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U.S. BANKRUPTCY COURT
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UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

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| IN RE: | ) | |
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| Susan Lynne Tiskiewic, | ) | Case No. 02-11754C-7G |
| | ) | |
| Debtor. | ) | |

ORDER

This case came before the court on December 3 and December 10, 2002, for hearing upon a motion to dismiss case filed by the United States Bankruptcy Administrator. Robyn C. Whitman appeared on behalf of the Bankruptcy Administrator and Phillip E. Bolton appeared on behalf of the Debtor.

The motion seeks dismissal of this case pursuant to § 707(b) of the Bankruptcy Code. 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]." Under this language, it is a prerequisite that the debts in the case be "primarily consumer debts" before dismissal can occur. See In re Booth, 858 F.2d 1051, 1055 (5th Cir. 1988)("[S]ection 707(b) only applies in a Chapter 7 proceeding in which the debts are 'primarily' consumer debts. Even if the filing of the petition is in fact a substantial abuse, a case may not be dismissed under this provision unless this prerequisite is satisfied."). Because the evidence presented at the hearing was insufficient to show that the debts in this case are primarily

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consumer debts, the court, without reaching the issue of substantial abuse, must deny the motion.

Consistent with the general rule that the burden of proof rests on the party who asserts the affirmative, bankruptcy courts generally have placed the burden of proof on the party moving for the dismissal of a chapter 7 case pursuant to § 707(b). See e.g., In re Regan, 269 B.R. 693, 696 (Bankr. W.D. Mo. 2001); In re Browne, 253 B.R. 854, 856-57 (Bankr. N.D. Ohio 2000); In re Fletcher, 248 B.R. 48, 51 (Bankr. D. Vt. 2000); In re Cohen, 246 B.R. 658, 665 (Bankr. D. Colo. 2000). Although § 707(b) contains a presumption in favor of granting the relief requested by the chapter 7 debtor[1], the degree of proof required is proof by a

[1]Section 707(b) provides: "There shall be a presumption in favor of granting the relief requested by the debtor." This language has been cited by many courts as a basis for concluding that the party seeking dismissal under § 707(b) has the burden of proof. E.g., In re Woodhall, 104 B.R. 544, 545 (Bankr. M.D. Ga. 1989)("There is a presumption in favor of granting relief. Therefore, Trustee bears the burden of showing substantial abuse."). The precise effect of the "presumption" contained in § 707(b), however, is not entirely clear. Under Rule 301 of the Federal Rules of Evidence, "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." Because the bankruptcy cases placed the burden of proof (i.e., the burden of going forward as well as the burden of persuasion) upon the movant, the substantive effect of the presumption would seem minimal. One view of the presumption is that it is "a caution and a reminder" to the bankruptcy court that the Code and Congress favor the granting of bankruptcy relief and that the court, accordingly, should give the benefit of any doubt regarding dismissal to the debtor and dismiss a case only when substantial abuse is clearly shown. See In re Kelly, 841 F.2d

preponderance of the evidence rather than a heightened level of proof. See In re Harris, 279 B.R. 254, 259-60 (9th Cir. BAP 2002). Thus, it was the Bankruptcy Administrator who had the burden of proof in this case. In order to carry that burden, the Bankruptcy Administrator initially was required to produce evidence at the hearing sufficient to show by a preponderance that the debts in this case are primarily consumer debts. When measured pursuant to applicable legal standards, the evidence produced at the hearing fell short of making the required showing.

Under § 101(8) of the Bankruptcy Code, a consumer debt is defined as a debt "incurred by an individual primarily for a personal, family, or household purpose. . . ." In determining whether debt is for a "personal, family, or household purpose" under §101(8), courts look to the purpose for which the debt was incurred. See In re Kelly, 841 F.2d 908, 913 (9th Cir. 1988). Debt incurred "for a business venture or with a profit motive does not fall into the category of debt incurred for 'personal, family, or household purposes. . . ." In re Runski, 102 F.3d 744, 747 (4th Cir. 1996). Applying this test in Runski, the court held that debt incurred by an individual to purchase medical and office equipment for use in the debtor's chiropractic practice was not consumer debt

