

In the United States Bankruptcy Court

for the Northern District of Iowa

MARY ANNE REED
Debtor(s).

Bankruptcy No. 94-61109KW
Chapter 7

RULING ON MOTION TO DISMISS

On September 21, 1994, the above-captioned matter came on for hearing in Waterloo on the U.S. Trustee's Motion to Dismiss. Debtor appeared in person with Attorney Donna Lesyshen. The U.S. Trustee appeared by John Schmillen. Evidence was presented after which the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

STATEMENT OF THE CASE

Debtor's Chapter 7 Petition was filed July 7, 1994. The First Meeting of Creditors was held in Waterloo on August 15, 1994. The U.S. Trustee's Office filed the pending Motion to Dismiss on August 25, 1994.

Debtor's schedules reflect unsecured debts totaling \$10,144, monthly net income of \$2,208, and total monthly expenses of \$1,503. The U.S. Trustee asserts that this monthly surplus income of \$705 would allow Debtor to generate in excess of \$22,000 over the course of a three year Chapter 13 Plan after deducting Trustee's fees. The U.S. Trustee argues that the schedules establish that Debtor is capable of paying her debts in full out of future income.

The U.S. Trustee contends that Debtor's Chapter 7 petition should be dismissed pursuant to § 707(b) as a substantial abuse as defined by the 8th Circuit. In re Walton, 866 F.2d 981 (8th Cir. 1989). He argues that no evidence exists that dismissal is not warranted because of unique hardships of Debtor as authorized by Walton. He further asserts that since this is pled as a no asset case, a dismissal would have no adverse affect on creditors.

The U.S. Trustee's Office sent a copy of the Motion to Dismiss as well as the Notice Setting Hearing to counsel for Debtor. The Notice Setting Hearing had a bar date for filing a responsive pleading of September 18, 1994. Debtor filed no responsive pleading prior to hearing.

The U.S. Trustee's evidence was presented entirely by documents. U.S. Trustee's Exhibits A through D were received without objection. These exhibits analyze Debtor's schedules and include a debt summary and repayment analysis prepared by Mr. Glenn Swenson, U.S. Trustee's Regional Bankruptcy Analyst. In summary, the U.S. Trustee's evidence establishes that, based upon the schedules presented, Debtor could pay off 68% of her unsecured debt under a three year plan with monthly payments of \$307. She could pay off 100% of her unsecured debt under a three year plan with monthly payments of \$452. It also establishes that under a five year plan, Debtor could pay 100% of her unsecured debts by making monthly payments of \$271.

Debtor testified and introduced Exhibits 1 and 2. Debtor's Exhibit 1 is a copy of her personal check register from June 15 through the date of hearing. Exhibit 2 is a real estate mortgage entered into by Debtor and Harvey L. Reed, husband and wife, and USA Financial Services, Inc. in 1991 in the amount of \$4,818.

The essence of Debtor's testimony is that while the schedules reflect surplus income of \$700, she has no disposable income at the end of each month. The check register was offered into evidence, presumably for the purpose of establishing that all of Debtor's disposable income is utilized for necessary expenses. However, examination of the check register fails to establish any relevant evidence on the issue of monthly expenses. Absent further analysis, the check register is largely meaningless to establish monthly expenses of Debtor.

The Court made independent inquiry as to whether it was Debtor's intent to impeach her own Schedule J which listed monthly expenses of \$1,503. Counsel for Debtor explicitly stated that was her intention. As early as the First Meeting of Creditors, Debtor commented to her counsel that the schedules appeared to be inaccurate because she did not have the amount of disposable income which the schedules reflect. Nevertheless, since that time until the date of hearing, no amended schedules were filed.

The record presented at this hearing fails to establish that Debtor does not have the amount of disposable income shown on her schedules. The U.S. Trustee made a prima facie showing that the scheduled income of Debtor is correct and that based upon her projections of monthly expenses submitted in Schedule J under oath, she does have the amount of disposable income each month as alleged by the U.S. Trustee. Debtor does not contest the amount of monthly income set forth in her schedules. She contests the amount of monthly expenses as being too low. However, she has not amended her schedules to reflect an alternative state of her financial affairs and she has not presented relevant evidence to correctly state her monthly expenses, if they are indeed different than those set forth in Schedule J.

The U.S. Trustee resists granting Debtor the opportunity to now amend her schedules. He asserts she has had sufficient time to do so. As the matter has been brought to hearing and evidence presented, he asks the Court to make a determination, based upon this record, as opposed to allowing additional time to amend the schedules and then having another hearing if the schedules are substantially different.

CONCLUSIONS OF LAW

The U.S. Trustee moves to dismiss based on 11 U.S.C. § 707(b). This section states:

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.

Two issues must be addressed under § 707(b): 1) whether the debts are primarily consumer debts and 2) whether substantial abuse exists. In re Palmer, 117 B.R. 443, 446 (Bankr. N.D. Iowa 1990). The presumption in favor of granting the debtor bankruptcy relief places the burden of showing substantial abuse on the U.S. Trustee. In re Woodhall, 104 B.R. 544, 545 (Bankr. M.D. Ga. 1989).

Debtor does not dispute and a review of the schedules confirms that the debts are "primarily consumer debts" under §§ 707(b) and 101(8). Therefore, the first element is established and the U.S. Trustee need only establish that relief would constitute substantial abuse.

The Eighth Circuit has specifically held that the ability to fund a Chapter 13 plan can be sufficient reason to dismiss a Chapter 7 petition as substantial abuse under § 707(b). United States Trustee v. Harris, 960 F.2d 74, 77 (8th Cir. 1992). The essential inquiry is whether the debtor has the ability to repay creditors with future income. Fonder v. United States, 974 F.2d 996, 999 (8th Cir. 1990). The court may also consider debtor's good faith and unique hardships. In re Walton, 866 F.2d 981, 983 (8th Cir. 1989).

Debtors have a strict obligation to file complete and accurate schedules. In re Dubberke, 119 B.R. 677, 680 (Bankr. S.D. Iowa 1990). A basic rule in bankruptcy is that schedules must be accurate and complete and must be corrected if they are incomplete. In re Mohring, 142 B.R. 389, 394 (Bankr. E.D. Cal. 1992). To further this rule, amendments are liberally granted. Id. "The petition, schedules and statements must be accurate and reliable, without the necessity of digging out and conducting independent examinations to get the facts." Mertz v. Rott, 955 F.2d 596, 598 (8th Cir. 1992).

The debtor has the duty to file supplemental schedules when circumstances change postpetition. Id.; In re Wiethuchter, 147 B.R. 193, 199 (Bankr. E.D. Mo. 1992). When a debtor's attorney becomes aware of omitted information, the attorney is required to update the schedules. In re Giguere, 165 B.R. 531, 536 (Bankr. D.R.I. 1994). Failure to do so is a breach of the attorney's continuing duty to update as new information becomes available. Id.

If Debtor's schedules are inaccurate in their portrayal of disposable income, Debtor should have filed amended schedules to correct them. Debtor states that as early as the meeting of creditors on August 15, 1994 she realized and communicated to her attorney that she did not have the disposable income revealed by her schedules. She did not file amended schedules at that time. Nor did she respond with amended schedules when she and/or her attorney received notice of the U.S. Trustee's Motion to Dismiss. If the schedules are truly inaccurate, this constitutes a breach of both the Debtor's and her attorney's duty to update schedules as inaccuracies are discovered.

Debtor is not necessarily precluded by her failure to amend from presenting other competent evidence regarding her disposable income in response to the Motion to Dismiss. See Fonder, 974 F.2d at 1000 (debtor offered evidence of increased expenses although he had sworn to the accuracy of his original schedules; court's rejection of evidence warranted on the record); Dubberke, 119 B.R. at 678 (debtor resisted motion to dismiss with affidavit and new schedule of actual income and expenses). Here, Debtor's evidence consisted of copies of her check register from June 15 until the date of the hearing. No evidence was offered to explain the individual entries in the register. Without further explanation, the check register does not establish that the expenses listed on Schedule J are inaccurate or unreliable.

The Court concludes that Schedule J as originally filed by Debtor is the most competent evidence to establish Debtor's expenses. Debtor does not controvert that Schedule I is an accurate accounting of her current income. Thus, the U.S. Trustee's repayment analysis which is based on those figures must be accepted by the Court as accurate. This repayment analysis establishes that Debtor has the ability to fund a Chapter 13 plan and repay her creditors through future income. No evidence of good faith or unique hardships was offered which would contradict this conclusion. Therefore, the Court concludes that the U.S. Trustee has shown that granting Chapter 7 relief would be a substantial abuse of the Bankruptcy Code and dismissal is warranted under § 707(b).

The Court cannot compel Debtor to convert to Chapter 13. Fonder, 974 F.2d at 999; 11 U.S.C. § 706 (c). Debtor may request conversion to Chapter 13 if she is eligible for Chapter 13 relief. § 706(c), (d). Here, the Court concludes that Debtor should be given a short period of time to request conversion to Chapter 13 to avoid the consequences of dismissal of her Chapter 7 case. See Fonder, 974 F.2d at 998 (bankruptcy court gave debtor 10 days to convert to Chapter 13 or dismissal would be entered for substantial abuse). If Debtor chooses not to convert, the dismissal will be entered.

WHEREFORE, Debtor is given until **4:30 p.m. on October 21, 1994** within which to request conversion to Chapter 13.

FURTHER, if Debtor does not request conversion within that time, the U.S. Trustee's Motion to Dismiss will be deemed GRANTED and this case shall be DISMISSED without further action by the Court.

SO ORDERED this 11th day of October, 1994.

Paul J. Kilburg
U.S. Bankruptcy Judge