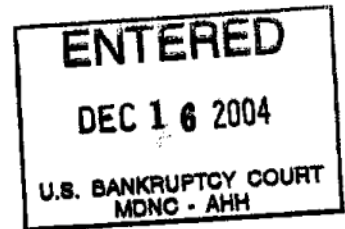


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION



IN RE:)
)
Christopher B. Edwards,) Case No. 03-84291C-7D
)
Debtor.)
)

MEMORANDUM OPINION

This case came before the court on October 22, 2004, for hearing on whether this Chapter 7 case should be dismissed pursuant to § 707(b) of the Bankruptcy Code. The Debtor appeared at the hearing with his attorney, Melissa McGill Davis. Appearing on behalf of the Bankruptcy Administrator was Robyn C. Whitman. Having considered the evidence offered by the parties and the matters of record in this case, the court has concluded that this case should be dismissed pursuant to § 707(b) of the Bankruptcy Code based upon the following findings of fact and legal conclusions.

FACTS

This voluntary Chapter 7 case was filed by the Debtor on December 23, 2003. The Debtor is married and has two minor children by his current wife and one minor child by his former wife. For several years prior to filing this case the Debtor was employed by Oakwood Mobile Homes as the manager of one of its retail outlets. At the time of the filing, the Debtor listed an annual salary of \$147,000.00 which produced a gross monthly salary of \$12,250.00 and, according to his Schedule I, a net monthly

salary of \$5,582.00. On October 20, 2004, two days before the scheduled § 707(b) hearing, the Debtor filed an amended Schedule I reflecting that he had changed jobs and listing a gross monthly salary of \$9,118.19 and a net monthly salary of \$6,643.82. In his amended Schedule J which was also filed on October 20, 2004, the Debtor listed expenses of \$8,098.83 which was approximately \$400.00 less than the expenses listed in his original Schedule J. In 2003 the Debtor earned \$138,399.00, in 2002 he earned \$220,724.00 and in 2001 he earned \$176,881.00.

The schedules filed by the Debtor list a residence valued at \$375,000.00 which is shown as being subject to a deed of trust securing an indebtedness of \$325,209.00. The personal property listed by the Debtor in Schedule B includes a 2002 Chevrolet Suburban, a 2002 Ford F150 pickup truck and a 2002 Stratos boat, all of which are listed as being subject to purchase money liens. Debtor's personal property also includes a 401(k) account valued at \$17,000.00 and miscellaneous personal property such as clothing, household furnishings, etc. The schedules show a total value of \$99,150.00 for Debtor's personal property, including the 401(k) account.

In his Schedule F the Debtor listed unsecured indebtedness totaling \$117,241.87 consisting of a \$47,567.00 equity line obligation to Central Carolina Bank, a \$65,139.78 equity line obligation owed to National City Bank and \$4,534.77 owed on two

credit card accounts. No priority debt is listed in Debtor's schedules.

LEGAL CONCLUSIONS AND DISCUSSION

Under § 707(b), the court may dismiss a case filed by an individual debtor under Chapter 7 whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of Chapter 7.

The first requirement in order for § 707(b) to be applicable is that the debts of the debtor be primarily consumer debts. 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). In re Kestell, 99 F.3d 146, 149 (4th Cir. 1996). In the present case, it is admitted that the debts consist of consumer debts incurred by an individual, thus satisfying the first requirement under § 707(b).

The remaining issue is whether granting the Debtor in this case a Chapter 7 discharge pursuant to § 727 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 for determining "substantial abuse" have been developed by the courts. The rule cited most frequently in the Fourth Circuit is the one adopted in In re Green,

934 F.2d 568 (4th Cir. 1991). In Green the court declined to adopt a per se rule under which a debtor's ability to pay his debts, standing alone, justifies a § 707(b) dismissal. Instead, while specifically recognizing that the debtor's ability to pay is the primary factor to be 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 573. 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 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 ability of the debtor to pay his or her creditors; and (6) whether the petition was filed in good faith. See id. In making this evaluation, the court must give effect to the presumption in favor of granting Chapter 7 relief that Congress included in § 707(b). See id.

Considering the totality of the circumstances shown by the evidence in this case, the court is convinced that the granting of a Chapter 7 discharge in this case would constitute a substantial abuse of the provisions of Chapter 7. This is not a case that was filed because of illness, calamity, unemployment or disability

involving the Debtor. The Debtor did sustain a significant drop in income in 2003 as a result of financial problems encountered by his employer and the drop in income played a role in this case being filed. However, it appears that the primary cause of the filing was the failure of the Debtor to reduce spending and his decision to incur substantial debt in order to maintain a standard of living which he could not afford at the time. Having lived beyond his means during 2003 at the expense of his creditors, the Debtor now seeks a Chapter 7 discharge without paying those creditors and while continuing to maintain the same high standard of living.

As noted in Green, the ability of a debtor to pay his or her creditors is the primary factor in the § 707(b) analysis. Making an analysis of a debtor's ability to pay under § 707(b) involves examining the debtor's future income and future expenses. See 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. Braley, 110 B.R. 211, 214-15 (Bankr. E.D. Va. 1990).

In the present case, the Debtor has a history of stable income. Although he lost his job with Oakwood in April of 2004, he secured a comparable job with Palm Harbor Homes within a month. It is therefore reasonable to conclude that Debtor's stable employment and income likely will continue in the future.

The next step is to examine whether such anticipated future income is sufficient to conclude that the Debtor has the ability to pay his creditors. As a general rule, the ability to pay 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. In re DeRosear, 265 B.R. 196, 203-04 (Bankr. S.D. Iowa 2001). The debtor's disposable income usually is determined in accordance with the definition of disposable income contained in § 1325(b)(2) of the Bankruptcy Code using income and expense figures that are reasonable and accurate. Id. at 204. 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. 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." DeRosear, 265 B.R. at 204.

In assessing whether a debtor has the ability to pay for purposes of § 707(b), it is appropriate for the court to consider whether the expenses claimed by a debtor can be reduced significantly without depriving the debtor and his dependents of adequate food, clothing, shelter and other necessities of life. See In re Engskow, 247 B.R. 314, 317 (Bankr. M.D. Fla. 2000). The

expenses that may be reviewed in making such an analysis include the mortgage payments or rent paid by the debtor for housing. See id. (budget was "extravagant and unreasonable" based upon the amount included for mortgage payments and utilities); In re Smith, 229 B.R. 895, 899 (Bankr. S.D. Ga. 1997) (mortgage payment of \$1,695.00 was not reasonable); In re Carlton, 211 B.R. 468, 473 (Bankr. W.D.N.Y. 1997) (residence rental of \$3,000.00 per month for a family of four was unreasonable and excessive).

Debtor's amended Schedule I listed Debtor's net income as being \$6,643.82 per month as of October 20, 2004. Debtor's new job is general manager of a Palm Harbor Homes retail outlet in Greensboro, North Carolina. Beginning in December, the Debtor's guaranteed salary will drop but at that point he will begin receiving 30% of the net profits generated at the outlet he is managing plus the possibility of an additional bonus. This is the type of arrangement that enabled the Debtor to produce the level of income that he received at Oakwood and should result in a similar level of income going forward. In addition to the Debtor's income, his wife also is employed part-time and is producing approximately \$300.00 per month of additional income. For purposes of the § 707(b) analysis in this case, the income figure used by the court should include Debtor's income as well as that of his wife. See In re Williamson, 296 B.R. 760 (Bankr. N.D. Ill. 2003) (holding that income of debtor's non-debtor spouse should be considered for

purposes of determining whether debtor has the ability to fund a plan); In re Staub, 256 B.R. 567 (Bankr. M.D. Pa. 2000) (same). Thus, the court will utilize a net income figure of \$6,943.82 in assessing Debtor's ability to pay his creditors.

The expenses listed in Debtor's amended Schedule J total \$8,098.83. However, it is clear from a review of the items included in Debtor's list of monthly expenditures that some of the listed expenditures should be reduced or eliminated based upon the reasonable needs of the Debtor and his family. The expenses listed by the Debtor include a monthly housing cost of \$1,850.00, consisting of rent of \$1,700.00 which Debtor is paying for his current residence and home maintenance of \$150.00 per month. The Debtor moved into his current residence a few days after the filing of this case. The residence is relatively new, has 2,700 or 2,800 square foot of living space and is located in an upscale neighborhood located near Quarry Hills Golf Course. According to the Debtor, the residence is owned by his father; however, the Debtor pays the \$1,700.00 "rent" directly to the lender that financed the purchase of the residence. While the current residence is somewhat smaller than the \$350,000.00 residence the Debtor was living in when this case was filed, the current residence nonetheless is excessive and unreasonable for an individual seeking to discharge \$119,000.00 of unsecured debt under the circumstances of the present case. See In re DeRosear, 265

B.R. 196, 218 (Bankr. S.D. Iowa 2001) ("While the sentimental reason underlying the Debtors' desire to continue living in their current homestead may be understandable, it does not justify permitting them to erase an otherwise manageable debt load via a Chapter 7 proceeding."). As a result, in deciding whether the Debtor has the ability to repay, this excessive monthly expense should be reduced by at least \$350.00 per month and such reduction treated as being available for payment to creditors. Other expenses claimed by the Debtor that are excessive and subject to reduction include telephone expense of \$325.00 (for two land lines and two cell phones) which should be reduced to \$100.00, medical expense which was increased in the amended Schedule J from \$250.00 to \$450.00 to include payments on a bill which will be paid in the short term and therefore should remain at \$250.00, transportation expense of \$340.00 which should be reduced to \$240.00 since Debtor will be commuting a shorter distance in his new job, life insurance expense of \$514.00 which should be reduced to \$214.00 to provide a reasonable amount of term life coverage, and Debtor's motor vehicle expense which should be reduced from \$1,338.00 per month to no more than \$900.00 per month. Other items included in Debtor's list of expenses should be eliminated, such as \$270.00 for health insurance premium which is a duplicate of a deduction that is taken from Debtor's gross salary, \$100.00 per month for unpaid 2003 income taxes since little, if any, of such taxes remain unpaid and, in any

event, would be paid by the Chapter 13 trustee under the hypothetical Chapter 13 plan, \$261.00 per month which the Debtor is paying each month on the purchase price of the 2002 Stratos boat which is not a necessary living expense, \$236.32 which the Debtor included as a payment on an unsecured pre-petition obligation to Foust Fuels which likewise is not a necessary living expense and \$275.00 per month which the Debtor included as a payment on an unsecured pre-petition indebtedness which is owed to his father. Debtor's expenditure of \$125.00 per month to send his children to private kindergarten "to improve their social skills" also is a questionable expenditure for a debtor seeking Chapter 7 discharge under the circumstances of this case. The result of these adjustments is that Debtor's monthly expenditures could be reduced from the \$8,098.83 shown in Debtor's amended Schedule J to \$5,343.00 per month. Thus, the expense figure that should be used in making the § 707(b) determination of the Debtor's ability to pay is \$5,343.00.

Based upon the monthly income figure in this case of \$6,943.00 and reduced monthly expense figure of \$5,343.00, the Debtor has disposable income of at least \$1,600.00 which should be available to fund payments to his creditors. In a Chapter 13 case, if the Debtor submitted only a 36 month plan, a total of \$57,600.00 would become available for distribution under a Chapter 13 plan involving a \$1,600.00 monthly payment to the Chapter 13 Trustee. After

taking into account the \$3,456.00 in trustee fees and costs related to such a Chapter 13 case, it appears that the Debtor could pay \$54,144.00 to unsecured creditors which would yield a dividend of some 45% if he were willing to proceed under Chapter 13 with a three-year plan, rather than seeking a Chapter 7 discharge. With a longer plan, the Debtor, of course, could pay a higher dividend to his creditors or, if appropriate, reduce the amount of the monthly plan payment. Of course, what constitutes a reasonable budget for a debtor is not a matter that can be projected with absolute precision and certainty and, while the dividend which the Debtor in this case would be able to pay under Chapter 13 may not be exactly 45%, the court nonetheless is satisfied that the Debtor in this case has an ability to repay creditors which, under the circumstances of this case, is sufficient to render this case abusive for purposes of § 707(b).

In addition to Debtor's ability to pay, there are other factors which weigh against the Debtor in the present case. The Debtor's family budget is excessive and unreasonable in the respects previously discussed. Moreover, the record reflects that the Debtor incurred consumer credit in excess of his ability to pay while such debt was being incurred. According to the Debtor's evidence, most of his unsecured debt was incurred during 2003 as a result of the drop in his income that year. It is a reasonable inference from the evidence that such debt was incurred as a result

of the Debtor not reducing his spending in order to deal with the drop in income and the court so finds. Rather than reduce spending, the Debtor chose to continue to spend as in past years using borrowed funds from two equity lines to fund such spending. For example, Debtor retained and continued to make substantial payments on newly purchased, expensive vehicles. Debtor continued to live in a \$360,000.00 residence in an upscale neighborhood and to make the very substantial mortgage payments related thereto until the very end of 2003. Debtor retained and continued to make payments on a \$30,000.00 boat which he had purchased the previous year. In fact, there was little, if any, evidence that Debtor made any cuts or reductions in spending during 2003, a year which he described as his worst year ever from an income standpoint. The result was substantial borrowing against the two equity lines, resulting in a vast majority of the indebtedness in this case.

It further appears that the schedules filed by the Debtor are not complete and accurate and do not accurately reflect the Debtor's true financial condition. In that regard, the Debtor admitted that obligations owed by the Debtor were intentionally omitted from the schedules. These omissions include an indebtedness owed to his father and an obligation owed to RBC Centura which was guaranteed by his father. Another inaccuracy in the schedules involves a 1994 mobile home which the Debtors listed in the schedules as having a value of \$8,000.00 and being subject

to a lien securing indebtedness of \$11,527.39. Despite having shown no equity in this mobile home, the Debtor testified that within a few months after the case was filed, the mobile home was sold in a transaction which netted the Debtor \$2,500.00 which the Debtor testified was used to pay living expenses. When questioned about the apparent undervaluation of this asset, the Debtor could not supply any information regarding the transaction, or even recall the name of the person who purchased the mobile home.

Whether a Chapter 7 case was filed in good faith is an important factor in applying § 707(b). See In re Kestell, 99 F.3d 146 (4th Cir. 1996) (approving a dismissal pursuant to § 707(b) based upon a lack of good faith). There are circumstances in the present case which raise a serious issue regarding whether this case was filed in good faith and which weigh against the Debtor. Such circumstances include the foregoing omissions and inaccuracy of the schedules which were filed by the Debtor. Additionally, the evidence showed that during 2002, the year preceding the filing of this case, the male Debtor utilized his equity line at National City Bank in order to borrow \$17,000.00 which he used to prepay an alimony obligation to his former wife. It thus appears that the Debtor incurred debt in a manner that substituted a dischargeable debt in place of a nondischargeable debt. Such conduct is strongly suggestive of an intent to take unfair advantage of creditors and weighs against the Debtor in the context of a § 707(b) proceeding.

CONCLUSION

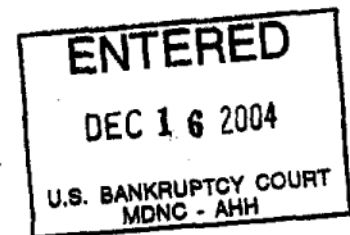
Having considered the totality of the circumstances presented by this case, the court concludes that the granting of Chapter 7 relief in this case would be a substantial abuse of the provisions of Chapter 7 and that this case should be dismissed under § 707(b) of the Bankruptcy Code. An order so providing will be entered contemporaneously with the filing of this memorandum opinion.

This 15th day of December, 2004.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION



IN RE:)	
)	
Christopher B. Edwards,)	Case No. 03-84291C-7D
)	
Debtor.)	
)	

ORDER

For the reasons stated in the memorandum opinion filed contemporaneously with this order, this case is hereby dismissed pursuant to § 707(b) of the Bankruptcy Code.

This 15th day of December, 2004.

~~William L. Stocks~~

WILLIAM L. STOCKS
United States Bankruptcy Judge