

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION



IN RE:)
)
Lowell C. Shinn,) Case No. 04-10038C-7G
)
Debtor.)
)

ORDER

This case came before the court on July 27, 2004, for hearing upon a motion by the Bankruptcy Administrator to dismiss case pursuant to § 707(b) of the Bankruptcy Code. The Debtor appeared at the hearing with his attorney, Tommy S. Blalock, III. 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 the motion to dismiss should be denied based upon the following findings of fact and legal conclusions.

FACTS

This voluntary Chapter 7 case was filed by the Debtor on January 6, 2004. The Debtor is a physician specializing in oncology. The Debtor was 44 years of age when this case was filed and his dependents consisted of an estranged wife and three minor children who were eight, seven and five years of age. When this case was filed, the Debtor was employed as a staff oncologist at Moses Cone Hospital in Greensboro, North Carolina. According to the schedules, the Debtor's assets consisted of personal property which he valued at \$4,730.00 and two residences, one owned jointly

with his former wife and one located on Wright Avenue owned solely by the Debtor, which he valued, respectively, at \$580,000.00 and \$210,000.00. The Debtor scheduled secured debt totaling \$783,197.87 which was shown as secured by deeds of trust on the scheduled residential real property. The Debtor also listed priority income taxes of \$43,050.00 and unsecured indebtedness of \$146,207.80 consisting primarily of credit card indebtedness. His unsecured creditors included his former wife who was scheduled as having a contingent, unliquidated and disputed claim for alimony and child support.

On February 11, 2004, the Trustee in this case filed a report of no distribution. Thereafter, on April 8, 2004, the Bankruptcy Administrator's § 707(b) motion was filed. The hearing on such motion was held on July 27, 2004, after the parties had completed pre-trial discovery. The evidence at the hearing consisted of the testimony of two witnesses, one of whom was the Debtor and the other was an employee from the Chapter 13 Trustee's office. The evidence also included certain documentary exhibits offered by the parties and the schedules in this case.

By the time of the hearing, the Debtor's financial situation had changed significantly. At the end of April, 2004, the Debtor left the employ of Moses Cone Hospital and began a new job at Premier Medical Associates, a medical group with offices in and around Pittsburgh, Pennsylvania. With the change in employment,

the Debtor relocated and moved his residence to Pennsylvania. Effective May 1, 2004, the Debtor's gross monthly salary went from the \$29,104.88 listed in his schedules to \$21,771.58, while his net monthly salary went from \$18,073.96 to \$14,035.41. Also, by the time of the hearing the Debtor's financial obligations to his wife and children had been finalized, resulting in a long-term obligation to his wife of \$10,000.00 per month, consisting of \$6,000.00 per month alimony and \$4,000.00 month child support. The resolution of his former wife's equitable distribution claim resulted in a distributive award of \$56,525.00 plus the transfer of his IRA accounts having a value of \$10,225.00 to his former wife. The Debtor satisfied the distributive award by transferring his entire 401(k) with a value of \$35,533.00 to his former wife and paying the balance of the \$56,525.00 award in cash. The Debtor also became obligated to pay all marital indebtedness, including the \$585,748.00 mortgage on the family residence, the \$197,449.00 mortgage on the Wright Avenue residence and all credit card indebtedness. Although the family residence was transferred to the Debtor, he was unable to sell the residence and it had gone into foreclosure by the time of the hearing, as had the Wright Avenue residence owned by the Debtor.

DISCUSSION

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, the debts consist of mortgages related to the purchase of Debtor's residence and former residence, credit card and other unsecured personal, family or household indebtedness that was not incurred for a profit motive or in connection with a business transaction and personal income tax for 2002. Debtor's debts therefore are primarily, if not entirely, 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. However, 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 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 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.

Since the ability of a debtor to pay his or her creditors is the primary factor in the § 707(b) analysis, the court will first evaluate the ability of the Debtor in the present case to pay his creditors. 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 (E.D. Va. 1990).

In the present case, the Debtor has a long history of stable income and it is reasonable to conclude that employment and income will likely 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. DeRosear, 265 B.R. at 203-04. The 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. 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 determining whether a Chapter 7 case should be dismissed as a substantial abuse of Chapter 7, it is appropriate for the court to consider whether the expenses claimed by a debtor can be reduced significantly without depriving the debtor of adequate food,

