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

IN RE:)
)
Benny Keith Welch and) Case No. 02-10570 C-7G
Brenda Goines Welch,)
)
Debtors.)
)

ORDER

This case came before the court on November 5, 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 Ryan Dyson appeared on behalf of the Debtors.

The motion seeks dismissal of this case pursuant to § 707(b) of the Bankruptcy Code. There are two requirements in order for § 707(b) to be applicable: the debts in the case must be "primarily consumer debts" and it must be shown that granting the debtor a Chapter 7 discharge would involve a "substantial abuse" of the provisions of Chapter 7. In the present case, it is undisputed that the debts are primarily consumer debts.[1] Hence, the only issue for determination is whether granting the Debtors a Chapter 7 discharge

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[1]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". In determining whether debt falls within this definition, 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 "personal, family, or household" debt. See In re Runski, 102 F.3d 744, 747 (4th Cir. 1996). A debt 'not incurred with a profit motive or in connection with a business transaction" is considered consumer debt for purposes of § 707(b). See In re Kestell, 99 F.3d 146, 149 (4th Cir. 1996). Apparently, none of the debt in this case was related to any type of business venture.

37

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 have been developed by the courts for determining when substantial abuse is present. The applicable rule 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 or her 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 or her 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 debtor's ability to pay; and (6) whether the petition was filed in good faith. See id. Having considered these factors and the other attendant circumstances in this case, and giving effect to the presumption in favor of granting Chapter 7 relief that Congress built into § 707(b), the court has concluded that the granting of a Chapter 7 discharge in this case would not constitute a substantial abuse of the provisions of Chapter 7.

This case was filed on February 26, 2002. The schedules and statement of financial affairs filed by the Debtors reasonably and accurately reflect the Debtors' true financial condition.

On the petition date, the Debtors had unsecured debt in the amount of $94,000.00 which consisted of $87,000.00 of credit card debt and $7,000.00 owed to a contractor. This was more debt than the Debtors could service. However, the debt was not incurred shortly before bankruptcy or in anticipation of a bankruptcy filing. Rather, it appears that the credit card debt was gradually incurred over a period of nine or ten years and that high interest rates and penalty. charges imposed during the last couple of years before this case was filed account for a significant portion of the credit card debt.

During the nine or ten years preceding the filing of this case, both of the Debtors were employed and were able to make the minimum payments required of them and generally to remain current with their creditors. Beginning in 2000, however, developments occurred which adversely altered Debtors' financial situation. In early 2000, the Debtors were called upon to contribute to the support of their adult son while he was out of work after being seriously injured in an accident. Later in 2000, Debtors' adult daughter became seriously ill following a divorce, and Debtors were called upon to provide financial assistance to their daughter and three grandchildren during their daughter's crisis. Debtors! financial resources were further stressed when the female Debtor's elderly mother required financial assistance after she became ill and could no longer live independently. As a result of these unexpected expenditures, the Debtors fell behind in making the required monthly payments to their creditors and credit card interest and penalties began to mount. At the same time, the Debtors were in the middles of having a new home constructed. The home was completed in early 2001; however, the Debtors were unable to find permanent financing because of their deteriorated financial condition. While they sought permanent financing, the Debtors were locked into paying the construction lender a monthly payment that was significantly greater than had been anticipated. In the face of mounting difficulties, the male Debtor cashed out his 401(k) plan and used the $7,038.00 of proceeds in an effort to deal with Debtors' financial problems. Debtors were unsuccessful in finding permanent financing and, faced with foreclosure and a debt load that they no longer could manage, moved into an apartment where they were residing when this case was filed. While the evidence reflects that the Debtors unwisely accumulated a debt load that left no margin for error, the evidence did not disclose that they did so in bad faith or with any intent to abuse their creditors. Further, when the Debtors found themselves in a financial crisis in 2001, they made a conscientious effort to avoid bankruptcy by reducing expenses and resorting to their savings. Under these and the other circumstances of this case, the court concludes that chapter 7 relief for the Debtors in this case would not result in a substantial abuse of the provisions of chapter 7. One of the factors that was considered in reaching this conclusion is whether the Debtors in this case have the ability to repay their creditors. The Bankruptcy Administrator produced evidence that by reducing some of the expenses list in Schedule J, the Debtors could make a monthly payment of $1,760.00 in a hypothetical chapter 13 case, which would yield a 25% dividend to unsecured creditors. However, this evidence failed to take into account that the male Debtor's employer has changed the 'manner in which the Debtor's travel expenses are handled. The male Debtor is a traveling salesman, covering four states for his employer. Most of this travel is by automobile. Instead of being furnishing with an automobile as was done in the past, the male Debtor is now provided a travel allowance and required to use his own automobile in traveling for his employer. The employer-also has changed the manner in which the male Debtor's out-of-pocket expenses 'are handled. The male Debtor produced detailed records which showed that he is driving his automobile over 41,000 miles per year, that his expense reimbursements do not cover his actual expenses and that the expense allowance probably is not commensurate with the mileage being placed on his automobile. The result is that the male Debtor's travel expenses are significantly greater than reflected in Debtors' Schedule J. This increase was not taken into account in the $1,760.00 figure relied upon by the Bankruptcy Administrator. Also, the evidence did not support some of the reductions in expenses asserted by the Bankruptcy Administrator.

When the figures are adjusted to reflect the increased travel expenses and the reductions that were not supported by the evidence, any dividend to creditors would be small and not reflective of an effort to use chapter 7 to discharge debt that the debtors have the ability to pay. Instead, this appears to be a case that was filed in good faith by debtors who are truly in need of relief under chapter 7. Accordingly, the motion to dismiss will be denied.

IT IS SO ORDERED.

This 3rd day of January, 2003.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge