

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ENTERED

JAN 16 2004

U.S. BANKRUPTCY COURT
MDNC - KWC

IN RE:)
Deborah Lynn Brittian,) Case No. 03-11675
)
Debtor.)

ORDER

This case came before the court on December 18, 2003, 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 John H. Boddie 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, if not entirely, 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 factor² to be

¹Under § 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).

²However, 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 this case, the Debtor admits that she has sufficient income to fund a Chapter 13 plan that would pay at least 25% of her indebtedness. While under the Green decision, this is the factor that weighs most heavily in determining whether to dismiss pursuant to § 707(b), the Green decision makes it clear that the court must consider the other circumstances of the case before reaching a conclusion regarding the dismissal of Debtor's case. The standard adopted in Green thus is sufficiently flexible that under

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).

appropriate circumstances a debtor may opt for a **Chapter 7** discharge even though he or she has the ability to fund a Chapter 13 plan. After weighing the circumstances presented in this case, the court has concluded that this is such a **case** and that the motion to dismiss therefore should be denied.

The schedules and statement of financial affairs filed by the Debtor in this case reasonably and accurately reflect the Debtor's true financial condition. The schedules reflect that the Debtor had unsecured indebtedness of \$112,732.00 when this case was filed. This is a high amount of debt for a single debtor with no dependents and a history of stable employment and, undoubtedly, reflects that indebtedness incurred by the Debtor ultimately exceeded her ability to pay according to the applicable terms. However, there was no showing that the indebtedness was incurred under circumstances in which the Debtor knew at the time that she would be unable to repay the indebtedness or under circumstances in which it reasonably could be inferred that she had no intention of repaying the creditors. None of the debt was incurred on the eve of bankruptcy or in anticipation of bankruptcy. Nearly all of the debt is credit card debt and it appears that a substantial portion of the indebtedness **was** incurred more than five years before the bankruptcy filing, with a considerable amount of the debt **going** back to the late 1980's, during a period when the Debtor underwent a job transition that involved a significant reduction in income

for a period of several years.

There was no evidence that the indebtedness in this case was incurred for luxury items, expensive vacations or to maintain an extravagant life style. To the contrary, Debtor's Schedule I reflects personal and household expenses that are modest and which certainly are not excessive or unreasonable. For example, Debtor's rent for her residence is \$500.00 per month and her only vehicle is a 1995 van which is paid for and in poor condition.

A significant amount of the debt owed by the Debtor consists of credit card interest and penalties that have accumulated over a period of years during which the Debtor sometimes was able to make only minimum payments. It appears from the evidence that the Debtor found herself in the too familiar situation in which her credit card balances were increasing despite her continuing to make payments. For several years, the Debtor paid a total of \$2,300.00 per month to the credit card companies just to cover the minimum payments required by the credit card agreements. In January of 2001, the level of indebtedness that had accumulated under the credit cards reached the point at which the Debtor began to experience difficulty in making even the minimum payments required to stay current on the credit card debt and still pay her living expenses. She continued to make the credit card payments until January of 2003 when she no longer was able to do so and still pay her living expenses. After unsuccessfully seeking assistance from

a credit counseling agency, she filed this case in June of 2003. By that time, the credit card debt had increased to \$112,732.00 primarily as a result of additional interest and penalty charges. Although the Debtor elected to file under Chapter 7 rather than Chapter 13, the court believes that her filing was made in good faith. Given the age of the debt owed by the Debtor when this case was filed, the conscientious efforts of the Debtor over a long period of time to repay the debt, the moderate life style adopted by the Debtor in order to make such payments over that period of time and the absence of any evidence of Debtor having incurred the indebtedness recklessly or in order to purchase luxury items, expensive automobiles, or otherwise to finance a lifestyle beyond her means, the court finds and concludes that this case was filed in good faith and that Debtor's election to seek relief under Chapter 7 was not unfair to her creditors nor an abuse of the bankruptcy process and that granting the Chapter 7 relief requested by the Debtor will not result in a substantial abuse of Chapter 7.

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

This 13 day of January, 2004.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge