

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
JOHN & NINA LARMA,) CASE NO. BK93-80538
)
DEBTOR) CH. 7

MEMORANDUM

Hearing was held on September 10, 1993, on Motion to Dismiss for Substantial Abuse filed by United States Trustee. Appearing on behalf of debtors was Mary Powers of Omaha, Nebraska. Appearing on behalf of the United States Trustee was Sam King of Omaha, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (O).

Background

John and Nina Larma, the debtors, filed a Chapter 7 case on April 1, 1993. In their schedules, the debtors listed thirty-one unsecured non-priority creditors with aggregate claims totaling \$86,106.12. The schedules list no secured creditors and no unsecured priority creditors. The debtors listed assets totaling \$8,153.00.

The United States Trustee (Trustee) has filed a motion to dismiss for substantial abuse under 11 U.S.C. § 707(b).

The debtors are over sixty-five years old. John Larma is a United States Air Force retiree. The couple has no dependents. Recently, Nina Larma has had back surgery. The debtors argue that they need the opportunity for a fresh start to prepare for retirement, and their increasing health needs. The couple admits that all of the debt in this case arose from the use of credit cards, most of which the couple received either unsolicited or without being required to submit financial statements.

The schedules list debtors' monthly after tax income as \$3,261.39, which is derived from John Larma's United States Air Force pension and social security payments. Expenses of the debtors total \$2,601.00. The trustee argues that the difference between the expenses and the income of the debtors will leave approximately \$660.00 per month to fund a Chapter 13 plan. The trustee asserts that under these figures, without considering proposed expense deductions that the debtors could make, the debtors would be able to pay \$23,760.00 or 27% of their secured debt in three years. After deduction of the trustee's fees, this figure would actually be \$21,384.00 or 24.8%.

During the hearing on September 10, 1993, the trustee pointed to several of the debtors' expenses which the trustee believed could be reduced. For the sole purpose of the motion, these additional sources of income will be factored into the debtors' disposable income computation. The use of these figures is only to present the trustee's figures in the context of the trustee's "best case," and the merits of the trustee's suggestions are not ruled upon. However, several of these expense reduction suggestions would probably be viewed as unreasonable if the Court were to determine the merits of the trustee's suggestions. The trustee's proposed expense reductions are as follows:

		Additional Income
Rent (oversight)		5
Listed	495	
Real	490	
Cable		45
Basic	30	
2 Movie	15	
Food*		84.8
Monthly	424	
Proposed	339.2	
Medical & Dental		100/yr 1 & 2
Medication	87	
Denture and eyeglasses	100	
Proposed yr. 1&2	87	
Proposed yr. 3	187	
Transportation		35
Scheduled Total	175	
Gas	95	
Maintenance	75	
Proposed	140	
Charity		80
Scheduled	95	
Proposed	15	
Gifts/Haircuts/ Household supplies*		24.20
Scheduled	121	
Proposed	96.8	
Vacation*		19
Scheduled	95	
Proposed	76	
Subtotal per mo. (not incl. Medical & Dental)		293
Subtotal per year		3,516
Total For 3 years		10,548
Medical and Dental (year 1 & 2 only)		2,400

Total Additional Disposable Income **12,948**

* Where the item is marked, the trustee did not propose an exact figure, but proposed to "limit" the expense; therefore, these expenses were reduced 20%, based upon the limitation suggested by the Trustee on how much to reduce Transportation.

Following the table above, the maximum amount the debtors would be able to pay in a three-year plan is \$36,708.00 subject to the trustee's fees of \$3,670.80 (10%); therefore, the amount of debt that could be repaid under a three-year Chapter 13 plan is \$33,037.20 or 38%.

The trustee requests that the Court dismiss the Chapter 7 case on the basis that the Chapter 7 filing is in violation of 11 U.S.C. § 707(b) because permitting the debtors to remain in Chapter 7 constitutes a substantial abuse of the Bankruptcy Code.

Decision

The Court finds that this Chapter 7 case is not a substantial abuse of Chapter 7 of the Code. The debtors' maximum possible repayment under a Chapter 13 plan does not constitute a substantial portion of the debt owed to unsecured creditors.

Discussion

Under 11 U.S.C. § 707(b), the Court on its own motion or by motion of the trustee may dismiss a Chapter 7 case filed by an individual debtor if the debtor's debts are primarily consumer debts and if granting relief under Chapter 7 would constitute substantial abuse of the code. There is no dispute in the Larma's case that the debts are primarily consumer debts. The issue to be addressed is what constitutes substantial abuse in the Eighth Circuit and whether the debtors' are substantially abusing the bankruptcy system by filing a Chapter 7 case instead of funding a Chapter 13 case.

Eighth Circuit Court of Appeals decisions interpret the "substantial abuse" language of Section 707(b) to encompass consideration of the debtor's ability to pay his debts out of future income. In re Walton, 866 F.2d 981, 984 (8th Cir. 1989); U.S. Trustee v. Harris, 960 F.2d 74, 76 (8th Cir. 1992); Fonder v. U.S., 974 F.2d 996, 999 (8th Cir. 1992). A court may consider the unique hardships and good faith of the debtor, but the primary consideration is whether the future income of the debtor could fund a Chapter 13 plan. Walton, 866 F.2d at 983-84. What is not clear in the Eighth Circuit is what "ability to pay" exactly entails, beyond the reference that "ability to pay" refers to the ability to pay a substantial portion of the unsecured debt. Fonder, 974 F.2d at 1000.

In Walton, the court held that the debtor's ability to pay more than two-thirds of his total debt out of future income within three years constituted substantial abuse. 866 F.2d at 985. In Fonder, the court held that the ability to pay 89% of unsecured debt in three years was proof that the debtor could repay a substantial portion of his unsecured creditors in three to five years. 974 F.2d at 1000. In Harris, the court held that the ability to pay 156% of the unsecured debt in three years under a Chapter 13 plan, constituted substantial abuse if allowed to proceed in Chapter 7. The Eighth Circuit pointed out that the Bankruptcy Court in Harris, 122 B.R. 744 (Bankr. D.S.D. 1991), initially found that the debtor's ability to pay 56% of the debt was not a substantial abuse; however, the District Court, 125 B.R. 254 (D.S.D. 1991), found that the bankruptcy court had erred by overstating expenses, and the real figure that the debtor could repay in three years was 156% of his unsecured debts. 960 F.2d at 77.

The Circuit Court has not defined the point at which a debtor is able to pay a substantial portion of the debts and, therefore, should be prohibited from filing a Chapter 7 case. The bankruptcy court level cases in the Eighth Circuit seem to suggest that the minimum payback percentage is significantly greater than 50%. In re Day, 77 B.R. 225 (Bankr. D. N.D. 1987) (ability to pay more than 100% in more than three years justified dismissal for substantial abuse); In re Kress, 57 B.R. 874 (Bankr. N.D. 1985) (debtor could pay back unsecured creditors 100% within three years); But see In re Gyurci, 95 B.R. 639 (Bankr. D. Minn. 1989) (estimating that debtor could pay back between 40-50% in case where bad faith accumulation of debt was involved).

The Eighth Circuit in Fonder, 974 at 1000, adopted the language that was being used in the lower courts which required a "substantial portion" of the debt be paid off. The bankruptcy court in Fonder has come the closest to drawing a line by holding that "substantial abuse" occurred when the debtor was capable of repaying at least 50% of unsecured debts. 974 F.2d at 998. See also Harris, 125 B.R. at 257 (finding that a substantial portion of the debt was able to be repaid).

After a review of the circuit, district and bankruptcy cases in this circuit, it appears that the majority of courts have interpreted the statutory language of "substantial abuse" in Section 707(b) to mean that if a debtor has the ability to pay more than 50% of the debt from future income in the three years of a Chapter 13 plan, the debtor should not be permitted to obtain relief under Chapter 7. The trustee takes the position that if a debtor has the ability to pay any of the debt from future income, the debtor's Chapter 7 case should be dismissed for "substantial abuse." However, there is no language in the statute to support the position of the trustee. To the contrary, the bankruptcy court

cannot compel a debtor to file a Chapter 13 bankruptcy. Fonder, 974 F.2d at 999.

Congress has indicated in other provisions under Chapter 13 that Congress knows how to distinguish between Chapter 7 and Chapter 13 cases and the potential abuses of these Chapters, i.e., 11 U.S.C. § 1325(a)(4) requires that a Chapter 13 plan pay out at least as much to creditors as would be received in a Chapter 7 liquidation. It appears that Congress intended the courts to create a working definition of "substantial abuse," perhaps on a case-by-case basis. Had Congress intended to prohibit an individual from filing a Chapter 7 case if the debtor was capable of paying a small percentage of debt from future income, Congress could easily have said so.

In light of these cases and the determination that a court may consider the unique hardships and good faith of the debtors, the trustee's Motion To Dismiss is denied. The debtors are over sixty-five years old, they are in retirement, and they are of an age where their health impairments are likely to become more pronounced as the next few years pass. The debtors may proceed in Chapter 7 bankruptcy because under the best payout possible, as suggested by the trustee, the most the debtors are capable of paying in the next three years is 38% of the unsecured debt. Thirty-eight percent, which is the trustee's best case scenario, falls short of the repayment percentages that meet the "substantial abuse" standards set by the Eighth Circuit in Walton, Harris, and Fonder.

Separate journal entry to be entered.

DATED: September 24, 1993.

BY THE COURT:

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

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [X] U.S.Trustee
Movant is responsible for giving notice of this journal entry to any parties in interest not listed above.

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JOHN & NINA LARMA,)	CASE NO. BK93-80538
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<u>DEBTOR(S)</u>)	
)	CH. 7
)	Filing No. 10, 12
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	DATE: September 24, 1993
<u>Defendant(s)</u>)	HEARING DATE: September
)	10, 1993

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Dismiss for Substantial Abuse Filed by United States Trustee; Resistance.

APPEARANCES

Mary Powers, Attorney for debtors
Sam King, Attorney for UST

IT IS ORDERED:

Motion to Dismiss denied. See memorandum this date.

BY THE COURT:

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

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [X] U.S.Trustee

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