

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

IN RE:

William L. Hull

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Case No. 01-52457C-7W

ORDER

This matter came on for hearing before the undersigned Bankruptcy Judge on January 2, 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 William L. Yaeger, Attorney for Debtor, William L. Hull, the Debtor, Michael D. West, Bankruptcy Administrator and W. Joseph Burns, 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 not 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 October 16, 2001. The Debtor is a self employed insurance broker. The Debtor's schedules reflected monthly gross pay of \$6,500.00 or an annual salary of \$78,000.00. At the hearing, the Debtor testified that he had recently suffered a substantial drop in income due to the loss of one of his insurance carriers. The Debtor's prospect for continued employment is good. The Debtor's wife, who did not join in the Chapter 7 petition, is a teacher with an annual income of \$45,000.00 a year.

The schedules filed by the Debtor reflect a secured indebtedness on his primary residence in favor of Homecomings Financial Network. The Debtor and his wife own this house as tenants by the entirety with a tax value of approximately \$200,000.00. The amount of the mortgage is \$140,987.00. The monthly payment, including taxes and insurance on the home, is \$1,779.00 per month. The Debtor owes a secured debt in favor of Southtrust Bank NA for a 1998 Ford Explorer XLT with a value of \$12,500.00 and balance due of approximately \$15,133.00. Individually, the Debtor owes \$69,610.86 in priority debt to taxing authorities and approximately \$147,846.60 general unsecured credit card debt. The Debtor owes \$34,462.00 in joint priority debt with his wife. The Debtor testified that he expects his tax debt to be even greater once he files his 2001 income tax returns. Despite the large amount of unsecured credit card debt, the Debtor only lists personal effects having a value of \$4,979.00. The Debtor also owns a one half partnership interest with his wife in a condominium in Charlotte, North Carolina, which is jointly owned with another couple, James and Ann McQuiston. This condominium has a tax value of \$37,780.00.

DISCUSSION

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.” 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). In this case, over 50% of the debts are consumer debts, not incurred with a profit motive or in

connection with a business transaction, and as such, this case qualifies under Section 707(b). See In re Kestell, 99 F.3d 146, 149 (4th Cir. 1996).

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 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.

The first factor weighs in favor of the debtor. The Debtor testified that the filing of this petition was precipitated by a sudden drop in the income of the Debtor. Indeed, it was the Debtor's testimony that he had recently suffered a tremendous loss in income due to the drop of one his carriers following the sale of the company. On the Debtor's Statement of Financial Affairs, the Debtor disclosed that his income in the year 1999 was \$193,741.00 and in the year 2000 it was \$227,200.00. Furthermore, his income in 2001 as of the date of filing was

\$136,550.00. The Debtor now estimates his income is \$78,000.00 a year.

The second factor in Green is whether the debtor incurred consumer debt in excess of his ability to pay. In this case, the Debtor did incur substantial consumer credit card debts. Further, the Debtor disclosed \$40,000.00 in gambling losses on his statement of financial affairs. However, these debts were incurred at a time when his income was very high. In the year 2000, the Debtor's income averaged over \$18,000.00 per month. The Debtor testified that he had no reason to expect that his income would drop as it did. He testified that, in his business, it was not uncommon for insurance carriers to be sold; however, such sales did not usually result in a loss of business. Based on his prior income, the Court finds that while the Debtor did not manage his financial affairs well, a fact which the Debtor admitted while testifying at the hearing, the Debtor may not have incurred debt beyond his ability to pay if his income had not dropped. Therefore, this factor carried little weight in the Court's analysis.

The third factor, whether the debtor's family budget is excessive or unreasonable, weighs against the Debtor. 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 \$6,500.00 per month. On Schedule J, the Debtor stated that a sum of \$2,500.00 is spent each month on employment taxes. The Debtor estimates his current monthly expenses at \$9,068.00 per month. The Debtor testified that the budget presented in Schedule J is the family budget and that his wife contributes her full salary of \$2,700.00 per month to this budget. Therefore, these expenses are not solely those of the Debtor and are overstated.

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 finds that under the Debtor's current circumstances, the budget is excessive. The Debtor lists numerous expenses that are unusually high. In particular, the Debtor lists life insurance expenses at \$400.00 per month, disability insurance at \$200.00 per month, book expenses of \$60.00 per month, grooming expenses of \$100.00 per month and clothing expenses of \$200.00 per month. The Debtor lists \$400.00 in travel expenses, which he testified was probably a high estimate given his reduction in business related travel. The Debtor also included "family" expenses of \$100.00 per month, which the Debtor described as miscellaneous. While the Court recognizes that miscellaneous expenses do occur, the generous food budget of \$700.00 per month, recreation of \$150.00 per month and maintenance expenses of \$165.00 should be able to absorb most of these expenses. The Debtor lists expenses for his son Andrew, age 18, at \$600.00 per month and his daughter Whitney, age 21, at \$300.00 per month. He testified that these amounts were for college expenses. The majority of courts agree that college educational expenses for children are discretionary, and are not expenses that should be carried by the debtor's creditors. See e.g., In re Staub, 256 B.R. 567 (Bankr. M.D.Md. 2000); In re Stallman, 198 B.R. 491 (Bankr. W.D.Mich. 1996).

Many courts evaluate the Debtor's budget 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 Debtor has almost \$69,610.86 priority tax debt. If the Debtor funded a Chapter 13 plan by contributing the \$900.00 that he donates to his children's college expenses and by trimming an additional \$1000.00 off of the remainder of his budget, by cutting, for

example, the life and disability insurance payments (\$600), books (\$60), family (\$100), and also reducing his clothing, travel, and grooming expenses, the Debtor would almost pay his priority debts over three years ($\$1900.00 \times 36 \text{ months} = \$68,400.00$). It is unlikely that he would be able to generate any meaningful dividend to the general unsecured creditors through a Chapter 13 plan. The Debtor will remain responsible for the priority debts even after a Chapter 7 discharge. The Debtor will have to make arrangements to pay these debts and adjust his lifestyle accordingly.

In sum, the Debtor's budget is excessive, does not accurately reflect his wife's portion of the expenses, and can be reduced significantly without depriving the Debtor of adequate food, clothing, shelter or other necessities of life. However, given the substantial amount of priority debt owed by the Debtor and the Debtor's drop in income, little money would be available to pay general unsecured debt. The Debtor has little ability to fund a theoretical Chapter 13 plan which would pay his creditors any more than he will be responsible for in a Chapter 7.

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. As stated previously, the Debtor's budget did include expenses of his wife. This fact was clarified through the Debtor's testimony at the hearing on this matter. 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 does not weigh against the Debtor.

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 filed a report of no distribution. 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 last factor weighs in favor of the Debtor. The totality of the circumstances in this case reveal that this is a situation where a Debtor lived just within his means, failed to properly plan for his tax liabilities and then suffered a huge loss in income.

CONCLUSION

Having considered the totality of the circumstances presented, the Court concludes that the granting of Chapter 7 relief in this case is not a substantial abuse of the provisions of Chapter 7 pursuant to § 707(b) and the Debtor is entitled to a discharge.

IT IS SO ORDERED.

This the 30 day of January, 2002.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge