State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. HEA 20864-15

AGENCY DKT. NO. HESAA

NEW JERSEY HIGHER EDUCATION
STUDENT ASSISTANCE AUTHORITY
(NJHESAA; THE AGENCY),

Petitioner,

v.

ROBERT D. WILLIAMS,

Respondent.

Kortney Swanson Davis, Esq., for petitioner (Schachter Portnoy, LLC, attorneys)

No appearance by Robert D. Williams, respondent, pro se

Record Closed: March 14, 2016 Decided: March 30, 2016

BEFORE **JOSEPH LAVERY,** ALJ t/a:

STATEMENT OF THE CASE

The **New Jersey Higher Education Student Assistance Authority (HESAA, the agency**), **petitioner**, acting under authority of 20 U.S.C.A. Sec.

1095(a) and (b) and 34 C.F.R. 682.410(b)(9) moves to continue an existing order of wage garnishment against respondent.

Respondent, Robert Williams, contests this appeal by the agency and seeks relief from the existing garnishment.

Today's decision:

(a) grants the agency's petition to continue the administrative order of garnishment, and

(b) directs the agency to assure that the employer deducts no more than 15 percent of respondent's disposable income.

PROCEDURAL HISTORY

This is an appeal brought by the agency, NJHESAA, seeking to continue an administrative order garnishing the wages of respondent. It was filed in the Office of Administrative Law (OAL) on December 17, 2015. Respondent Williams' cross-appeals, challenging the garnishment.

The Acting Director and Chief Administrative Law Judge appointed the undersigned on January 7, 2016, to hear and decide the matter. Hearing was scheduled as an in-person proceeding and convened on February 11, 2016. Respondent did not appear, but the agency did. The case went forward with the testimony of the agency, as the law requires, with the record closing at completion of the hearing on the same day.

The record was reopened by letter of the undersigned dated March 7, 2016, asking the parties to respond to a point of law. The agency did so through letter of counsel dated March 10, 2016, date-stamped as received in the OAL on

March 14, 2016. Mr. Williams did not respond. At that time, the record closed finally.

ANALYSIS OF THE RECORD

Background:

Respondent, NJHESAA (the agency) presented its case through documentary exhibits and the testimony of its witness, **Aurea Thomas**:

Ms. Thomas adopted the affidavit of Janice Seitz (Exhibit P-1), Program Officer, Servicing Collection Unit of NJHESAA, as her own, based on Ms. Thomas' experience and specific knowledge of the case. She verified that she was personally familiar with all the information contained within the affidavit. Further, Ms. Thomas explained how the exhibits, which disclosed respondent's loan history and eventual default, supported the agency's request that an existing garnishment order be continued:

Ms. Thomas testified that appellant had executed a Federal Stafford Loan Master Promissory Note on May 2, 2002 (Exhibit P-2). The amount borrowed from Sallie Mae Education Trust was intended to pay tuition to DeVry University. Eventually, respondent Williams defaulted in its payments to the lender, which thereafter submitted to NJHESAA, the guarantor, a claim for payment of principal and accumulated interest (Exhibits P-3, P-4). The amount sought was $18,288.72 on the principal, plus interest.

The agency, as guarantor of the loan, on October 30, 2008, repaid the lender, Navient-Deutsche Bank and Trust. Respondent Williams was then obligated to forward scheduled payments to NJHESAA, now holder of the note. He did not voluntarily, claiming that his responsibility ended when his debts were discharged through bankruptcy. (Exhibit P-5).

The agency then gave notice to respondent Williams that, under the relevant federal law, the loan was not dischargeable through bankruptcy (Exhibits P-6, P-7) and that the agency intended to garnish his wages, absent either remission of the amount or his filing of an appeal. Respondent did neither, and an administrative order of garnishment ensued. It is from this that appellant asks relief, re-asserting that his debt was discharged in Bankruptcy Court.

In post-hearing letter-brief, the agency further took the position as a matter of law that student loans cannot be discharged[1] unless repayment of the loans would cause undue hardship. The agency contends that before such a finding can be made, the U.S. Bankruptcy Court must hold a separate adversary hearing and apply the "Brunner Test." That court must also weigh the totality of the circumstances and thereafter render a written decision explaining why a borrower's student loan would be eligible for discharge. The agency declares that it is without any knowledge confirming that this separate adversary proceeding occurred, or that the Brunner Test was applied, or that a written decision ever issued from the U.S. Bankruptcy Court granting a discharge of respondent Williams' student loans. For that reason, the agency maintains, the administrative garnishment order should be upheld.

Findings of Fact:

To resolve those material facts in dispute, **I FIND** the following:

1. On April 19, 2013, an order of discharge was issued by United States Bankruptcy Judge Raymond T. Lyons, Jr. granting respondent a discharge under Section 727 of Title 11, United States Code (the Bankruptcy Code).

[1] Letter-brief, Kortney Swanson Davis, Esq., dated March 10, 2016 to the administrative law judge.

2. Judge Lyons' order did not address disposition of respondent's student loan, nor did it apply the Brunner test.
3. Subsequent proceedings before United States Bankruptcy Judge Christine M. Gravelle did not dispose of respondent's request for discharge of his student loan debt, which is not disputed as to amount or underlying calculations.

