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SEP 13 2004
U.S. BANKRUPTCY COURT
MDNC-SRW

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, clothing, shelter and other necessities of life. See In re Engskow, 247 B.R. 314, 317 (Bankr. M.D. Fla. 2000).

The schedules and statement of financial affairs in this case reasonably and accurately reflect the Debtor's true financial condition at the time this case was filed in January of 2004. However, because the Debtor has changed jobs and moved to another state, the Schedules I and J as filed back in January of 2004 do not accurately reflect Debtor's current income and expenses which have changed significantly since January. The Debtor's current job generates gross monthly income of $21,770.83 and net monthly income of $14,035.41. Consideration has been given to whether Debtor's level of income is likely to increase significantly in the future. The Debtor is in a situation in which, in effect, he is starting over in a new job and therefore there is no history of raises or bonuses to rely upon in projecting increases in income. Moreover, according to the Debtor's evidence, there is considerable uncertainty regarding overall future revenue and income for oncologists as a result of changes brought about by the Medicare Prescription Drug Improvement and Modernization Act of 2003. According to the Debtor's evidence, the initial effect of these changes likely will be a decrease in revenue which likely will negatively affect his future income. Under the evidence presented, there was not a sufficient evidentiary basis for projecting specific increases in Debtor's income and the court therefore has used his current income in analyzing Debtor's ability to pay.

Debtor's current monthly expenses total $17,929.41, not including a $700.00 per month health insurance premium which will begin in January of 2005. The court has examined these expenses to see if some of the expenses should be eliminated or reduced based upon the reasonable needs of the Debtor. Clearly, some reductions are in order. Debtor's monthly expenses include $5,000.00 per month for a payment to the IRS on back taxes. However, the Debtor no longer is paying $5,000.00 per month to the IRS. Using a portion of the compensation that the Debtor received during his last four months at Moses Cone Hospital, the Debtor has paid the $43,050.00 tax liability down to $5,800.00 and is now making payments to the IRS of $1,000.00 per month on the unpaid balance of the taxes. Debtor also has included in his monthly expenses the sum of $245.40 per month for lease payments on the 1998 Jeep that he drives. However, Debtor testified that he has paid up the monthly lease payments on the Jeep and no longer has this monthly expense. Debtor also has included in his monthly expenses the sum of $65.00 per month to cover the premium on a life insurance policy under which his fiancee is the beneficiary, which is not a necessary expense in the context of a § 707(b) analysis. A careful review of the other expenses included in the Debtor's current budget reveals that the remainder of his expenses are reasonable and that there was no showing that any of his other expenses should be reduced or eliminated as being excessive or unreasonable. Thus, taking Debtor's monthly expense figure of $17,929.57 and eliminating $4,000.00 of the tax payment, $245.40 for the lease payment and $65.00 for the life insurance premium, the Debtor is left with monthly expenses of $13,619.17, including the $10,000.00 per month payment to his former wife. It thus appears from the evidence that the amount of disposable income available to fund a Chapter 13 plan is $416.24, that being the difference between Debtor's net monthly income and his monthly expenses. It is true that the $1,000.00 per month payments to the IRS should be completed within five or six months. However, in January of 2005, the monthly premium for health insurance for the Debtor and his three children will increase by $700.00 per month which will offset most of the reduction from the completion of payments to the IRS. Additionally, the monthly expense figure of $13,619.17 does not include any amount for the extra travel expenses that likely will be necessary in order for the Debtor to visit with his children in North Carolina or have them visit him in Pennsylvania and also does not take into account that within a matter of eight or nine months the Debtor will be faced with either purchasing the leased Jeep or purchasing or leasing a replacement vehicle.

Without the inclusion of any deficiency indebtedness that may be left after the two foreclosures on Debtor's real property, the Debtor has unsecured indebtedness of at least $145,000.00. Based upon that amount of unsecured indebtedness, the dividend that Debtor could pay to those unsecured creditors with his disposable income and a 36 month plan would be approximately 11%. Even this figure probably is overly optimistic given Debtor's mortgage indebtedness which totals $783,197.87 and the likelihood that such indebtedness will not be fully paid in the foreclosure proceedings and result in additional unsecured deficiency debt. Faced with these figures, the representative from the Chapter 13 who reviewed the Debtor's income and expenses and who testified at the hearing concluded that the Debtor did not have sufficient disposable income to fund a 36 month plan that would pay 25% to unsecured creditors. Based upon the foregoing, the court finds that there has been no showing in this case that the Debtor has the ability to pay for purposes of § 707(b).

The Green case requires that the court also consider the circumstances leading to the filing of the case and whether there were extenuating circumstances such as illness, loss of employment or calamity that led to the filing. This case was not filed as a result of sudden illness, disability or unemployment. It does appear, however, that the breakup of Debtor's marriage did play a significant role in the filing of this case. The marital separation resulted in Debtor having increased expenses related to maintaining two households. The Debtor also was saddled with the legal and other expenses related to protracted and expensive litigation involving his former wife, as well as the transfer of assets and payments that were required in order to satisfy the final settlement of the various claims involved in the marital litigation. The financial impact of this marital discord was accentuated because it occurred at a time when the Debtor's income at Moses Cone Hospital, while still very substantial, was declining. The evidence strongly suggested that prior to the separation and decline in income, the Debtor and his wife had pursued a standard of living that year after year consumed Debtor's entire income and that Debtor simply could not survive financially when the marital separation occurred contemporaneously with a decline in Debtor's income. Whether or not these circumstances constitute a calamity, they do constitute extenuating circumstances which in large measure account for the Debtor filing this Chapter 7 bankruptcy case.

While the Debtor had more consumer debt than he could pay when this case was filed, it does not appear that such debt was incurred at a time or under circumstances in which the Debtor knew that he would not be able to pay the debt. Most of the debt in this case was incurred prior to the breakup of Debtor's marriage and prior to the reduction in his income. According to the Debtor, much of the credit card indebtedness was incurred by his wife prior to their divorce and became his sole responsibility under the final settlement with his former wife. While the exact circumstances under which the marital indebtedness was incurred was not entirely clear from the evidence, there was no evidence of reckless spending by the Debtor or suggestion that indebtedness was incurred by him at a time when he had no ability or no intention of repaying the indebtedness.

Considering Debtor's circumstances at the time this case was filed, the court finds that this case was filed in good faith. The evidence reflects that despite having a substantial income, the Chapter 7 filing was justified by the personal and financial problems confronting the Debtor at the time of the filing. There was no showing of any intention or effort on the part of the Debtor to take unfair advantage of his creditors or to obtain advantages or relief contrary to the intended policies of the Bankruptcy Code. Taking into account the totality of the circumstances, and bearing in mind that § 707(b) contains a presumption that the debtor who files a Chapter 7 case is entitled to relief under Chapter 7, the court has concluded that the evidence in this case was insufficient to establish substantial abuse under § 707(b). Accordingly, the motion to dismiss shall be denied.

IT IS SO ORDERED.

This 9th day of September, 2004.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge