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NOT FOR PUBLICATION

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. AZ-12-1305-JuTaAh
)	
ERIC D. NICHOLS and)	Bk. No. 11-12027
BONITA M. NICHOLS,)	
)	Adv. No. 11-00784
Debtors.)	
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ERIC D. NICHOLS;)	
BONITA M. NICHOLS,)	
)	
Appellants,)	
)	
v.)	MEMORANDUM*
)	
ALIGN WESTERN STATES LEARNING)	
CORPORATION,)	
)	
Appellee.)	
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Argued and Submitted on June 21, 2013
at Phoenix, Arizona

Filed - July 9, 2013

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Sarah Sharer Curley, Bankruptcy Judge, Presiding

Appearances: Appellant Eric D. Nichols argued pro se; Steven M. Cox of Waterfall, Economidis, Caldwell, Hanshaw & Villamana, P.C. argued for Appellee Align Western States Learning Corporation.

* This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Before: JURY, TAYLOR, and AHART** Bankruptcy Judges.
2

3 Debtors Eric Nichols ("Mr. Nichols") and Bonita Nichols
4 ("Ms. Nichols")(collectively, "the Nichols") appeal from a
5 judgment denying the discharge of student loan debt. The
6 Nichols contend they were not accorded adequate due process and
7 that the court misapplied the factors set forth in Brunner v.
8 N.Y. State Higher Educ. Servs. (In re Brunner), 46 B.R. 752
9 (Bankr. S.D.N.Y. 1985) aff'd, 831 F.2d 395 (2d Cir. 1987). We
10 AFFIRM.

11 **I. FACTS**

12 On April 27, 2011, the Nichols filed an adversary complaint
13 seeking to discharge Mr. Nichols's student loans under
14 § 523(a)(8). The defendant creditor, Align, did not respond to
15 the complaint and the clerk entered a default against Align on
16 June 2, 2011. On June 13, 2011, Align moved to set aside the
17 default. On July 26, 2011, the bankruptcy court heard the
18 motion to set aside the default but neither granted nor denied
19 the motion, deciding instead to conduct a prove-up hearing to
20 determine if debtors could establish a *prima facie* case for
21 undue hardship as necessary for nondischargeability. As for
22 Align, the court suggested debtors provide it with medical proof
23 of the conditions which prevented repayment of the student loans
24 to see if it would voluntarily abate the debt.

25 Before the next hearing, scheduled for September 27, 2011,
26

27
28 ** The Honorable Alan M. Ahart, Bankruptcy Judge, Central
District of California, sitting by designation.

1 the Nichols refused to provide Align's counsel with the medical
2 records which might establish hardship. The Nichols expressed
3 concern that the documents would be accessed by individuals that
4 had no connection to the case. At that hearing, the court asked
5 the Nichols to cooperate with Align's counsel in a limited
6 fashion. However, by the next hearing on October 20, 2011,
7 Align dropped its request to see the medical records before the
8 prove-up hearing and agreed that the hearing proposed by the
9 court would determine the issue of dischargeability; i.e. if the
10 court found the Nichols had proved a *prima facie* case for undue
11 hardship, Align would not defend further and the debt would be
12 discharged. An evidentiary hearing would occur, and Align's
13 attorney would be allowed to attend and cross-examine witnesses
14 at the hearing. This hearing began on November, 30 2011. After
15 an hour of testimony, the hearing was continued to February 16,
16 2012. The February hearing was subsequently continued to
17 April 17, 2012, at the request of the Nichols.

18 At the prove-up hearing, Mr. Nichols testified that he was
19 unemployed. He had been receiving \$856 per month in
20 unemployment benefits, but those expired. Mr. Nichols has
21 softening and degeneration of the cartilage in his knee, causing
22 pain and mobility issues. He is unable to have surgery to
23 repair his knee due to a heart murmur. The records introduced
24 confirmed Mr. Nichols was not certified as being disabled by a
25 doctor.

26 Ms. Nichols testified that she worked full-time as a flight
27 attendant. Since 2008, Ms. Nichols encountered a variety of
28 medical problems, including: a colon resection, an appendectomy,

1 a hernia, a hysterectomy, a fractured foot, gallbladder issues,
2 abnormalities in her breasts, hip and disc issues, osteoporosis,
3 bronchitis, carpal tunnel, and an ulcer. At the hearing,
4 Ms. Nichols testified that her hernia required further repair.
5 Despite her many ailments, Ms. Nichols was also not certified as
6 being disabled by a doctor. At the conclusion of the second day
7 of testimony, the court heard argument from Mr. Nichols and took
8 the matter under advisement.

9 On April 19, 2012, the bankruptcy court made oral findings
10 of fact and conclusions of law on the record in an empty
11 courtroom. After making the oral record, the court entered a
12 minute order denying the discharge of the student loan debt and
13 dismissing the adversary proceeding because the Nichols failed
14 to make a *prima facie* case. The minute order referred the
15 reader to a compact disc for further details. On April, 27
16 2012, the Nichols filed a motion to reconsider. On June 4,
17 2012, the Nichols' motion to reconsider was denied by entry of a
18 lengthy order. The Nichols did not appeal the denial of
19 reconsideration and that ruling is not before the Panel.

20 In its oral findings, the bankruptcy court determined
21 Mr. Nichols's student loans did not impose an undue hardship
22 under § 523(a)(8). The bankruptcy court applied the
23 three-pronged test established in Brunner, which was adopted by
24 the Ninth Circuit in United Student Aid Funds, Inc. v. Pena
25 (In re Pena), 155 F.3d 1108, 1112 (9th Cir. 1998).

26 The bankruptcy court held that the Nichols did not satisfy
27 the second and third elements of the Brunner test. Analyzing
28 the second prong, the court found that Mr. Nichols had not

1 proven his unemployment would continue. The court stated
2 Mr. Nichols was pleasant, articulate, and while he was unable to
3 do physical labor, he could still work a desk job. The court
4 placed significant weight on the fact that neither of the
5 Nichols were certified as physically or mentally disabled. In
6 fact, Ms. Nichols continued to work. The court also noted that
7 in 2008 the Nichols' combined income was \$72,424 and there was
8 nothing in the record suggesting the Nichols could not return to
9 the same level of financial stability.

10 Analyzing the third prong, the bankruptcy court found there
11 was no evidence in the record to show that the Nichols made a
12 good faith effort to repay the loans. The Nichols provided no
13 evidence to show a repayment effort, nor did they address that
14 prong in argument.

15 Because the Nichols failed to satisfy the second and third
16 prongs of the Brunner test, the court entered the order
17 dismissing the adversary proceeding. On June 8, 2012, the
18 Nichols filed a timely appeal.¹

19 **II. JURISDICTION**

20 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
21 §§ 1334 and 157(b)(1). This Panel has jurisdiction under
22 28 U.S.C. § 158.

23 **III. ISSUES**

24 A. Whether the bankruptcy court's prove-up procedure and
25 subsequent oral ruling violated the Nichols' due process
26 rights.

27 ¹ The time to appeal had been extended by the timely
28 reconsideration motion.

1 B. Whether the bankruptcy court erred in refusing to discharge
2 Mr. Nichols's student loan debt.

3 IV. STANDARD OF REVIEW

4 We review de novo the bankruptcy court's application of the
5 legal standard in determining whether a student loan debt is
6 dischargeable and whether the Nichols' due process rights were
7 violated. Rifino v. United States (In re Rifino), 245 F.3d
8 1083, 1086-87 (9th Cir. 2001).

9 We review the bankruptcy court's factual findings for clear
10 error. Educ. Credit Mgmt. Corp. v. Mason (In re Mason),
11 464 F.3d 878, 881 (9th Cir. 2006) (quoting Miller v. Cardinale
12 (In re DeVille), 361 F.3d 539, 547 (9th Cir 2004)). We affirm
13 the bankruptcy court's factual findings if its interpretation of
14 the facts was not illogical, implausible, or without support in
15 the record. United States v. Hinkson, 585 F.3d 1247, 1261-62
16 (9th Cir. 2009).

17 V. DISCUSSION

18 A. **The Bankruptcy Court's Prove-Up Procedure and Oral Ruling** 19 **did not Violate the Nichols' Due Process Rights.**

20 The Nichols assert a two-pronged argument that the
21 decisional process of the bankruptcy court was unfair, depriving
22 them of due process. First, they submit they were not accorded
23 a trial on the merits before the adversary proceeding was
24 dismissed. Second, they accuse the bankruptcy judge of first
25 ordering dismissal, then later - after the reconsideration
26 motion and appeal - making findings to support the ruling.
27 Neither argument has merits on this record.

28 Instead of ruling on Align's motion to set aside default,

1 the court set an evidentiary prove-up hearing for the debtors,
2 which Align subsequently agreed would be the basis for the
3 court's dispositive ruling on dischargeability. The Nichols had
4 two days in court to present their oral testimony and
5 documentary evidence to establish undue hardship, subject only
6 to cross-examination by Align and questions from the court. At
7 the close of the evidentiary presentation, the court allowed
8 Mr. Nichols to argue his case, then took the matter under
9 advisement.

10 Although not labeled a "trial," this procedure accorded the
11 Nichols full opportunity to present an evidentiary showing to
12 prove their claims and was more favorable to them than a full
13 trial because Align was not allowed to present a defense, such
14 as testimony from expert witnesses. The Nichols' complaint of
15 not having a trial rings hollow.

16 The Nichols' assertion that the court did not support the
17 minute order with factual findings and their confusion about the
18 transcript of the April 19 ruling is understandable. The
19 procedure used by the bankruptcy judge - recording an oral
20 ruling in an empty courtroom and referencing that record in a
21 minute entry by stating "order the compact disc" - is
22 nonstandard and likely to lead to an assertion on appeal that
23 the court supported its decision after the fact. As the Nichols
24 noted at oral argument, they did not initially understand the
25 compact disc contained the oral ruling nor could they have
26 afforded to pay for it at the time. Although we rule the
27 Nichols received proper due process here and the record contains
28 necessary findings, the far preferable method is for the court

1 to announce its ruling in open court with the parties present to
2 avoid the obvious confusion this judge's procedure created.

3 The transcript of the court's oral ruling, referenced in
4 the April 19 minute order by noting the compact disc, did not
5 appear on the court's docket until June 5, 2012, after the
6 appellee ordered it. However, the cover page of the transcript
7 irrefutably shows the transcribed ruling was placed on the
8 court's digital recording system by the judge on April 19, 2012,
9 two days after the matter was taken under advisement.

10 Therefore, the foundation for the court's merits ruling was
11 established prior to the dispositive order. This foundation was
12 legally sufficient under the rules.

13 The Federal Rules of Civil Procedure provide that in an
14 action tried on the facts without a jury or with an advisory
15 jury, the court must find the facts specifically and state its
16 conclusions of law separately. Civil Rule 52(a). The findings
17 and conclusions may be stated on the record after the close of
18 the evidence or may appear in an opinion or a memorandum of
19 decision filed by the court. Id. This rule is incorporated
20 into bankruptcy proceedings by Federal Rule of Bankruptcy
21 Procedure 7052. The rationale for imposing the "written
22 statement" requirement is to ensure accurate fact-finding and to
23 assist in judicial review of the decision. See United States v.
24 Daniel, 209 F.3d 1091, 1093 amended, 216 F.3d 1201 (9th Cir.
25 2000). These purposes are met when a court states the reasons
26 for its decision on the record. Id.

1 In American Mfrs. Mut. Ins. Co. v. Sullivan, the Supreme
2 Court created a two-step analysis to determine if there has been
3 a due process violation:

4 The first inquiry in every due process challenge is
5 whether the plaintiff has been deprived of a protected
6 interest in 'property' or 'liberty'. Only after
7 finding the deprivation of a protected interest do we
8 look to see if the State's procedures comport with due
9 process.

10 526 U.S. 40, 59 (1999).

11 In this case there was no deprivation of a protected
12 interest and, therefore, there was no due process violation.
13 The Nichols contend the bankruptcy court violated their due
14 process rights by not providing written findings of fact and
15 law. However, the bankruptcy court provided a record of its
16 factual findings and legal conclusions. The transcript of the
17 oral ruling of the bankruptcy court functions as a written
18 record because it allows for accurate judicial review of the
19 court's factual findings and legal conclusions. The oral
20 findings of the bankruptcy court help to ensure accurate
21 fact-finding and provide a basis for judicial review, fulfilling
22 the purposes of a written record.

23 **B. The Bankruptcy Court Properly Applied the Brunner Factors
24 and its Findings of Fact were not Clearly Erroneous.**

25 Under § 523(a)(8), student loan debt is to be presumed
26 nondischargeable unless the debtor establishes that repayment
27 would impose an undue hardship. The Bankruptcy Code does not
28 define undue hardship. Educ. Credit Mgmt. Corp. v. Nys
(In re Nys), 446 F.3d 938, 944 (9th Cir. 2006). We apply the
three-part test established in Brunner to determine if repayment

1 would impose an undue hardship. See Pena, 155 F.3d at 1112
2 (adopting the "Brunner test" from Brunner, 46 B.R. at 753).
3 Under the Brunner test, the debtor must prove: (1) he cannot
4 maintain, based on current income and expenses, a minimal
5 standard of living for himself and his dependents if required to
6 repay the loans; (2) additional circumstances exist indicating
7 that this state of affairs is likely to persist for a
8 significant portion of the repayment period; and (3) the debtor
9 has made good faith efforts to repay the loans. Id. at 1111.
10 The debtor bears the burden of proof on all three elements.
11 Rifino, 245 F.3d at 1078-88.

