

IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE
 SOUTHERN DISTRICT OF GEORGIA
 Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>96-11160</u>
JAMES E. SMITH)	
CHRISTINE SMITH)	
Debtors)	
<hr style="border: 0.5px solid black;"/>		
DONALD F. WALTON, ACTING UNITED STATES TRUSTEE, REGION 21)	FILED at 5 O'clock & 17 min. P.M. Date: 3-31-97
Movant)	
vs.)	
JAMES E. SMITH)	
CHRISTINE SMITH)	
Respondents)	

ORDER

Donald F. Walton, Acting United States Trustee, Region 21 (hereinafter "U.S. Trustee") seeks dismissal of this Chapter 7 case pursuant to 11 U.S.C. §707.¹ Based upon the evidence presented at

¹11 U.S.C. §707 provides:

(a)
 T h e
 c o u r t
 m a y
 d i s m i
 s s a
 c a s e

under
this
chapter
only
after
notice
and
a
heari
ng
and
only
for
cause
,
includ
ing-
-

(1)
unrea
sonab
le
delay
by
the
debto
r
that
is
preju
dicia
l to
credi
tors;

(2)
nonpa
yment
of
any
fees
or
chang
es

requi
r e d
under
chapt
e r
1 2 3
o f
title
2 9 ,
and

(3)
failu
re of
t h e
debto
r in
a
volun
tary
case
t o
file,
withi
n
fifte
e n
days
o r
such
addit
ional
time
a s
t h e
court
m a y
allow
after
t h e
filin
g of
t h e
petit
i o n
comme
ncing

such
case,
the
infor
matio
n
requi
red
by
parag
raph
(1)
of
secti
on
521,
but
only
a
motio
n by
the
Unite
d
State
s
trust
ee.

(b)
After
notic
e and
a
heari
ng ,
the
court
, on
its
own
motio
n or
on a
motio
n by
the
Unite

d
State
s
Trust
e e ,
b u t
n o t
a t
t h e
reque
st or
sugge
stion
o f
a n y
party
i n
inter
est,
m a y
dismi
ss a
case
filed
by an
indiv
idual
debto
r
under
this
chapt
e r
whose
debts
a r e
prima
rily
consu
m e r
debts
if it
finds
that
t h e
grant
i n g
o f

hearing, I make the following findings of fact and conclusions of law overruling the U.S. Trustee's objection.

Debtors, James E. Smith and Christine Smith filed a petition for relief under Chapter 7 of the Bankruptcy Code on June 4, 1996. The filing of this case follows a significant reduction in Mr. Smith's income from \$67,000.00 per year in 1994 to currently

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.

\$38,000.00 per year. Following Mr. Smith's reduction in income, the Debtors surrendered automobiles in an effort to reduce their monthly expenses and attempted credit counseling prior to resorting to Chapter 7 relief. As of the filing of this case, the Debtors' combined monthly net income totaled \$4,935.00. The U.S. Trustee does not dispute the scheduled net disposable income of Ms. Smith totaling \$2,540.00 per month. The evidence at trial establishes that Mr. Smith's average monthly net pay for 1996 through October 18 as \$2,396.00. His regular pay through October 18, 1996 was \$32,147.06, less federal income tax withholdings of \$5,256.29, Social Security tax of \$2,073.32, Medicare tax of \$484.88 and Georgia income tax of \$1,573.42, leaving \$22,759.15 divided by 9.5 months equaling \$2,396.00 average monthly net pay. In agreeing with the U.S. Trustee's calculation of Mr. Smith's net pay, I do not consider his 401(k) voluntary savings plan payment as a necessary expense in calculating his net income. See, Baxter v. Smith (In re Smith) Ch. 13 No. 96-11193 (Bankr. S.D. Ga. March 21, 1997).

The Debtors' bankruptcy petition schedule "J", as amended, established the monthly family living expenses.

Mortgage Payment	\$ 724.28
Utilities	\$ 388.33
House Maintenance	\$ 150.00
Food	\$ 670.00
Clothing	\$ 120.00
Laundry and Dry Cleaning	\$ 50.00
Medical and Dental	\$ 141.00
Transportation	\$ 132.00
Recreation	\$ 55.00
Auto Insurance	\$ 210.00
Maintenance and Support Payments	\$ 850.00
Day Care	<u>\$ 149.00</u>

TOTAL MONTHLY EXPENSES: \$3,639.61

Subtracting the family living expenses of \$3,639.61 from the Debtors' combined net monthly income of \$4,935.00 results in a net disposable income of \$1,295.39.

The Debtors' household consists of four persons, the Debtors, Mrs. Smith's adult daughter and Mrs. Smith's minor granddaughter. The adult daughter attends Augusta State University and works part-time at Heilig-Meyers Furniture store. The Debtors included in their budget their daughter's living expenses, including providing her a 1992 Pontiac automobile, but did not include her income nor her educational expenses. According to the Debtors' post trial brief, the adult daughter had net earnings of \$4,627.13 (\$462.71 per month) in the first ten months of 1996. The Debtors claim that the adult daughter's net income is consumed by her expenses, leaving nothing to contribute to the household. Her claimed monthly college expenses total \$225.00, gasoline and automobile repairs of \$120.00, clothing allowance of \$40.00 and \$30.00 for recreation. Even using these figures, \$47.71 remains to be contributed to the household for the adult daughter's living expenses.

Although the U.S. Trustee has challenged various aspects of the Debtors' overall household budget including monthly home maintenance of \$150.00 and food expense for a family of four of \$670.00, overall household expenses for a family of four of \$3,639.61, including a monthly child support and alimony payment of

\$850.00 and day care expenses of \$149.00 for the minor grandchild, are not excessive or unreasonable. However, my determination that this household budget is reasonable includes the living expenses of four persons, including the adult daughter. Inclusion of the adult daughter's living expenses requires inclusion of her income to determine whether the Debtors have sufficient income to pay a significant dividend to their unsecured creditors in a Chapter 13 case. This analysis does not require the adult daughter, a non-debtor, to devote her income to the payment of the Debtors' obligations. To the contrary, this analysis requires that the adult daughter contribute her income to her portion of the household expenses. The adult daughter's monthly income of \$462.71, less projected monthly educational expenses of \$225.00, leaves \$237.71 available for contribution to the household to cover her living expenses, with the corresponding reduction in the Debtors' household expenses thereby increasing the amount available to the Debtors to pay creditors to \$1,533.10 (\$237.71 plus \$1,295.39).

The Debtors have sufficient disposable income to pay a significant dividend to unsecured creditors in a Chapter 13 case. The following amounts constitute either secured debts that the Debtors have agreed to reaffirm, which debts Debtors' counsel indicates include principal and interest, or are tax debts excepted from a Chapter 7 discharge.

Badcock Furniture	\$ 400.00
CSRA Credit Union	\$ 800.00
CSRA Credit Union	\$ 6,000.00
Kerr Motor	\$ 4,497.00

Blazer Finance	\$ 1,160.00
Internal Revenue Service	\$14,200.00
Georgia Department of Revenue	<u>\$ 2,800.00</u>
Total Secured or Nondischargeable Tax Debt:	<u>\$29,857.00</u>

The Debtors' schedule "F" lists unsecured nonpriority debt of \$30,567.00. Based upon the Debtors' listing of secured, nondischargeable tax and general unsecured debts, the Debtors' monthly disposable income of \$1,533.10 per month would total \$55,191.60 over 36 months, and would constitute a 72% dividend to their unsecured creditors in a 36 month Chapter 13 plan. The plan would pay secured and nondischargeable tax claims of \$29,857.00 in full; administrative costs of \$3,311.50 (6% of \$55,191.60) and \$22,023.10 toward unsecured claims. Available funds for payment of unsecured claims of \$22,023.10 divided by total unsecured debt of \$30,567.00 equals a dividend of 72%.

The primary purpose of bankruptcy relief is to provide the honest but unfortunate debtors with a fresh start through the discharge of their 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, limitations such as §707(b) on the extent or availability of an individuals access to a bankruptcy discharge are designed to prevent a debtor from taking "unfair advantage of his creditors." Id. at 126. Section 707(b) provides the debtor with a presumption in favor of relief under Chapter 7, which presumption may be rebutted by the U.S. Trustee, bearing the burden of proof on the substantial abuse issue. Green

v. Staples (In re Green), 934 F.2d 568 (4th Cir. 1991), Matter of Dubberke, 119 B.R. 677, 679 (Bankr. S. D. Iowa 1990); Matter of Woodhall, 104 B.R. 544, 545, (Bankr. M.D. Ga. 1989). Section 707(b) is intended "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 totality of the circumstances should be used in determining whether the debtors' Chapter 7 filing constitutes a substantial abuse of the bankruptcy process warranting dismissal. Factors for consideration are:

1. debtor's future income and ability to pay their debts;
2. whether the Chapter 7 petition was filed in response to sudden illness, calamity, disability or unemployment;
3. whether the debtors incurred cash advances or made consumer purchases far in excess of their ability to pay;
4. whether the debtor's schedules and statement of current income and expenses reasonably and accurately reflect debtor's true financial condition; and
5. debtor's subjective good faith in filing for Chapter 7 relief.

In re Green, 934 F.2d at 572 (4th Cir. 1991); Krohn, 886 F.2d. at 126; United States Trustee v. Rowell (In re Rowell), Ch. 7 No. 92-50228 slip op. at 7 (Bankr. S.D. Ga. Dec. 16, 1992). The Debtors' future income and ability to repay their debts is a primary factor in finding substantial abuse, but standing alone this factor is insufficient to warrant dismissal. Id. at 11.

In this case, the Debtors' ultimate Chapter 7 filing resulted from a substantial reduction in Mr. Smith's income. Prior to filing this case, the Debtors attempted through credit counseling and the surrender of two more expensive automobiles to reduce their living expenses and resolve their debts without a bankruptcy filing.

They were unsuccessful and forced to seek relief under the Bankruptcy Code.

Considering the totality of the circumstances surrounding the Debtors' filing, their ability to pay a 72% dividend to unsecured creditors under a Chapter 13 plan standing alone is not sufficient to warrant dismissal. This Chapter 7 resulted from a substantial reduction in income to the household. There is no evidence that the Debtors continued to live beyond their means following Mr. Smith's reduction; to the contrary, the evidence establishes an effort by the Debtors to reduce their cost of living and to resolve their debt without resort to bankruptcy. This petition was brought in good faith as a last resort. This case does not constitute substantial abuse of the bankruptcy process nor do I find cause to dismiss.

It is therefore ORDERED that the motion of the U.S. Trustee to dismiss this case under 11 U.S.C. §707 is denied.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 31st day of March, 1997.