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U.S. BANKRUPTCY COURT
MDNC - SD

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

In Re:	)	
	)	
ROSEMARY PARKER	)	Case No. 04-12747C-7G
	)	
Debtor.	)	

MEMORANDUM OPINION

On September 16, 2004, the Office of the United States Bankruptcy Administrator ("Bankruptcy Administrator") filed a motion to dismiss the Chapter 7 bankruptcy case of Rosemary Parker ("Debtor") for substantial abuse of the Bankruptcy Code under 11 U.S.C. § 707(b). The Court held a hearing on this matter at the United States Courthouse in Greensboro, North Carolina, on January 10, 2005, and took the matter under advisement. After consideration of the motion to dismiss, the evidence adduced at the hearing, the arguments of the parties, and the relevant law, the Court will deny the Bankruptcy Administrator's motion to dismiss the Debtor's case.

I. BACKGROUND

On September 9, 2004, the Debtor filed her Chapter 7 bankruptcy petition. The Debtor listed primarily consumer debts in her schedules, mostly consisting of unsecured indebtedness of $59,210.82, two mortgages totaling $290,198.64, and a $14,701.00 vehicle lien. As of the date of the petition, the Debtor was employed as a registered nurse earning a $35.00 per hour and she claimed a net monthly income of $4,074.95.[1] The Debtor is married, has two stepchildren ages 14 and 15, and the Debtor's spouse does not currently work.

The Debtor's Schedule J expenditures have oscillated irregularly since the date of filing. At first, the Debtor claimed total expenses of $4,321.78, consisting primarily of a $2,290.71 mortgage payment,[2] and the Debtor did not list any dependents or income for her spouse on Schedule I. On

[1] The Debtor testified that this amount did not include a $200.00 periodic allowance that her employer gave her for work-related travel expenses.

[2] Other Schedule J expenditures included: $350.00 in electricity and heating fuel; $400.00 in medical expenses; $85.00 homeowner's insurance; and $100.00 in taxes.

October 14, 2004, after the Bankruptcy Administrator filed its motion to dismiss her case, the Debtor amended Schedule I to reflect that her spouse earned no income, but was self-employed selling prints at a flea market, and that her two stepchildren were dependents. The Debtor amended Schedule J to refine her utility expenses, itemize her medical expenses between the cost of self-insurance and out of pocket expenses, and increase her monthly tax payments, the net effect of which lowered her total monthly expenses to $4,288.58.[3] Finally, on the date of the hearing, the Bankruptcy Administrator introduced a document that purported to amend Schedule J – despite not having been filed – which reduced the Debtor's mortgage payment to $2,172.53, increased her medical and dental expenses, decreased her homeowner's insurance, and added her husband's car payment and child support payments as the Debtor's expenses. The net effect of the purported amendment was to increase her monthly expenditures to $4,890.40.[4]

According to the Debtor's testimony, her eventual bankruptcy was adumbrated by at least four different financial stressors. First, the Debtor testified that she was a financially stable homeowner before marrying in 2001. At that time, the Debtor's new husband was seeking custody of his two children by a previous marriage, and the Debtor agreed to take out a second mortgage on her home to pay for improvements that would better accommodate the children. The Debtor was not too worried about the costs of improvements because her husband allegedly assured her that he had about $70,000.00 due to him from the sale of his former marital home, which he told her he would use to cover the costs. When her husband received the anticipated proceeds, however, he applied the money towards his business debts rather than the Debtor's second mortgage. Essentially, the

[3] More specifically, the Debtor lowered the $350.00 claimed for electricity and heating fuel to $187.00, and declared new expenditures of $14.87 for water, $35.00 for telephone expenses, and $29.99 for a home security service. The Debtor reduced her medical expenses from $400.00 to $91.17 per month, but she added the costs of self-procured health insurance of $308.83 per month. The Debtor's real and personal property taxes increased from $100.00 to $150.00.

[4] The Debtor's decreased mortgage expense is related to a reaffirmation agreement that she executed in favor of her second mortgage holder. The agreement reduces the Debtor's interest rate from 14% to 9.5% and approval of that agreement is currently pending before the Court. On the ostensible amendment to Schedule J, the Debtor's medical expenses increased from $91.17 to $131.17, and her homeowner's insurance decreased about $45.00. Her spouse's automobile installment payments are $397.00, and his child support obligation is $328.00 a month.

