



ORDER NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

MICHELE N. GUTEK,

Debtor.

Case No. 2:14-bk-28312 RK

Chapter 7

Adv. No. 2:14-ap-01838 RK

MICHELE N. GUTEK,

Plaintiff.

**ORDER DENYING PLAINTIFF'S
MOTION FOR DEFAULT JUDGMENT
AND SETTING STATUS CONFERENCE**

vs.

WELLS FARGO EDUCATION
FINANCIAL SERVICES,

Defendant.

DATE: September 17, 2015
TIME: 10:00 a.m.
PLACE: Courtroom 1675
255 East Temple Street
Los Angeles, CA 90012

The above entitled adversary proceeding came on for hearing before the undersigned United States Bankruptcy Judge on September 17, 2015 on the motion of Plaintiff Michele N. Gutek ("Plaintiff") for default judgment. David Joel Follin, Law Offices of David Joel Follin, appeared for Plaintiff. No appearance was made by Defendant Wells Fargo Education Financial Services ("Defendant").

On July 9, 2015, Plaintiff filed the instant motion for default judgment under Local Bankruptcy Rule 7055-1. At the hearing on the motion on July 28, 2015, the court set a "default prove-up" evidentiary hearing on the motion for September 17, 2015. At the

1 “default prove-up” evidentiary hearing, the court received the testimony of Plaintiff and
2 counsel for Plaintiff by declaration, heard argument from counsel for Plaintiff and took
3 the motion under submission after hearing argument from counsel. Having considered
4 the moving papers and the evidence received in support thereof, the court now rules on
5 the motion and denies the motion.

6 Although generally, in considering a motion for default judgment, the factual
7 allegations of the complaint, except those relating to the amount of damages, are taken
8 as true, *TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917-918 (9th Cir. 1987),
9 courts have “broad discretion” as to whether to enter default judgment, *Lu v. Liu (In re*
10 *Liu)*, 282 B.R. 904, 907 (Bankr. C.D. Cal. 2002), including discretion to require the
11 plaintiff to offer sufficient evidence to establish a *prima facie* case for relief, Fed. R. Civ.
12 P. 55(b)(2), made applicable to this adversary proceeding under Fed. R. Bankr. P.
13 7055.

14 An individual may discharge a debt incurred “for an educational . . . loan made,
15 insured, or guaranteed by a governmental unit, or made under any program funded in
16 whole or in part by a governmental unit or nonprofit institution,” if “excepting such debt
17 from discharge . . . would impose an undue hardship on the debtor and the debtor’s
18 dependents.” 11 U.S.C. § 523(a)(8). Congress did not define “undue hardship” as used
19 in the statute. However, courts have noted that “[t]he existence of the adjective ‘undue’
20 indicates that Congress viewed garden-variety hardship as [an] insufficient excuse for a
21 discharge of student loans.” *Brunner v. New York State Higher Education Services*
22 *Corporation (In re Brunner)*, 46 B.R. 752, 753 (S.D.N.Y. 1985), *aff’d*, 831 F.2d 395 (2d
23 Cir.1987). The Ninth Circuit has adopted the Second Circuit’s three-part standard for
24 determining “undue hardship” under 11 U.S.C. § 523(a)(8) in *Brunner. United Student*
25 *Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108, 1112 (9th Cir. 1998). This test
26 requires the debtor to prove:

27 (1) that the debtor cannot maintain, based on current income and
28 expenses, a ‘minimal’ standard of living for herself and her dependents if
forced to repay the loans; (2) that additional circumstances exist indicating

1 that this state of affairs is likely to persist for a significant portion of the
2 repayment period of the student loans; and (3) that the debtor has made
good faith efforts to repay the loans.

3 *In re Brunner*, 831 F.2d at 396. “The debtor has the burden to prove all three prongs of
4 the *Brunner* test. If the debtor fails to prove any one of the three prongs then the loan
5 will not be discharged.” *Carnduff v. United States Department of Education (In re*
6 *Carnduff)*, 367 B.R. 120, 127 (9th Cir. BAP 2007).

7 **1. Debtor’s Current Ability to Maintain a Minimal Standard of Living**

8 The first *Brunner* prong requires the debtor to prove that she “cannot maintain,
9 based on current income and expenses, a ‘minimal’ standard of living for herself and
10 her dependents if forced to repay the loans.” *In re Brunner*, 831 F.2d at 396. A
11 “minimal standard of living” is higher than the federal poverty guidelines but lower than a
12 middle class standard of living. *Education Credit Management Corporation v. Howe (In*
13 *re Howe)*, 319 B.R. 886, 889 (9th Cir. BAP 2005). “The meaning of a ‘minimal standard
14 of living’ must be determined in light of the particular facts of each case.” *Id.* at 890. A
15 court may use the Internal Revenue Service Collection Financial Standards (“IRS
16 Standards”) as “one piece of evidence,” but must conduct an individualized analysis into
17 a debtor’s actual expenses. *Id.* at 890-893. Ultimately, “[t]he method for calculating a
18 debtor’s average monthly expenses is a matter properly left to the discretion of the
19 bankruptcy court.” *In re Pena*, 155 F.3d at 1112.

20 To meet the first prong:

21 [D]ebtor must demonstrate more than simply tight finances. In defining
22 undue hardship, courts require more than temporary financial adversity,
23 but typically stop short of utter hopelessness. The proper inquiry is
whether it would be ‘unconscionable’ to require the debtor to take steps to
earn more income or reduce her expenses.

24 *PHEAA v. Birrane (In re Birrane)*, 287 B.R. 490, 495 (9th Cir. BAP 2002) (*citing*
25 *United Student Aid Funds, Inc. v. Nascimento (In re Nascimento)*, 241 B.R. 440,
26 445 (9th Cir. BAP 1999)).

27 Plaintiff’s evidence in support of the motion is brief and conclusory. The
28 evidence consists of her two-page declaration filed with the motion and two counsel

1 declarations, one filed with the motion and one filed on the date of the hearing on
2 September 15, 2015. ECF 24 & 33. The counsel declarations are inadmissible
3 because counsel lacks personal knowledge to testify on the circumstances affecting his
4 client as required by Federal Rule of Evidence 602. In considering the motion for
5 default judgment, the court may also consider the allegations of the complaint, but in
6 this case, the allegations of the complaint track and are substantially identical to the
7 two-page declaration of Plaintiff in support of the motion. ECF 1 & 24.

8 The substance of Plaintiff's testimony by declaration is as follows:

9 6. Requiring me to pay the education debt of \$66,651.53 will impose a
hardship that I will not be able to sustain a living.

10 7. At the time I filed for bankruptcy on September 26, 2014, my net
income was \$3,243.00 and my expenses were \$2,922.00 per month. I
11 am employed as a Freelance Production Assistant. My current income is
only \$931.24 and my expenses are \$1,060.46.

12 8. I am required now to pay \$501.64 monthly on the three (3) student
loans and I have not been able to make any payment as of May 6, 2014.

13 9. I currently cannot maintain a minimum standard of living if forced to
repay these loans.

14 10. I did not wish to file for bankruptcy. I had no other option when Wells
Fargo Education Financial Services and Key Bank National Association
15 (additional student loan company) would not work with me in arriving at a
reasonable prepayment plan in order to allow me to maintain a minimal
16 standard of living. I sought relief under the bankruptcy code to obtain a
fresh start free from unsecured debts.

17
18 Plaintiff's Declaration, ECF 24 at 12.

19 As stated earlier, Plaintiff's testimony is brief and conclusory, and in this court's
20 view, insufficient to meet her burden under *Brunner*. As acknowledged in her counsel's
21 supplemental declaration, Plaintiff is a single woman with no dependents, and as
22 represented at the hearing, she is 42 years of age. Plaintiff appeared with her counsel
23 at the hearing, and she appeared to be in good health. There is no evidence that she
24 has any health problems that would keep her from being employed full time, which she
25 is not now. Based on the evidentiary showing at the hearing, the court finds that
26 Plaintiff has not met her burden of proving by a preponderance of the evidence that she
27 lacks the current ability to maintain a minimal standard of living and that it would be
28 unconscionable to require her to take more steps to earn more income, such as training

1 for other employment other than her chosen field of being a freelance videographer,
2 photographer and writer, or seeking other gainful employment, which may not be to her
3 liking, but would not be a matter of physical inability.

4 **2. Likelihood that Inability to Pay will Persist for a Significant Portion of the**
5 **Repayment Period of the Loan**

6 The second *Brunner* prong requires the debtor to prove that “additional
7 circumstances exist indicating that this state of affairs is likely to persist for a significant
8 portion of the repayment period of the student loans.” *In re Brunner*, 831 F.2d at 396.
9 This second prong is intended to effect “the clear congressional intent exhibited in
10 section 523(a)(8) to make the discharge of student loans more difficult than that of other
11 nonexcepted debt.” *Id.* (internal quotations omitted). Therefore, “[r]equiring evidence
12 not only of current inability to pay but also of additional, exceptional circumstances
13 strongly suggestive of continuing inability to repay over an extended period of time,
14 more reliably guarantees that the hardship presented is ‘undue.’” *Id.* These additional
15 circumstances, however, need not be “exceptional,” “except in the sense that they are
16 tenacious and demonstrate insurmountable barriers to the debtor’s financial recovery
17 and ability to pay for a significant portion of the repayment period.” *Nys v. Educational*
18 *Credit Managment Corporation (In re Nys)*, 308 B.R. 436, 446 (9th Cir. BAP 2004).

19 In *Nys*, the BAP identified a non-exhaustive list of 12 factors which a court may
20 consider to show such “additional circumstances”:

21 [(1)] serious mental or physical disability or the debtor’s dependents which
22 prevents employment or advancement; [(2)] the debtor’s obligations to
23 care for dependents; [(3)] lack of, or severely limited education; [(4)] poor
24 quality of education; [(5)] lack of usable or marketable job skills; [(6)]
25 underemployment; [(7)] maximized income potential in the chosen
educational field, and no other more lucrative job skills; [(8)] limited
number of years remaining in the [debtor’s] work life to allow payment of
the loan; [(9)] age or other factors that prevent retraining or relocations as
a means for repayment of the loan;¹ [(10)] lack of assets, whether or not

26 ¹ “The debtor’s age has been held to be a factor in student loan cases [C]onsideration of
27 the debtor’s prospective earning capacity is consistent with the requirement that the Court take
28 into account the long term effect of debtor’s current financial condition.” *Sequeira v. Sallie Mae*
Servicing Corp. (In re Sequeira), 278 B.R. 861, 866 (Bankr. D. Or. 2001).

1 exempt, which could be used to pay the loan; [(11)] potentially increasing
2 expenses that outweigh any potential appreciation in the value of the
3 debtor's assets and/or likely increases in the debtor's income; and [(12)]
4 lack of better financial options elsewhere.

5 *Id.* at 446-447.

6 Plaintiff's evidentiary showing does not meet her burden under *Brunner* that
7 "additional circumstances exist indicating that this state of affairs is likely to persist for a
8 significant portion of the repayment period of the student loans." *In re Brunner*, 831
9 F.2d at 396. Plaintiff could seek other employment, and there are no barriers,
10 impediments or other circumstances, such as those identified in *Nys* to show that she
11 would be incapable of repaying her loans, given that at age 42, she has probably over
12 20 more years of a productive work life.

13 **3. Debtor's Good Faith Efforts to Repay the Loan**

14 The third *Brunner* factor requires the debtor to prove that she "has made good
15 faith efforts to repay the loans." *Brunner*, 831 F.2d at 396. "The 'good faith' test
16 encompasses the notion that a debtor may not willfully or negligently cause his own
17 default, but rather his condition must result from factors beyond his reasonable control."
18 *Wallace v. Wallace (In re Wallace)*, 259 B.R. 170, 185 (C.D. Cal. 2000) (internal
19 quotations omitted). "Factors to be considered include the number of payments [the
20 debtor made, attempt to negotiate with the lender, proportion of loans to total debt, and
21 possible abuse of the bankruptcy process." *Id.* (internal citations omitted). "A number
22 of cases, including *Brunner* itself, have concluded that a debtor's effort – or lack thereof
23 – to negotiate a repayment plan is an important indicator of good faith." *Id.*

24 Based on the foregoing, Plaintiff's evidentiary showing does not meet the
25 *Brunner* standard. Plaintiff's statements in her declaration on her efforts to pay the loan
26 and negotiate a repayment plan are uninformative and conclusory. Plaintiff provides her
27 typewritten notes regarding alleged contacts she had with Defendant about negotiating
28 a repayment plan, but the statements in these notes are uncorroborated and lack

1 evidentiary foundation since there is no useful information in the notes regarding whom
2 she spoke with and what their identities and capacities were.

3 Accordingly, the court finds that Plaintiff by her moving papers has failed to
4 establish a *prima facie* case under the *Brunner* standard to warrant relief to discharge
5 her alleged student loan debt with Defendant.

6 The named defendant, Wells Fargo Education Financial Services, has not
7 appeared in this action, though Plaintiff has filed declarations of service on Defendant.
8 Although Plaintiff listed the purported loan numbers and offered into evidence with her
9 declaration some typewritten notes of telephone conversations with persons with
10 unknown identities and capacities purportedly with Defendant, Plaintiff's moving papers
11 did not provide any written documentation of her student loans with Defendant. Plaintiff
12 has not provided sufficient evidence to corroborate that Defendant is the proper party to
13 be sued in that she has not produced written documentation of the loans or even
14 account information to substantiate the existence of the loans with Defendant.

15 It is hereby ORDERED that Plaintiff's motion for default judgment is DENIED.

16 It is further ORDERED that a status conference in this adversary proceeding is
17 set for November 10, 2015 at 1:30 p.m. in Courtroom 1675, Roybal Federal Building,
18 255 East Temple Street, Los Angeles, California. At the status conference, counsel
19 should be prepared to discuss what additional discovery and evidence Plaintiff will need
20 to obtain to prove up her claims.

21 IT IS SO ORDERED.

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24 Date: October 5, 2015



Robert Kwan
United States Bankruptcy Judge