

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

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In re: LUISA X. SANTIS JARA,

Case No. 04-47384 (RTL)

Debtor.

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LUISA X. SANTIS JARA, Plaintiff

Adv. Proc. No: 05-1451 RTL

v.

NEW JERSEY HIGHER EDUCATION
STUDENT ASSISTANCE AUTHORITY,

Defendant.

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OPINION

APPEARANCES:

MARTHA GONZALEZ, Esq.
Legal Services of Northwest Jersey/Hunterdon
(Attorney for Plaintiff/Debtor)

AMINA MADDOX, Esq.
Deputy Attorney General
Anne M. Milgram, Acting Attorney General of New Jersey
(Attorney for Defendant)

RAYMOND T. LYONS, U.S.B.J.

The Debtor seeks a determination that her student loan is dischargeable under 11 U.S.C. § 523(a)(8) as an undue hardship. In light of the Debtor's chronic health problems, prognosis, history of underemployment, reliance on charity and government assistance and inability to support her child and dependant parent, all of which are likely to persist, her student loan should

be discharged.

JURISDICTION

This court has jurisdiction of this adversary proceeding under 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a) and the Standing Order of Reference by the United States District Court for the District of New Jersey dated July 23, 1984, referring all proceedings arising under Title 11 of the United States Code to the bankruptcy court. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(I) to determine the dischargeability of a particular debt.

FINDINGS OF FACT

Luisa Santis Jara was born in 1960 in Chile. She graduated high school and finished two years in college studying computers and engineering. Eventually, she became an officer in the Chilean army working in basic training and as a COBAL programmer for the Department of Defense. After twelve years, her military career ended suddenly when she became engaged to a man who had been a political prisoner.

Seeking better opportunities, Ms. Santis Jara and her fiancé immigrated to the United States in 1991. She is now a naturalized citizen and has a fourteen-year old son born in this country. The boy's father and she became estranged and the father has custody of the child. She now sees her son occasionally during school days and he stays with her on alternate weekends.

Coincidentally with her family problems, Ms. Santis Jara became depressed but did not seek treatment at that time. She thought that improving her computer skills might boost her spirits so she enrolled in DeVry University. She signed a note for 2 student loans in the amount of \$2,000.00 and \$1,312.00 to pay the tuition. After completing one term in the Spring of 2001, she did not return for the second part of the program. It was then that her mental health took a

dramatic turn for the worse and her personal life collapsed.

Ms. Santis Jara became paranoid. She was convinced that people were following her meaning to do her harm. A battered woman's shelter took her in and she ended up being admitted to Hunterdon Medical Center. Besides paranoia, she was diagnosed with bipolar disorder and attention deficit hyperactivity disorder ("ADHD").

After being released from the hospital, Ms. Santis Jara became homeless. She sought help from a hospitality network – a cooperative effort of several churches – offering short term shelter. For the better part of a year Ms. Santis Jara moved from one church to another every week or two. Finally, she found help from an agency called Alternatives, Inc. specializing in assistance to low-income people and those with special needs. <http://www.alternativesinc.org>. They helped her locate an apartment and pay most of her rent. Ms. Santis Jara has to give 40% of her income towards rent and Alternatives pays the rest.

A psychiatrist provides continuing care for her chronic mental illness and has prescribed a phalanx of medicines including antipsychotics and antidepressants. Government and charitable programs, as well as her physician's generosity, help pay for her medications and treatment, that she could not otherwise afford as she has no health insurance. Her attorney represents her free of charge in this adversary proceeding and her bankruptcy case.

Ms. Santis Jara sought employment but has only been able to get temporary jobs through an employment agency. Her wages ranged from \$9.00 to \$13.00 per hour with no benefits – no health insurance, no sick leave, no paid holidays, no paid vacation. Her wages in 2003 were \$5,688; 2004 were \$7,888 and 2005 were \$28,833. Although she was able to stay at one job for a considerable period of time in 2005, she was fired for habitual tardiness. One of the side

effects of her medication is that Ms. Santis Jara needs much more than the eight hours of sleep recommended for a healthy adult. Consequently, it is very difficult for her to work a forty-hour week. She would like to have a permanent job with benefits but has been unsuccessful for more than three years.¹

Besides her mental illness, Ms. Santis Jara has physical ailments that she cannot afford to treat. Her liver is affected by her psychiatric medicines and she is going through menopause but does not have the money to pay for treatment. An orthopedist has recommended surgery for a painful condition in her neck that, likewise, goes untreated for lack of funds or health insurance.

Having rented an apartment with the assistance of Alternatives, Ms. Santis Jara is now able to have her son visit her overnight. She also has an elderly mother whom she houses for about half the year. Her mother spends several months with relatives in Chile but has no income or assets of her own. Ms. Santis Jara claims her mother as a dependant on her federal income tax returns.

The National Institute of Mental Health (“NIMH”) has a detailed booklet that describes the symptoms, causes and treatments for bipolar disorder. It is available on the web at <http://www.nimh.nih.gov/publicat/bipolar.cfm>. According to NIMH:

Bipolar disorder, also known as manic-depressive illness, is a brain disorder that causes unusual shifts in a person’s mood, energy, and ability to function. Different from the normal ups and downs that everyone goes through, the symptoms of bipolar disorder are severe. They can result in damaged relationships, poor job or school performance, and even suicide. But there is good [news](#): bipolar disorder can be treated, and people with this illness can lead full and productive lives.

¹ Another side effect of her medication is tremors. She was fired from one job because her employer thought she must be an alcoholic based on her tremors.

Ms. Santis Jara has experienced “damaged relationships, poor job or school performance, and even suicide.” She is estranged from her child’s father, lost custody of her child, cannot hold a job and has even attempted suicide.

The NIMH booklet quotes from a book written by a doctor of philosophy who suffers from bipolar disorder.

“Maniac-depression distorts moods and thoughts, incites dreadful behaviors, destroys the basis of rational thought, and too often erodes the desire and will to live. It is an illness that is biological in its origins, yet one that feels psychological in the experience of it; an illness that is unique in conferring advantage and pleasure, yet one that brings in its wake almost unendurable suffering and, not infrequently, suicide.”

“I am fortunate that I have not died from my illness, fortunate in having received the best medical care available, and fortunate in having the friends, colleagues, and family that I do.”

Kay Redfield Jamison, Ph.D., *An Unquiet Mind*, 1995, p. 6.
(Reprinted in the NIMH booklet with permission from Alfred A. Knopf, a division of Random House, Inc.)

As is quoted above, bipolar disorder can be treated but not cured. It is a chronic disease. Bipolar disorder is treated by a combination of medication and psychosocial therapy. Ms. Santis Jara takes Lithium and Cymbalta, mood stabilizers for depression; Risperdal (an antipsychotic); Adderall for ADHD and Valium for the tremor side effects of Lithium.

One of the symptoms of bipolar disorder is mania. The NIMH booklet lists several signs of manic episodes that Ms. Santis Jara described in her testimony: little sleep needed, racing thoughts, an unrealistic belief in one’s abilities and powers and poor judgment. In one of her manic episodes she unrealistically thought she could start her own business to provide computer support. She actually started a business called Data Doc Vision and realized a small amount of

income in 2003 and 2004. The business is now defunct.

As the NIMH booklet says, people with bipolar disorder can lead full and productive lives. Ms. Santis Jara has received treatment for approximately five years and has dragged herself up from homelessness and abject poverty to a state where she maintains a household with help from charity, the government and sporadic employment. This is as well as she can do.

In her current job, if Ms. Santis Jara works 40 hours at \$13.00 an hour she makes \$520 gross per week. Her net, take-home pay is approximately \$1,500 per month. She pays 40% of her net income for rent – \$520. Alternatives makes up the difference in the total rent of \$1,300.

Her monthly net income and expenses are:

Net income		\$1,500
Expenses		
Rent	\$520	
Utilities	\$200	
Food	\$300	
Clothing	\$75	
Telephone	\$110	
Cable	\$90	
Medicine (co-pay)	\$120	
Auto - fuel	\$130	
Auto - insurance ²	\$250	
Child support	<u>\$200</u>	
Total Expenses:		\$1,995
Deficit		-\$495

The state court has ordered Ms. Santis Jara to pay \$200 per month child support, but she has been unable to do so, and the father has not pressed her. In lieu of paying support, Ms.

