

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
JUDITH NELL HEISERMAN,) CASE NO. BK98-82471
)
DEBTOR.) CH. 7

MEMORANDUM

Hearing was held on January 7, 1999, on Motion to Dismiss Under 11 U.S.C. § 707(b) for Substantial Abuse filed by the United States Trustee. Appearances: Oliver Pollak for the Debtor and Jerry Jensen for the United States Trustee. 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).

Background

On September 28, 1998, debtor Judith Heiserman ("Debtor") filed a petition under Chapter 7 of the Bankruptcy Code. Debtor incurred approximately \$42,000.00 in consumer debts, which are primarily unsecured claims, as listed on Schedule F. Debtor recorded \$1,908.00 on Schedule I as monthly income. Debtor also scheduled \$1,467.00 as current expenditures on Schedule J. This leaves Debtor with approximately \$441.00 in disposable monthly income. Debtor plans to use the disposable income to purchase another vehicle in the near future. Debtor currently owns a 1993 Geo Metro with 80,300 miles recorded. Debtor is single, has no children and is employed as a paralegal.

The U.S. Trustee filed a motion to dismiss under 11 U.S.C. § 707(b) for substantial abuse. The motion alleges that Debtor has in excess of \$441.00 a month in disposable income which could be used to fund a Chapter 13 plan. The motion asserts that the Debtor's projected disposable income is sufficient to enable Debtor to repay thirty-seven percent of her unsecured debts in three years. Therefore, the U.S. Trustee argued that allowing Debtor to be discharged of her indebtedness in a Chapter 7 proceeding would constitute substantial abuse and should not be allowed.

In resistance to the motion, Debtor's main argument is that the facts of her case are distinguishable from the facts

presented in the relevant cases which interpret 11 U.S.C. § 707(b). Debtor further argued that having the ability to fund a Chapter 13 plan should not be the only fact considered with regard to dismissal of a Chapter 7 case for substantial abuse. Finally, Debtor argued that the disposable income of \$441.00 a month is necessary for her to purchase a new vehicle. No evidence was offered at the hearing regarding the condition of the vehicle currently owned by Debtor other than the fact that it is a 1993 Geo Metro with 80,300 miles.

Issues

1. Whether Debtor's ability to pay approximately 37% of Creditor's claims in a three-year Chapter 13 plan falls within the Eighth Circuit's definition of "ability to fund a Chapter 13 plan."

2. Whether a Chapter 7 case filed by a debtor who has the "ability to fund a Chapter 13 plan" from disposable income should be dismissed for "substantial abuse" as that term is used in 11 U.S.C. § 707(b).

3. Whether Debtor's desire to purchase a new vehicle within the foreseeable future is considered a "unique hardship" which would permit the court to find an exception to the otherwise required dismissal for "substantial abuse."

Decision

Debtor's ability to pay approximately 37% of her creditor's claims in a three-year Chapter 13 plan or 62% in a five-year plan appears to fall within the Eighth Circuit's substantial abuse standard which requires the bankruptcy judge to review a debtor's ability to fund a Chapter 13 plan. The Debtor's desire to purchase a new vehicle does not constitute a "unique hardship." Therefore, because Debtor has no "unique hardship" and can adequately fund a Chapter 13 plan, the motion of the U.S. Trustee should be granted.

Discussion

Although there is a presumption in favor of granting a debtor's discharge of indebtedness in a Chapter 7 case, under 11 U.S.C. § 707(b), a debtor's case may be dismissed for substantial abuse if the debtor's incurred debts are primarily consumer debts and if the court finds that granting a discharge under Chapter 7 would be a "substantial abuse" of

the bankruptcy system. In this case, Debtor owes approximately \$42,000.00 to various creditors, a majority of which are credit card companies. Such debts are "primarily consumer debts."