Debtor represented that when she married her husband he cozened her into believing that he was a successful small business owner. The Debtor anticipated being able to quit her job to be a homemaker. In reality, her anticipation was premature, and the illusion that her husband was a successful small business owner eventually dissipated. In fact, the Debtor asserted that she only recently learned that her husband was not making any money in his business and had not done so for several years. The consequence of the Debtor's faith in her spouse's financial stability was more fixed indebtedness from the second mortgage, which destroyed any equity that she had in her home.

Second, the Debtor made many financial accommodations for her husband. She gave him a few of her credit cards, and he used up all the available credit. When he could not make his automobile payment, she would make it for him. When he could not pay his child support payment, she would make it for him. While the Debtor initially gratified her husband's financial requests, she began to realize that her husband's asseverations of reimbursement and economic stability – although they may have been genuine – were fatuous, and her willingness to meet his financial needs began to wane. Over time, the Debtor reclaimed her credit cards, terminated her cellular telephone contract, discontinued long distance telephone service, and stated to her husband – in apparent deference to their marital relationship – that she would only pay his bills if she had the financial wherewithal at the time.

Third, the Debtor claimed to have medical problems that prohibited her from fulfilling her full earning potential. In 2000, the Debtor worked as a nurse, but she missed a large number of days due to prolonged migraine headaches. For treatment, the Debtor flew to New York to have botox injections, which gave her some relief. When the Debtor tried to have a local physician perform the procedure, however, she claims that the procedure was botched and that she missed over a month of work while in recovery. In 2000, the Debtor left the nursing profession and took a home-based job for a mortgage company so that she could have more flexible work hours; she hoped that a new career would help relieve the onset of her headaches. In 2002, the Debtor claimed total income of $21,784.00 in the mortgage business, and in 2003 the Debtor only did slightly better, earning $26,318.00. The Debtor's medical problems did not end, however, and in December 2003, she was hospitalized for cardiac problems. When the Debtor reentered the nursing profession in

April 2004 – after it became apparent that she was having difficulty making ends meet – she greatly increased her income and she reported a gross monthly pay of $5,024.93 as of the date of filing.

Finally, the Debtor claims that while she was working for CTX Mortgage, she and another individual earned over $50,000.00 in commissions that were not paid. The Debtor hired an attorney to pursue her claim, but that litigation was curtailed once the Debtor no longer had the funds necessary to pay her attorney. Currently, the Debtor testified that her Chapter 7 trustee is investigating whether the unpaid commissions are recoverable. The Debtor stated that not being paid in a timely manner caused her overall unsecured indebtedness to increase.

The Debtor's banking records in the year preceding her bankruptcy filing are convoluted. The Debtor is the sole person listed on her bank account, but the total deposits often far exceed her monthly income.[5] For example, in April 2004, the Debtor started with a negative balance of $2,400.93, had deposits totaling $9,890.64, and had a negative ending balance of $538.72. In May 2004, the Debtor's total deposits were $14,846.68. The Debtor explained some of the debits and credits to her account on the fact that she had received a large sum of money from her minister for her to manage while he traveled the world, that some of the deposits were donations received for a friend's cancer treatment, and that some of the transactions were related to her husband's finances.[6] No evidence was adduced at the hearing to show that the Debtor was purchasing luxury goods or services in the months preceding her bankruptcy petition.

II. DISCUSSION

The Bankruptcy Administrator alleges that the Debtor is substantially abusing the Bankruptcy Code on the basis that her filing is an attempt to take unfair advantage of her creditors. The primary grounds for the Bankruptcy Administrator's allegation are that the Debtor's schedules are inaccurate, the Debtor incurred debt beyond her ability to pay, and that the Debtor's unsecured creditors should

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[5] On Schedule B of her bankruptcy petition, filed on September 9, 2004, the Debtor claimed that she only had $2,000.00 in her bank account, which amount was entirely exempted pursuant to N.C. Gen. Stat. § 1-362. On September 9, 2004, her bank account balance was $7,063.92.

[6] The Debtor's bank records also reflect numerous overdraft charges. The Debtor testified, however, that she had never bounced a check and that in each instance the bank made an error. The Debtor indicated where she had received some overdraft fee refunds from the bank.

not suffer because the Debtor insists on keeping a home that the Bankruptcy Administrator asserts is too expensive for her.

Section 707(b) of the Bankruptcy Code provides that the Court may dismiss a case filed by a Chapter 7 debtor whose debts are primarily consumer debts, if the Court finds that granting the debtor relief would be a substantial abuse of the Bankruptcy Code. 11 U.S.C. § 707(b). The burden of proving substantial abuse rests on the moving party. In re Vansickel, 309 B.R. 189, 213 (Bankr. E.D. Va. 2003). Moreover, there is a statutory presumption in favor of granting the relief requested by the debtor in determining whether to dismiss a case. 11 U.S.C. § 707(b). As the leading treatise on bankruptcy states:

> [T]he statutory presumption is obviously meant to be something more than simply a rule about the burden of proof, since that burden would already have been on the party seeking to dismiss the case.... It appears that the presumption is an indication that in deciding the issue, the court should give the benefit of any doubt to the debtor and dismiss a case only when a substantial abuse is clearly present.

6 *Collier on Bankruptcy* ¶ 707.04[5][a], p. 707-27 to 707-28 (Alan N. Resnick & Henry J. Sommer, eds., 15th rev. ed. Matthew Bender 2004). See also Harris v. United States Trustee (In re Harris), 279 B.R. 254, 259 (B.A.P. 9th Cir. 2002)(noting that the lack of clarity in the statute was akin to inspired tergiversation and concluding that the burden of proof necessary to overcome the presumption was not "clear abuse," but was one of "substantial abuse" as stated in the statute).

Abuse of the Bankruptcy Code occurs under 11 U.S.C. § 707(b) when a debtor attempts to use the provisions of the Code to get a "head start" rather than a "fresh start." Green v. Staples (In re Green), 934 F.2d 568, 570 (4th Cir. 1991)(providing that Section 707(b) allows "a bankruptcy court to deal equitably with the situation in which an unscrupulous debtor seeks to gain the court's assistance in a scheme to take unfair advantage of his creditors."); In re Schmonsees, No. 01-10844, 2001 Bankr. LEXIS 1896 at *5 (Bankr. M.D.N.C. 2001)("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."). In the Fourth Circuit, a "totality of the circumstances" test is used in making a determination of substantial abuse under Section 707(b) because it is consonant with Congressional intent to punish the abusers of the Bankruptcy Code and with the statutory presumption in favor of granting the relief requested by a debtor. Green, 934 F.2d at 573. Some of the relevant factors to be evaluated in the "totality of the circumstances" approach include:

(1) Whether the bankruptcy petition was filed because of sudden illness, calamity, disability, or unemployment;
(2) Whether the debtor incurred cash advances and made consumer purchases far in excess of his ability to repay;
(3) Whether the debtor's proposed family budget is excessive or unreasonable;
(4) Whether the debtor's schedules and statement of current income and expenses reasonably and accurately reflect the true financial condition; and
(5) Whether the petition was filed in good faith.

Id. at 572 (citations omitted). The Fourth Circuit also stated "that the majority of the cases hold that the debtor's ability to repay is the primary factor to be considered." Id.

1. Illness, Calamity, Disability, or Unemployment

While the Bankruptcy Administrator does not contend that the Debtor's bankruptcy filing was made in the absence of any illness, calamity, disability or unemployment, the Debtor presented evidence that such forces helped to propel her towards bankruptcy.

While the Debtor's bankruptcy filing was not due to a sudden illness, calamity, disability, or unemployment, the Debtor's bankruptcy filing was not utterly devoid of such considerations. For example, the Debtor testified that her history of migraine headaches caused her to miss numerous days of work and prompted her to leave her job as a nurse in 2000. Instead of nursing, she entered the mortgage business hoping that home-based employment would alleviate stressful work-related conditions that might trigger another event. While the hours may have been better, the pay was far less in comparison to her nursing wages in 2004. Although, the Debtor was able to maintain steady employment in the mortgage business, she is allegedly missing as much as $25,000.00 in unpaid commissions that is the subject of litigation. Not being paid in a timely manner can have much the same effect as a period of unemployment on individual finances. Additionally, the Debtor testified that she missed at least one-month of work due to an allegedly botched botox treatment for her migraines. Furthermore – although it is not a "calamity" – when the Debtor married in 2001 her husband allegedly had debts she did not anticipate and much of her income and credit went to the support of her husband and his failing business. Thus, some concomitance exists between the Debtor's decision to file bankruptcy and the financial stressors associated with a sudden illness, calamity, disability, or unemployment.