² In her trial testimony, the Debtor estimated her annual auto insurance expense at \$3,000. That computes to \$250 per month. Her Schedule J and a certification filed in this adversary proceeding show the expense at \$165 per month. She explained that she was involved in an accident and subjected to a large increase in her auto insurance premium

Santis Jara buys clothes and other necessities for her son.

Her only assets are a 1994 Chrysler Concord with 160,000 miles on it and some clothing and household items. She owns no real estate and has no savings, pension or other assets. Her checking account has only a minimal balance at any time.

The current balance on the student loan is \$4,652.40. The loan has been in default since February, 2003. Before default the monthly payments were \$51.00. Ms. Santis Jara never made a payment. The creditor was able to set off a tax refund of \$234 to apply against her loan account. When payments first became due in February 2002, Ms. Santis Jara was just beginning to get treatment for her mental illness and was homeless. She did not respond to collection letters. A year later in 2003, while climbing up from rock bottom, Ms Santis Jara contacted the student loan servicing agent and attempted a payment plan but was unable to pay the initial \$500 demanded. Debtor applied for a temporary deferral of her loan based upon economic hardship on December 14, 2005 and again on April 28, 2006.

DISCUSSION

Hardship Discharge – § 523(a)(8)

Courts have generally construed exceptions to discharge contained in § 523 narrowly against the creditor and in favor of the debtor in order to carry out the rehabilitative fresh start policy of the Bankruptcy Code. *See, In re Pelkowski*, 990 F.2d 737 (3d Cir. 1993). The statute in effect when this case was filed in 2004 provided:

§ 523. Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(8) for an educational benefit overpayment or loan made, insured or

guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

The term "undue hardship" is not defined in § 523(a)(8). Thus the definition is left for judicial interpretation. *See, In re Riveria*, 284 B.R. 88 at 90 (Bankr. D.N.J. 2002), *citing, Brightful v. Pennsylvania Higher Education Assistance Assoc., [PHEAA] (In re Brightful)*, 267 F.3d 324 (3d Cir. 2001). The Third Circuit in *PHEAA v. Faish (In re Faish)*, 72 F.3d 298 (3d Cir. 1995), adopted the Second Circuit's "*Brunner*" test for determining undue hardship. *See, Brunner v. New York State Higher Educ. Services Corp.*, 831 F.2d 395 (2d Cir. 1987).

The *Brunner* test for undue hardship requires a three-part showing that: (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 loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period for student loans; and (3) the debtor has made good faith efforts to repay the loans. *See, Brightful*, at 327; *Faish*, at 306.

The Debtor has the burden of establishing each element of this test by a preponderance of the evidence. *See, Faish*, at 306; *see also, Grogan v. Garner*, 498 U.S. 279 at 291 (1991) (holding that "the standard of proof for the dischargeability exceptions in 11 U.S.C. § 523 (a) is the ordinary preponderance-of-the-evidence standard"). If one of the elements of the test is not

proven, the inquiry must end, and the student loans cannot be discharged. *Faish*, at 306.³

1. Debtor Cannot Maintain a Minimum Standard of Living If the Loans Are Not Discharged.

The first prong of the *Brunner* test asks whether the debtor can maintain a minimum standard of living if forced to repay these loans. A debtor's extremely low income, compared with the cost of basic necessities, establishes that a debtor is unable to maintain a minimal standard of living if forced to repay the obligations. *See, N.J. Higher Education Assistance Authority v. Zierden-Landmesser (In re Zierdan-Landmesser)*, 249 B.R. 65 (M.D. Pa. 2000).

In this case, Ms. Santis Jara cannot maintain steady employment. At her peak wages of \$13 per hour, her budget runs a deficit of \$495 per month. She survives through the generosity of Alternatives, Inc., a charity that subsidizes her rent, the generosity of her psychiatrist who provides treatment and sample medications, a government program paying most of the cost of prescription medication and by failing to pay court ordered child support. The state argues that Debtor should eliminate cable TV at \$90 per month and reduce her telephone usage – the only items in her budget the defendant questions. The Debtor explained she has the TV service for her son's visitation on weekends and pays for cell phones for her son and herself so they can communicate. In any event, even if those expenses were eliminated, the Debtor's budget would be at a deficit during her highest earning months. While she is between jobs, or forced to work for lower wages, her budget deficit only grows. Her budget does not include expenses for auto repairs or health insurance and her rent is subsidized. If those ordinary expenses were added her

³*See generally, In re Segal*, 57 F.3d 342, 346-347 (3d Cir. 1995) (comprehensively describing the development of § 523 (a)(8)).

monthly shortfall would be greater. Ms. Santis Jara does not have the ability to earn sufficient income to provide a minimal standard of living for herself, let alone her son and impecunious mother.