The cases of In re Walton, 866 F.2d 981 (8th Cir. 1989), and United States Trustee v. Harris, 960 F.2d 74 (8th Cir. 1992), support the motion to dismiss. In those cases, the United States Court of Appeals for the Eighth Circuit has interpreted the meaning of §707(b) and explained its view of the "substantial abuse" standard. In Walton, the Eighth Circuit held that courts may consider a debtor's future income and the debtor's ability to repay creditors from that future income when determining if "substantial abuse" has occurred. Walton, at 984. In so holding, the Court did not provide a method for determining exactly what percentage of the creditor's claims must be repaid in a Chapter 13 plan in order for the Chapter 7 to be considered "substantial abuse." However, the debtor in Walton had sufficient disposable income to repay up to two-thirds of the creditors in a Chapter 13 plan.

In Harris, the Eighth Circuit expanded the "substantial abuse" standard by ruling that the "ability to fund a chapter 13 plan" is sufficient reason to dismiss a Chapter 7 petition. Again, the Court did not rule on a specific percentage of a debtor's debts that would be considered adequate or necessary to fund a Chapter 13 plan. As in Walton, the debtor in Harris had the ability to repay approximately all of his unsecured debt in three years.

In the case at hand, Debtor has the ability to repay approximately 37% of creditor's claims in a three-year Chapter 13 plan. As mentioned above, Debtor has disposable income of \$441.00 a month. This Court has held that there is no specific percentage of debt to be repaid for the "substantial abuse" standard to be met. In the Matter of Schmidt, 200 B.R. 36, 39 (Bankr. D. Neb. 1996). In fact, Schmidt found that the primary factor in determining "substantial abuse" is debtor's ability to pay some of the debts out of future income. Id. at 38-39 (emphasis added). Because the Debtor does have the ability to pay 37% of her creditor's claims in a three-year plan and 62% in a five-year plan, her disposable income situation satisfies the "ability to pay some debts" requirement for a finding of "substantial abuse."

The Eighth Circuit Court of Appeals, in addition to requiring a finding that the debtor could pay "some debts," also suggested that a debtor's "good faith" and "unique hardships" may be considered when determining "substantial abuse." Harris, at 77. Although the Court has not promulgated any guidelines for use by bankruptcy judges when attempting to determine if a debtor's situation includes a "unique hardship," the term itself implies that it is a fact specific analysis which must be determined on a case-by-case basis.

Debtor, in the present case, argues she will need a new vehicle in the near future and she will pay for it out of her current disposable income. Debtor is currently driving a 1993 Geo Metro but does not offer any evidence that this car is dilapidated or that driving this vehicle is unsafe.

Conclusion

As the Eighth Circuit Court of Appeals has recently stated, "§ 707(b) was intended to promote fairness to creditors, and thereby increase the flow of consumer credit, by 'stemming the use of Chapter 7 relief by unneedy debtors.'" Stuart v. Koch, 109 F.3d 1285 (8th Cir. 1997). This Debtor's debts are "primarily consumer debts." She has funds sufficient to fund a Chapter 13 plan, and she has presented no evidence supporting a valid "unique hardship" argument. Therefore, allowing Debtor to remain in Chapter 7 and obtain a Chapter 7 discharge of debts would be a "substantial abuse" as contemplated by Congress under Section 707(b). For the above mentioned reasons, the Trustee's motion to dismiss should be granted. However, the dismissal shall be withheld for twenty days to permit the Debtor to convert to another chapter.

Separate journal entry to be entered.

DATED: February 5, 1999

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

69 POLLAK, OLIVER

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.

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FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	
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JUDITH NELL HEISERMAN,)	CASE NO. BK98-82471
)	A
<u>DEBTOR(S).</u>)	
)	CH. 7
)	Filing No. 4, 6
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	
)	DATE: February 5, 1999
<u>Defendant(s)</u>)	HEARING DATE: January 7, 1999

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Dismiss Under 11 U.S.C. Section 707(b) for Substantial Abuse filed by the united States Trustee for the District of Nebraska; Resistance.

APPEARANCES

Oliver Pollak, Attorney for Debtor
Jerry Jensen, Attorney for the U.S. Trustee

IT IS ORDERED:

Trustee's motion to dismiss is granted. However, the dismissal shall be withheld for twenty days to permit the Debtor to convert to another chapter. See separate memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

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