IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA

In the Matter of:

Charles Leon Vest,
Lori Louise Vest, Case No. 10-01950-als7

Debtors Chapter 7

Lori Louise Vest, Adv. Pro. 10-30106-als

Plaintiff

v.

U.S. Department of Education,

Defendant

MEMORANDUM OF DECISION
(date entered on docket: May 26, 2011)

Before the Court is the unopposed Motion for Summary Judgment filed by the United States of America, Department of Education, related to the Debtor-Plaintiff's adversary proceeding seeking discharge of her student loan obligation for undue hardship as provided for at 11 U.S.C. section 523(a)(8). For the reasons discussed below, the Motion is granted.

COURSE OF PROCEEDING

Lori Louise Vest ("Debtor" or "Plaintiff") filed a joint voluntary chapter 7 proceeding on April 17, 2010. An adversary complaint seeking discharge of her student loan obligation in the amount of approximately $3,130 was filed on July 21, 2010. A

scheduling conference conducted on September 27, 2010 established deadlines for discovery and dispositive motions. Upon the granting of an extension of time requested by the Department of Education ("DOE" or "Defendant"), a Motion for Summary Judgment ("Motion") was filed on behalf of the Defendant. No response to the Motion was filed by the Plaintiff. The matter was set for telephonic hearing. Plaintiff's counsel did not participate in the hearing on the Motion.

FACTS

The Plaintiff is 45 years old. In support of her request for discharge of her student loans, she states that her family's income is insufficient to make payments on the obligation and that she has suffered from two strokes and a brain bleed that prevent her from working. Due to her condition the Plaintiff states "[t]hese medical incidents plus the medication that [she] is required to take have caused catastrophic memory loss, seizures, chronic pain . . . in the extremities and back and difficulty with mobility."

Discovery was served by the Defendant upon the Plaintiff seeking information related to her medical condition and inability to make payments on her student loan. Along with these requests, information was also provided to counsel related to available repayment options including the Income Contingent Repayment Program ("ICRP"). According to the Statement of Genuine Issues of Material Fact filed by the DOE, Debtor has not used any months available to her to defer or forbear on repayment of her student loans; she has also failed to re-enroll in the ICRP. She also failed to provide any specific information to support her disability and medical condition.[1] The substance of

[1] A summary of the responses, as contained in the Motion filed by the DOE is as follows:

Defendant's argument is that Plaintiff's failure to produce any evidence supporting her claim of undue hardship means that she will similarly fail to meet her burden of proof at trial.

DISCUSSION

Federal Rule of Bankruptcy Procedure 7056 incorporates Federal Rule of Civil Procedure 56. Rule 56(c)(1) states:

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

"Summary judgment is appropriate if, viewing the evidence favorably to the non-moving party, there is no genuine issue of material fact and the moving party is entitled

---

In Interrogatory # 3, Debtor/Plaintiff was asked to provide all information about her requests of deferment and/or forbearance in repayment of her student loans. She answered that she "can not remember."

In Interrogatory # 4, Debtor/Plaintiff was asked to provide all information about requests for administrative relief. Her answer was much the same – she "[does] not remember any."

In Interrogatory # 18, Debtor/Plaintiff was asked to provide all information that supported her claims as alleged in paragraphs 9 and 10 of her Complaint. The Interrogatory asked for the identification of "each and every medical practitioner" and for contact information for each practitioner involved in her treatment, diagnosis, and prognosis. Defendant's Request for Production was directed to the same such information. Debtor/Plaintiff did not provide any of the specific information in answer to Interrogatory # 18.

Debtor/Plaintiff's response to the Request for Production was contained in counsel's letter to the effect that his client did not keep copies of any of the records being requested and offered nothing more.

to judgment as a matter of law." HealthEast Bethesda Hospital v. United Commercial Travelers of Am., 596 F.3d 986, 987 (8th Cir. 2010). "Summary judgment is not appropriate if the non-moving party can set forth specific facts, by affidavit, deposition, or other evidence, showing a genuine issue for trial." Buam v. Helget Gas Prods., Inc., 440 F.3d 1019, 1022 (8th Cir. 2006) (citing Grey v. City of Oak Grove, 396 F.3d 1031, 1034 (8th Cir. 2004)). Although the Defendant's Motion was unopposed, the Court is required to evaluate whether the Defendant has met its burden to show no genuine issue of material fact exists for trial. See Fed. R. Bankr. P. 7056; N. Slope Borough v. Rogstad (In re Rogstad), 126 F.3d 1224, 1227-28 (9th Cir. 1997). A motion for summary judgment may not be granted merely because no opposition was filed. See also Hibernia Nat'l Bank v. Admin. Cent. Sociedad Anonima, 776 F.2d 1277, 1279 (5th Cir. 1985).

The Bankruptcy Code provides for discharge of educational loans if requiring repayment would impose an "undue hardship on the debtor or debtor's dependents." 11 U.S.C. § 523(a)(8) (2011). The debtor bears the burden of proof by a preponderance of the evidence to establish the existence of an undue hardship. Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 779 (8th Cir. 2009). As established in Long v. Educational Credit Management Corporation, discharge of student loans in this Circuit is based upon an evaluation of the totality of the circumstances. 322 F.3d 549, 553-54 (8th Cir. 2003). In applying this standard, and to reach a determination on whether undue hardship has been shown, courts must examine (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case. Id. at 554 (citing Andresen v. Nebraska

Student Loan Program, Inc. (In re Andresen), 232 B.R. 132 (8th Cir. B.A.P. 1999)). An additional factor to be considered is whether the ICRP[2] is an option for repayment. Lee v. Regions Bank Student Loans (In re Lee), 352 B.R. 91, 95 (B.A.P. 8th Cir. 2006). Under this program an individual's ability to pay is determined based upon adjusted gross income, HHS Poverty Guidelines and special circumstances. Jesperson, 571 F.3d at 781. If after twenty five years the loan has not been repaid the obligation may be canceled. Id. (citing 11 U.S.C. § 685.209(c)(4)(iv)).

The DOE asserts that Plaintiff fails to remember many key issues including any communication with the DOE that she has had regarding repayment and any requests that she has made for administrative relief from repayment or requests for deferment and/or forbearance. According to the Statement of Genuine Issues of Material Fact, Debtor has not used any months available to her to defer or forbear on repayment of her student loans. Further, according to the sworn affidavit by Sheryl Davis, Senior Loan Analyst for the DOE (Exhibit E), Plaintiff requested to be enrolled in the ICRP on January 20, 1998. Her request was granted, and she was enrolled in the program until February 10, 2009 when she was removed because she would not provide to DOE updated information needed to continue her participation. Plaintiff has not requested to be re-enrolled in ICRP. She did not provide the DOE with information when she had the chance to continue in the ICRP program.

The issue of whether this was actually a discovery dispute that would be appropriately addressed pursuant to a Motion to Compel was raised by the Court at the

[2] The Department of Education describes the ICRP as a plan that allows a borrower "to meet your Direct Loan obligations without causing undue financial hardship." Repayment Plans, Federal Student Aid, http:// www. ed. gov/ offices/ OSFAP/ Direct Loan/ Repay Calc/ dlindex 2. html (last visited May 24, 2011).

hearing. Counsel for the Defendant argued that the decision to file for Summary Judgment was based upon two considerations: (1) that based upon the Plaintiff's discovery responses any further attempt to compel more detailed responses would likely not lead to additional information and (2) taking such action would further delay the proceeding. Having reviewed the relevant information, this argument is persuasive in support of the Motion for Summary Judgment.

"Summary judgment is one of the primary weapons in the Federal Rules of Civil Procedure arsenal, all of which are to 'be construed to secure the just, speedy, and inexpensive determination of every action.'" Tinder v. U.S. Dept. of Educ., No. 06-9106, 2007 WL 2532869 at *1 (Bankr. N.D. Iowa Aug. 31, 2007) (citations omitted). Allegations in the complaint do not constitute evidence. "To withstand a motion for summary judgment, the non-moving party 'has an affirmative burden to designate specific facts creating a triable controversy.' Failure to oppose a basis for summary judgment constitutes a waiver of that argument." Omaha Joint Elec. Apprenticeship & Training Comm. v. Stephens, No. A10-8056-TLS, 2011 WL 672000 at *1 (Bankr. D. Neb. Feb. 17, 2011) (citations omitted). In United States v. Ashanti, the court stated that the movant "simply may show – that is, point out to the district court – that there is an absence of evidence to support the non-moving party's case." No. 3:10cv42/MCR/EMT, 2010 U.S. Dist. LEXIS 138700 at *9 (N.D. Fla. Nov. 29, 2010). Here the DOE has done just that by providing the responses (or lack thereof) to the interrogatories and document requests. Based upon the filed documents and the current status of this proceeding, the Plaintiff has not demonstrated any ability to sustain her burden of proof related to the

discharge of the student loan obligation, and therefore judgment as a matter of law is appropriate.

It is hereby Ordered that the Motion for Summary Judgment is granted.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

Parties receiving this Memorandum of Decision from the Clerk of Court:
Electronic Filers in this Adversary Proceeding