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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CANTONUNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:)	CHAPTER 7
)	
FRED J. BRANDT AND)	CASE NO. 08-61820
LINDA L. BRANDT,)	
)	JUDGE RUSS KENDIG
)	
Debtors.)	
)	
)	MEMORANDUM OF OPINION
)	(NOT INTENDED FOR
)	PUBLICATION)

The United States Trustee (hereafter "UST") filed a motion to dismiss Debtors' chapter 7 case for abuse on August 17, 2008. UST argues that Debtors' expenses are not reasonable and if adjusted to a more modest level, Debtors would have sufficient income to repay some of their debt. Debtors deny UST's contentions and oppose the motion to dismiss. The Court conducted an evidentiary hearing on November 3, 2008.

The court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1334 and the general order of reference entered in this district on July 16, 1984. Venue in this district and division is proper pursuant to 28 U.S.C. § 1409. The following constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052. The Court has considered the testimony of the witnesses and the documentary evidence introduced at the hearing, as well as the related pleadings.

This opinion is not intended for publication or citation. The availability of this opinion, in electronic or printed form, is not the result of a direct submission by the court.

FACTS

Fred J. Brandt and Linda L. Brandt ("Debtors") filed a joint chapter 7 case on May 30, 2008. Mr. Brandt is 61 years of age and Mrs. Brandt is 65 years of age. Debtors do not have any dependents. Mr. Brandt has had back surgery but is not in bad health; Mrs. Brandt has medical problems, including cancer. The petition indicates that the debts included in Debtors' case are primarily consumer debts and this was not challenged by UST.

Debtors currently reside at 10000 Portage St., N.W., Canal Fulton, Ohio. On Schedule A, Debtors valued the property at \$1,200,000.00. Secured debts totaling \$1,341,633.00 are listed on Schedule D. Debtors built their "dream" home in 2001. They applied \$300,000.00 of their savings toward the purchase, and financed approximately \$750,000.00. When combined with the extra lot purchased by Debtors, they own approximately four acres of land. The mortgage payments on the home are approximately \$7,200.00 per month. Prior to filing, Debtors attempted to sell the home by listing it with a realtor, but were not successful, having obtained no offers. Debtors have not paid the mortgages on the home since approximately October of 2007 and are surrendering the home.

The first mortgage company obtained relief from the automatic stay on September 9, 2008. Debtors are also surrendering their interest in a time share with Marriott Ownership Resorts, Inc. Debtors have sizeable exempt retirement assets, but do not have meaningful non-exempt assets which can be used for the benefit of creditors.

Mr. Brandt has been self-employed for more than thirty years, mainly as an insurance agent, which is his current occupation. In the last decade, Mr. Brandt had engaged in a partnership venture and a business venture with others that appear to have led to his economic downfall. As a result, he found himself once again self-employed as a solo insurance agent rebuilding a sole proprietorship at the end of 2007.

At the date of filing, Debtors disclosed \$10,163.00 in gross monthly income on Schedule J: \$9,500.00 from Mr. Brandt's employment and \$663.00 from Mrs. Brandt's social security benefit. On Form B22 A (the "means test"), Debtors identified gross business receipts of \$11,818.00 and a current monthly income of \$8,177.00, exclusive of Mrs. Brandt's social security. Mr. Brandt's 2008 gross income, from question one on the Statement of Financial Affairs, shows earnings of \$76,182.00 prior to the filing, or \$15,236.00 per month. These figures were not challenged by UST.

In addition to the income disclosed above as of the petition date, Debtors also introduced post-petition income figures which seriously contradict those set forth in the schedules and means test. According to Exhibit 1, Mr. Brandt's earnings were much less than projected on Schedule I. From May 31, 2008 to July 29, 2008, Mr. Brandt earned \$6,939.66 in total commissions. In order to meet their obligations, Debtors withdrew \$5,000.00 from their retirement accounts during this time period. Exhibit 3, in turn, provides an outline of Debtors' income from May 31, 2008 to October 15, 2008. During that period, Mr. Brandt earned \$41,789.45 in commissions. With the \$5,000.00 IRA withdrawal, Debtors' total income, not including social security, was \$46,789.45, or approximately \$10,398.00 per month. Discounting this amount by the IRA withdrawal results in gross income for Mr. Brandt in the amount of \$9,286.54 per month. Debtor Fred Brandt testified that after resuming his full-time employment as an insurance agent, the "low-hanging fruit" on his income tree has been picked.

On Schedule J, Debtors claimed a housing expense of \$1,750.00 and itemized life insurance policy premiums totaling \$1,100.00. A substantial portion of the life insurance was required by the first mortgage lender. Debtors have a \$1,000,000.00 policy on Debtor Fred Brandt and a \$500,000.00 policy on Debtor Linda Brandt which Debtors intend to cancel. Debtor itemized business expenses of \$3,641.00 in the schedules and testified to business expenses in the realm of \$3,000.00 per month. On question one of the Statement of Financial Affairs, Debtors provided both the gross revenues for 2008 until the date of filing and the revenues after expenses. Using these figures, the business expenses were approximately \$23,434.00 from January 2008 through May 30, 2008, or roughly \$4,678.00 per month.

The Court found the testimony of the witnesses to be competent and credible.

LAW

In the past year, the Court has addressed, in written form, the legal underpinnings of

11 U.S.C. § 707(b)(3) on three occasions: In re Baum, 386 B.R. 649 (Bankr. N.D. Ohio 2008); In re Eckard, 2008 WL 859155 (Bankr. N.D. Ohio 2008) (unpublished); and In re Barnett, 2007 WL 4510277 (Bankr. N.D. Ohio 2007) (unpublished). Combined, these cases provide a thorough overview of section 707(b)(3). Briefly, a court must look at the “totality of the circumstances” in order to determine whether abuse, in the form of “lack of honesty or want of need,” exists. See 11 U.S.C. § 707(b)(3); Baum, 386 B.R. 649, 655 (citing Behlke v. Eisen (In re Behlke), 358 F.3d 429, 434 (6th Cir. 2004)). The burden on a 707(b)(3) motion rests upon the movant, and is established by a preponderance of the evidence. Eckard, 2008 WL 859155 *3 (citations omitted).

In this case, the honesty of Debtors is not at issue. Rather, the UST premises its argument on its perception that Debtors have the ability to repay their debts from future income. This is a prime factor, which alone can serve as the basis for dismissal under section 707(b)(3), for the court’s consideration. See Eckard, 2008 WL 859155 *4 (citing In re Krohn, 886 F.2d 123, 126 (6th Cir. 1989)); In re Seeburger, 392 B.R. 735 (Bankr. N.D. Ohio 2008).

Other factors relevant to need include whether the debtor enjoys a stable source of income, whether he is eligible for adjustment of his debts through Chapter 13 of the bankruptcy Code, whether there are state remedies with the potential to ease his financial predicament, the degree of relief obtainable through private negotiations, and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities.

Krohn, 886 F.2d at 126.

After consideration of the exhibits and the testimony of the witnesses, the Court cannot conclude that Debtors have the ability to repay their debts with future income. Looking first at Debtors’ income, the Court notes while the relative income is in line with the estimation of income on Schedule I, it has fluctuated drastically to the point of requiring, less than three weeks after filing, a \$5,000.00 withdrawal from retirement funds. Additionally, Debtor Fred Brandt testified that he is now working to find new clients and that the current economic environment requires more work for less business. Because of the way his former partnership dissolved, Mr. Brandt does not have access to the client lists of that business, so he is resorting to all new prospecting and cold calls. Additionally, he is not sure about this bankruptcy filing will impact his ability to either obtain or maintain his various licenses, including his Series 6 license. Clearly, several factors must be overcome in order for Mr. Brandt to meet his income expectations.

The Court cannot accept the UST’s suggestion, made during closing argument, that Mr. Brandt’s income potential is \$10,000.00 to \$11,000.00 per month. While Debtors may have enjoyed a six figure income in 2006, Mr. Brandt was involved in two businesses, both of which have now gone under. Now he is restructuring and rebuilding. The Court finds that Debtors’ maximum combined income, before expenses, is less than \$10,000.00 per month. The Court has severe doubts about Mr. Brandt’s ability to recognize this income in the short term now that the “low-hanging fruit is gone.” This is evidenced by the fact that Debtors’ prepetition gross business earnings exceeded \$15,000.00 per month, while in the

four and one-half months after the filing, Debtors' business income declined to under \$10,000.00 per month. This gives Debtor Fred Brandt's testimony about the easy "fruit" credence. Moreover, financial conditions in the area are declining unabated, as testified by Mr. Brandt. It is clear that Mr. Brandt does not have a stable source of income. If any thing, Mr. Brandt's estimates appear optimistically high given numerous factors, including current market conditions.

Next, the Court must look at Debtors' expenses, specifically their housing and life insurance expenses listed on Schedule J. The Court finds the housing expense is reasonable following the explanation provided during the hearing. Debtors' claimed \$1,750.00 for rental/mortgage expense on Schedule I. As UST pointed out, this clearly exceeds the IRS standard for this category of expenses. At first glance, it admittedly appears excessive. As Debtor Fred Brandt competently and credibly testified, however, this amount also includes an allowance for business space. If Mr. Brandt operates his business out of his home, Debtors will need to locate a residence to accommodate the business, requiring consideration of size, access, neighborhood and zoning, as well as their personal needs, which include pets. To date, they have located only one residence that met their needs and were not successful in securing that property (even with the offer of \$30,000.00 cash down on a lease with an option to buy). If Debtors elect not to operate the business from home, Mr. Brandt will need to lease office space. Thus, the Court finds that the \$1,750.00 figure includes an allocation for the business as well as Debtors' personal needs. With this taken into consideration, the \$1,750.00 housing expense is not unreasonable. In fact, the Court finds it is probably low if Debtors are forced to lease two separate spaces.

Debtors claimed a total expense of \$1,100.00 for life insurance premiums on Schedule J. As explained during their testimony, a majority of the life insurance was required by the mortgage lender to protect its loan on Debtors' residence. Mrs. Brandt testified that approximately seventy-five to eighty percent of the life insurance premiums were for policies required by the mortgagee. In light of their surrender of the residence, Debtors will no longer be required to maintain the level of life insurance listed on Schedule J, which will reduce their expenses by \$825.00. The question then becomes does the elimination of that expense provide disposable income with which Debtors could repay a portion of their debt? This determination requires review of all of Debtors' expenses.

Debtor Fred Brandt divided expenses into three categories: taxes, business expenses, and personal/household expenses. In the tax category, he testified that estimated taxes at forty percent: twenty-five percent for federal taxes, five percent for state taxes, and thirteen percent for self-employment taxes. During Mr. Brandt's testimony, the tax rate was calculated, using the figures from the means test (net income, after business expenses of \$8,177.00 and taxes of \$2,340.00), at 28.6 percent. On income of \$10,000.00, this represents taxes of \$2,860.00.

In the second category of expenses, business expenses, Mr. Brandt testified that he needs to earn \$2,900.00 to \$3,000.00 to break even in his business when operating from an independent location. Realistically, the Court surmises the figure is higher. The monthly business expenses itemized in Schedule I are \$3,641.00 and do not include an allowance for rent. Mr. Brandt's business expenses immediately prior to filing were \$4,678.00 and rent was not included. The Court finds that a reasonable figure for monthly business expenses is an average of \$1,900.00 (Mr. Brandt's low break even point less a deduction of \$1,000.00

for rent), \$3,641.00, and \$4,678.00, which is \$3,406.00. This figure does not include an allowance for office space, either in Debtors' home or by lease of commercial space, which is accounted for in the \$1,750.00 expense allowed for housing.

Using the above figures, after deducting the taxes and business expenses from \$10,000.00, Debtors would have \$3,734.00 remaining for household expenses. As stated above, the \$1,750.00 is reasonable for a rental or mortgage payment in these circumstances. Debtors have reaffirmed *one* vehicle payment, their only means of transportation, for \$490.00 per month. After reducing the life insurance premiums by \$825.00, Debtors will be paying \$275.00 per month for life insurance. On schedule J, Debtors listed health insurance expenses totaling \$500.00 per month, which was also supported by Mrs. Brandt's testimony. The result is that Debtors have only \$719.00 remaining each month for other household expenses, including utilities, groceries, unreimbursed medical costs, charitable contributions, transportation expenses, property insurance, priority taxes owed to the State of Ohio, and other day-to-day living expenses. Even on a modest budget, this is an indomitable effort. As a gauge, the IRS standard for food, clothing and other items is \$961.00 for two people while the utility standard is \$412.00.¹ Thus, the Court cannot conclude that Debtors have the ability to pay their creditors out of their future earnings.

Turning to the other factors which may impact a section 707(b)(3) determination, the Court cannot conclude that Debtors are abusing the bankruptcy system. As stated above, Mr. Brandt's income is not stable, particularly in the current economic environment. Debtors are at or near retirement age. Debtors are not eligible for relief under Chapter 13 because of the debt limitations; Chapter 11 is impractical – Debtors could not fund a plan and would essentially pay a great deal of money to lawyers, court costs and expenses to obtain a discharge for a zero percent plan. There was no testimony as to any state law remedies which might be available to Debtors. The Court recognizes that it is difficult to engage in private negotiations with creditors without disposable income. Debtors have reduced their expenses significantly: they have surrendered their home, have only one car, and are reducing their life insurance expenses by approximately seventy-five percent. From enjoying a standard of living which permitted them to pay \$7,200.00 in mortgage payments every month to now attempting to live on a total of \$3,734.00 each month, it is clear Debtors reduced their expenses significantly.

CONCLUSION

UST bears the burden of proof, by a preponderance of the evidence, in establishing a filed case is an abuse of the bankruptcy system. Here, UST has not met its burden. UST alleges that Debtors' case should be dismissed because Debtors have the ability to repay their debts from their future earnings. After considering the documentary evidence, testimony of the witnesses, and the pleadings submitted by the parties, the Court cannot agree. If anything, Debtors projections appear to be overly optimistic.

¹ Based on the figures in effect at the date of filing of this case.

An order denying the motion will be entered immediately.

/s/ Russ Kendig

JUDGE KENDIG
U.S. BANKRUPTCY JUDGE

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