12 **1. Minimal Standard of Living**

13 Under the first prong of the Brunner test, the Nichols must
14 prove that they cannot maintain a minimal standard of living if
15 they are required to repay the loans. United Student Aid Funds
16 v. Nascimento (In re Nascimento), 241 B.R. 440, 445 (9th Cir.
17 BAP 1999). The bankruptcy court found that the Nichols' net
18 income was approximately \$2,000 per month, with expenses over
19 \$3,600 per month. The court held the Nichols' current financial
20 situation was sufficient to satisfy the first prong of the
21 Brunner test. Neither party challenged that ruling on appeal.

22 **2. Additional Circumstances**

23 Under the second prong of the Brunner test, the Nichols'
24 must provide additional circumstances that indicate their
25 inability to repay the debt is likely to persist for a
26 significant portion of the loan repayment period. See Brunner,
27 831 F.3d at 396. Additional circumstances are not defined
28 solely by their nature or by a convenient label, but by their

1 effect on the debtor's continuing inability to repay over an
2 extended period of years. In re Nys, 308 B.R. 436, 443 (9th
3 Cir. BAP 2004), aff'd, 446 F.3d 938 (9th Cir. 2006). A court
4 may consider a number of factors not limited to the following:
5 the debtor's age, training, physical and mental health,
6 education, assets, and ability to obtain a higher paying job or
7 reduce expenses. Id. at 446-47.

8 The "additional circumstances" prong of the Brunner test is
9 intended to effect the clear congressional intent, exhibited in
10 11 U.S.C. § 523(a)(8), to make the discharge of student loans
11 more difficult than other nonexcepted debt. Rifino, 245 F.3d at
12 1088-89. Merely having physical or mental health problems does
13 not automatically satisfy the additional circumstances prong.
14 See Brightful v. Pa. Higher Educ. Assistance Agency
15 (In re Brightful), 267 F.3d 324, 330-31 (3d Cir. 2001). The
16 debtors must show how these physical or mental conditions
17 prevent them from obtaining future employment. Id.

18 The Nichols contend that their health issues are additional
19 circumstances that will prevent them from repaying the loans.
20 The Nichols argue that their financial situation will only get
21 worse due to their health problems. The Nichols' argument is
22 not persuasive because they have not shown how their health
23 problems will prevent them from working in the future.

24 In Brightful, the debtor lacked a college degree and had
25 severe emotional and psychiatric problems. 267 F.3d at 330. The
26 court refused to discharge the debtor's student loan debt
27 because she failed to introduce evidence showing how her mental
28 health problems would prevent her from working. Id. at 331.

1 Similarly, in this case, Mr. Nichols did not demonstrate
2 how his health problems will prevent him from obtaining
3 employment at a job that does not require physical labor.
4 Indeed, Mr. Nichols applied for jobs as an office manager,
5 administrative assistant, and purchasing supervisor.
6 Ms. Nichols recently returned to work full-time and did not show
7 how her health issues prevented her from working, aside from
8 temporary absences for surgery. Neither Mr. Nichols nor
9 Ms. Nichols has been certified as being physically or mentally
10 disabled from working. In 2008, the Nichols made over \$72,000
11 combined and there is nothing in the record to show they cannot
12 return to that income level. As in Brightful, the Nichols have
13 health issues that might make work more difficult, but not
14 issues that prevent them from obtaining or keeping employment.

15 The bankruptcy court considered these physical conditions
16 in determining that the Nichols did not meet the second prong.
17 Thus, the court's findings are not clearly erroneous.

18 **3. Good Faith**

19 The third and final prong of the Brunner test requires that
20 the debtor prove that he made good faith efforts to repay the
21 loans or show that the forces preventing repayment are truly
22 beyond his control. Brunner, 46 B.R. at 755. To determine good
23 faith, the court measures the debtor's efforts to obtain
24 employment, maximize income, minimize expenses, and negotiate a
25 repayment plan. Mason, 464 F.3d at 884. A history of making or
26 not making payments is, by itself, not dispositive of good
27 faith. Id.

1 Here, the bankruptcy court found that the Nichols presented
2 insufficient evidence to prove they made good faith efforts to
3 repay the loan. The Nichols did not provide any evidence of
4 payments, deferrals, or attempts to consolidate. The bankruptcy
5 court stated there was no evidence on those issues, and the
6 record confirmed there was none. On appeal, the Nichols contend
7 that they made and deferred payments when necessary, but they
8 presented no evidence to the bankruptcy court to support their
9 position. The bankruptcy court was unable to determine when the
10 Nichols' payments started or stopped, nor could it determine
11 whether the Nichols had explored other repayment options.

12 The bankruptcy court properly concluded the Nichols did not
13 provide sufficient evidence to satisfy their burden of proof on
14 the third prong.

15 VI. CONCLUSION

16 Having determined the bankruptcy court's factual findings
17 were not clearly erroneous, the Brunner test was correctly
18 applied, and the Nichols' due process rights were not violated,
19 we AFFIRM.