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908, 917 (9th Cir. 1988). See generally 6 COLLIER ON BANKRUPTCY ¶ 707.04[5][a] (15th ed. rev. 2002). However, the legislative history is scant and inconclusive regarding the § 707(b) presumption. See In re Harris, 279 B.R. 254, 259-60 (9th Cir. BAP 2002)(citing In re Weir, 173 B.R. 682, 685-89 (Bankr. E.D. Calif. 1994)).

because such debt was incurred with a profit motive, i.e., to earn a living. Id. at 747. In accord In re Kestell, 99 F.3d 146, 149 (4th Cir. 1996); In re Jones, 114 B.R. 917 (Bankr. N.D. Ohio 1990); In re Latimer, 82 B.R. 354 (Bankr. E.D. Pa. 1988); In re Goulding, 79 B.R. 874 (Bankr. W.D. Mo. 1987); In re Frisch, 76 B.R. 801 (Bankr. D. Colo. 1987); In re Restea, 76 B.R. 728 (Bankr. D. S.D. 1987); In re Bell, 65 B.R. 575 (Bankr. E.D. Mich. 1986); In re Almendinger, 56 B.R. 97 (Bankr. N.D. Ohio 1985).

In the present case, the debts consisted of unsecured, nonpriority debt totaling $41,205.00. According to the Debtor, most of this indebtedness was incurred prior to a divorce which occurred in late 1997. The Debtor's testimony was the only testimony regarding the purpose for which the indebtedness was incurred. According to the Debtor, 75% to 80% of her debt was incurred in connection with a new business that her husband started and operated during their marriage. The Debtor testified that she obtained loans and permitted the use of her credit cards in order to purchase equipment for the business and to pay expenses incurred in the operation of the business. The business failed, as did her marriage, and, according to the Debtor, she was left with debt which her former husband could not or would not pay. Debtor's testimony thus attributed 75% to 80% of her debt to a failed business venture. While there is some inconsistency between the Debtor's testimony and one of the exhibits which described the debt existing at the time of the Debtor's divorce, there was no other evidence concerning the purpose for which the debts were incurred. Given the Debtor's testimony and the dearth of other evidence relating to the purpose for which the debts were incurred, the court is left with a record that would support a finding that only 20% to 25% of the debt in this case is consumer debt and that such consumer debt is owed to three or four of the nine creditors listed in Debtor's schedules. The issue that remains is whether this percentage of debt owed to three or four of nine creditors is sufficient for the court to find that the indebtedness in this case is "primarily" consumer debt.

The cases are divided concerning the test that should be utilized in determining whether the debt in a chapter 7 case is primarily consumer debt for purposes of § 707(b). Some courts, probably a majority in number, rely upon the ratio of the dollar amount of consumer debt to non-consumer debt and conclude that the consumer debt must be over 50% in order for the debt to be primarily consumer debt. See In re Stewart, 175 F.3d 796 (10th Cir. 1999); In re Booth, 858 F.2d 1051 (5th Cir. 1988); In re Kelly, 841 F.2d 908 (9th Cir. 1988). Other courts rely upon the number of consumer debts compared to number of non-consumer debts and have found that the debt is primarily consumer debt where the number of consumer debts is more than 50% of the total debts. See In re Motaharnia, 215 B.R. 63 (Bankr. C.D. Cal. 1997); In re

Higginbotham, 111 B.R. 955 (Bankr. N.D. Okla. 1990). Other courts have concluded that it is appropriate for the court to consider both percentage of consumer debt as well as the number of consumer debts in deciding whether the debt is primarily consumer debt. See In re Bell, 65 B.R. 575 (Bankr. E.D. Mich. 1986). See generally Annotation, What Are "Primarily Consumer Debts" Under 11 U.S.C. § 707(b), 101 A.L.R. Fed. 771 (1991).

The amount of the debts which could be found to constitute consumer debt in this case is only 20% to 25%, while the number of such debts is 33% to 44% of the total number of debts. Under any of the foregoing tests, the consumer debt is insufficient to support a finding that the debts in this case are "primarily" consumer debts. It follows that motion to dismiss pursuant to § 707(b) should be denied.

IT IS SO ORDERED.

This 2nd day of January, 2003.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge