic work load at Memphis State University (now University of Memphis) was twelve (12) to eighteen (18) hours.

Debtor's transcript and testimony reveal that Debtor first enrolled at Memphis State University (now University of Memphis) for the Fall Semester 1980 and that he received his Bachelor of Arts degree at the end of the Summer Semester 1984, on August 19, 1984. Debtor's transcript and testimony reveal that he enrolled again for the Spring Semester 1985 (which began on January 17, 1985), but that he completed only one 3- hour course, Acct 2010, and that he dropped a second 3- hour course, Econ 2110. The deadline for dropping courses during the Spring Semester 1985 was March 8, 1985.[2]

Among the stipulated documents provided by the parties is a document entitled "Memphis State University---Change of Course Application," which is dated January 12, 1990, and which indicates that it affects the student William L. Phillips and the course "Econ 2110." The Change of Course Application contains the handwritten words "Retroactive Dp Sp 1985." Because the date on which the loan first became due depends on when the Debtor dropped the second 3-hour course (Econ 2110), the effect of the "Retroactive Dp Sp 1985" language is critical.

Prior to the hearing, Debtor filed a Motion in *Limine* Regarding the Effective Date of Amendments to 11 U.S.C.§ 523(a)(8)(A). The motion was granted, and this court will apply the five-

[2] Debtor also enrolled in and successfully completed two 3-hour courses during the Spring Semester 1990.

year period provided for in the Bankruptcy Code prior to the enactment of the Crime Control Act of 1990 (Pub. L. No. 101-147)[3] and not the seven-year period in the Crime Control Act of 1990. The Debtor's Chapter 7 bankruptcy case was filed on December 4, 1990, and the amendments to § 523(a)(8)(A) did not become effective until May 28, 1991.

The court has considered the statements of counsel, the testimony of the witnesses and the case record as a whole in determining whether the debt owed the Defendants is a dischargeable debt under 11 USC § 523(a)(8)(A). This opinion is limited to the question of whether the indebtedness is dischargeable because more than five years elapsed between the date such loan first became due and the date of the filing of the bankruptcy petition on December 4, 1990.

One of the policies underlying the Bankruptcy Code is the provision of a fresh start to the honest, but unfortunate, debtor. *In re Clay*, 12 B.R. 251, 255 (Bankr. N.D, Iowa 1981); *In re Mendoza*, 16 B.R. 990, 993 (Bankr. S.D. Cal. 1982). To further this policy, courts have held that exceptions to dischargeability must be narrowly construed against the creditor's objections. The exceptions should be strictly construed in favor of the debtor. *See In re Rembert*, 141 F.3d 277, 281 (6th Cir. 1998); *In re Ward*, 857 F.2d 1082, 1083 (6th Cir. 1988); *In re Klapp*, 706 F.2d 998, 999 (9th Cir. 1983); *In re Crouch*, 199 B.R. 690, 691 (9th Cir. BAP 1996). Exceptions to discharge are to "be strictly construed against the objecting creditor and liberally in favor of the debtor." 4 *Collier on*

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[3] Prior to the Crime Control Act of 1990, 11 U.S.C. 523 § (a)(8)(A) stated as follows:

> (8) for an educational 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 a nonprofit institution unless—
>
> (A) such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition;"

11 U.S.C. 523 § (a)(8)(A)(1990).

Bankruptcy ¶ 523.05 (16th ed. Rev. 2009) citing *In re Crosswhite,* 148 F.3d 879 (7th Cir. 1998); *Equitable Bank v. Miller (In re Miller),* 39 F.3d 301 (11th Cir. 1994); *Boyle v. Abilene Lumber, Inc. (In re Boyle)* 819 F.2d 583 (5th Cir. 1987); *In re Tully,* 818 F.2d 106 (1st Cir. 1987).

In cases construing 11 U.S.C. § 523(a)(8), courts have held that "the creditor has the burden to show that the student loan became due within five years before the date of the petition being filed...." *In re Norman,* 25 B.R. 545, 547 (Bankr. S.D. Cal. 1982) (citing *In re Wright*, 7 BR 197, 200 (Bankr. N.D. Ala.1980).

The policy underlying the student loan exception to discharge has its roots in Congress' desire that debtors with student loans would only file bankruptcy for sound reasons, and not just because of a mere desire to avoid paying the obligation. Congress adopted a bright line test to effectuate this policy. Prior to the Crime Control Act of 1990, educational loans were excepted from discharge unless at least five years had elapsed between the due date for the loan repayment and the filing of the petition in bankruptcy.

The burden is on the objecting creditor to prove that the five-year period has not been met. Defendants here have argued that the 1990 Change of Course Application provides proof that the three-hour course, Econ 2110, was dropped in 1990 and not in 1985. Interpreting the Change of Course Application in this manner would mean that Debtor was still taking at least one-half the normal full-time academic work load during the Spring Semester 1985, and that the nine-month period triggering the commencement of the repayment period would have ended after February, 1986-a date within five years of the filing of the petition in December 1990.

The problem with this interpretation of the Change of Course Application is that Debtor testified that he dropped the course well before the last day of the drop period, which ended on March

8, 1985. Debtor testified that, during his years as a student at Memphis State University, he dropped several courses, and he always did so during the first two to three weeks of classes, which would have been well within the drop period.[4] The court found Debtor to be a highly credible witness and found his testimony to be persuasive.

Moreover, Debtor's testimony regarding the usual manner in which he dropped courses while he was a student, is consistent with the testimony of Ms. Hale, the Assistant Registrar. Ms. Hale testified that when a student dropped a course by the last day of the drop period no special signatures on an application was required. The debtor's signature does not appear on the Change of Course Application. In addition, the Dean's office, which signed the 1990 Change of Course Application authorizing the retroactive drop of the course, determined that a retroactive drop of the 1985 course was appropriate. The Assistant Registrar testified that her office would not have been told the reason for the retroactive drop; her office simply would have been given the proper paperwork and signature from the Dean's office. No one has testified that Debtor applied for the retroactive Change of Course Application. Debtor testified that he did not apply for it, and that he did not know that it was possible to drop a course retroactively—in this case five years later. The court has no evidence before it indicating who initiated the Change of Course Application. The court should not and will not engage in speculation on facts not in evidence, and will not infer that Debtor initiated the application.

The Change of Course Application itself has the handwritten and partially encircled words, "Retroactive Dp Sp 1985." Spring Semester 1985 is the time period when Debtor testified that he dropped the course. Random House College Dictionary defines the word "retroactive" as "operative with respect to past occurrences." RANDOM HOUSE COLLEGE DICTIONARY 1128 (Rev. ed. 1980).

[4] The official transcript shows that Debtor dropped five classes while he was a student at Memphis State University.

Similarly, Black's Law Dictionary defines the word "retroactive" as "...extending in scope or effect to matters that have occurred in the past." BLACK'S LAW DICTIONARY 1343 (8th ed. 2004). These definitions call to mind the legal term, *nunc pro tunc*, which Black's Law Dictionary defines as "[Latin 'now for then'] Having retroactive legal effect..." (emphasis added). *Id.* at 1100. Black's Law Dictionary also notes: "When an order is signed 'nunc pro tunc' as of a specified date, it means that a thing is now done which should have been done on the specified date." *Id. (*quoting 35A C.J.S. *Federal Civil Procedure* §§ 370 at 556 (1960).

The fact that the Change of Course Application states that it is to have retroactive effect, along with the Debtor's testimony that he dropped the course during the Spring Semester 1985, persuades the court that it should give effect to the "retroactive" language of the Change of Course Application. This is consistent with the generally held view that exceptions to dischargeability are to be strictly construed against the objecting creditor and liberally in favor of the debtor.

The court finds that the course was dropped before the last day for dropping courses during the Spring Semester 1985, and that the Debtor ceased to carry at least one-half the normal full-time academic work load at that time. As a result, the first installment of the debt owed the Defendants came due prior to the five-year period before Debtor filed the petition in bankruptcy.

The court finds that the debt owed Defendants by Debtor is a dischargeable debt pursuant to 11 U.S.C. § 523(a)(8)(A)(1990). Additionally, the court finds that the debt owed Defendants by Debtor was discharged pursuant to the June 17, 1991 order of discharge entered in the Chapter 7 case No. 90-30934.

cc: Debtor
Attorney for Debtor
Defendants
Defendants' Attorney
Chapter 7 Trustee
U.S. Trustee