

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

In re:

ZABETTI A. PAPPAS,

Case No: 09-32024-LMK

Debtor.

ZABETTI A. PAPPAS,

Adv. Proc. No: 10-03001-MAM

Plaintiff,

v.

NEW JERSEY DEPARTMENT OF
HIGHER EDUCATION,

Defendant.

ORDER DENYING DEBTOR'S MOTION TO STRIKE ANSWER

Zabetti A. Pappas, *pro se* Debtor
Brian S. Behar, attorney for Defendant

This matter is before the Court on Debtor Zabetti A. Pappas' Motion to Strike New Jersey Higher Education Student Assistance Authority's Answer. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(1), and the Court has authority to enter a final order. For the following reasons, Debtor's Motion is due to be DENIED.

FACTS

On April 14, 2010, Debtor filed a Motion to Strike New Jersey Higher Education Student Assistance Authority's ("Student Assistance Authority's") Answer and Affirmative Defense alleging that Student Assistance Authority was not a proper party in interest, and therefore had no standing to answer Debtor's complaint seeking a determination of dischargeability of a

student loan. On May 11, 2010, this Court issued an Order Continuing Debtor's Motion to Strike Answer on the basis that the Court needed further argument from the parties on this matter. The Court set a schedule for submission of supplemental documents and argument and after holding a continued hearing on June 28, 2010, the Court took the matter under advisement.

LAW

I.

AFFIDAVIT OF JANICE SEITZ

In accordance with the Court's request for supplemental information, Student Assistance Authority filed the affidavit of Janice Seitz, Program Officer of Student Assistance Authority and custodian of the organization's records. In her affidavit, Seitz refers to the following documents which were attached to the affidavit: (1) an application for student loan on NJHEAA letterhead dated June 2, 1973 that appears to bear Debtor's signature, (2) a student loan application supplement dated June 7, 1973 that appears to bear Debtor's signature, (3) a second application for student loan on NJHEAA letterhead dated May 14, 1974 that appears to bear Debtor's signature, (4) a student loan application supplement dated July 11, 1974 that appears to bear Debtor's signature, (5) a lender's report of guaranteed student loan on Department of Health, Education, and Welfare letterhead dated August 6, 1974 that appears to bear Debtor's signature, (6) an original note on NJHEAA letterhead dated August 24, 1973 that appears to bear Debtor's signature, (7) a promissory note, with NJHEAA listed as loan guarantor, dated January 23, 1974 that appears to bear Debtor's signature, (8) a promissory note, with NJHEAA listed as loan guarantor, dated August 23, 1974 that appears to bear Debtor's signature, (9) a promissory note, with NJHEAA listed as loan guarantor, dated October 4, 1974 that appears to bear Debtor's signature, (10) a promissory note, with NJHEAA listed as loan guarantor, dated February 20,

1976 that appears to bear Debtor's signature, (11) an original invoice dated October 26, 1977, that is a statement of a "defaulted student loan of Zabetti A. Pappas."

Debtor filed an objection to the affidavit arguing that the affidavit and attached documents violated Federal Rules of Civil Procedure 103, 104, 601, 602, 603, 801, 802, 803, 805, 901, and 902. Debtor also alleges that the documents bear the "indicia of fraud" because they have crossed-out and interspersed handwritten and typed writings. Despite Debtor's objections, the affidavit is proper. The Seitz affidavit is a statement by the records custodian cataloging documents in the possession of Student Assistance Authority. Additionally, counsel for the Student Assistance Authority informed the court that the only alterations made were to redact Debtor's social security number in accordance with the rules of this Court. Finding no problem with the affidavit or attached documents, Debtor's Objection to Affidavit is due to be DENIED.

II.

REAL PARTY IN INTEREST

Federal Rule of Civil Procedure 17(a), incorporated by Federal Rule of Bankruptcy Procedure 7017(a), states that "an action must be prosecuted in the name of the real party in interest." The purpose of this rule is to require that an action be brought in the name of the party who possesses the substantive right being asserted under the applicable law. WRIGHT, MILLER & KANE, 6A FED. PRAC. & PROC. CIV. §1541, 3d ed. (2010). Under Rule 17(a)(1)(G), a party authorized by statute is a real party in interest.

A.

Debtor argues that Student Assistance Authority is not a real party in interest because it is not a named defendant in this case, because it has not offered sufficient proof that it is legally

charged as New Jersey's designated guaranty agency, and because the New Jersey Higher Education Assistance Authority ("NJHEAA") is not the same entity as the New Jersey Higher Education *Student* Assistance Authority ("Student Assistance Authority") and therefore is not the appropriate party to act.

New Jersey Statute 18A:71A-1, Assembly Note No. 2217—L.1999, c.46 states: "As amended, this bill consolidates the various student assistance functions of the Office of Student Assistance, the Student Assistance Board and the Higher Education Assistance Authority into a new authority, the Higher Education Student Assistance Authority." N.J. STAT. ANN. § 18A:71A-1 (West 2009). Further, New Jersey Statute 18A:71A-30, entitled "Transfer of function, powers and duties of higher education assistance authority" states:

- (a) The Higher Education Assistance Authority in, but not of, the Department of the Treasury, established pursuant to N.J.S. 18A:71-3, is abolished and all its functions, powers, and duties are transferred to the Higher Education Student Assistance Authority in, but not of, the Department of State.
- (b) Whenever, in any law, rule, regulation, order, contract, document, judicial or administrative proceeding or otherwise, reference is made to the Higher Education Assistance Authority or the officers thereof in, but not of, the Department of the Treasury, the same shall mean and refer to the Higher Education Student Assistance Authority or the officers thereof in, but not of, the Department of State.
- (c) Nothing in this act shall be construed to alter the terms and conditions of loans made to students by the authority. Nothing in this act shall be construed to alter the terms, conditions, rights, or remedies of any obligation issued by the authority.

N.J. STAT. ANN. § 18A:71A-30.

The statutory authority clearly shows that the New Jersey legislature abolished the NJHEAA and the Student Assistance Authority became the holder of all rights and responsibilities that formerly belonged to the NJHEAA. Accordingly, under Rule 17(a)(1)(G), Student Assistance Authority is the proper party because it is authorized as the real party in interest by statute.

B.

During the June 28 hearing, Debtor additionally argued that the under Title 34 of the Code of Federal Regulations, there is a mandatory assignment by guaranty agencies of defaulted loans to the Secretary of Education, and therefore the Secretary of Education is the proper party to this action instead of Student Assistance Authority. Title 34 governs the Federal Family Education Loan programs (including Stafford loans, SLS loans, PLUS loans, and the Consolidation Loan program). Debtor's exhibit D indicates that a loan disbursed on August 2, 1974, is classified as a Stafford Subsidized loan.

The Second Circuit Court of Appeals addressed a similar issue in *McNamee, Lochner, Titus & Williams, PC v. Higher Education Assistance Foundation*, 50 F.3d 120 (2d Cir. 1995). Citing Judge Crabb's summary (also adopted by the Tenth Circuit in *Colorado v. Cavazos*, 962 F.2d 968 (10th Cir. 1992)) the Second Circuit stated:

Under the Guaranteed Student Loan Program, lenders make low-interest loans subsidized by the federal government to students under the protection of guarantees issued by fifty-eight state or private, non-profit agencies, who are in turn reinsured by the Department of Education. . . . The guaranty agency is the link between the lender and the Department of Education. It administers the program at the state and local levels. Its primary function is to issue guarantees to lenders on qualifying loans, for which it collects insurance premiums paid by the lenders but passed on to the borrowers. Guaranty agencies must insure one hundred percent of the amount of these loans. When a borrower fails to repay a loan, the lender must first satisfy due diligence collection requirements. It then files a claim with the guarantee agency and the agency pays the claim. It is the agency's obligation to attempt to collect the unpaid balance of the loans on which it has paid default claims directly from the borrowers. . . .The relationship between the Department of Education and the guaranty agencies is formalized by written agreements. . . [t]he contents of the agreements are governed by the Higher Education Act, 20 U.S.C. §§ 1078(b)(2), (c)(2), and they are expressly 'subject to subsequent changes in the Act or the regulations that apply to the [Guaranteed Student Loan] Program.' 34 C.F.R. § 682.400(d).

Id., 50 F.3d at 121-22, citing *Great Lakes Higher Educ. Corp. v. Cavazos*, 711 F. Supp 485, 487-88 (W.D. Wis. 1989). Discussing Title 34 of the Code of Federal Regulations, the Second

Circuit went on to state: “Section 682.409(a) provides, for example, that if the Secretary of Education determines that action is necessary to protect the fiscal interest, the Secretary may direct a guaranty agency to assign to the Secretary any loan held by the guaranty agency on which the agency seeks or has received payments from the Government under its federal insurance agreement with the agency.” *Id.*, 50 F.3d at 122.

Based on the text of 34 C.F.R. § 682.409 and these observances by the Second Circuit, the “Mandatory Assignment” alleged by the Debtor is not effective in the case of every default. Rather, an assignment to the Secretary of the Department of Education is mandatory when, and not until, the Secretary makes a determination that action is necessary and accordingly directs the guaranty agency to promptly assign the loan to the Secretary. 34 C.F.R. § 682.409(a)(1). Further, § 682.410(b)(6) states “[a] guaranty agency must engage in reasonable and documented collection activities on a loan on which it pays a default claim filed by a lender.” 34 C.F.R. § 682.410(b)(6).

In the case at hand there is no evidence, nor has it been suggested, that the Secretary has mandated assignment of the loans in question. Without such a demand, the loan is not assigned and remains with the guaranty agency, who is charged with engaging in “reasonable and documented collection activities.” The Secretary of Education is not a proper party because no assignment has been made to the Secretary. Instead, Student Assistance Authority remains the real party in interest.

C.

The purpose of Rule 17 is to protect a party from having to defend an action twice. 59 AM. JUR. 2D PARTIES § 44 (2010). The real party in interest rule seeks to promote judicial economy and fairness, and is not intended to allow technicalities to interfere with the litigable

merits of a case. ID. In the present case, Student Assistance Authority has stepped in to defend this action and has indicated a strong desire to reach a final determination as to the status of these loans. To that effect, Student Assistance Authority stated on the record that any determination of this Court will have final effect and no other parties associated with Student Assistance Authority will pursue Debtor with regard to these loans.

New Jersey statutory law and the Code of Federal Regulations both indicate that Student Assistance Authority is indeed a real party in interest and is the proper party to defend this action. Additionally, in light of Student Assistance Authority's statements on the record, Rule 17's protections against relitigating the same matter twice remain intact. Student Assistance Authority is a real party in interest and is the proper party to defend this action.

Therefore, it is ORDERED:

- (1) Debtor's Objection to Affidavit is OVERRULED;
- (2) Debtor's Motion to Strike Answer is DENIED.

DATED: June 30, 2010


MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE