UNITED STATES BANKRUPTCY COURT

IN AND FOR THE DISTRICT OF ARIZONA

In Re **MARY E. STOCKMAN,** **Debtor.**	**Chapter 13 Proceedings** **Case No. 05-BK-11523-CGC** **Adv. No. 05-799**
MARY E. STOCKAMAN, **Plaintiff,** **v.** **EDUCATIONAL CREDIT MANAGEMENT CORPORATION** **Defendant.**	**UNDER ADVISEMENT DECISION RE: MOTION TO SUBMIT ADDITIONAL EVIDENCE FOR CONSIDERATION ON REMAND**

I. Introduction

This matter is before the Court on remand from the District Court. The previous order of the Court was vacated and remanded on three bases: 1) an error of fact regarding the Debtor's expenses; 2) an error of law regarding the amount of Debtor's allowed tithing; and 3) an error of law in concluding that the Debtor's repayments to lenders were made in good faith. The Debtor has filed motions to present additional evidence on remand; Educational Credit Management Corporation ("ECMC") has objected. A status hearing was held to consider the motions and the objections on May 23, 2008. At the conclusion of the hearing the Court took the matter under advisement, pending the filing of a response memorandum by ECMC.

II. Background

The Debtor is now a 62 year old woman who decided to change careers in the 1990s. Debtor had been a real estate agent for 26 years when she decided to complete her undergraduate degree and then continue onto law school. She decided to change careers because her real estate office had closed and real estate opportunities in Maryland, where she lived at the time, had diminished. She attended law school in Florida and during the course of her legal education amassed approximately $200,000 in student loans. She received her law degree in 1998 when she was 52 years old.

Upon graduation she was told that there was no market for new attorneys in Florida. After research, the Debtor determined that Arizona provided the best possibility for her to gain employment as an attorney. She moved to Arizona and passed the state bar. She applied and interviewed with several law firms but did not receive any offers. In July 1999, a year after graduating law school, she did not have a job. Previously, she asked for forbearance on her student loans, however, the forbearance period was expiring in the summer of 1999.

Under these circumstances, she decided to start her own firm. Based, in part, on her experience as a summer intern with the United States Trustee's Office, she specialized in consumer bankruptcy. She worked hard to build her practice - working 45 to 60 hours a week - but did not succeed. Her statement of financial affairs indicates that she made $35,000 in 2003, $60,000 in 2004 and $31,200 in 2005.

In June 2005, the Debtor filed her bankruptcy. Soon after, like many other bankruptcy attorneys, when BAPCPA became effective in October 2005 the Debtor determined that the change in the law would make survival difficult and decided to close her office. After closing her law practice, she became a mortgage broker earning approximately $37,000 per year.

In April 2007, she decided to sell her house and move to Florida generating $50,000 in proceeds from the sale of her home. These funds were used to pay off her Chapter 13. As of May 2007, she was working as a mortgage broker purely on a commission basis.

III. Bankruptcy Trial

In October 2005, the Debtor filed a complaint to discharge her student loan debt as an undue hardship under 11 U.S.C. §523(a)(8)(B). A trial was held on the matter on June 19, 2007. The

Court took evidence regarding the Debtor's income, expenses, job prospects and current employment. The Court determined that the Debtor was entitled to a partial discharge as provided under *In re Saxman*, 325 F.3d 1168 (9th Cir. 2003). As a prerequisite to a partial discharge under *Saxon*, a debtor must first show that the requirements of *United Student Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108 (9th Cir. 1998) have been met. Under *Pena,* a debtor must show by the preponderance of the evidence: 1) that she cannot maintain a minimal standard of living based on current income and expenses if required to repay the loan, 2) that additional circumstances indicate that the state of affairs is likely to persist for a significant portion of the repayment period, and 3) that she has made a good faith effort to repay the loan. *Id.* at 1111-12 (adopting the requirements of *In re Brunner*, 46 B.R. 752, 753 (S.D.N.Y. 1985)).

As to the first *Pena* prong the Court looked to the Debtor's income and expenses. Although evidence of her income was fuzzy, the Court determined that her after tax income was $38,500 per year or $3,208 per month. Using the budget provided by the Debtor as a guide, the Court then calculated her monthly expenses as $2,954, thus leaving $250 a month to repay her student loans. Under the Ford Plan, suggested by ECMC, the repayment would be approximately $800 per month. Based on these facts, the Court determined that the Debtor had met the first prong of the *Pena* test. The Court then looked to the Debtor's age and concluded age can be considered when analyzing prong two of the *Pena* test. Essentially, the Debtor does not have 20-25 working years in front of her to repay the student loans, but has only 5-10 years. Accordingly, the Court determined that the Debtor's circumstances were likely to persist for the duration of the loan and, in fact, were likely to get worse.

As to whether Debtor made a good faith effort to repay the loans, it was undisputed that The Education Resources Institute, Inc. ("TERI") received substantially more money in the repayment of student loans than had ECMC. Based on this evidence, the Court was left with a conundrum of whether this showed good faith to one lender, but bad faith to the other. The Court answered the conundrum by looking to the payments made by the Debtor to the lenders and found that there was no evidence that the payments were directed to one lender and not the other. Accordingly, there was no indication of bad faith and the third prong of *Pena* was met.

Based on these conclusions, the Court determined that the Debtor would be able to pay back $27,500 of her loans with the remaining being discharged. ECMC appealed the Court's order.

IV. District Court Remand

The District Court vacated this Court's order and remanded the matter for further proceedings.

Using *Pena* as a guide, the District Court found that the Court's findings concerning the Debtor's expenses was clearly erroneous. In this Court's decision, made on the record, the Court enumerated the Debtor's monthly expenses and announced total expenses equaling $2,954. However, the monthly expenses put on the record totaled only $2,619. Because the specifically enumerated expenses did not equal the total expenses, the District Court found the calculations clearly erroneous. The District Court also found that the $200 amount allotted for tithing was unreasonable as a matter of law citing to *Waguespack v. Rodriguez*, 220 B.R. 31, 34 (W.D.La. 1998). Based on these two errors, the District Court found insufficient support for a finding that the Debtor satisfied prong one of the *Pena* test. Because of these uncertainties, the District Court determined that it could not analyze prong two - whether an inability to pay will persist.

The District Court also found error in the Courts analysis of prong three of *Pena*. According to the District Court, this Court determined that the Debtor did not show bad faith in repaying primarily only one of her two loans. The District Court did not take issue with the Court's finding, but it did determine that the wrong legal standard was applied. According to the District Court, the burden was on the Debtor to show good faith in repayment of her loans, not an absence of bad faith. According to the District Court, the Debtor "must supply the bankruptcy court with an affirmative, plausible explanation as to how one lender received significant repayment at the nearly complete expense of the other." The matter was remanded and the District Court took no position on whether the Debtor's loans are dischargeable in whole or in part.

V. Analysis

Debtor asks the Court to reopen the record so that she can present additional evidence. The additional requested evidence takes two basic forms: 1) evidence available at trial but not presented due to attorney error and 2) updated evidence of her current economic condition as her circumstances have changed since the trial over one year ago. The Debtor stresses that the *Pena* standard does not focus on a debtor's past choices, but instead focuses on a debtor's current circumstances. The Debtor claims that circumstances have in fact worsened since the trial, that she may be unable to work soon and asks the Court to lower the payment originally granted to ECMC.

ECMC counters that the record should not be reopened because the District Court did not instruct a new trial and that the parties had sufficient opportunity to present all the evidence. ECMC contends that as an experienced attorney, the Debtor could have either insisted that her attorney present the evidence or take over the proceedings herself. Further, if she has complaints about her attorney's performance she can take them to the state bar. In the end, reopening the evidence would be inequitable because of the considerable energy and expense already used to prosecute and defend the case.

