18-6011

UNITED STATES BANKRUPTCY APPELLATE PANEL
for THE EIGHTH CIRCUIT

Richelle Page,
Plaintiff/Appellant

v.

National Collegiate Student Loan Trust,
Defendant/Appellee

Appeal from an order of summary judgment granted by the
Hon. Charles Rendlen of the United States Bankruptcy Court for the
Eastern District of Missouri

Reply Brief of Appellant Richelle Page

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3. ARGUMENT

As is true with many appeals, the parties agree on a lot of stuff. They agree on who made the loan, how much it was for, that it exceeded Richelle's cost of attendance by tens of thousands of dollars.... What they disagree on, is TERI's role in Chase's loan program and what that means to the dischargeability of the loan.

National Collegiate says the loan is nondischargeable because: (a) TERI guaranteed loans made under the program and (b) that TERI played a meaningful role in that program by accepting "all loan applications" made under it.[1] But that's not what the record shows.

Whether TERI guaranteed the loan was never established. That allegation comes from an affidavit provided by National Collegiate on summary judgment.[2] Richelle moved to strike the paragraph where that allegation was made.[3] The court, however, declined to rule on the merits of that motion.[4] It decided instead that TERI funded the loan program by possibly receiving some of Chase's mail.[5]

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[1] National Collegiate's Response Brief, at p. 9.

[2] Affidavit on Defendant National Collegiate Student Loan Trust 2006-1's Motion for Summary Judgment, para, 11.

[3] Page Mot. Strike.

[4] Mem. Op. & Order, at p. 11, March 22, 2018.

[5] *Id.* at 10.

Similarly, it was never established that TERI received "all loan applications under the program". Or that it received any loan applications whatsoever. What was established is that Chase: (1) marketed its loan program to students on an application it designed;[6] (2) approved applications it received from borrowers;[7] (3) instructed borrowers to submit verification documents to it by fax or by mail;[8] and (4) disbursed funds to Richelle.[9]

So what was TERI's role?

Based on the evidence before the court, TERI's role was limited to possibly receiving some of those verification documents but only if they were returned by mail.[10] The record does not show whether TERI received any documents.

But even if it had received some documents, and even if it had served as a guarantor, those two things, by themselves, still would not have been enough for TERI to have funded Chase's loan program and thus make the loan nondischargeable. More evidence is needed. Exactly how much more is needed is unclear. But the evidence must be closer to proving TERI's role was so absolute that it reduced

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[6] Page Statement of Material Facts, at ¶ 8.

[7] *Id*. at ¶ 11.

[8] *Id*. at ¶ 10.

[9] *Id*. at ¶ 13.

[10] Loan Instructions Sheet.

Chase's role to that of a mere agent[11] than it is to proving TERI simply served as Chase's postal box.

Congress has carefully amended § 523(a)(8) to except from discharge only certain types of education related debts; the Chase loan is none of those types

Richelle joins National Collegiate in acknowledging that Congress, through its amendments, has indicated a strong desire to expand § 523(a)(8)'s reach and thereby increase the types of debts excepted from discharge.

But here's the thing about those amendments: not one shows an intent by Congress to reach the type of loan at issue here. This loan was neither made by the government nor under a program funded by the government. Nor was it made under a program funded in whole or in part by a nonprofit. Likewise, it wasn't made solely to cover Richelle's cost of attendance at an eligible institution.

This loan is dischargeable.

That the promissory note says otherwise matters not. Bankruptcy courts routinely reject such clauses.[12]

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[11] *The Educ. Res. Inst., Inc. v. Hammarstrom (In re Hammarstrom)*, 95 B.R. 160, 166 (Bankr. N.D. Cal. 1989).

[12] *See e.g., In re Johnson*, WL 5120913, at *1 n. 5 (Bankr. M.D. Pa. Dec. 3, 2008) (prepetition promissory note acknowledgement); *In re Wiley*, 579 B.R. 1, 7 (Bankr. D. Me. 2017) (same); *Lichtenstein v Barbanel (In re Lichtenstein)*, 161 Fed. Appx. 461 (6th Cir. 2005) (prepetition settlement agreements); *In re Maiers*, WL 5033660, at *4 (Bankr. C.D. Ill. Oct. 31, 2017) (postpetition agreement); *Klingman v. Levinson*, 831 F.2d 1292,

This loan is a sly attempt to create a product that looks and feels like something it isn't to gain something it wouldn't otherwise deserve.

4. CONCLUSION

Whether TERI — a now defunct entity, which offered no educational programs or training and was effectively a shill for a for-profit corporation — was the type of nonprofit institution Congress sought to extend discharge protection is an argument for another day. So too is what constitutes a loan program for § 523(a)(8)(A)(i).

What matters instead is marking the boundaries of § 523(a)(8)'s reach. Not every loan made to a debtor while she is a student is an educational loan within the meaning of § 523(a)(8). When it comes to an educational loan made by a private lender under a program that isn't guaranteed by the government, Congress says that that loan is excepted from discharge only if:

- it was made under a program funded by a nonprofit;[13] or
- it was made solely to cover a borrower's cost of attendance at an eligible institution.[14]

1296 n. 3 (7th Cir.1987) ("[f]or public policy reasons, a debtor may not contract away the right to a discharge in bankruptcy").

[13] § 523(a)(8)(A)(i).

[14] § 523(a)(8)(B).

The Chase loan is neither of those things. It is outside the bounds of § 523(a)(8). It is dischargeable.

Respectfully submitted,

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