IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

IN RE:

BEVERT RAY GALBREATH, JR.
SHEILA LYNN GALBREATH — CASE NO. 8801476JC

BEVERT RAY GALBREATH, JR.
SHEILA LYNN GALBREATH — PLAINTIFFS

vs. — ADVERSARY NO. 880115JC

THE LOAN SERVICING CENTER
AND
HIGHER EDUCATION ASSISTANCE
FOUNDATION — DEFENDANTS

Pro Se — Attorney for Plaintiffs

J. Mark Franklin III
Bennett, Lotterhos, Sulser
& Wilson
P. O. Box 98
Jackson, MS 39205 — Attorney for Defendants

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION AND ORDER

Before the Court is the Motion of the defendant, Higher Education Assistance Foundation, for summary judgment in the adversary proceeding commenced by the debtors to obtain a hardship discharge for a certain student loan.

Bevert Ray Galbreath and Shelia Lynn Galbreath filed a Joint Petition for Relief under 11

U.S.C. Chapter 7 on May 18, 1988. The debtors were represented by Elbert E. Haley, Jr. In their schedules the debtors listed an unsecured debt without priority to the Student Loan Center for a student loan made to Bevert Ray Galbreath. On June 28, 1988, the debtors commenced an adversary proceeding in the form of a Motion for Hardship Discharge naming the Student Loan Center as defendant. The Higher Education Assistance Foundation then filed a Motion to Be Joined as Additional Defendant Due to Transfer of Interest, alleging that the note evidencing the debt for the student loan had been guaranteed by and assigned to the Foundation. An Order for joinder of the Higher Education Assistance Foundation as an additional party defendant was entered on August 23, 1988.

The Higher Education Assistance Foundation propounded its First Set of Interrogatories and Requests for Admissions to the Plaintiffs on August 30, 1988. Elbert E. Haley, Jr., counsel for the debtors, then filed Motions to Withdraw as Counsel in both the Chapter 7 and adversary proceedings on September 6, 1988, and October 14, 1988, respectively, alleging that his clients were unwilling to cooperate in his representation of them and would not respond to the Interrogatories and Requests for Admissions propounded to them by the Higher Education Assistance Foundation.

A Motion for Summary Judgment and Brief in Support of the Motion were filed by the Higher Education Assistance Foundation on October 28, 1988. An Order Allowing Withdrawal of Counsel and Granting Time to Retain New Counsel was entered on November 2, 1988. The debtors have neither retained new counsel nor responded to the interrogatories and requests for admissions propounded to them by defendant on August 30, 1988.

The Motion for Summary Judgment and Brief in Support of the Motion filed by the Higher Education Assistance Foundation contend that since no responses were made to the Requests for Admissions submitted to the Plaintiffs, the Requests for Admissions are deemed admitted pursuant to Rule 36 of the Federal Rules of Civil Procedure as made applicable by Rule 7036 of the Bankruptcy Rules. Rule 36 provides in pertinent part as follows:

> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. . . .
>
> Fed. R. Civ. P. 36

It is the position of the Higher Education Assistance Foundation that plaintiffs have by way of their failure to respond within thirty days, or at all, to the Requests for Admissions submitted to them, admitted everything necessary for a summary judgment to be entered finding the student loan debt non-dischargeable pursuant to 11 U.S.C. §523(a)(8)(B).

The Court would note that in the debtors' Motion for Hardship Discharge the statutory authority used in support of the motion is 11 U.S.C. §1328(a)(8). There exists no such section. Section 1328 does deal with the granting of a discharge to a debtor who has not completed a plan. However, that provision is inapplicable in this situation. The Court assumes that the debtor is attempting to have the student loan discharged under §523(a)(8)(B) which provides that a debt for an educational loan is excepted from discharge unless:

> Excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.
>
> 11 U.S.C. §523(a)(8)(B)

This section of the Code is self executing and does not have to be raised by a creditor to have the debt excepted from discharge. The burden is on the debtor to show that excepting the debt from discharge will cause undue hardship on the debtor or the debtor's

dependents. The debtor has merely pled generally in his motion that to except the loan from discharge would cause undue hardship.

The debtor has admitted by his failure to respond to Requests for Admissions that he executed a promissory note in favor of First American Savings for an educational loan made to the debtor under a program funded by a governmental unit. The debtor also has admitted that the note was assigned to the Higher Education Assistance Foundation, that it did not first become due before five years before the date of the filing of the petition, and finally that to except the note from discharge would not impose an undue hardship on the debtor or his dependents.

As such, the Court finds that no genuine issue as to a material fact exists and that the defendant, Higher Education Assistance Corporation, is entitled to a summary judgment dismissing with prejudice the plaintiff's complaint for hardship discharge.

In doing so, the Court notes the joint debtor, Shelia Lynn Galbreath, was named a plaintiff in this adversary proceeding, but there is nothing in the record to indicate that she has ever been liable for this debt incurred by her husband. The Court's finding that the complaint should be dismissed with prejudice

is in no way a finding that she, too, is liable for the debt.

ORDERED this the 24TH day of February, 1989.

Edward Felton

U. S. BANKRUPTCY JUDGE