2. Debtor's Financial and Medical Conditions Will Likely Persist Into the Future.

The second prong of the *Brunner* test asks if additional circumstances exist such that the undue hardship will likely persist. *See, In re Goulet*, 284 F.3d 773 at 778 (7th Cir. 2002), quoting, *In re Roberson*, 999 F.2d 1132 at 1136-1136 (7th Cir. 1993) (“Dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment.”). These circumstances need to be detailed and not based on assumptions. *See, Brightful*, 267 F.3d 324 at 330.

Ms. Santis Jara has a chronic, incurable mental health condition (bipolar disorder) that will persist. Medication and medical treatment have allowed her to recover from total disability, hospitalization and homelessness to sporadic employment and subsidized housing. That is the best she can accomplish for the foreseeable future. Her condition will likely persist.

The Third Circuit noted that a well-educated individual, with no dependants should be able to find work, whether in the chosen field or not, that would permit the individual to repay her loans. That assumes reasonably good health – not something this Debtor enjoys. Bipolar disorder is a serious, often life-threatening, mental illness. The cycling mood swings from crippling depression to mania seriously impair Ms. Santis Jara's outlook for self-sufficiency.

3. Debtor Made a Good Faith Effort to Repay the Loans.

Under the final prong of the *Brunner* test, the court considers whether the debtor made a good faith effort to repay her obligations. The good faith prong of the *Brunner* test fulfills

Congress's purpose to reign in the "rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of education loan debts." See, *In re Pena*, 155 F.3d 1108 at 1111 (9th Cir. 1998), quoting the Report of the Commission on the Bankruptcy Laws of the United States, House Doc. No. 93-137, Pt. I, 93d Cong., 1st Sess. (1973) at 140 n.14.

Good faith requires that the debtor's poor financial condition and default were not caused by the debtor's own willfulness or negligence, but rather by factors beyond the debtor's control. See, *Faish*, 72 F.3d 298 at 305.⁴ Further, the debtor must not have ignored her obligations and must have dealt with her student loans through repayment, deferral or restructuring. See, *In re Pena*, at 1111, and *Nary v. The Complete Source, et al.*, 253 B.R. 752, 768 (N.D. Tex., 2000), quoting, *In re Brown*, 239 B.R. 204 at 209 (S.D. Cal. 1999) ("A lack of payment does not by itself preclude a good faith finding.").

In this case, when her loan first became due, Ms. Santis Jara was in the depths of her mental illness. A long hospitalization was followed by an extended homelessness. Even with the desire to pay the student loan, she had no ability. This was through no fault of her own. Although her situation improved, there has never been a time where she has earned enough to pay her basic living expenses and child support, let alone her student loan. She contacted the creditor to discuss a payment plan, but was unable to pay the \$500 demanded at that time. Since then she has applied for deferments based on insufficient income.

Ms. Santis Jara's default was caused by her mental illness, not by her own willfulness or negligence. She has not ignored her obligations and would pay her student loan if she could.

⁴See also, 4 COLLIER ON BANKRUPTCY, P 523.14[2] (15th ed. rev. 2003) ("Therefore, if the debtor has not made payments on the loans because, through no fault of the debtor, he or she has never had the ability to pay, the good faith effort test is met.")

She has satisfied the good faith requirement of the *Brunner* test.

CONCLUSION

Debtor has proved by a preponderance of the evidence that she cannot maintain a minimum standard of living for herself if required to repay her student loan due to her mental and physical health. This situation is likely to persist for the foreseeable future. The Debtor's situation is due to circumstances beyond her control, not any willfulness or negligence on her part. She has not ignored her student loan, but is merely unable to pay it. Her student loan is discharged under 11 U.S.C. § 523(a)(8).

September 27, 2006

/S/ **Raymond T. Lyons**
United States Bankruptcy Judge