UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

IN RE:

STEPHANIE L. TABOR, **Case No. 5-04-00727**

Debtor

DECISION AND ORDER

At Harrisonburg in said District this 1st day of April, 2005:

The matter before the court for decision is a motion filed on July 22, 2004, by the Office of the U. S. Trustee to dismiss the above-captioned Chapter 7 proceeding for substantial abuse pursuant to 11 U.S.C. § 707(b).[1] After a pretrial conference, pretrial order, completion of discovery and other pretrial matters, an evidentiary hearing was held on November 4, 2004. At the conclusion of the evidence, counsel for the debtor and the U. S. Trustee presented their arguments and the U. S. Trustee submitted a written memorandum in support of its motion to dismiss.

The court reviewed all of the documentary evidence in the case, and the testimony of witnesses. It also reviewed the written memoranda filed by the U. S. Trustee's office and considered the arguments of counsel. For the reasons stated in this decision and order, the court holds that the motion of the U. S. Trustee for dismissal under 11 U.S.C. § 707(b) will be granted.

[1] 11 U.S.C. § 707(b). Dismissal. After notice and a hearing, the court, . . . 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.

Facts

The debtor in the above-captioned proceeding is a pharmacist who lives and works in Front Royal, Virginia. She has been employed as a pharmacist for approximately nine (9) years and at the time of the filing of her petition under Chapter 7 she scheduled a gross monthly income of $7,280.00.[2] The debtor is married and the non-debtor spouse operates a kennel for the breeding and training of Rottweilers, which kennel is located at the debtor's residence. The non-debtor's spouse's business operation can be characterized as in the start-up phase and has not been profitable as of the date of the filing of debtor's petition. The debtor and the non-filing spouse were married in 2001 and, at the time of their marriage, the residence occupied by the debtor and the non-filing spouse was owned by the debtor in her own name. She purchased it for $299,500.00.[3]

The debtor's schedules and statement of affairs show that at the filing of her petition she had $125,714.00 of unsecured debt composed primarily of ten credit cards and consumer loans. $52,000.00 of the unsecured debt is represented by the claim of a Jaguar car dealer for a deficiency generated when the debtor elected to return a 2004 Jaguar and cancel a lease. The debtor's Schedules I and J show monthly expenses of $991.00 in excess of net income. They show a monthly mortgage payment of approximately $2,600.00. They show grocery expenses for two of $600.00 and they show a payment by the debtor of a child support obligation of the non-filing spouse in the amount of $538.00 per month for which the debtor has

[2] Trustee's Exhibits 9 and 11 show a gross income of $7,538.09 based on a pay stub dated April 9, 2004, just prior to the April 19, 2004, Chapter 7 filing date.

[3] The debtor's 3-bedroom residence is located on 3.43 acres outside of the city limits of Front Royal and meets all code requirements for operation of a kennel.

no legal obligation. In addition, at the time of the filing of the petition, the debtor was paying $471.00 per month on a vehicle used by the non-filing spouse.

At trial, the U. S. Trustee offered evidence showing that the debtor failed to account for items of income, in the form of tax refunds, which would increase the amount of monthly income available for payment of creditors. The evidence showed that, based upon the debtor's prior refund experience for the years 2002 and 2003, the debtor over withholds each month federal and state income tax of $314.88 and $201.28, respectively. The trustee argues that this over withholding should be added to the debtor's available disposable income.[4]

The debtor does not dispute the receipt of tax refunds in 2002 and 2003 which form the basis for the trustee's computation of additional disposable income. However, she argues that the tax refunds are generated because of significant business losses which the non-filing spouse incurred in the start-up and operation of the kennel together with depreciation expense from that business operation and that the prospect of tax refunds in the future is speculative.

The U. S. Trustee introduced evidence showing that the debtor has an additional $1,164.80 of income per month.[5] This computation is based on a number of factors. First, the debtor provided her weekly pay stub for the period ending April 9, 2004, to the trustee. This pay stub represents a pay period immediately prior to the filing of her petition for relief which did not have any items of additional income attributable to either bonus or overtime work.[6] The

[4] *See*, Trustee's Exhibits 9 and 11.

[5] *See*, Trustee's Exhibit 11.

[6] *See*, Trustee's Exhibit 8.

trustee utilized that pay stub to annualize the debtor's weekly income by multiplying the gross wages on the pay stub by fifty two and then dividing that total by twelve to arrive at an annualized monthly income.[7] The trustee also added federal and state tax refunds based upon Exhibit 9 and pro-rated over a twelve-month period of time and made adjustments to the debtor's scheduled payroll deductions based upon the pay stub provided by the debtor.[8] The increase in total monthly income was $1,164.80. The trustee then adjusted the debtor's scheduled expenses by deleting the automobile expense for the 2001 Ford F-250 pickup truck used by the non-filing spouse and the non-debtor spouse's child support payments. The adjustment to Schedule I, monthly income, and Schedule J, expenses, yielded $1,186.80 of disposable income available for payment to creditors. Thereafter, the U. S. Trustee offered evidence that the disposable income would permit the debtor to offer a 36 month repayment plan to her creditors which would yield pay out of allowed creditor claims of 42.39%. This computation was based upon the debtor's scheduled debt, reduced by an allowance for reduction of the deficiency owed to the Jaguar dealer once the Jaguar was liquidated, and an allowance for any deficiency on surrender of the Ford F-250 pickup truck.[9]

The debtor offered evidence that the non-filing spouse operated his kennel business from their residence and that his role in the marriage was to be the "house husband." She testified that while she earns income outside of the home, the non-filing spouse takes care of all the household duties, including shopping, cooking, cleaning and maintaining the home. The

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[7] *See*, Trial Transcript, p. 91, line 16 p. 93, line 9.

[8] *See*, Trial Transcript, p. 93, lines 11-19.

[9] *See*, U. S. Trustee's Exhibit 11.

debtor offered no evidence to dispute the U. S. Trustee's evidence concerning the non-filing spouse's business operation and its lack of profitability. She testified that she used her real estate asset as collateral for borrowing to pay credit card debt, to infuse the non-filing spouse's business with cash, to make a down payment on a 2000 BMW, and to pay back child support obligations of the non-filing spouse.[10] She also testified that she did not incur any substantial credit card debt for approximately a year prior to the filing of her petition for relief and that she made an effort to resolve her debt problem through credit counseling and her efforts to refinance the residence property before consulting with counsel about bankruptcy.

She testified that she owned a 2002 Jaguar and attempted to return it because of its mechanical problems and the monthly payments on the car. However, the Jaguar dealer convinced her that she could purchase a grade higher 2004 Jaguar, avoid lease cancellation penalties, and lower her payments by extending the lease term. She discovered that the representations made by the Jaguar dealer were false and returned the 2004 Jaguar only to be faced with a $52,000.00 deficiency claim. As of the date of the trial, the debtor had not heard from the Jaguar dealer about the deficiency claim.

With respect to the residence, the debtor testified that she attempted to refinance the residence property to reduce her monthly payment. She originally paid $299,500.00 for the property prior to her marriage in 2001. At some point after 2001, the property was subject to the liens of a first and second deed of trust. She refinanced the house to put money into the house and kennel business and then refinanced again but was subject to a pre-payment penalty on both refinances which depleted the net cash proceeds from the refinances by $17,000.00 and resulted

[10] *See*, Trial Transcript, p. 104, lines 6-18.

in a $348,000.00 principal unpaid amount of indebtedness as of January 2004. She testified that there was an appraisal of the property for the refinance of $384,000.00 so that she refinanced 100% of the value of the property. In April of 2004, she purchased a Jeep in the name of her husband and incurred a monthly obligation for it of $474.00 per month. Thus, from April of 2004, just prior to the filing of her petition for relief, until August of 2004, the debtor paid debt on the two vehicles she owned, and paid debt on the Jeep. In August of 2004, the debtor sold the BMW for the amount of the indebtedness owned on it. The debtor continues to pay for the Jeep and F-250 truck from her earnings.

Discussion

When the debtor married in 2001, she continued a lifestyle that included existing consumer debt, a large home, and expensive vehicles. She added to that lifestyle a spouse, with two children from a previous marriage, who is attempting to start a small business located at the residence. To help her husband, she elected to add to her monthly expenses by paying for his child support obligation, the cost of improvements to the real estate necessary and incident to his start up of a kennel business, and the cost of the vehicle, the F-250 truck, he used. The source of her resources to support her economic and domestic decisions were income from her job and capital from the value of her residence. In summary, the debtor voluntarily assumed a lifestyle that she could not afford. The debtor also made some questionable choices by electing to refinance twice when faced each time with early pre-payment penalties on debts secured by her real estate and by purchasing a 2004 Jaguar in exchange for a 2002 Jaguar she wanted to return. The choice to refinance reduced the proceeds of the refinance available to pay unsecured creditors. It depleted her asset base. The choice to buy a new Jaguar and then return it increased her unsecured indebtedness.

