UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ENTERED
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U.S. BANKRUPTCY COURT
MDNC - CPH

IN RE:	)	
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Shelia W. Wood,	)	Case No. 03-12275C-7G
	)	
Debtor.	)	
	)	

ORDER

This case came before the court on February 18, 2004, for hearing upon a motion to dismiss case filed by the United States Bankruptcy Administrator. Robyn C. Whitman appeared on behalf of the Bankruptcy Administrator and Stan H. Dick appeared on behalf of the Debtor.

The motion seeks dismissal of this case pursuant to § 707(b) of the Bankruptcy Code. Under § 707(b) the court "may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds the granting of relief would be a substantial abuse of the provisions of this chapter." This provision represents an attempt to strike a balance between allowing debtors a fresh start and stemming abuse of consumer credit by providing the bankruptcy court with a means of dealing equitably with the situation in which a debtor seeks to take unfair advantage of his or her creditors through the use of Chapter 7. See In re Green, 934 F.2d 568, 570 (4th Cir. 1991). Section 707(b) should be applied in a manner in which a truly needy debtor is allowed a fresh start, while denying a head start to the abusers. See In re Rodriguez, 228 B.R. 601, 603 (Bankr. W.D. Va. 1999).

However, under § 707(b) a debtor who files a Chapter 7 case automatically has the benefit of a presumption in favor of granting the relief requested by the debtor.

There are two requirements in order for § 707(b) to be applicable: the debts in the case must be primarily consumer debts and it must be shown that granting the debtor a Chapter 7 discharge would involve a "substantial abuse" of the provisions of Chapter 7. In the present case, it is undisputed that the debts are primarily consumer debts.[1] Hence, the only issue for determination is whether granting the Debtor a Chapter 7 discharge would involve a substantial abuse of the provisions of Chapter 7.

There is no statutory definition of "substantial abuse" to aid in this determination. Various tests or rules have been developed by the courts. However, the rule most cited in the Fourth Circuit is the one adopted in In re Green. In Green, the court declined to adopt a per se rule under which a debtor's ability to pay his or her debts, standing alone, justifies a § 707(b) dismissal. Green, 934 F.2d at 571-72. Instead, while specifically recognizing that the debtor's ability to pay is the primary factor[2] to be

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[1]Under § 101(8) of the Bankruptcy Code a consumer debt is a "debt incurred by an individual primarily for a personal, family, or household purpose." A debt "not incurred with a profit motive or in connection with a business transaction" is considered consumer debt for purposes of § 707(b). See In re Kestell, 99 F.3d 146, 149 (4th Cir. 1996).

[2]However, in Kestell, the court approved a dismissal pursuant to § 707(b) based upon a lack of good faith and apparently without

considered, the court ruled that "the substantial abuse determination must be made on a case-by-case basis, in light of the totality of the circumstances." Id. at 572-73. The court then provided the following examples of the circumstances or factors to be considered: (1) whether the bankruptcy petition was filed because of sudden illness, calamity, disability or unemployment (2) whether the debtor incurred consumer credit in excess of his or her ability to pay; (3) whether the debtor's family budget is excessive or unreasonable; (4) whether the schedules and statement of financial affairs reasonably and accurately reflect the debtor's true financial condition; (5) the debtor's ability to pay; and (6) whether the petition was filed in good faith. See Id. at 572. In the present case, all of these factors weigh against the Debtor and in favor of the dismissal of this case pursuant to § 707(b).

The Debtor is a noncommissioned officer in the United States Army with the rank of sergeant and is on active duty with a local army reserve unit. Debtor has been in the army for 22 years and her annual income in 2002 was $41,187.60. Debtor's two children are adults and she has had no dependents for at least the last three years. Debtor's income has remained steady and she has not

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any consideration of the debtor's ability to pay, perhaps establishing that in an appropriate case lack of good faith may be the primary, if not sole, factor in deciding whether a Chapter 7 case should be dismissed pursuant to § 707(b). See Nicole L. Ripken, Rendering Section 707(b) the Equivalent of a Good Faith Requirement for Debtor, 57 Md. L. Rev. 1114 (1998).

sustained any interruption or reduction in her income as a result of sudden illness, calamity, disability or unemployment and this case was not filed as a result of any such circumstances. Nevertheless, the Debtor admits that she has incurred consumer debt in excess of her ability to pay.

Moreover, the Debtor's family budget is excessive and unreasonable. In that regard, the evidence established that the amounts allocated by the Debtor for telephone expense, food, pet care, and clothing exceed the amounts reasonably required for such needs. The evidence also established that the Debtor is a prolific shopper who spends extravagant amounts for items such as speciality lingerie, other items of civilian clothing, alcohol, cigarettes, restaurant charges, movie rentals and purchases, health club fees, and other luxury items not reflected in her budget. Because of these and other inaccuracies, the Debtor's schedules and statement of financial affairs do not reasonably and accurately reflect the Debtor's true financial condition. Such inaccuracies include Debtor's Schedule I which initially did not accurately state her monthly income. Debtor's Schedule J, as previously noted, does not accurately state the Debtor's expenses. Debtor's Schedule F does not accurately state her nonpriority unsecured debts. For example, Debtor has included the full amount of a debt ($86,138.00) which was secured by a deed of trust even though the deed of trust went into foreclosure in 1996 and the Debtor has never received any

demands from the lender regarding a deficiency. The Debtor also included the full amount of a cosigned debt on a vehicle which she listed as having been surrendered which, according to the Debtor's testimony, remains in the possession of her daughter who is servicing the debt. The Debtor has retained possession of a motorcycle which her schedules state was to be surrendered. The cumulative effect of the inaccuracies contained in Debtor's schedules and statement of financial affairs is that they do not accurately reflect her true financial condition and are misleading.

Making an analysis of a debtor's ability to pay under § 707(b), of course, involves examining the debtor's future income and future expenses. See In re Green, 934 F.2d at 572 (exploring "the relation of the debtor's future income to his future necessary expenses" is part of § 707(b) analysis); In re Krohn, 886 F.2d 123, 126 (6th Cir. 1989); Waites v. Bailey, 110 B.R. 211, 214-15 (E.D. Va. 1990). This is particularly true where, as in the present case, a debtor has stable income. The ability of a debtor to repay his or her creditors generally is measured by assessing how much disposable income a debtor would be able to pay his or her unsecured creditors under a three to five year Chapter 13 plan. See In re DeRosear, 265 B.R. 196, 203-04 (Bankr. S.D. Iowa 2001). A debtor's disposable income is determined in accordance with the definition contained in § 1325(b)(2) of the Bankruptcy Code using income and expense figures that are reasonable and accurate. See

Id. at 204. In deciding what income figures to use, it is appropriate for the court to consider whether the expenses claimed by the debtor can be "reduced significantly without depriving the debtor of adequate food, clothing, shelter and other necessities of life." In re Engskow, 247 B.R. 314, 317 (Bankr. M.D. Fla. 2000). Many courts base the ability to pay determination upon the percentage of unsecured debt that could be repaid by the debtor in a Chapter 13 case, although the percentages regarded as reflecting an ability to pay have varied from case to case. See In re Norris, 225 B.R. 329, 332 (Bankr. E.D. Va. 1998). However, "the essential inquiry remains whether the debtor's ability to repay creditors with future income is sufficient to make the Chapter 7 liquidating bankruptcy a substantial abuse." In re DeRosear, 265 B.R. at 204 (citing Fonder v. United States, 974 F.2d 996, 999 (8th Cir. 1992)).

In the present case, the court finds from the evidence that the Debtor currently has net monthly income after deducting taxes, insurance, etc. of at least $3,504.00 and that she can be expected to receive at least that amount of net income for the next three years. Although the Debtor lists monthly expenses of $3,219.00 not including her car payment, the court finds that the Debtor's figure includes certain items which are excessive and not reasonably necessary. If these items are reduced to reasonable amounts, the Debtor's reasonable monthly expenses do not exceed $2,790.00 per

month, which would leave $714.00 available to fund a Chapter 13 plan, not including the amounts which the Debtor has been and continues to expend on unnecessary luxury items. Even after taking into account the trustee's fees and expenses related to a Chapter 13 case, it appears that the Debtor could pay her unsecured creditors a dividend of at least 25%. The court concludes that this constitutes an ability to pay that, under the totality of the circumstances of this case, is sufficient to render this case substantially abusive for purposes of § 707(b). While the decision to dismiss this case is not based upon a finding of bad faith, there are aspects of this case which are inconsistent with a good faith invocation of Chapter 7. These include the misleading inaccuracies in the Debtor's schedules and statement of financial affairs, and the Debtor's lack of candor in her testimony at the hearing.

It is, therefore, ORDERED, ADJUDGED AND DECREED that the motion to dismiss this case pursuant to § 707(b) of the Bankruptcy Code is granted and this case is hereby dismissed.

This 19th day of March, 2004.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge