

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
ROBERT and NORETTA MARSHALL,) CASE NO. BK94-80182
)
DEBTOR) CH. 7

MEMORANDUM

Hearing was held on October 17, 1994, on the Motion to Dismiss Under 11 U.S.C. § 707(b) for Substantial Abuse filed by the United States Trustee. Appearing on behalf of debtor was Thomas Blount of Bertolini, Schroeder & Blount, Bellevue, 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).

I. History and Facts of the Case

The debtors in this case are Robert and Noretta Marshall. The debtors are married. The debtors filed a voluntary petition under Chapter 7 of the Bankruptcy Code on February 7, 1994.

The trustee moves to dismiss the case under 11 U.S.C. § 707(b) for substantial abuse. The debtors are resisting the motion.

Both debtors are employed by the United States Air Force and are stationed at Offutt Air Force Base, Nebraska. Robert is a jet engine mechanic earning \$1,499.64 gross and \$1,195.90 net each month and Noretta is a medical administrator earning \$1,499.64 gross and \$1,187.56 net each month. Combined, the debtors have a monthly gross income of \$2,999.28 and a monthly net income of \$2,383.46. The debtors have two daughters ages 4 and 2.

The debtors have two secured debts totalling \$21,218.54, \$18,644.50 of which stems from the purchase of a 1993 Jeep Cherokee. Their unsecured debts total \$31,333.14.

There is a fact dispute as to what the total monthly expenditures are and what the amount is that can be paid monthly to the unsecured creditors. The debtors contend \$430.84 per month is available to pay unsecured creditors, while the trustee contends the figure is \$623.84.

II. Discussion of Law

Section 707(b) of the Bankruptcy Code providing for the dismissal of Chapter 7 cases provides as follows:

(b) After notice and a hearing, the court, on its own motion or on a motion by the United States Trustee, but not at the request or suggestion of any party in interest, 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).

The determinative language of Section 707(b) is "primarily consumer debts" and "substantial abuse." The term "consumer debt" is defined in Section 101(7) as a debt incurred by an individual primarily for a personal, family, or household purpose. The term "substantial abuse" is not defined in the Bankruptcy Code itself but in case law.

In re Kress, 57 B.R. 874 (Bankr. N.D. 1985), the court adopted the following criteria against which the facts of a particular case should be judged in determining whether substantial abuse exists in a particular case to warrant dismissal under Section 707(b);

1. Whether the debtor has a likelihood of sufficient future income to fund a Chapter 13 plan which would pay a substantial portion of the unsecured claims:

2. Whether the debtor's petition was filed as a consequence of illness, disability, unemployment or some other calamity;

3. Whether the schedules suggest the debtor incurred cash advances, and consumer purchases in an excess of his ability to repay them;

4. Whether the debtor's proposed budget is excessive or extravagant;

5. Whether the debtor's statement of income and expenses is misrepresentative of his true financial condition.

Almost all courts that have interpreted the "substantial abuse" language of Section 707(b) have concluded that this language encompasses consideration of the debtor's ability to pay his debts out of future income. See, e.g., In re Gouklee, 63 B.R. 224 (Bankr. D.N.D. 1986); In re Kress, 57 B.R. 874 (Bankr. D.N.D. 1985); In re Hudson, 56 B.R. 415 (Bankr. N.D. Ohio 1985); Grant, 51 B.R. 394. In each of these cases, the bankruptcy court decided that a crucial factor in determining "substantial abuse" was whether the debtor's future income could fund a repayment plan

under the protection of Chapter 13. But see, In re Deaton, 65 B.R. 663 (Bankr. S.D. Ohio 1986) ("the mere ability to fund a Chapter 13 plan is not sufficient to constitute "substantial abuse").

It is in view of the above criteria that the facts of the instant case are considered.

Initially, the debtors' Schedule F, Creditors Holding Unsecured Non-priority Claims, shows objections comprised mostly of consumer debt.

While this Court declines to examine any particular item of the debtors' declared current expenditures or state a bright line for the percentage of unsecured debt that must be paid off in a Chapter 13 plan, it is uncontroverted that at least \$430.84 and possibly as much as \$623.84 of net disposable income could be used to repay unsecured creditors. The exact percentages become less important considering 11 U.S.C. § 1322(c). Section 1322(c) says a bankruptcy court "for cause" can approve plans which provide for payments during a period up to five years. This would add between \$10,320 and \$15,952 to the amount paid to unsecured creditors.

The debtors are skilled employees with the United States Air Force. The debtors did not present any evidence suggesting their employment will be terminated at any time in the near future. Nor is there any evidence that a medical condition would prevent the debtors from working a full schedule.

III. Conclusion

It appears the debtors have the financial means at hand and will continue to have the means to fund a Chapter 13 plan which would retire a substantial portion of the unsecured debt. To allow this case to go forward as a Chapter 7 would be a substantial abuse of the Bankruptcy Code.

Separate journal entry will be entered.

DATED: December 6, 1994

BY THE COURT:

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

Copies mailed by the Court to:

Thomas Blount, 1620 Wilshire Dr., Suite 250, Bellevue, NE 68005
United States Trustee

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
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ROBERT and NORETTA MARSHALL,)	CASE NO. BK94-80182
)	A
<u>DEBTOR(S)</u>)	
)	CH. 7
)	Filing No. 11, 13
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	DATE: December 6, 1994
<u>Defendant(s)</u>)	HEARING DATE: October
)	17, 1994

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 filed by the United States Trustee and Objection by Debtor.

APPEARANCES

Thomas Blount, Attorney for debtor
Sam King, Attorney for UST

IT IS ORDERED:

It is ordered that the Chapter 7 petition of Robert W. and Noretta D. Marshall be dismissed pursuant to Section 707(b) of the Bankruptcy Code.

BY THE COURT:

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

Copies mailed by the Court to:

Thomas Blount, 1620 Wilshire Dr., Suite 250, Bellevue, NE 68005
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.