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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 04-10802
)
DAVID M. ROGERS and) Chapter 7
CATHLEEN L. ROGERS,)
) Judge Pat E. Morgenstern-Clarren
Debtors.)
) **MEMORANDUM OF OPINION**

The United States trustee moves to dismiss this chapter 7 case on the ground that the debtors' debts are primarily consumer debts and granting relief would be a substantial abuse of the bankruptcy code.¹ *See* 11 U.S.C. § 707(b). The debtors counter that they are in need of the bankruptcy code protections and the United States trustee did not show that their debts are primarily consumer debts.² For the reasons stated, the trustee's motion is granted.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(O).

THE HEARING

The court held an evidentiary hearing on July 23, 2004. The United States trustee (UST) presented his case through the testimony of bankruptcy examiner John Weaver. The debtors testified on their own behalf. Additionally, both sides offered exhibits that were accepted into evidence. In reaching this decision, the court has considered the testimony of all witnesses and

¹ *See* Docket 10, 18 and 23.

² *See* Docket 14, 19 and 22.

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all documents admitted into evidence. These findings of fact reflect the court's weighing of the evidence, including determining the credibility of witnesses. In doing so, the court considered the witnesses' demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression. *See* FED. R. BANKR. P. 7052, incorporating FED. R. CIV. P. 52(a) (applied to contested matters under FED. R. BANKR. P. 9014).

11 U.S.C. § 707(b)

Generally speaking, when an individual files for relief under chapter 7 of the bankruptcy code, a chapter 7 trustee will collect and liquidate the debtor's non-exempt assets and distribute the proceeds to creditors. *See* 11 U.S.C. §§ 701 *et seq.* In turn, the debtor receives a discharge of most debts. *See* 11 U.S.C. § 727. Bankruptcy code § 707, however, provides that an individual's case may be dismissed if the debts are primarily consumer debts and "the granting of relief would be a substantial abuse" of chapter 7. 11 U.S.C. § 707(b). Determinations under § 707(b) regarding substantial abuse are equitable ones. *See Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 433 (6th Cir. 2004). There is a presumption that the debtor should be granted the relief requested. *See* 11 U.S.C. § 707(b).

Consumer debts are "debt[s] incurred by an individual primarily for a personal, family, or household purpose[.]" 11 U.S.C. § 101(8). In deciding whether debts fall into this category, the purposes for which the debts were incurred must be considered. *See Internal Revenue Service v. Westberry (In re Westberry)*, 215 F.3d 589, 593 (6th Cir. 2000) (noting that a profit motive analysis may be used to determine whether a debt falls outside the category of consumer debt). For example, a debt which is incurred to purchase a home is not incurred with a profit motive

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and is, therefore, consumer debt. *See In re Dickerson*, 166 B.R. 480, 483 (Bankr. N.D. Ga. 1993). “The term ‘primarily’ indicates that all of the debts need not be consumer debts but that consumer debts must be a substantial component of the indebtedness.” 6 COLLIER ON BANKRUPTCY § 707.04[3][d] (15th ed. rev. 2004). Courts have held that a debtor has primarily consumer debt when more than half of the total dollar amount of his debt is consumer debt. *See, for example, In re Ragan*, 171 B.R. 592, 595 (Bankr. N.D. Ohio 1994) (citing *In re Farrell*, 150 B.R.116 (Bankr. N.J. 1992)).

Substantial abuse can be shown through “*either a lack of honesty or a want of need.*” *Behlke*, 358 F.3d at 433 (emphasis in original). The UST relies here only on the debtors’ alleged lack of need. A debtor is “needy . . . [if] his financial predicament warrants the discharge of his debts in exchange for liquidation of his assets.” *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989). Need is determined by examining all of the circumstances, including these factors: the debtor’s ability to repay the debts out of future earnings; whether the debtor has a stable source of future income; whether he is eligible for chapter 13; whether there are state remedies available to him; whether he can obtain relief through private negotiations; and whether he can reduce his expenses significantly without being deprived of necessities such as food, clothing, and shelter. *Id.* at 126-27. A debtor’s ability to repay debts out of future earnings alone may be sufficient to warrant dismissal. *See Behlke*, 358 F.3d at 434, and *Krohn*, 886 F.2d at 126.

THE POSITIONS OF THE PARTIES

The UST argues that the debtors got themselves into financial difficulties through reckless credit card practices and spending beyond their means. The UST contends that the debtors will be able to pay their debts if they live within a more modest, yet reasonable, budget.

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With the debtors' \$92,000.00 a year gross income, the UST argues that the debtors can pay 100% of their debt within three years under a chapter 13 plan. If the debtors stay in a chapter 7, that debt will all be discharged.

The debtors look back to 1992 to 1998 as the origin of their troubles, attributing their financial decline to taking care of David Rogers's father during that time and also starting a business that ultimately failed. They believe that all of their current expenses are reasonable and they are not able to pay their debts in a chapter 13. They also argue that a substantial portion of their unsecured debt is business debt.

In short, the UST argues that the debtors do not need chapter 7 and the debtors argue that they do.

FACTS AND DISCUSSION

I. The nature of the debts

Dismissal under § 707(b) is appropriate only if a debtor's obligations are primarily consumer debts. *See* 11 U.S.C. § 707(b). The debtors here dispute this characterization, noting that "the portion of [their] credit card purchases, cash advances, and the like that was incurred with a profit motive is not subject to [§] 707(b)." (Debtors' Objection) (Docket 14). Analysis of the debtors' total debt, however, shows that this requirement is clearly met.

The debtors maintain that much of their debt was incurred in connection with a business called Not Just Cotton Candy which Cathleen Rogers started in 1995. The business was not successful and she closed it in late 1998. The debtors' post-hearing brief states that \$21,340.99 of their debt was incurred in connection with the failed business and the court accepts that characterization for purposes of this discussion. The debtors scheduled total debt of

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\$159,077.88. As the \$21,340.99 which the debtors argue they incurred with a profit motive constitutes only 13.5% of their total debt, their debts are primarily consumer debts.

II. Substantial abuse

The UST charges substantial abuse based solely on the debtors' lack of need. As noted above, a determination regarding need is based on the totality of the circumstances and includes consideration of whether the debtors: (1) are able to repay their debts; (2) have a stable source of future income; (3) are eligible for chapter 13; (4) have state remedies or can obtain relief through private negotiations; and (5) can reduce expenses significantly without being deprived of necessities. These considerations lead to the conclusion that granting chapter 7 relief to the debtors would constitute a substantial abuse of chapter 7.

The debtor Cathleen Rogers is 44; her husband David Rogers's age is not in the record. Neither has any significant health problems. Both debtors have steady employment. Cathleen Rogers has worked at Denny's for 20 years and is currently a manager. Since June 1999, David Rogers has worked as a computer system administrator.³ He is currently employed at University Hospitals through Affiliated Computer Services, Inc. Together, the debtors have a gross annual income of \$92,000.00. Their four children, ages 20, 19, 17, and 15, live with them. The older children have part time jobs, but do not contribute to the household expenses. They do pay for some of their own expenses for transportation. The two older children attend Lakeland Community College with the debtors paying their tuition.

³ From 1992 to 1998, David Rogers worked at home and took care of his sick father. He was paid a stipend for doing this. The amount of the stipend was \$600.00 for the first two years and it was raised to \$1,000.00 and then to \$1,500.00 in succeeding years. His father died in 1998.

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The debtors filed their chapter 7 case on January 24, 2004. They scheduled \$38,478.39 in unsecured debt, primarily from credit cards. They scheduled \$120,599.49 in secured debt made up of two mortgages on their home totaling \$80,825.08 and two car loans totaling \$39,774.41.

The debtors scheduled a combined net monthly income of \$5,296.90. This amount is understated by approximately \$2,555.70 annually, however, because Ms. Rogers's income was calculated on a bi-monthly basis and she is actually paid bi-weekly. As a result, her monthly income is understated by approximately \$213.00 (\$2,555.70 divided by 12). In addition, savings of \$148.52 is deducted bi-weekly from Ms. Rogers' wages. The debtors opened this savings account two years ago, but funds have not accumulated because the debtors use them to cover expenses. This \$148.52 then is additional income which is not reflected on the debtors' schedule of income and which results in the debtors' monthly income being understated by approximately \$297.04 (\$148.52 multiplied by 2). Making these adjustments results in the debtors having net monthly income of approximately \$5,807.00. In addition, both debtors have received raises since their case was filed.

The debtors scheduled monthly expenses of \$5,666.10. This amount included \$1,550.00 for credit card payments plus these additional expenses:

Rent or home mortgage payment	\$746.68
Utilities	
Electricity and heating fuel	\$200.00
Water and sewer	\$ 35.00
Telephone	\$140.00
Home maintenance	\$120.00
Food	\$800.00
Clothing	\$200.00
Laundry and dry cleaning	\$ 50.00
Medical and dental expenses	\$150.00
Transportation (not including car payments)	\$250.00

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Recreation	\$100.00
Insurance (health)	\$100.00
Taxes (sales)	\$ 30.00
Installment payments	\$884.82
2nd mortgage	\$250.00
Other (cable and DSL)	\$ 60.00

On June 23, 2004, the debtors filed an amended schedule of expenses to address concerns raised by the UST. The amendment deletes the line item for credit card payments because these debts will be discharged in a chapter 7 and thus would not form a part of an on-going budget for chapter 7 debtors.⁴ The amended budget claims these monthly expenses totaling \$5,948.08:

Mortgage	\$746.68
Electricity and heating fuel	\$233.25
Water and sewer	\$ 34.00
Telephone	\$115.83
Other utilities (trash)	\$ 10.39
Home maintenance	\$317.33
Food	\$1,053.65
Clothing	\$450.00
Laundry and dry cleaning	0
Medical and dental	\$150.00
Transportation	\$532.67
Recreation	\$218.85
Auto insurance	\$174.70
Sales tax and CCA	\$ 47.00
Auto installment payments	\$784.38
Second mortgage	\$250.00
Credit cards	0
Other (cable and DSL)	\$ 77.61
(bank fees)	\$ 9.83
(pet care)	\$ 50.00
(birthday and funeral flowers)	\$ 25.00
(high school expenses)	\$184.53

⁴ The debtors' explanation for this omission was ambiguous; however, it appears that the amounts initially scheduled for credit card payments were reassigned to specific expense categories in the amended budget.

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(books, postage, personal care)	\$112.00
(children's college tuition)	\$369.98

The debtors' original budget included the exact amount of their fixed payments. The other amounts represent David Rogers's general understanding of their expenses. The debtors prepared their amended budget based on their actual expenditures for a period of time before the bankruptcy filing.

The debtors have not made any effort to reduce their expenses. The expenses scheduled in both versions of their budget exceed the scheduled monthly income. Moreover, although the couple's amended monthly budget indicates they have no excess income, some items in the budget are excessive and unreasonable. At a minimum, these include the amounts budgeted for college tuition, flowers, home maintenance, and entertainment. The debtors are paying \$369.98 a month for their two oldest children's college tuition because they do not want their children to be in debt. While this is understandable and laudable, it is not enough to make it a necessary expense. Under these circumstances, the expense of providing the debtors' children with a college education should not be borne by the creditors. A \$25.00 monthly expense for flowers is scheduled because, as Ms. Rogers explained, she always sends flowers for funerals or to people in the hospital. Again, while this practice is thoughtful, the expense is unreasonable given the debtors' finances. The \$317.33 monthly home maintenance expense is also excessive. The initial budget listed \$120.00 for home maintenance; the increase reflects the couple's average monthly expenditures in the last year. The amended number, however, is inflated because it included the purchase of three major appliances. The \$120.00 originally scheduled is a more reasonable figure and the extra \$197.33 each month could be devoted to creditors. Finally, the

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\$218.00 which the debtors have budgeted for entertainment each month is excessive as it includes payments for at least four magazine and newspaper subscriptions. An allocation of \$168.00 for entertainment (a \$50.00 reduction) would be more than sufficient under the circumstances. In sum, the debtors' expenses can be readily reduced by at least \$642.00 "without depriving [the debtors] of adequate food, clothing, shelter and other necessities." *Krohn*, 886 F.2d at 127.⁵ These debtors are not needy.

Additional factors also support a finding that these debtors are not needy. The debtors are eligible for relief under chapter 13. They both have stable employment which is likely to continue. Both debtors have received raises since the case filing. Mr. Rogers testified that he is comfortable in his current position and confident about his future prospects and noted that he is very good at what he does. Although Ms. Rogers expressed concern regarding her employer's profitability, there was no concrete evidence that her long-time employment is at risk any time in the near future. Properly calculated, the debtors' actual net monthly income is approximately \$5,807.00. As previously discussed, after deducting unnecessary expenses, the debtors have expenses totaling \$5,306.00 and they have at least \$500.00 of monthly disposable income available to pay their unsecured debt.

⁵ The debtors' amended budget includes other items which are excessive. They have, for example, allotted \$1,053.65 monthly for food. As this includes amounts to eat out as a couple once a week and for the entire family to eat out once or twice each month it could clearly be reduced without great deprivation to the debtors. Also, their clothing budget includes amounts for clothing their adult children. Finally, the monthly transportation amount of \$532.67 (in addition to monthly car payments) was not adequately explained and absent explanation is unreasonable.

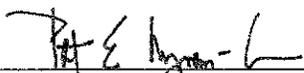
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Based on these circumstances, the court finds that the debtors are not needy. Granting the relief they have requested would constitute a substantial abuse of the provisions of chapter 7 of the bankruptcy code.

CONCLUSION

The UST's motion to dismiss under § 707(b) is granted. This decision does not preclude the debtors from filing a motion to reinstate for the sole purpose of converting to a case under chapter 13. A separate order will be entered based on this decision.

Date: 18 Oct 2011



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Lenore Kleinman, Esq.
Mark Kaiser, Esq.
Virgil Brown, Trustee

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Debtors.)
) **ORDER**

For the reasons stated in the memorandum of opinion issued this same date, the United States trustee's motion to dismiss this case under 11 U.S.C. § 707(b) is granted and the case is dismissed. (Docket 10).

IT IS SO ORDERED.

Date: 8 Oct 18 2004



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Lenore Kleinman, Esq.
Mark Kaiser, Esq.
Virgil Brown, Trustee