"On remand, the decision on whether to reopen the record should be left to the sound discretion of the trial court." *Jones & Laughlin Steel Corp. v. Pfeifer*, 103 S.Ct. 2541, 2558, 462 U.S. 523, 551 (1983); *See also In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1302 (9th Cir. 1994) (determining that on remand the district court has the discretion to develop the record more fully). This concept has been applied several times in bankruptcy courts with some courts determining to reopen the record*; In re BMC Industries*, 359 B.R. 725 (Bankr.D.Minn. 2007); *In re Mesaba Aviation, Inc.*, 350 B.R. 105 (Bankr.D.Minn. 2006); *In re Grimm*, 168 B.R. 102 (Bankr.E.D.Va. 1994) with others deciding the matter on the existing record. *In re Papercraft Corp.*, 247 B.R. 625 (Bankr.W.D.Pa 2000); *In re JKJ Chevrolet, Inc.*, 190 B.R. 542 (Bankr.E.D.Va. 1995); *In re DiBerto*, 171 B.R. 461 (Bankr.D.N.H. 1994). "[T]rial courts must comply with the appellate court's mandate, but trial courts may decide 'anything not foreclosed by the mandate.'" *Cossu v. Jefferson Pilot Securities Corp.*, 2007 WL 2729846, *3 (E.D.Cal. 2007) (quoting *Herrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir.1993)). Here, the Court must determine whether reopening the record is appropriate.

The Court has revisited the record in an attempt to recreate its findings concerning the Debtor's expenses. In its prior decision, the Court based its mathematical conclusions in large part on Debtor's budget. In reviewing the budget, the Court calculated some expenses without any sort of discount, others were counted but reduced and still others excluded. By comparing the Debtor's budget to the decision on the record it is apparent some legitimate expenses listed in the Debtor's budget were not recited in the decision. For instance, electricity was listed as an expense of $200 per month. This is the type of expense that the Court gave full credit to, but it was not announced on the record. On the other hand, there are other expenses, such as doctor visits, CLE and business expenses, that the Court did not clearly delineate in the announced decision. At this point, the Court does not recall, and it is not clear from the record, to what extent or whether these expenses were included in its calculations. Based on the record, the Court cannot recreate a proper calculation and therefore cannot correct the error cited by the District Court. Accordingly, the record must be reopened as to issue one. Moreover, as noted by the District Court, the satisfaction of prong two rests on the evidence provided by prong one. Again, the record needs to be reopened.

In its remand, the District Court gave a clear directive that the Debtor must provide "an affirmative, plausible explanation" as to how TERI received significant repayment, while ECMC did not. In reviewing the record, there is inadequate evidence to reach this guideline. Accordingly, the evidence must be reopened as to good faith.

Reopening the record to introduce new evidence is particularly appropriate when the facts are not static, knowing the current facts is essential and the events that have occurred between trial and the appellate decision have changed the factual scenario. *BMC Industries* at 730. This is a situation where the facts are not static. It is apparent from the record that the Debtor's financial situation was in flux up to the trial and allegedly remains so after the trial, according to the Debtor's pleadings. Additionally, it is important to remember that the District Court vacated and remanded for reconsideration under *Pena*. Under *Pena*, the Court must make a determination of the Debtor's standard of living based on the Debtor's *current* income and expenses. The only way to determine the Debtor's current income and expenses is to take evidence. Under the circumstances, reopening the record is appropriate.

VI. Conclusion

For the foregoing reasons the record will be reopened. Debtor and counsel for ECMC are to confer and attempt to agree on an appropriate scheduling order. If there is an agreed order, counsel for ECMC is to upload it for the Court's signature. If agreement is not possible, the parties are to contact the Court's courtroom deputy to set a time for a Rule 16(b) conference.

So ordered.

DATED: July 23, 2008

Charles G. Case II
UNITED STATES BANKRUPTCY JUDGE

COPY of the foregoing mailed by the BNC and/or sent by auto-generated mail to:

Mary E. Stockman
Jackson Crowder and Associates, P.A.
28870 US Highway 19 North
Suite 406
Clearwater, FL 33761

Madeleine Wanslee
Raul Abad
Gust Rosenfeld, PLC
201 E Washington, #800
Phoenix, AZ 85004
Attorneys for Educational Credit Management Corporation