Conclusions of Law

Burden of Proof:

The burden of proof falls on the agency in enforcement proceedings to prove violation of administrative regulations, Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The agency must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings, Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion, Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power, State v. Lewis, 67 N.J. 47 (1975). Credibility, or more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well, Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

Applying the Law to the Facts:

It is clear that student loans of this nature, which are an exception to discharge of debt provided under the Bankruptcy Code, cannot be discharged[2] unless repayment of the loans would cause "undue hardship." 11 U.S.C. Sec. 523(a)(8)B. Undue hardship is determined in Bankruptcy Court by applying what is known there as the "Brunner test." This test originated in the 2d Circuit of the United States Court of Appeals, in the case of Brunner v. N.Y. State Higher Educ. Services Corp., 831 F2d 395 (2d Cir. 1987). The test was adopted for use in our 3rd Circuit by the court in Pa. Higher Educ. Assistance Agency v. Faish (In re Faish), 72 F.3d 298, 307 (3d Cir. 1995). In an unreported opinion of the United States District Court for the District of New Jersey, the court noted that the Third Circuit had adopted the Brunner test, and acted consistent with its application in New Jersey, reiterating the elements of the test adopted in Brunner v. N.Y. State Higher Educ. Services Corp, supra, in its opinion:

> 1. 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 loan.
>
> 2. Additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period for the student loan, and
>
> 3. The debtor has made good faith efforts to repay the loan.
>
> [Vasilyeva v. Educational Resources Institute, Inc., 2009 U.S. Dist. Lexis 98400, at *4-5 (D. N.J. 2009).

The court went on to observe that, in the 3d Circuit, Bankruptcy Courts must apply this test. Id at *10.

[2] See, letter-brief, Kortney Swanson Davis, Esq., dated March 10, 2016, to the administrative law judge.

Therefore, in view of the foregoing analysis, respondent, who, in claiming escape from the self-executing exception to discharge under 11 U.S.C. Sec. 523(a)(8)B, has raised an affirmative defense. Doing so, he must prove that the Bankruptcy Court in which he sought relief has: addressed the Brunner requirements, applied them to his circumstances, and ruled that he falls outside the exception, thus allowing Judge Lyons' discharge order to protect him from repaying his student loan. No such proofs are apparent on this record.

Judge Lyons did grant a discharge from debt (Exhibit P-8)[3], as found at p. 5, ante. Nevertheless, neither Judge Lyons' order nor in the record of subsequent proceedings before Judge Christine M. Gravelle, is there any document memorializing a Brunner disposition (Exhibits P-8, P-10). Respondent Williams himself neither appeared nor offered specific documents which would support his bare assertion that "The Brunner Test was applied to my case . . . ." (Exhibit P-8, p.1).

Consequently, the evidence preponderates that the Brunner test was not applied, and that no decision was made in bankruptcy court which would place respondent outside the exception of Sec. 523(a)(8), by reason of undue hardship. A reasonably cautious mind could not arrive at any other conclusion, on this record. Bornstein v. Metropolitan Bottling Co., 26 N.J. at 275.

All that remains is to acknowledge that under authority of the provisions of 20 U.S.C.A. Sec. 1095(a) and (b) and 34 C.F.R. 682.410(b)(9)(i)(M) and (N), hearing was held before the undersigned. During this proceeding, the agency, NJHESAA, was required to show by a preponderance of evidence that (a) the debt exists in the amounts it has calculated, (b) that the debtor is delinquent. and (c) that the terms of repayment compelled through its administrative order of garnishment fairly fall within the maximum of 15 percent of respondent's disposable pay. This the agency has ordered done as to its order, though it has

[3] Adversary Complaint, Page 12 of 16.

not confirmed actual compliance by the employer in withholding no more than the 15 percent level of disposable wages.

Conclusions:

I **CONCLUDE** for the reasons stated that appellant's student loan has not been discharged in bankruptcy.

Further, I **CONCLUDE** that respondent has been delinquent in his loan payments in the amounts calculated by NJHESAA.

Finally, I **CONCLUDE** that the existing garnishment order is appropriate and should be affirmed, but that the agency, which concedes that it has not done so to date, should now investigate and thereafter assure that the garnishment is, in fact, not being deducted beyond the 15 percent maximum by respondent's employer.

DECISION

I ORDER, therefore, that the amount defined of record, plus accrued interest and fees continue to be recovered by garnishment. However, the amount deducted for any pay period may not exceed 15 percent of disposable pay. 20 U.S.C.A. 1095(a)(1).

I ORDER further that the agency, NJHESAA, determine factually that the employer is not withholding more than the 15 percent portion of respondent's disposable pay.

This decision is final pursuant to 34 C.F.R. § 682.410(b)(9)(i)(N) (2010).

March 30, 2016
DATE

JOSEPH LAVERY, ALJ t/a

Date Received at Agency: _____

Date Mailed to Parties: _____

LIST OF WITNESSES:

For petitioner:

Aurea Thomas

For respondent:

None

LIST OF EXHIBITS:

For petitioner NJHESAA:

P-1 Affidavit of Janice Seitz, dated November 2, 2015, with attachment

P-2 Federal Stafford Master Promissory Note executed by Robert Williams to Sallie Mae Education Trust Panama City, FL, dated May 2, 2002

P-3 Claim Form submitted to NJHESAA by lender for payment of principal and interest owed by Robert Williams, borrower

P-4 Default Master Screen

P-5 Payment Screen: Robert D. Williams

P-6 Correspondence Screen: Robert D. Williams.

P-7 Blank Forms: Notice Prior to Wage Withholding and Request For Hearing

P-8 Pages from adversary complaint file in Bankruptcy Court before Hon. Christine Gravelle, pp. 2 through 16 (includes copy of Request For Hearing, undated, Robert D. Williams sent to NJHESAA)

P-9 Unsigned, undated NJHESAA Notice of Intent letter to withhold wages in the amount of $235 per month: Robert D. Williams

P-10 Case Summary: Robert D. Williams, before US Bankruptcy Court before Judge Christine M. Gravelle

For respondent:

None