

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION**

IN RE:)	
Randy D. Readling, Sr.)	Case No. 01-51678C-7W
)	
)	
)	

ORDER

This matter came on for hearing before the undersigned Bankruptcy Judge on October 31, 2001, in Winston-Salem, North Carolina, on a Motion by the Court for Determination as to Dismissal of Case pursuant to Section 707(b) of the Bankruptcy Code. Appearing before the Court were Jeffrey P. Farran, Attorney for Debtor, Randy D. Readling, Sr., the Debtor, Michael D. West, Bankruptcy Administrator and Bruce Magers, Chapter 7 Trustee.

Having considered the testimony of the Debtor, the exhibits presented and other matters of record, the Court has concluded that this case should be dismissed pursuant to § 707(b) of the Bankruptcy Code based on the following findings of fact and legal conclusions.

FACTS

This voluntary Chapter 7 petition was filed on July 18, 2001. At the time the Debtor filed, he was divorced. The Debtor is a psychiatrist and his primary employment is with Piedmont Behavioral Health Care in Albemarle, N.C. Additionally, on Wednesdays he works at the Guilford Diagnostic and Treatment Center in Greensboro, N.C. and on one or two Saturdays per month he works at the Counseling Alternatives in Hickory, N.C. The Debtor's schedules

reflected monthly gross pay of \$12,648.00 or an annual salary of \$151,776.00.¹ At the hearing, the Debtor noted that he had lost a grant which provided additional income but had obtained a raise from his major employer. He believed that the difference in his salary on an annualized basis would result in less than a \$3,000.00 reduction in his annualized income. The Debtor's prospect for continued employment is good.

The schedules filed by the Debtor reflect a secured indebtedness on his primary residence in favor of Charter One Mortgage. The Debtor and his ex-wife own this house as tenants in common with a tax value of approximately \$124,000.00. The amount of the mortgage is \$113,272.00. The monthly payment, including taxes and insurance on the home, is \$899.00 per month. The Debtor owes a secured debt in favor of Ford Motor Credit for a 1997 Ford Ranger. The balance due on this vehicle is approximately \$3,000.00 and will be paid off over the next year. Monthly payments to this creditor are \$299.00 per month. The Debtor is also indebted to First Virginia Credit for a 1999 Acura for which the sum of \$19,170.00 was owed at the time of the filing of the petition. The Debtor proposes to release this vehicle as it is used by his ex-wife. The Debtor does not owe any money to taxing authorities. The Debtor has student loan debt in the amount of \$64,000.00 and the balance of his debt is general unsecured credit card debt which totals approximately \$132,000.00. Despite the large amount of unsecured credit card debt, the Debtor only lists personal effects having a value of \$2,310.00.² The Debtor also listed a 401(k)

¹ This was the Debtor's salary at the time that he filed.

² The Debtor stated that he had neglected to list his tools of the trade on his bankruptcy schedules.

Plan in which he has approximately \$13,000.00.³

Under § 707(b) the court “may dismiss a case filed by an individual under this chapter whose debts are primarily consumer debts if it finds that granting relief would be a substantial abuse of the provisions of this chapter.” All parties stipulated that the debts in this proceeding are primarily consumer debts. Section 707(b) was a result of an attempt to protect a fresh start for those debtors in need of one against those instances in which it would be abusive for a debtor with the ability to pay to take unfair advantage of his creditors through the use of a Chapter 7. In re Green, 934 F.2d 568, 570 (4th Cir. 1991). Section 707(b) is designed to prevent abuses of the bankruptcy system. In re Rodriguez, 228 B.R. 601, 603 (Bankr. W.D. Va. 1999).

The bankruptcy code does not define the term substantial abuse. In this district, the governing authority for substantial abuse is In re Green, 934 F.2d 568 (4th Cir. 1991). In Green, the court declined to adopt a per say rule under which a debtor’s ability to pay his debt, standing alone, justifies a § 707(b) dismissal. Instead the court recognized that the debtor’s ability to pay is a primary factor to be considered but stated that substantial abuse must be determined on a case by case basis in light of the totality of the circumstances. Id. at 573. In addition to the ability to pay, the court listed five other factors to be considered in determining if the filing is a “substantial abuse” of the bankruptcy system which allows the debtor to take unfair advantage of his creditors. Those factors are: (1) whether the bankruptcy petition was filed because of sudden illness, calamity, disability or unemployment; (2) whether the debtor incurred consumer debt in excess of his ability to pay; (3) whether the debtor’s family budget is excessive or unreasonable; (4) whether the debtor’s schedules and statement of financial affairs reasonably and accurately

³ The exhibits presented at the trial indicate that the actual amount in this account is \$15,000.00.

reflect true financial conditions; and (5) whether the petition was filed in good faith. In making this evaluation, the court must always give weight to the presumption in favor of granting a Chapter 7 relief for individuals.

This petition was not filed because of a sudden illness, calamity, disability, unemployment or other event that reduced the income of the Debtor to a significant degree. Indeed, it was the Debtor's testimony that his student loans and charge cards were debts that have existed for more than ten years. The Debtor described his divorce as a calamity but offered no evidence to that effect. It did not impact his job performance. It did not reduce the household income by any meaningful amount as his wife only made \$4,000.00 per year. The loss of \$4,000.00 in annual income does not constitute a calamity. The Debtor testified that his wife did take approximately \$5,000.00 out of an account they had with North Carolina Credit Union and that he is now incurring counseling expenses in the amount of \$40.00 a month as a result of the divorce. However, the Debtor is no longer making car payments on the vehicle that the wife is driving and this results in a monthly savings of \$361.21. The Debtor's auto insurance has been reduced inasmuch as only one vehicle is covered. Therefore, the Court finds that the first of the Green factors weighs against the Debtor.

The second factor in Green also weighs against the Debtor. It is quite clear from the evidence that the Debtor has incurred consumer debt in excess of his ability to pay. The Debtor has an excess of \$130,000.00 in credit card debt. He testified that at the time of the filing he was unable to make the minimum payments on his credit cards. The Debtor has a reasonable house payment in the amount of \$899.00 and car payment in the amount of \$299.00. The Debtor is also required to pay child support payments in the amount of \$1,282.00 per month. However, the Debtor has clearly mismanaged his finances and has lived beyond his means. The Debtor

therefore, has incurred more consumer debt than he has the ability to pay if he continues to maintain the lifestyle that he desires.

The Court has examined the Debtor's schedules I and J which set forth the income and expenses in the Debtor's budget. Schedule I discloses that the Debtor has gross pay of \$12,648.00 per month. The Debtor has deducted the sum of \$1,265.00 per month from his pay to go into a non-mandatory deferred compensation plan. These monies would clearly be available for the repayment of unsecured debt were they not deposited into this account. Additionally, the Debtor stated that a sum of \$4,657.00 is withdrawn from his wages on a monthly basis for taxes and social security. The Debtor did not make the adjustment to provide that he reaches his maximum deduction for FICA tax prior to the end of the tax year and has, therefore, overstated the amount of withholding. In those months in which he does not have to pay any social security taxes, the Debtor has approximately an additional \$720.00 in disposable income. The Debtor lists his net monthly income of \$6,522.00. However, if his income is increased simply by the amount contributed to the non-mandatory deferred compensation plan, his net monthly income totals \$7,787.00.

The next issue that the Court must address is the current expenditures of the individual Debtor as listed on Schedule J. The Debtor estimates his current monthly expense at \$7,220.00 per month. Schedule J contains excessive and unreasonable items which if eliminated or reduced would enable the Debtor to pay a significant dividend to creditors through a thirty-six month Chapter 13 plan. In making a determination as to 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 the debtor can be reduced significantly without depriving the debtor of adequate food, clothing, shelter or other necessities of life. See In re Engskow, 247 B.R. 314

(Bankr. M.D. Fla. 2000). The Court does not consider the home loan payment which includes taxes and insurance of \$899.00 to be excessive or unreasonable. The Court notes, however, that the Debtor lives alone. In addition to the mortgage payments, the upkeep of the home requires electricity and heating fuel costs of \$200.00 per month as well as water and sewer in the amount of \$38.00 per month. The Debtor has listed his monthly telephone and cell phone bill at \$195.00 per month. The Court finds this amount to be excessive and the Debtor testified that he had taken no steps to see if a more reasonable plan could be obtained. The Debtor has telephone service with AT&T, Sprint, MCI and Alltel. The Court finds that a more reasonable telephone service provider could be obtained and that the reasonable cost of telephone service given the Debtor's profession and the fact that he has to be able to reach clients would be no more than \$100.00 per month. The Debtor lists monthly expenses for a satellite at \$90.00 per month, gas heat at \$30.00 per month and garbage pickup of \$40.00 per month. Clearly, the satellite at \$90.00 per month is not a necessity.

The Debtor lists food cost at the rate of \$700.00 per month. The Debtor has a minor child that lives with his mother in Durham, N.C. and visits his father on the weekends. To explain this extraordinary food cost the Debtor testified that he eats virtually all of his meals on the road. His job requires him to leave home early and, therefore, he stops to eat breakfast on the way. He eats lunch at his place of employment and eats dinner driving back at night. The Court finds that such behavior given his economic circumstances is unreasonable. According to guidelines furnished by the United States Department of Agriculture, a liberal plan for a male individual age 20 to 50 years is \$240.50 per month. A liberal plan for an individual male child age 12 to 14 is \$227.00 per month. The Debtor only has his child on weekends and therefore the Court concludes that a liberal spending plan for food is \$400.00 per month. The Debtor designated the

sum of \$100.00 per month for recreation clubs and entertainment, which he testified was for entertaining his son on weekends. The Debtor also listed a separate expense for bottled water at \$15.00 per month, charges to his veterinarian for his three cats at \$35.00 per month and hair cuts at \$40.00 per month.

The current expenditures claimed by the Debtor reflect student loan payments in the amount of \$542.00 per month. Although nondischargeable, the educational loan is an unsecured debt that stands on the same footing with other unsecured debt in the context of § 707(b). Accordingly, in evaluating the Debtor's ability to repay, the educational loan payments will be included as unsecured debt along with the Debtor's credit card debt and, as such, the sum of \$542.00 will be treated as being available for the repayment of such debt.

The Court finds that this Debtor's budget is excessive and unreasonable to the extent of the foregoing items: excessive contributions to the 401(k) Plan, the excessive amount claimed for telephone bills, food as well as perks such as the satellite dish and bottled water. Therefore, the fourth factor also weighs against the Debtor.

In looking at the Debtor's ability to pay, the Court is required to examine the Debtor's future income and future expenses. In re Green, 934 F.2d at 572. In this case it is apparent that the Debtor has a stable income. His performance at work is such that he has recently obtained a raise. The Debtor attributed most of the credit card debt to the expenditures of his ex wife. Therefore, it appears that the Debtor will no longer have these expenses to pay nor will he have the expenses of the vehicle loan in favor of First Virginia Bank. The Court does note that there is a possibility that the Debtor will have to pay for college expenses for his minor child who is presently age twelve and that the Debtor's ex-spouse is demanding a sum of \$1,500.00 a month in spousal support.

Many courts evaluate the Debtor's ability to pay in light of the Debtor's theoretical ability to fund a Chapter 13 plan based upon future income and future expenses. In re DeRosear, 265 B.R. 196, 204 (Bankr. S.D. Iowa 2001); In re Norris, 225 B.R. 329, 332 (Bankr. E.D. Va. 1998). In the present case, the net income listed by the Debtor is \$6,522.00. For the reasons, previously addressed, for the purposes of § 707(b) availability to pay analysis this figure should be increased by the following sum: (1) \$1,265.00 which is based on the Debtor's unreasonable deduction for 401(k) Plan; (2) \$300.00 which is based upon a reduction in the Debtor's unreasonable allocation of the food budget; (3) \$100.00 on the Debtor's unreasonable estimate of telephone expenses; and (4) \$542.00 which represents the Debtor's loan payments on student loans.

Additionally, there must be an adjustment in the Debtor's estimated net income inasmuch as the Debtor has failed to make adjustments for that time period in which he is not required to make social security tax payments. It should also be noted that the Debtor would only have to pay for his vehicle for another 12 months and after twelve months he would have an additional \$299.00 per month available to pay his creditors.

Thus, if this Debtor were in a Chapter 13 proceeding and submitted only a 36 month plan, a total of approximately \$84,500.00 would become available for distribution in the Chapter 13 plan. There are no priority debts in this proceeding. If every unsecured creditor filed a proof of claim, which is seldom the case, the Debtor could generate a dividend to unsecured creditors of 45% in a Chapter 13 with a 3 year plan. If the Debtor were willing to submit to a longer plan he could pay a substantially higher dividend to his creditors. This constitutes an ability to pay under the totality of the circumstances which is sufficient to render this case abusive for the purposes of § 707(b).

The next factor is whether the debtor's schedules and statement of financial affairs reasonably and accurately reflect true financial conditions. For the most part, the Debtor's schedules and statement of affairs were reasonably accurate. The Debtor neglected to list his tools of the trade. The Debtor did not list an adjustment or decrease in his car insurance when he dropped his ex-wife's vehicle nor did the Debtor accurately reflect his net disposable income as he overstated the amount that was being withdrawn for social security taxes. Except as otherwise stated, there appears to be no showing that the schedules do not accurately reflect the Debtor's true financial condition. Therefore, this factor carried little weight in the Court's conclusion that the case should be dismissed pursuant to § 707(b).

Under the Green analysis, the last factor to be considered is whether the case was filed in good faith. In Green, the court concluded that § 707(b) was intended to provide a tool for dismissing a Chapter 7 case "when the total picture is abusive." Green at 934 F.2d at 572. The Chapter 7 trustee has identified two nonexempt assets that would be available to creditors. The trustee has filed a motion requesting that the Debtor be allowed to retain his vehicle by paying the sum of \$1,000.00 to the estate.⁴ The Court does not believe that this case was filed in bad faith nor does the Court believe that there is any fraud involved; however, it is not required that bad faith or fraud be shown in order to make a finding of substantial abuse. This is a case in which the Debtor with annual income of approximately \$150,000.00 has the ability to repay his creditors if he is willing to do so. The Debtor has lived beyond his means for a significant period of time and could easily fund a meaningful Chapter 13 and provide creditors with some payout

⁴The trustee has also filed a motion that he be allowed to settle a state court action in which the debtor is the plaintiff for the sum of \$1,500.00. Other than the nominal recovery of \$2,500.00 it does not appear that any assets would be available to creditors and the debtor would retain all assets but the Acura automobile.

settlement.⁵ The totality of the circumstances in this case exemplifies an abuse of the bankruptcy process by a debtor seeking to take unfair advantage of his creditors. This is a case in which granting Chapter 7 relief would involve a substantial abuse of the provisions of Chapter 7.

CONCLUSION

Therefore, having considered the totality of the circumstances presented, 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 this case is therefore dismissed under § 707(b) of the Bankruptcy Code.

IT IS SO ORDERED.

This the 21 day of November, 2001.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge

⁵In re Praleikas, 248 B.R. 140 (Bankr. W.D. Mo. 2000)(substantial abuse where debtor could fund a Chapter 13 plan that would pay more than \$5,500.00, roughly 20% of her debt); In re Smilhula, 234 B.R. 240 (Bankr. D.R.I. 1999)(debtors had disposable income of \$838.00 per month and could afford to pay a dividend of approximately 40%); In re Gomes, 220 B.R. 84 (B.A.P. 9th Cir. 1998)(case dismissed for substantial abuse on the ground that the debtors had the ability to repay 43% of their unsecured debt through a three-year Chapter 13 plan); In re Norris, 225 B.R. 329 (Bankr. E.D.Va. 1998)(debtors could have paid 47% of creditors' claims through a 36-month Chapter 13 plan); In re Cohen, 246 B.R. 658 (Bankr. D.Colo. 2000)(debtor's expenses could be reduced to allow for payment of approximately 50% of unsecured creditors' claims in three years).