

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

In the matter of:)	
)	Chapter 7 Case
JOSEPHINE RICHARDSON)	
)	Number <u>95-41052</u>
<i>Debtor</i>)	

MEMORANDUM AND ORDER
ON UNITED STATES TRUSTEE'S MOTION TO DISMISS

Josephine Richardson (hereinafter "Debtor") filed a petition for relief under Chapter 7 of the Bankruptcy Code on June 2, 1995. On June 27, 1995, the United States Trustee filed a Motion to Dismiss Debtor's case, alleging that the grant of a discharge in this case would constitute a "substantial abuse" under 11 U.S.C. Section 707(b). The matter came on for a hearing on August 30, 1995, at which time this Court evaluated the evidence and permitted the parties two additional weeks to supplement their arguments. Based upon the parties briefs, the record in the file, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

In February of 1993, Debtor divorced her husband and received custody of her two minor children. Under the terms of the divorce decree, Debtor was awarded \$800.00 per month child support, \$400.00 per child until each one achieves the age

of majority, and \$700.00 alimony until 1999. Over the past two years, Debtor's husband became delinquent in his payments and accumulated an arrearage of more than \$30,000.00.

Six months prior to the filing of bankruptcy, Debtor successfully secured a garnishment of her ex-husband's wages and has been receiving \$1,167.67 each month from her ex-husband's employer, the United States Army. Debtor's ex-husband resides in Washington State and is scheduled to retire from the military in October, 1995. At the present moment, Debtor's ex-husband intends to pursue an educational degree after receiving a discharge from the army.

Debtor, who works as a clerk in a day care center, earns a monthly income of \$1,203.19 and still resides in Southeast Georgia. She lives with her two children, although both will have achieved the age of majority by the end of next month.

At the time of filing, Debtor's schedules indicate that she has unsecured debts of \$30,000.00¹ and secured debts of \$5,600.00. According to the initial schedules, her budgeted monthly expenses add up to \$1,743.29 while her net monthly income is \$2,370.86. Debtor's ex-husband still owes Debtor approximately \$13,000.00.

In support of its motion, Trustee asserts that Debtor's schedules, statement of

¹ Debtor's \$30,000 unsecured debt includes the following:
1) \$16,067.89 - deficiency after foreclosure on Kentucky home.
2) \$13,000.00 - deficiency after foreclosure on Georgia home.
3) \$900.00 - credit card and miscellaneous unsecured debt.

affairs, and budget indicate an ability to pay a substantial portion of her debt. Specifically, Debtor possesses disposable income of at least \$600.00 per month. Thus, because Debtor not only qualifies for Chapter 13 relief, but also possesses income exceeding the reasonably necessary standards of maintenance and support under 11 U.S.C. Section 1325(b), Trustee requests dismissal of this Chapter 7 case pursuant to 11 U.S.C. Section 707(b), or in the alternative, converting this proceeding to a case under Chapter 13 under 11 U.S.C. Section 706(a).

In response, Debtor contends that Trustee has only considered a "snap-shot" of Debtor's financial condition. Debtor claims that her ex-husband is an unreliable source of income when considering his past course of conduct and future intentions. Debtor also cites the difficulty of obtaining another wage garnishment order in Washington State courts. Further, Debtor points out that even if she were successful in obtaining regular payments from her ex-husband, she would only receive alimony payments, effectively reducing her present support by half.

CONCLUSIONS OF LAW

The United States Trustee moves to dismiss this Chapter 7 case for substantial abuse pursuant to 11 U.S.C. Section 707(b), which provides in relevant part:

After notice and a hearing, the court . . . on a motion by the United States Trustee . . . 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 asserts that this case should be dismissed or, in the alternative, Debtor should be allowed to repay her debts through Chapter 13 of the Bankruptcy Code, if she so desires.

Section 707(b) of the Bankruptcy Code mandates the presumption that debtor is entitled to relief under Chapter 7. This presumption may be rebutted by the trustee who bears the burden of proof on the issue of substantial abuse. Matter of Woodhall, 104 B.R. 544, 545 (Bankr.M.D.Ga. 1989); Matter of Dubberke, 119 B.R. 677, 679 (Bankr.S.D.Iowa 1990). Before dismissing for substantial abuse, the court should remember that bankruptcy relief was intended by Congress to provide the honest debtor with a fresh start. Local Loan Co., v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934).

Although the Eleventh Circuit has not addressed the issue of "substantial abuse" under 11 U.S.C. Section 707(b), case law has development among the circuit and bankruptcy courts.² This Court recognizes a "totality of the circumstances" test in deciding substantial abuse issues. When assessing the totality of the circumstances, courts should consider the following non-exclusive list of factors:

² See In re Green, 934 F.2d 568 (11th Cir. 1991) (excess income not the only factor, bankruptcy court should consider totality of the circumstances in determining substantial abuse); In re Fonder, 974 F.2d 996 (8th Cir. 1992) (essential inquiry remains debtor's ability to repay with future income); Matter of Blair, 180 B.R. 656 (Bankr.N.D.Ala. 1995) (707(b) requires totality of the circumstances test); In re Tindell, 184 B.R. 842 (Bankr.M.D.Fla. 1994) (dismissal was warranted where filing was not prompted by sudden illness or calamity); In re Dominguez, 166 B.R. 66 (Bankr.E.D.N.C. 1994) (court should consider debtor's future income and ability to repay debts); Matter of Tefertiller, 104 B.R. 513 (Bankr.N.D.Ga. 1989) (707(b) requires a clear evidence of abuse and presumption in favor of granting relief to debtor).

- 1) ability to pay;
- 2) the conditions and events which led to filing;
- 3) credit abuse and excessive spending prior to filing;
- 4) purchases exceeding any ability to repay;
- 5) current need and reasonableness of debtor's budget;
- 6) any misrepresentation of financial condition;
- 7) future earnings and the stability of future income;
- 8) honesty and good faith.

Dubberke, at 679. *See also In re Krohn*, 886 F.2d 123 (6th Cir. 1989).

Here, although it is a close question, I agree with Debtor that while her financial picture as of the date of filing makes it appear that she could fund a successful Chapter 13, her Chapter 7 should not be dismissed. She knows that her level of income will be reduced and her ability to collect alimony is impaired. Knowing of these imminent changes in her income it is unlikely that she could propose a feasible Chapter 13 plan. Her debts are predominately deficiency claims arising from foreclosure of her residence. She incurred a relatively low amount of unsecured debt and there is no evidence of bad faith or credit abuse in the record. Accordingly, the motion is denied.

ORDER

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

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of September, 1995.