2. Cash Advances and Consumer Purchases Far in Excess of Ability to Repay

The Bankruptcy Administrator contends that the Debtor incurred about $59,210.82 in unsecured debt when the Debtor did not have any reasonable expectation that she would be able to repay it.

Incurring indebtedness without any reasonable expectation of being able to repay it is a factor for a court to consider when determining if a debtor is attempting to substantially abuse the Bankruptcy Code, but a court should not so broadly interpret this factor to foreclose the availability of Chapter 7 relief to nearly all consumer debtors; rather, a debtor's ability to repay consumer purchases and cash advances should be interpreted in a manner consistent with the Debtor's reasonable expectations of repayment at the time that the debt was incurred. Vansickel, 309 B.R. at 211. Indeed, nearly all debtors in bankruptcy have incurred obligations in excess of their ability to repay, and the bankruptcy court is mandated to adhere to the statutory presumption that a debtor is entitled to the relief originally sought. 11 U.S.C. § 707(b). Taken in its proper context, a court should examine the nature of the debts incurred, if the debts were consistent with the debtor's financial status, and whether there was an unexplained change in spending patters – all of which must be considered in light of whether a debtor is taking unfair advantage of creditors. Vansickel, 309 B.R. at 211.

The Debtor's total unsecured debt in this case is $59,210.82, and she has secured indebtedness on her house, computer, and vehicle of $307,498.58, for a combined total of $366,709.40. At first blush, it seems that the total indebtedness is in excess of her ability to repay her creditors inasmuch as it is nearly six times the amount of her projected annual income as of the date of filing. On the other hand, the Debtor encumbered her home with a second mortgage to pay for improvements to her home in order to accommodate her stepchildren, and she made the expenditure on the expectation that her new husband would reimburse her for those costs. Likewise, an undetermined amount of her credit card debt was not for consumer purchases, but was for her husband's business debts and some of it was related to her medical expenses. In fact, in the year preceding her bankruptcy, the Debtor made relatively few purchases on her credit cards – none of which were identified as luxury goods. During that time, the Debtor continued to make payments on her credit cards, which were accruing finance charges at high rates of interest. Meanwhile, the Debtor's husband purportedly remained reticent about his finances, and she had not yet realized that he had insufficient income to pay those debts. If anything, the Debtor made fewer credit card purchases in the year before her filing than at any time before. Accordingly, the Debtor's inability to pay for her consumer purchases and cash advances in this case do not appear to be flagrant when considering that the nature of her credit card debts are relatively mundane, no discernable adverse change in spending patters was adduced, and, the Debtor seemed to harbor a reasonable expectation that she – and her husband – would be able to repay those debts.

3. Excessive or Unreasonable Family Budget

Apart from the Debtor's mortgage expense, there is no dispute between the parties that the Debtor's budget on Amended Schedule J is reasonable. The Bankruptcy Administrator argues, however, that the mortgage payment alone renders the Debtor's bankruptcy filing a substantial abuse of the Bankruptcy Code on the basis that the Debtor ought not be allowed to spend about $2,290.71 in monthly mortgage installments while the unsecured creditors stand to gain little, if anything.

A debtor's budget may be unreasonable or excessive based on a high mortgage payment. See, e.g., Shaw v. United States Bankr. Adm'r (In re Shaw), 310 B.R. 538, 541 (M.D.N.C. 2004)(finding that the debtors earned $7,804.11 in net monthly income and that a mortgage payment of $3,349 on a $415,000 house was unreasonable in that it manifested a desire to hold on to a station in life that seemed to precipitate the bankruptcy in the first place); Schmonsees, 2001 Bankr. LEXIS 1896 at *12-13 (holding that mortgage payments of $2,450 on a $290,000 four-bedroom home in an upscale neighborhood occupied by two people was excessive when the debtor and his non-filing spouse earned a net pay of $5,400 per month); In re Engskow, 247 B.R. 314, 317 (Bankr. M.D. Fla. 2000)(stating that mortgage, taxes, and insurance expenses of $2,184.53 were excessive when the debtor's net monthly income was $3,548.40 and when the debtor did not include the income of his spouse on the schedules); United States Trustee v. Duncan (In re Duncan), 201 B.R. 889, 896 (Bankr. W.D. Pa. 1996)(finding a mortgage and utility expenses consuming 89% of the household budget was unreasonable and unconscionable, considering the debtor was attempting to wipe out nearly $224,000 in unsecured indebtedness). Cf. Vansickel, 309 B.R. at 199-200 (finding that $2,300 per month in rent was not excessive for a family of four in a three bedroom townhouse when the debtor's net income was $5,287.00 per month). In considering whether a housing expense is excessive, due regard should be given to the size of the family, their reasonable needs, and the cost of alternative housing. Furthermore, a court should not unduly depreciate a debtor's long-standing, traditional ties to a homestead. See, e.g., 11 U.S.C. § 524(d)(2)(providing that a court is not required to ascertain whether a reaffirmation of a consumer debt secured by the debtor's real property would result in an undue hardship on a debtor or whether it would be in the debtor's best interest).

In this case, the Debtor purchased her home in 1992 along with 48 acres of rural land. For many years she was able to manage her mortgage payments. When the Debtor married in 2001, she improved her home to accommodate her husband and his two children. The home is not extravagant; it is a two-bedroom ranch style house that is over eleven years old. The property also holds a large, unfinished metal building related to her husband's failed business. The Debtor's uncontradicted testimony is that her family needs a three-bedroom house to fully accommodate the two children and that a comparable rental for her locality was $1,700 per month. Depending on whether the Court approves the Debtor's reaffirmation agreement of her second mortgage, the Debtor's monthly mortgage will either be $2,172.53 or the current, $2,290.71, which amount is about 53% or 56% her net income. The Debtor is hopeful that her husband will be able to find and maintain work to help pay for future expenses. Given the length of time that the Debtor has owned her home, the size of her family, the relative cost of alternative housing, and the relatively modest living conditions of the Debtors, the Court is convinced that the Debtor did not inflate her homestead costs in an effort to live an indulgent and luxuriously lifestyle at the expense of her unsecured creditors.

4. Accuracy of the Debtor's Schedules

The Bankruptcy Administrator cites several inconsistencies in the Debtor's schedules and points to the Debtor's amendments to Schedules I and J as evidence of the Debtor's avariciousness in filing bankruptcy. Taken as a whole, the Bankruptcy Administrator contends that the Debtor's errors and omissions are too contrived and weigh in favor of dismissing the Debtor's case for substantial abuse.

The importance of having a debtor submit complete and accurate bankruptcy schedules is paramount; the bankruptcy system relies heavily on self-reporting by debtors. Mertz v. Rott (In re Mertz), 955 F.2d 596, 598 (8th Cir. 1992)("[T]he petition, including schedules and statements, must be accurate and reliable, without the necessity of digging out and conducting independent examinations to get the facts."); In re Fauntleroy, 311 B.R. 730, 738 (Bankr. E.D.N.C. 2004)(emphasizing that the schedules and statement of current income and expenses are to reasonably and accurately reflect the debtor's true financial condition). "Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight." Boroff v. Tully (In re Tully), 818 F.2d 106, 110 (1st Cir. 1987). Innocent mistakes in the form of a few minor omissions or errors might be forgiven; but multiple inaccuracies evidence "'a pattern of reckless and cavalier disregard for the truth'" and can lead to a finding that a bankruptcy petition was filed with fraudulent intent. Dean v. McDow (In re Dean), 299 B.R. 133, 140 (E.D. Va. 2003)(Section 727(d)(1) revocation of discharge proceeding)(citation omitted). Any amendment that a debtor makes to Schedules I and J subsequent to a motion to dismiss under 11 U.S.C. § 707(b) is viewed with inherent suspicion. In re Gullett, No. 03-10995, 2004 Bankr. LEXIS 1696 at *11 (Bankr. E.D. Ky. 2004); In re Lee, 162 B.R. 31, 43 (Bankr. N.D. Ga. 1993).