On the other hand, and to her credit, the debtor did seek pre-petition credit counseling; however, her creditors would not cooperate. So, the debtor filed a Chapter 7 proceeding and now seeks a discharge. For her discharge and fresh start, the debtor expects to:

1. Retain a large and valuable home worth $384,000.00 and pay a $2,600.00 per month mortgage;

2. Pay for her husband's vehicle at $474.00 per month;

3. Pay her husband's child support obligation of $538.00 per month;

4. Continue to be the sole income source of her household and pay all of the expenses of her husband's start-up business not covered by gross revenues that it generates. In summary, by virtue of the Chapter 7 discharge she wants her creditors to pay for her lifestyle choices and to pay some of her husband's creditors (the secured creditor on the Jeep and his child support). She will also retain and pay for the F-250 truck which her husband uses in his business.

Section 707(b) Factors[11]

A. Ability to Pay.

The evidence points to debtor's ability to repay some of her unsecured debt by eliminating her husband's child support and his business expenses. The U. S. Trustee's evidence shows an ability to repay approximately 42% over thirty-six (36) months in a Chapter 13 plan where all creditors file a proof of claim for the debtor's scheduled debt (allowing for a reduction

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[11] *See*, In re Green, 934 F.2d 566 (4th Cir. 1991).

in the Jaguar deficiency claim for resale and a deficiency on the surrender of the F-250 truck.[12] The truck payment and support payment add $1,012.00 per month to debtor's ability to pay unsecured creditors. If the U. S. Trustee's method of annualizing income and calculating payroll deductions is adopted, the number swells to $1,186.80 per month.[13]

B. The Green Totality of Circumstances.[14]

The court must examine the totality of circumstances criteria of In re Green.

The factors and the court's application of those factors to the evidence in this case is as follows:

1. Whether the bankruptcy petition was filed because of sudden illness, calamity, disability or unemployment.

There is no evidence that any of these factors is present in the debtor's case. The debtor has been employed in a high paying job as a pharmacist for almost nine years. She testified to no disability or sudden illness and the only facts which might point to calamity are poor economic decisions that she made concerning the refinancing of her real estate, and the acquisition of a more expensive luxury car. These were not circumstances beyond her control.

2. Whether the debtor incurred cash advances and made consumer purchases far in excess of the ability to repay.

This factor weighs against the debtor. When she filed her petition, she had $125,714.00 of unsecured debt in credit cards and consumer loans. Approximately $52,000.00

[12] *See*, Trustee's Exhibit 11.

[13] The debtor offered no evidence to discredit Exhibit 11.

[14] In re Green, at 570.

of that total is the deficiency claim on the surrender of a 2004 Jaguar automobile which occurred early in 2004. The balance of the unsecured debt was incurred by the debtor over a period of time and totaled $83,714.00. She sought credit counseling relief the year prior to her filing which indicates her realization of purchases in excess of her ability to repay.

3. Whether the debtor's proposed family budget is excessive or unreasonable.

This factor weighs against the debtor. She is showing on her Schedule I debt service for a Ford F-250 truck used solely by her husband and, primarily, in the operation of his business since he is otherwise unemployed outside of the household. She is also paying child support for her husband's two children by a previous marriage and she is under no legal obligation to pay same. Further, her monthly mortgage payment is extraordinarily high and reflects a mortgage indebtedness which, arguably, she would not have to incur but for the lifestyle which she and her husband have elected to follow.

4. Whether the debtor's schedules and statement of current income and expenses reasonably and accurately reflect the true financial condition.

The U. S. Trustee's analysis of the debtor's income based upon a pay stub from the debtor's employer dated April 9, 2004, just prior to the filing of her petition for relief, shows an average monthly income higher than shown by the debtor on her Schedule J. Further, the debtor did not take into account on Schedule J tax refunds which she received in previous years. The trustee annualized those tax refunds to show a monthly addition to the debtor's income for over withholding of taxes. The debtor counters with the argument that the refunds were generated by business losses for the non-debtor spouse and depreciation expense. The fact of the matter is that the tax refunds represent additional income that the debtor could utilize in a

Chapter 13 proceeding or outside of the jurisdiction of the bankruptcy court should dismissal be ordered. Under any circumstances, the refunds should have been disclosed. Also, the debtor's own testimony is that she omitted from Schedule J the 401(k) contribution on her pay stub and from Schedule I the repayment of a 401(k) loan on her pay stub. Thus, Schedules I and J are inaccurate.[15] On balance, the court finds that the debtor's schedules and statement of current income and expenses did not reasonably and accurately reflect the true financial condition of the debtor as of the date of the filing of the petition for relief.

5. Whether the petition was filed in good faith.

The U. S. Trustee puts this factor in issue at closing argument. If one forms a time line from the evidence, it shows that in 2003 debtor consulted a credit counseling agency. This consultation occurred approximately one year before the debtor's filing of her petition for relief.[16] Thus, for at least a year prior to the filing of her petition, the debtor knew she was unable to manage the payment of her unsecured indebtedness. In that same relative time period, the debtor turned to use of her residence with two refinancings. This effort cost her a total of $17,000.00 in pre-payment penalties.[17] The last refinance occurred on January 5, 2004, and resulted in a lien against the debtor's real estate of $348,000.00 which was its appraised value. Coincident with the closing of that refinance, the debtor conveyed the real estate from herself to herself and her husband as tenants by the entirety.[18] In this time frame, the debtor traded her

[15] *See*, Transcript, p. 97, line 20, p. 101, line 1.

[16] *See*, Trial Transcript, p. 103, line 9.

[17] *See*, Trial Transcript, p. 104, lines 6-14.

[18] She explained this conveyance as a condition of the refinance since her credit score would not support the request for extension of credit without her husband. However, there was no explanation as to why he needed to be on the title to the real estate rather than an obligor on the note.

2002 Jaguar for a 2004 Jaguar which resulted in a higher monthly car payment.[19] The debtor's decision to upgrade to a 2004 Jaguar resulted in a $52,000.00 deficiency claim. When she turned the Jaguar into the dealer, she used $6,000.00 of the refinancing proceeds to purchase a 2000 BMW for her transportation and financed $18,000.00 of the purchase. Then, just before the filing of her petition, the debtor acquired a Jeep, titled it in her husband's name, and incurred an additional $474.00 per month obligation. Within a month of her final refinancing of the real estate and her vehicle transactions, the debtor consulted bankruptcy counsel and, ultimately, filed the Chapter 7 on April 19, 2004.

In the final analysis, the debtor is willing to redirect her income away from her creditors to permit her husband to start up a new business on real estate with she owned before the marriage and to pay his child support obligation. What that boils down to is using her creditors to pay for her husband's business and his child support obligations. This court does not believe that the debtor's creditors should have to pay for the non-filing debtor's obligations or for his business. The debtor simply decided that she was going to walk away from her debt via discharge so that she could continue to pursue the lifestyle which she elected but which her creditors did not bargain for when they made the decision to extend credit. The court finds lack of good faith in the filing of this Chapter 7 proceeding.

<u>Conclusion</u>

The court has considered the debtor's ability to repay debt as shown by the

[19] The debtor explains that she returned to the Jaguar dealer with the intention of returning the 2002 Jaguar but was told that that was not possible and was convinced by the dealer to upgrade to a higher class of Jaguar with an extended lease repayment period which the dealer represented would result in lower monthly payments. The debtor implies that the dealer hoodwinked her and that she realized that after she made her first monthly payment on the 2004 Jaguar.

evidence and the totality of circumstances factors set forth in the Green decision. The court finds that substantial abuse exists in this case because the debtor asks her creditors to give her a fresh start via the discharge of her indebtedness while using her economic resources in the future to service indebtedness for which she is not legally obligated, transportation costs of the non-debtor spouse, and expenses of the start up of a business enterprise for the non-debtor spouse. Accordingly, it is

ORDERED:

That this Chapter 7 proceeding be, and it hereby is **DISMISSED** because of finding of substantial abuse under 11 U.S.C. § 707(b).

Copies of this decision and order are directed to be mailed to James G. Cosby, Esquire, Office of the U. S. Trustee, First Campbell Square Building, 210 First Street, SW, Suite 505, Roanoke, Virginia, 20011; and to Marilyn A. Solomon, Esquire, 130 East Cork Street, Winchester, Virginia, 22601, counsel for the debtor.

Ross W. Krumm

Ross W. Krumm
U. S. Bankruptcy Judge