

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
DALE & EVA WEST,) CASE NO. BK00-82636
)
DEBTOR) CH. 7

MEMORANDUM

Hearing was held on Motion to Dismiss Under 11 U.S.C. § 707(b) for Substantial Abuse filed by the United States Trustee ("UST"). Appearances: Howard Duncan for the debtors and Jerry Jensen for the UST. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A).

Introduction

This matter is before the court on the U.S. Trustee's Motion to Dismiss pursuant to 11 U.S.C. § 707(b) for Substantial Abuse and Objection by the debtors.

The U.S. Trustee claims that debtors have disposable income which could be used to pay creditors. This disposable income consists of 401K contributions the debtors are now making on a monthly basis, an extra \$66.00 in pension income not listed on the schedules and an indeterminate amount of income earned from teaching that was also excluded from debtors' schedules. The debtors are individuals and have reaffirmed all debts with secured creditors pursuant to 11 U.S.C. § 524(c). Debtors have nine unsecured creditors holding non-priority claims of \$45,533.67. The debtors' income schedule reflects that the debtors have total gross monthly income of \$5,042.56, total net monthly income of \$3,799.14 and total monthly expenditures of \$3,799.14. As noted previously, these figures fail to reflect a \$66.00 increase in pension income and income earned from teaching.

In opposition, the debtors deny that they have disposable income. The debtors argue that even in the event that the 401K contributions were added back into the debtors' available monthly income it would not result in a net sum of \$200.00 because income taxes would be deducted. Debtors further argue that they would require, and should be allowed, a reserve in

the amount of \$100.00 per month for extraordinary expenses. This reduction to extraordinary expenses would also reduce the amount theoretically available to unsecured creditors. Thus, the debtors assert that they do not have a sufficient amount of disposable income with which to fund a Chapter 13 Plan.

Issue

Whether permitting the case to proceed under Chapter 7 is a substantial abuse of the provisions of Chapter 7?

Law and Discussion

Dismissal for substantial abuse is governed by 11 U.S.C. § 707, which states in relevant part:

[T]he Court, on its own motion or 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).

Thus, the court has discretion to dismiss a case if: (1) there is a hearing after notice; (2) the debts are consumer debts; and (3) granting relief would be a substantial abuse. In re Bicsak, 207 B.R. 657 (Bankr. W.D. Mo. 1997).

The only issue to be resolved in this case is whether granting relief would be "substantial abuse." The term "substantial abuse" is not defined in the Bankruptcy Code. However, in determining whether the granting of relief in a particular case would constitute a substantial abuse, the Eighth Circuit has developed what it refers to as the Walton/Harris standard. United States Trustee v. Harris, 960 F.2d 74 (8th Cir. 1992); In re Walton, 866 F.2d 981 (8th Cir. 1989). See, Fonder v. United States, 974 F.2d 996 (8th Cir. 1992); In re Schmidt, 200 B.R. 36 (Bankr. D. Neb. 1996).

Under this standard, the primary factor in determining whether granting relief would constitute a substantial abuse

pursuant to Section 707(b) is "the debtor's ability to pay some of his or her debts out of future income."¹ Harris, 960 F.2d at 75; In re Walton, 866 F.2d at 984. See also Nelson v. Siouxland Federal Credit Union (In re Nelson), 223 B.R. 349, 353 (8th Cir. BAP 1998); In re Shelley, 231 B.R. 317, 319 (Bankr. D. Neb. 1999); In re Coleman, 231 B.R. at 762; In re Schmidt, 200 B.R. at 38.

The ability of the debtor to pay a substantial portion of his unsecured debt, as determined by his ability to fund a Chapter 13 plan, is, in itself, sufficient grounds to dismiss the Chapter 7 petition for substantial abuse. In re Nelson, 223 B.R. at 353; In re Walton, 866 F.2d at 985; Harris, 960 F.2d at 77. For Section 707(b) purposes, the debtor's ability to pay is measured by evaluating the debtor's financial condition in a hypothetical Chapter 13 proceeding. Taylor v. United States (In re Taylor), 212 F.3d 395 (8th Cir. 2000); Stuart v. Koch (In re Koch), 109 F.3d 1285 (8th Cir. 1997). In this hypothetical Chapter 13 proceeding, the court determines whether the debtors have "disposable income" within the statutory definition, such that they should be obligated to pay something to their unsecured creditors as the price of receiving a discharge in bankruptcy. In re Wilkins, No. BKY96-35061 1997 WL 1047545 (Bankr. D. Minn. March 26, 1997).

¹In In re Schmidt, this court stated that it

does not read Walton and Harris to hold that anytime a debtor has any amount of net monthly disposable income, dismissal under Section 707(b) is warranted. Neither does this court find that the debtor must have the ability to pay off a certain percentage of his or her unsecured debt under a three or five-year Chapter 13 plan. See, Fonder v. United States, 974 F.2d 996 (8th Cir. 1992). This court has confirmed chapter 13 plans where few, if any, unsecured creditors received any payments as part of the plan. Neither the percentage of debt that could be paid under a plan, the number of creditors holding unsecured claims, nor the amount of the debtor's net monthly disposable income are dispositive of the issue.

In re Schmidt, 200 B.R. at 39.

"Disposable Income" means income which is received by the debtor and which is not reasonably necessary to be expended for the maintenance and support of the debtors or their dependents. 11 U.S.C. § 1325(b)(2). Under Section 1325(b), the existence of disposable income is determined by first fixing a level of expenditures necessary to maintain a modest lifestyle over the three to five years of the hypothetical plan, and then comparing that amount to the debtor's claimed budget and current income. In re Wilkins, 1997 WL 1047545, at *1. In the context of a Chapter 13 case, the debtors would be expected to cut excessive expenses, making more disposable income available with which to pay creditors. In re Shelley, 231 B.R. at 319; In re Coleman, 231 B.R. at 762.

The debtors argue that there is no substantial abuse because they have no disposable income with which to pay creditors. However, allowing debtors to make contributions to their 401K plans, to the exclusion of other unsecured creditors, is a substantial abuse of the provisions of the Bankruptcy Code. 11 U.S.C. § 707(b). The voluntary contributions to the debtors' 401K plans are discretionary expenses and thus are not reasonably necessary for the debtors' support and maintenance during the three to five-year term of a Chapter 13 plan. In re Harshbarger, 66 F.3d 775 (6th Cir. 1995); In re Shirley, No. 99-02365-W 2000 WL 150835 (Bankr. N.D. Iowa Jan. 4, 2000); In re Anes, 216 B.R. 514 (Bankr. M.D. Pa. 1998). These contributions should be added back to their available income. See In re Bicsak, 207 B.R. at 657. (The bankruptcy court held that a \$395 contribution to a retirement and savings account being deducted from debtor's income each month must be included as part of a hypothetical Chapter 13 plan.). Therefore, the monthly combined 401K deductions of \$184.96 should be included in the calculation of debtors' disposable income.

Additionally, the increase of \$66.00 in the amount of debtor's pension should also be included as well as any income the debtor receives from teaching. Using a conservative estimate, the debtors would have disposable income of approximately \$240.00 per month plus the income the debtors receive from teaching classes to dedicate to a Chapter 13 Plan. Because the debtors did not include the teaching income in their schedules, if the debtors remain in bankruptcy, the schedules should be amended to reflect this additional income.

The debtors' bankruptcy schedules indicate they have unsecured debt of \$45,533.67. Not taking into account the additional amount of income received for teaching classes, the debtors would be able to fund a plan that pays \$8,640.00, or approximately 19% of their unsecured debt in a three-year plan, or \$14,400.00, or approximately 32% of their unsecured debt in a five-year plan. Even if the debtors have disposable income of only \$150.00 per month, the debtors would be able to pay \$5,400.00, or approximately 12% in a three-year plan, or \$9,000.00, or approximately 20% in a five-year plan. These amounts would sufficiently fund a Chapter 13 Plan.

Therefore, to allow the debtors to remain in Chapter 7 and obtain a discharge would be a substantial abuse as Section 707(b) has been interpreted by the Eighth Circuit Court of Appeals. The motion is granted. Debtors shall convert to Chapter 13 by May 1, 2001, or the case will be dismissed. Separate journal entry to be entered.

DATED: April 19, 2001

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:
20 DUNCAN, HOWARD T.

Copies mailed by the Court to:
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
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DALE & EVA WEST,)	CASE NO. BK00-82636
)	A
<u>DEBTOR(S)</u>)	
)	CH. 7
)	Filing No. 7, 8
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	
)	DATE: April 19, 2001
<u>Defendant(s)</u>)	HEARING DATE: March 19, 2001

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Dismiss Under 11 U.S.C. § 707(b) for Substantial Abuse by UST & Resistance by Debtors.

APPEARANCES

Howard Duncan, Attorney for debtors
Jerry Jensen, Attorney for U.S. Trustee

IT IS ORDERED:

The motion is granted. Debtors shall convert to Chapter 13 by May 1, 2001, or the case will be dismissed. See Memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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