Here, the Debtor has at least two inaccuracies on her schedules, she has amended Schedules I and J once already, and a document was admitted at the hearing ostensibly amending Schedule J for a second time. One of the Debtor's inaccuracies is fairly minor. The Debtor wrongfully claimed her real property as a tenancy by the entirety when in fact she was the sole owner. In different circumstances, this could be a serious and prejudicial error; in this case, however, the real property does not have any equity and the error was harmless. The second inaccuracy is more glaring. On Schedule B, the Debtor claimed that she had $2,000 in her bank account as of September 9, 2004, the date of filing, and she exempted this amount pursuant to N.C. Gen. Stat. 1-362. In fact, on September 9, 2004, the Debtor had $7,063.02 in her bank account. A $5,063.02 difference between the amount listed on Schedule B and the actual account is not picayune.[7]

The Debtor's first amendment to Schedules I and J subsequent to the Bankruptcy Administrator's motion to dismiss is fairly mundane, but the changes therein are troubling because

[7] A flagrant misrepresentation on the schedules of a known fact – or one that is easily ascertainable by a debtor – might be grounds for dismissal of a case pursuant to 11 U.S.C. § 707(a), or to deny a discharge pursuant to 11 U.S.C. § 727. Misrepresentations or inaccuracies in a debtor's schedules is but one factor to consider in the overall totality of the circumstances when a motion to dismiss is brought pursuant to 11 U.S.C. § 707(b). When a debtor discovers an inaccuracy in the debtor's schedules, an amendment should be filed without delay.

they are indicative of a cavalier attitude toward the necessity of accurate filings in the first instance. For example, on Amended Schedule I, the Debtor included the occupation of her spouse and included two stepchildren as dependents, neither of which altered the total monthly income for her family. No reason was given as to why this information was not included as of the date of filing. On Amended Schedule J, the Debtor reduced her electricity and heating fuel costs from $350 a month to $187, and she added new expenses for water, telephone and a home security system. These types of expenses are not such that they would be difficult for the Debtor to ascertain, and there was no evidence presented that the Debtor's case was an emergency filing. After a few other changes, the Debtor's total monthly expenses actually decreased from $4,321.78 to $4,288.58. In a later ostensible amendment to Schedule J, the Debtor lowered her monthly mortgage payment consonant with a pending reaffirmation agreement with her second mortgage holder, and included expenses of her husband's automobile installment payment and her husband's child support payments, the net effect of which was to raise her household expenses to about $4,890. If her husband's automobile and child support payments really were the Debtor's expenses on the date of filing, then why did the Debtor chose to omit the expenses in the first place?

Taken as a whole, the Court is satisfied that there are enough misstatements and alterations of the Debtor's original and amended schedules to consider the Debtor's schedules inaccurate for purposes of determining whether there is substantial abuse of the Bankruptcy Code. Quite simply, a $5,000 error in the amount of available cash on hand as of the date of filing cannot easily be overlooked, and while amendments to schedules are to be allowed as a matter of course, Fed. R. Bankr. P. 1009(a), the Bankruptcy Administrator ought to be able to reasonably rely on the accuracy of a debtor's income and expenses as of the date of the petition.

5. Good faith

The Bankruptcy Administrator argues that the Debtor did not file her bankruptcy in good faith mainly because the Bankruptcy Administrator considered it an abuse to allow the Debtor to hold on to a house and 48 acres of land, neither of which had any equity, when the unsecured creditors would receive little, if anything.

An analysis of whether a petition was filed in good faith – for purposes of an 11 U.S.C. § 707(b) motion – concerns whether a debtor is misusing the bankruptcy process to achieve some illicit purpose. Kestell v. Kestell (In re Kestell), 99 F.3d 146, 149-50 (4th Cir. 1996)(finding a "substantial abuse of the Bankruptcy Code when the debtor filed solely to discharge obligations owed to his former spouse – not any other creditor – because favoritism among creditors is antithetical to the bankruptcy process and the Bankruptcy Code is not to be used as a method of advancing personal antagonisms against an ex-spouse). "Good faith" is defined as "a state of mind consisting in (1) honesty in belief or purpose, ... or (4) absence of indent to defraud or seek unconscionable advantage." Black's Law Dictionary 713 (8th ed. 2004). See also Stewart v. United States Trustee (In re Stewart), 175 F.3d 796, 810 (10th Cir. 1999)(finding that a physician's opting for a lower paying job, disregarding his family support obligations, and buying a $26,000 vehicle instead of paying for those expenses – among other things – was sufficiently analogous to the old adage of "having your cake and eating it too" so as to call into question the debtor's good faith); In re Dominguez, 166 B.R. 66, 69 (Bankr. E.D.N.C. 1994)("Presumably, "good faith" [within the meaning of Section 707(b)] means subjective good faith.").

Here, the Bankruptcy Administrator has not demonstrated any attempts by the Debtor to favor particular creditors, any practice of running up insurmountable debts in contemplation of bankruptcy, or any dishonesty towards or intent to defraud particular creditors, or other unconscionable advantage that the Debtor seeks to gain through her bankruptcy. As discussed, supra, the Court does not consider her housing costs excessive based on the circumstances of this case, and the mere fact that unsecured creditors are left unpaid after a bankruptcy filing is an insufficient basis for finding a lack of good faith.

6. Ability to Repay Debts.

The Bankruptcy Administrator asserted that if the Debtor were to obtain more affordable housing, the Debtor would be able to repay some of her debts. The Bankruptcy Administrator did not attempt to reduce any other items in the Debtor's budget in a "belt-tightening" effort, and the Bankruptcy Administrator conceded that the Debtor's current budget is underwater.

An appropriate method of evaluating whether a debtor has the ability to repay debts is to determine what amount of that indebtedness could be repaid in a hypothetical Chapter 13 plan. See, e.g., Shaw, 310 B.R. at 541 ("In contrast with the second factor of the 'totality of the circumstances' test, where 'ability to repay' analyzes the debtor's historical ability to repay debts, 'ability to repay' in this context analyzes the degree to which the debtor could pay creditors a significant portion of the debt under a Chapter 13 plan."). Although a number of courts have considered the percentage of total indebtedness that could be repaid through a hypothetical Chapter 13 plan, there is no bright line test. As stated by one bankruptcy judge:

> While it may be true that the higher the percentage of debt a Debtor could pay with future earnings, the more likely it is that a court would find substantial abuse, the converse is not true. Otherwise debtors would be rewarded for having more debt, rather than less. Instead of the percentage of debt, the determination of a debtor's ability to fund a Chapter 13 plan is based on a consideration of the debtor's ability to make a substantial effort in repaying his or her debts.

In re Praleikas, 248 B.R. 140, 145 (Bankr. W.D. Mo. 2000).

Having found that the Debtor's housing expense in this case is not unreasonable or excessive based on her particular circumstances, and considering that even with the Debtor's lowest statement of monthly expenditures she still has a negative budget of about $200, the Court does not believe that the Debtor has any ability to made a substantial effort to repay her debts.

III. CONCLUSION

Giving due weight to the totality of the circumstances surrounding the Debtor's bankruptcy filing, the Court finds that the errors and omissions on the Debtor's schedules are insufficient to make the determination that allowing the Debtor's case to proceed would be a "substantial abuse" of the Bankruptcy Code within the meaning of 11 U.S.C. § 707(b). In short, the Debtor's interest in a fresh start outweighs the interests of creditors in stemming abuse of consumer credit under the facts of this case. This opinion constitutes the Court's findings of fact and conclusions of law. A separate order shall be entered pursuant to Fed. R. Bankr. P. 9021.

This 25 day of January, 2005.

THOMAS W. WALDREP, JR.
U. S. Bankruptcy Judge

ENTERED

JAN 25 2005

U.S. BANKRUPTCY COURT
MDNC - SD

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

In Re:	)	
	)	
ROSEMARY PARKER	)	Case No. 04-12747C-7G
	)	
Debtor.	)	

ORDER

Pursuant to the memorandum opinion entered contemporaneously herewith, it is

ORDERED that the Bankruptcy Administrator's Motion for Dismissal of Case Pursuant to § 707(b) (Document No. 5), be and hereby is DENIED.

This 25 day of January, 2005.

THOMAS W. WALDREP, JR.
U. S. Bankruptcy Judge