
In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:)
)
TONY RAY ACKERBERG) Chapter 7 Case
PATRICIA ANNE ACKERBERG) Number 97-20495
)
Debtors)

ORDER ON MOTION TO DISMISS

Debtors' case was filed April 25, 1997. On June 24, 1997, the United States Trustee filed a Motion seeking to dismiss this case under 11 U.S.C. Section 707. A hearing was held on November 6, 1997; based on the evidence from that hearing, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor is employed as a corrections specialist by the United States Navy. Debtors' Schedule "I" revealed gross income of \$3,142.41 and net income after taxes of \$2,563.27.¹ Debtors' Schedule "J", current expenditures, total \$2,410.35. Among the expenses which were deducted on Schedule "J" was \$100.00 per month for "recreation,

¹ This also includes a \$75.00 per month deduction for an individual retirement account.

clubs, entertainment, newspapers, magazines, etc.” The United States Trustee (“Trustee”) argues that taking the Debtors’ Schedule “I” and “J” at face value they have \$152.92 per month in disposable income and, after adding back in the IRA deduction and the recreation expenditures, have a true disposable income of \$327.00 per month. A monthly \$ 327.00 payment would fund a 41 percent dividend to unsecured creditors if Debtors filed a Chapter 13 case over three years and 69 percent of unsecured claims over five years. At the hearing the Debtor/husband did not appear, but Debtor/wife did. It is uncontradicted that although the parties are married, there is a divorce pending. Debtors listed their marital status on the petition for relief as “separated”; however, in the interest of minimizing expenses, they are living in the marital residence, but are living in separate bedrooms and remain in a *bona fide* state of separation.

In response to the Trustee’s objection concerning the budget figures, the Debtor/wife testified that the budget figure of \$300.00 per month for food is too low. She asserts that the budget contemplated only the husband’s food expenses as if he were living separately, but that the food budget for the entire family would actually be \$600.00 per month. She further testified that medical expenses not covered by any insurance or military benefits are approximately \$100.00, rather than the budgeted \$ 32.00, and that the recreation expense is justified because of the parties’ five year old son suffers from respiratory problems which limit the nature of his activities.

Debtor/wife also testified that the resolution of the parties' divorce will create substantial additional expenses. The Debtor/husband will necessarily need to find separate housing; if he moves into the barracks, approximately \$700.00 per month --- the amount of his "basic allowance for quarters," or BAQ --- will be lost. An examination of the schedules reveals that Debtors, at the time of filing, owned two automobiles, a residence valued at approximately \$85,000.00, and miscellaneous household furniture, furnishings and other personal property. Their major secured debt is an \$81,000.00 mortgage on the residence; unsecured claims in the case total \$28,400.00 and consist of credit card debt, a personal loan from the Navy credit union, and a revolving charge with Sears.

CONCLUSIONS OF LAW

11 U.S.C. Section 707(b) provides as follows:

(b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

The United States Trustee contends that a proper reading of Section 707(b) demands

dismissal of this case in that the parties' actions in filing a Chapter 7 constitutes a substantial abuse. In support of his position, the Trustee relies on the fact that with reasonable adjustments to the Debtors' budget a substantial Chapter 13 dividend could be paid to unsecured creditors, who will receive no distribution in this Chapter 7 case. The Debtors contend that the budget items are not truly reflective of their financial condition because the pendency of the divorce and a predictable future loss of income or income in expenses eradicate any disposable income which currently exists.

As a preliminary matter, this Court notes that § 707(b) applies to these Debtors, as they are individuals with primarily consumer debts in the nature of a home mortgage and credit cards. After this preliminary showing, the Court must determine whether granting relief under Chapter 7 would constitute a substantial abuse of the Code.

Section 707(b) mandates the presumption that the debtor is entitled to relief under Chapter 7 of the Bankruptcy Code. The Trustee, therefore, bears the burden of proving substantial abuse, either by showing that Debtors' expenses are overstated or that her income is understated. Matter of Strange, 85 B.R. 662 (Bankr. S.D.Ga. 1988). This Court has previously ruled in substantial abuse cases that the ability to fund a significant portion of debtor's unsecured claims is one factor in determining whether a Chapter 7 constitutes substantial abuse. Id. at 664. I have held, however, that it requires

more than this single factor to justify dismissal of the case. In re Richardson, Ch. 7 No. 95-41052, slip op. at 5 (Bankr. S.D.Ga. Sept. 28, 1995) (“This Court recognizes a “totality of the circumstances” test in deciding substantial abuse cases.”); *see also* In re Rowell, Ch. 7 No. 92-50228, slip op. at 11 (Bankr. S.D.Ga. 1992) (“Disposable income is a primary factor but, standing alone is insufficient to warrant dismissal for substantial abuse.”). To that end, I have held that to prevail, the Trustee must present additional evidence of bad faith or misconduct on the part of the debtors, for example, an extravagant lifestyle, prebankruptcy credit sprees, and the like.

The Trustee cites a recent Eighth Circuit Court of Appeals case in support of his position that Debtors’ ability to pay in and of itself warrants dismissal. *See In re Koch*, 109 F.3d 1285 (8th Cir. 1997). The Trustee correctly notes that the Eighth Circuit considered exempt income when determining an ability to pay²; the Eighth Circuit opinion, however, does not obligate this Court to consider only ability to pay. Koch was decided in light of the Eighth Circuit’s prior ruling in In re Walton, 866 F.2d 981 (8th Cir. 1989), that ability to pay, standing alone, justifies a § 707(b) dismissal. The Eleventh Circuit has not yet spoken on this issue.

Although the Trustee correctly notes that two circuit courts take the

² *See also In re Smith*, Ch. 7 No. 96-11160, slip op. at 2 (Bankr. S.D.Ga. 1997) (Dalis, J.).

position that ability to pay, standing alone, mandates a substantial abuse dismissal, it is equally true that two other circuit courts and one bankruptcy appellate panel take a position that other factors may be examined outside of the apparent ability to pay. In re Green, 934 F.2d 568, 572 (4th Cir. 1991) (adopting totality of the circumstances test); In re Krohn, 886 F.2d 123, 126 (6th Cir. 1989) (adopting rebuttable presumption rule)³; In re Stewart, __ B.R. __, 1997 WL 757556, *11 (10th Cir. B.A.P. Dec. 9, 1997) (adopting totality of the circumstances).

This Court declines the invitation of the United States Trustee to adopt the holdings of the Eighth and Ninth Circuits, choosing instead to adhere to the holding articulated in Rowell and related decisions of this Court. Factors to be considered in addition to a debtor's potential ability to pay include:

- 1) Whether the bankruptcy petition was filed because of sudden illness, calamity, disability, or unemployment;
- 2) Whether the debtor incurred cash advances and made consumer purchases far in excess of his ability to repay;

³ The Sixth Circuit in Krohn adopted an approach which recognizes that ability to pay can in some circumstances support a dismissal on its own; however, mitigating factors may be brought to the attention of the Court to rebut a showing of substantial abuse. In this sense, the Sixth Circuit's position adopts both the per se rule of the Eighth and Ninth and the totality of the circumstances of the Fourth and Tenth. In re Ontiveros, 198 B.R. 284, 288 (C.D.Ill. 1996).

- 3) Whether the debtor's proposed family budget is excessive or unreasonable;
- 4) Whether the debtor's schedules and statement of current income and expenses reasonably and accurately reflect the true financial condition;
- 5) Whether the petition was filed in good faith.
- 6) Whether the debtor's prebankruptcy dealings with creditors are tainted by misconduct insufficient to support an objection to discharge, but similar in kind, evidencing bad faith.

See generally, Green, 934 F.2d at 572; Rowell, Ch. 7 No. 92-50228, slip op. at 10.

On the facts of this case, this Court finds that Debtors' apparent ability to pay does not warrant a dismissal under § 707(b) for substantial abuse. Debtors have been living in the same house to minimize expenses, despite their marital separation and pending divorce. The Trustee presented no evidence that Debtors engaged in credit abuse or excessive spending prior to filing their bankruptcy petition. Moreover, Debtor testified that the budget as it exists currently is not feasible and will be subject to change once the divorce is finalized and Mr. Ackerberg moves back to the barracks. The anticipated food budget is not manifestly unreasonable for a family of three, and the family's medical expenses for their asthmatic son are significantly higher than are reflected in the budget. Perhaps most significantly, the Debtors' monthly income will necessarily decrease once

the parties' divorce is finalized. The husband will lose approximately \$ 700.00 per month in his BAQ. Even though the \$ 100.00 estimated for recreation is unnecessarily high, the loss of the BAQ more than compensates for any adjustment that might be made to lower the recreation expense.⁴

This Court has in the past granted the Trustee's motion to dismiss for substantial abuse where debtors engaged in unreasonable spending immediately prior to or during bankruptcy and where debtors failed to list assets on schedules or credit applications. *See In re Elliston*, Ch. 7 No. 91-50048, slip op. at 12 (Bankr. S.D.Ga. 1991) (debtors purchased \$ 12,400 car four months after filing); *In re Baribeau*, Ch. 7 No. 91-20140, slip op. at 12 (debtor accumulated over \$ 25,000 in debt through use of sixteen credit cards). These holdings are consistent with others in this district. *See In re Bush*, Ch. 7 No. 93-10771, slip op. at 5 (Bankr. S.D.Ga. 1993) (Dalis, J.) (debtor leased 1990 BMW and 1993 Lincoln Town Car immediately prior to filing bankruptcy).

Unlike those cases, however, this Court finds that Debtors' petition was filed in good faith and in anticipation of an impending divorce which will change

⁴ Debtor testified that the recreation expenses were high because of the limited activities available to her child, but did not clarify or explain the nature of those activities. Such a vague answer is difficult to rely upon when assessing the reasonableness of a debtor's budget, and does little to justify spending \$ 100.00 a month on entertainment for a child of five. Nevertheless, once the schedules are adjusted to reflect a recreational expense of zero, no IRA deduction, an increased food budget, and the loss of the BAQ, the accurate financial picture reflects monthly income of \$ 2517.41 and monthly expenses of \$ 2610.35, with no disposable income at all.

significantly their financial conditions. Finally, despite the apparent ability to pay reflected in Debtors' schedules, this Court finds that anticipated changes eviscerate that ability. This Court finds, therefore, that granting Debtors' relief under chapter 7 will not constitute a substantial abuse of the bankruptcy process.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Motion to Dismiss of the United States Trustee is DENIED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of January, 1998.