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

In the matter of:)	
)	Chapter 7 Case
HOWARD PATRICK ROWELL)	
PATRICIA ANNE ROWELL)	Number <u>92-50228</u>
)	
<i>Debtors</i>)	
)	
)	
UNITED STATES TRUSTEE)	
)	
<i>Movant</i>)	
)	
)	
v.)	
)	
HOWARD PATRICK ROWELL)	
PATRICIA ANNE ROWELL)	
)	
<i>Respondent</i>)	

MEMORANDUM AND ORDER
ON MOTION TO DISMISS FOR SUBSTANTIAL ABUSE

On October 20, 1992, a hearing was held on the United States Trustee's Motion to Dismiss this Chapter 7 case pursuant to 11 U.S.C. Section 707(a) or 707(b) and, alternatively, to convert this case to a Chapter 13 proceeding pursuant to 11 U.S.C. Section 706(a). Upon consideration of the evidence adduced at trial, the briefs submitted by the parties, and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtors filed their Chapter 7 petition on April 27, 1992. Debtors' petition reflects an annual income of \$34,320.00 with a monthly take home pay of \$2,230.00. *See* Schedule "I" of Debtors' petition. The Debtors' Schedules reflect monthly expenses of \$1,970.43. *See* Schedule "J". The Debtors owe approximately \$4,400.00 in unsecured, non-priority claims. *See* Schedule "F".

The evidence showed that Debtors' actual take home pay was \$2,031.00 per month instead of the \$2,230.00 listed in the petition. Debtor/husband introduced into evidence a copy of his September 29, 1992, pay stub which reflected lower earnings.

Since filing their Chapter 7 petition, Debtors have consented to the Motion for Relief on their mobile home and are in the process of surrendering a 1990 automobile. Debtors intend to keep their 1984 Ford Tempo automobile and a 1982 Ford pickup truck, which are scheduled in the Debtors' petition as exempt. *See* Schedule "C".

In July of 1991 Debtor injured his back lifting a heavy pipe at work. Debtor continued to work for several weeks until he hurt his back again in September of 1991 when he ruptured his side lifting heavy materials. Debtor was out of work from September 17, 1991, until March 4, 1992.

Debtor received Workers' Compensation for part of the period he was

unemployed, nevertheless he defaulted in making his car payments and mobile home payments. In March of 1992, Debtor was approximately three payments in arrears on the car and mobile home. Debtor testified that he could not pay and catch up the amounts due. Debtors filed bankruptcy in April, 1992.

A large portion of the Debtors' unsecured debt, approximately \$3,400.00, consisted of medical bills. Debtors also owed approximately \$1,009.00 on a Discover card. The evidence did not show that Debtors abused their credit privileges.

While Debtor/Husband was out of work, he had to pay his own health insurance premiums, which was given priority among the Debtors' expenses. The Debtors did not purchase any luxury items within the last year and have not purchased any large items such as a television, radio or refrigerator.

The Debtors' budget includes a \$30.00 per month telephone bill and a \$135.00 per month clothing expense. The Debtors' telephone bill is somewhat high because Debtor/Husband works out-of-town and frequently calls home, which is long distance, to check on his family. The \$135.00 per month clothing expense includes purchases for the Debtors' two young children who are school age as well as clothing expenses for the Debtors. Debtor/Husband is a construction worker and needs work clothes and boots regularly. The Debtors also listed on their petition \$50.00 per month recreation expense and \$50.00 per month in charitable contributions.

The Debtors are currently living on land given to them by Debtor/Husband's

father and have constructed a small building on the property in which to live. The Debtors are not paying any rental expenses but are paying taxes, insurance, and up-keep for the property. Debtor/Wife's mother helps them pay certain expenses.

Debtor/Wife has been sick since having a hysterectomy last year and regularly sees a doctor for her health problems. Debtor previously operated a hair salon to earn extra income; however, she had to close her business due to her health problems and inability to work more than two days a week.

Taking into consideration the Debtors' income and reasonable expenses, I concluded at the October hearing that Debtors currently have approximately \$650.00 - \$700.00 in disposable income, less an unknown amount for upkeep on their home.

