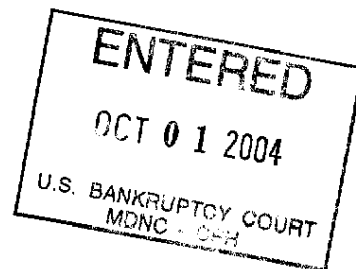


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION



IN RE:

Glenn Seymour,

Debtor.

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Case No. 04-80415C-7D

ORDER

This case came before the court on July 29, 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, Robert E. Whitfield. 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 February 11, 2004. At the time of the filing, the Debtor had an annual salary of \$90,000.00 which produced a gross monthly salary of \$7,500.00 and a net monthly salary of \$5,466.74. In his amended Schedule J the Debtor listed expenses of \$5,115.00 which included a mortgage payment of \$1,650.00 on his residence, \$400.00 per month for food and an educational expense of \$650.00 per month for an adult daughter. In 2003 the Debtor earned \$81,542.90, in 2002 he

earned \$80,838.00 and in 2001 he earned \$78,154.76. The Debtor is unmarried and has no dependents.

The schedules filed by the Debtor include an income tax liability of \$5,200.00. The secured indebtedness listed by the Debtor totals \$178,365.00 and consists of \$167,565.00 secured by a first and second mortgage on a residence valued at \$165,000.00, and \$10,800.00 secured by a 1995 Ford Explorer valued at \$2,800.00. In his Schedule F the Debtor listed unsecured indebtedness totaling \$92,601.83 consisting of \$64,089.00 listed as indebtedness owed to a former spouse, \$15,000.00 of attorney's fees incurred by the Debtor in litigation with the former spouse and most of the balance consisting of credit card indebtedness. The personal property listed by the Debtor in Schedule B consists of bank accounts (\$400.00), wearing apparel (\$200.00), household furnishings and miscellaneous items (\$775.00), general intangibles (\$135.00) and his 1995 Ford Explorer (\$2,800.00).

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. This provision represents an attempt to strike a balance between allowing debtors a fresh start and stemming abuse of consumer credit by providing the bankruptcy court with a means of dealing equitably with the

situation in which a debtor seeks to take unfair advantage of his or her creditors through the use of Chapter 7. See In re Green, 934 F.2d 568, 570 (4th Cir. 1991).

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. 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 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. Instead, it is a case that was filed when the Debtor was unsuccessful in litigation challenging an indebtedness to a former wife under a promissory note that the Debtor executed in 1998. Having failed in the pre-filing litigation, the Debtor now seeks to

discharge the indebtedness even though it is clear from the evidence that he has the ability to pay a substantial amount of the indebtedness owed to the former wife as well as his other creditors.

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 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. 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 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 Schedule I listed Debtor's net income as being \$5,000.00 per month. However, this figure is not accurate. It is undisputed that the Debtor's annual gross income is \$90,000.00 or \$7,500.00 per month. The pay stubs that were submitted into evidence reflect that the Debtor is paid bi-weekly and that his net income is \$2,523.11 every two weeks which produces a net annual income of \$65,600.86 and a net monthly income of \$5,466.74. The correct figure for Debtor's net monthly income is therefore \$5,466.74 instead of the \$5,000.00 figure listed in Schedule I. Thus, for purposes of the § 707(b) evaluation Debtor has net income of \$5,466.74 per month.

The expenses listed in Debtor's amended Schedule J total \$5,115.00. 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. The expenses listed by the Debtor include a monthly housing cost of \$1,750.00.00, consisting of a monthly mortgage payments of \$1,650.00 and home maintenance of \$100.00 per month. This \$1,750.00 monthly expense enables the Debtor to live in a four bedroom, three bathroom residence which he is purchasing. Given that Debtor has no dependents and lives alone in the residence, the court concludes that such a large monthly housing expense is excessive and unreasonable for an individual seeking a Chapter 7 discharge. 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 \$750.00 per month and such reduction treated as being available for payment to creditors. Other expenses claimed by the Debtor that are excessive and should be reduced as being excessive include utilities, which should be reduced from \$220.00 to \$110.00; food, which should be reduced from \$400.00 per month to \$300.00; entertainment, which should be reduced from \$150.00 to \$100.00; health insurance of \$60.00, which should be eliminated since it is deducted from Debtor's income and not paid separately; and a payment of \$100.00 per month to the IRS, which should be eliminated since the taxes would be paid by the Trustee under the hypothetical Chapter 13 plan. The result of these adjustments is that Debtor's monthly expenditures are reduced from the \$5,115.00 shown in Schedule J to \$3,945.00. This figure of \$3,945.00 should be reduced by an additional \$650.00 per month since Debtor's budget includes paying that amount each month for the support of an adult child that is attending college. A desire to provide one's children with a good education is understandable and commendable. However, Chapter 7 was not intended as a means of doing so at the

expense of one's creditors. See In re Miller, 302 B.R. 495, 502 (Bankr. M.D. Pa. 2003) ("To the extent that Debtors' budget accommodates the support of grown children, they are not reasonable and necessary expenses."); In re Staub, 256 B.R. 567, 570-71 (Bankr. M.D. Pa. 2000) ("courts generally agree that educational expenses for adult children are discretionary, and are not expenses that should be foisted upon a debtor's pre-petition creditors"); In re Stallman, 198 B.R. 491, 496 (Bankr. W.D. Mich. 1996); In re Goodson, 130 B.R. 897, 902 (Bankr. N.D. Okla. 1991). Thus, the expense figure that should be used in making the § 707(b) determination of the Debtor's ability to pay is \$3,295.00.

Based upon the Debtor's net monthly income of \$5,466.00 and reasonable monthly expenses of \$3,295.00, the Debtor has disposable income of at least \$2,171.00 which is available to fund payments to his creditors. In a Chapter 13 case, if the Debtor submitted only a 36 month plan, a total of \$78,156.00.00 would become available for distribution under a Chapter 13 plan. After taking into account the trustee fees and costs related to a Chapter 13 case and the \$5,200.00 of priority taxes, it appears that the Debtor could pay a dividend at least 74% to his unsecured creditors 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 substantially higher dividend to his creditors. Even without eliminating the \$650.00 per month for the

education of the adult child from the Debtor's budget, the Debtor could pay a dividend of at least 50% to his unsecured creditors. This case thus involves an ability to pay which, under the totality of the circumstances of this case, is sufficient to render this case abusive for purposes of § 707(b).

Whether a Chapter 7 case was filed in good faith also is an important factor in applying § 707(b). See In re Kestell, 99 F.3d 146 (4th Cir. 1996), where the court approved a dismissal pursuant to § 707(b) based upon a lack of good faith. However, neither bad faith nor fraud is an element required for a finding of substantial abuse. Green, 934 F.2d at 572. This case arguably involves an effort to take unfair advantage of creditors through the use of Chapter 7, given Debtor's ability to substantially repay his creditors if he were willing to do so, which raises a serious issue regarding whether this case was filed in good faith. However, even if the good faith factor is resolved in Debtor's favor, the other circumstances of the case are such that the granting of Chapter 7 relief in this case nonetheless would involve a substantial abuse of the provisions of Chapter 7.

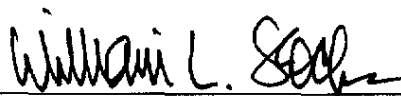
CONCLUSION

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, therefore, should be dismissed

under § 707(b) of the Bankruptcy Code.

IT IS SO ORDERED.

This 29th day of September, 2004.

A handwritten signature in black ink, appearing to read "William L. Stocks", written over a horizontal line.

WILLIAM L. STOCKS
United States Bankruptcy Judge