Despite the amount of disposable income there was no showing of fraud or intentional misrepresentation with regards to Debtors' petition. Debtors live in a modest home and drive relatively old cars, including the 1984 Ford Tempo and a 1982 Ford truck. Both Debtors have medical problems and have made an effort to decrease their expenses and adjust their lifestyle.

The United States Trustee argues that Debtors' Chapter 7 case should be dismissed based on Debtors' disposable income and apparent ability to fund a Chapter 13 plan. Debtors contend that the case should not be dismissed based on disposable income alone and that there must be a showing of bad faith or other abuse to dismiss their case.

CONCLUSIONS OF LAW

The primary purpose of bankruptcy relief is to provide the honest debtor with a fresh start through discharge of his debts. Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934). *See also* In re Krohn, 886 F.2d 123, 125 (6th Cir. 1989). However, the bankruptcy scheme places limits on the debtor's fresh start to prevent an "unscrupulous debtor" from taking "unfair advantage of his creditors." Id. at 126.

Section 707(b) of the Bankruptcy Code provides in pertinent 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.

11 U.S.C. §707(b). Section 707(b) provides the presumption that the debtor is entitled to relief under Chapter 7. In re Green, 934 F.2d 568 (4th Cir. 1991). Matter of Dubberke, 119 B.R. 677 (Bankr. S.D. Iowa, 1990). 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); Dubberke, 119 B.R. at 679.

"Substantial abuse" is not defined in the Bankruptcy Code. However, the courts which have examined the legislative history have concluded that Congress intended in Section 707(b) "to deny Chapter 7 relief to the dishonest or non-needy debtor." Krohn, 886 F.2d at 126. *See also* In re Walton, 866 F.2d 981, 983 (8th Cir. 1989).

The Sixth Circuit in Krohn, supra, concluded that the totality of the circumstances should be used to determine whether a debtor is dishonest or non-needy. 886 F.2d at 126. According to the court, "[s]ubstantial abuse can be predicated upon either lack of honesty or want of need." Id. First, the court listed several factors indicative of a debtor's honesty including good faith in filing schedules, any "eve of bankruptcy purchases," and filing bankruptcy due to "unforeseen or catastrophic events." Id.

The Sixth Circuit listed several other factors to determine whether a debtor was needy including the "ability to repay his debts out of future earnings." Id. *See also* Matter of Strange, 85 B.R. 662 (Bankr. S.D.Ga. 1988). "That factor alone [ability to repay] may be sufficient to warrant dismissal." 886 F.2d at 126. A debtor is not needy if "his disposable income permits liquidation of his consumer debts with relative ease." Id. It also considered "whether the debtor enjoys a stable source of future income . . . whether there are state remedies with the potential to ease his financial predicament . . . and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities." Id. at 126-127. *See also* In re Nolan, 140 B.R. 797 (Bankr. D.Colo. 1992).

Other courts following a totality of the circumstances test include In re Green, 934 F.2d 568 (4th Cir. 1991); Matter of Dubberke, 119 B.R. 677, 679 (Bankr. S.D. Iowa, 1990); and In re Wilkes, 114 B.R. 551 (Bankr. W.D.Tenn. 1989).

In Green, supra, the Fourth Circuit specifically held that disposable income

alone was insufficient for a finding of substantial abuse and dismissal under Section 707(b). The debtor, a bus driver, fell behind in paying his debts after sustaining a leg injury that caused him to be out of work for six months. Debtor asserted that his high 1988 income of \$46,000.00 included substantial overtime pay which he would be unable to receive in the future if his leg continued to hurt. Debtor estimated his annual 1989 income at \$26,000.00 without overtime pay. 934 F.2d at 569. Contra In re Kelly, 841 F.2d 908 (9th Cir. 1988) (Disposable income alone would constitute substantial abuse requiring dismissal of debtor's Chapter 7 case). In Kelly, the debtor, an attorney with an annual income of approximately \$60,000.00, had at least \$440.00 per month in disposable income without considering an excessive recreation expense of \$500.00 per month. After reducing the recreation expense to \$250.00 per month, the debtor could pay 99% of his unsecured debt in three years. 841 F.2d at 915. The bankruptcy court noted that debtor filed his petition after losing a lawsuit in which attorney's fees were awarded against him. 57 B.R. at 537-38. Also, no evidence of calamity, illness, or hardship was presented to show that debtor would have any difficulty repaying his debts. 57 B.R. at 540. *See also* United States Trustee v. Ham's, 960 F.2d 74 (8th Cir. 1992) (Substantial abuse does not require the moving party to show egregious behavior; however, permitting debtors to discharge their debts where debtors had ability to pay 156 percent of unsecured debt in three years would be a "substantial abuse").

The Fourth Circuit in Green agreed with Kelly, *supra*, that ability to repay is a primary factor to be considered but rejected the Ninth Circuit's conclusion that a majority of courts follow a *per se* rule that income is the sole test. Green, 934 F.2d at 572. According to the Fourth Circuit, the following factors should be considered under the totality of the circumstances test:

- 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) 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; and
- 5) Whether the petition was filed in good faith.

Green, 934 F.2d at 572. *See also* In re Strong, 84 B.R. 541, 545 (Bankr. N.D.Ind. 1988); In re Hammer, 124 B.R. 287, 289-290 (Bankr. C.D.Ill. 1991). Other courts have similarly held that disposable income alone is insufficient for a finding of substantial abuse and requires a showing of bad faith or egregious circumstances. *See* In re Wegner, 91 B.R. 854 (Bankr. D. Minn. 1988); In re Wilkes, 114 B.R. 551 (Bankr. W.D.Tenn. 1989); In re Martin, 107 B.R. 247 (Bankr. D.Alaska 1989). *See also* Matter of Tefertiller, 104 B.R. 513 (Bankr. N.D.Ga. 1989) (Rejecting the strict test for substantial abuse enunciated in Kelly). *See generally* In re Nolan, 140 B.R. 197 (Bankr. D. Colo. 1992).

Given the split of authority among circuits and in the absence of Eleventh Circuit precedent, I conclude that disposable income is a primary factor but, standing alone is insufficient to warrant dismissal for substantial abuse. In some cases high income and ability to repay may be so extreme as to constitute a substantial abuse. *See* In re Nolan, 140 B.R. 797 (Bankr. D.Colo. 1992) (Granting Chapter 7 relief to television sportscaster with

a stable job with annual income of \$170,000.00 per year would be substantial abuse). However, I cannot conclude that for families of ordinary means a showing of "disposable income" without more requires dismissal for substantial abuse. *See generally, In re Martin*, 107 B.R. 247 (Bankr. D. Alaska 1989), in which the bankruptcy court held that Section 707(b) grants the bankruptcy court discretion "to deny a motion to dismiss for 'substantial abuse' where there is evidence of an ability to fund some type of plan, but the court feels the debtor is entitled to the benefit of a 'fresh start' without dismissal." Additional factors such as stability of employment and a strong likelihood of ability to repay in the future should be considered in addition to the amount of current disposable income.

Here, the Trustee showed that Debtors had current disposable income of approximately \$650.00-\$750.00 per month. However, there has not been a showing that Debtors will be able to maintain that amount of disposable income and will be able to repay their debts in the future without hardship.

The Debtors' bankruptcy filing was precipitated by sickness and unemployment. *See Green*, 934 F.2d at 572; *Hammer*, 124 B.R. at 289-90. Debtors testified that they were delinquent in paying their debts, including their car and mobile home payments, at the time of filing. Debtors are now driving older automobiles and are living in a very modest home. They have surrendered their newer car and their mobile home which was financed in order to seek a more affordable life style. In no way have Debtors abused credit or engaged in bad faith with respect to their creditors. A significant amount of the unsecured debt is for health care, an involuntary expenditure.

Both Debtors have continuing health problems, which indicate a lack of stability in future employment and income. *See Krohn*, 886 F.2d at 126. Debtors are also likely to have additional medical bills in the future, which will decrease their disposable income. Debtor/Wife attempted to produce income for the family but had to close her business due to health problems. I conclude that Debtors will not be able to repay a substantial portion of their debts in the future.

In short, the sole factor on which to base a dismissal is the Debtors' current income level. No other factor suggesting abuse of the bankruptcy process is present. Given the totality of the circumstances, I cannot conclude that Debtors have substantially abused the provisions of Chapter 7 of the Bankruptcy Code. In light of the foregoing, I must deny the United States Trustee's Motion under Section 707(b).

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the United States Trustee's Motion pursuant to 11 U.S.C. Section 707(b) is denied.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of December, 1992.