

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

Clay Alan Beavers,

Case No. 02-10121

Debtor.

Chapter 7

**MEMORANDUM OPINION AND ORDER RE
MOTION TO DISMISS**

The Court conducted a hearing on the United States Trustee's Motion to Dismiss on November 1, 2002. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

The debtor in this case, Clay Beavers, ("Beavers"), filed his voluntary chapter 7 petition on January 9, 2002, as an individual with primarily consumer debt. Beavers previously filed a chapter 13 petition on April 18, 1989, with his now ex-wife, Brenda Ann Beavers, case number 89-11383. After paying 10% to their unsecured creditors, the Beavers' case was discharged and closed in January 1995.

A. Employment

Beavers has been employed for 19 years with Siegal-Roberts, Inc., as a corporate engineer. According to his tax return, Beavers' adjusted gross income for 2001 was \$55,976.00. He is paid bi-weekly and nets \$1,495.00 per paycheck. Beavers' has \$96.00 deducted out of every paycheck for repayment on a 401K loan. On his original Schedule I, Beavers listed monthly payroll taxes and social security deductions of \$780.10. On an amended Schedule I filed on August 29, 2002, the payroll taxes and social security deductions were adjusted to \$1,046.18. When questioned by the Court about this approximately \$260.00 increase, Beavers testified that he had increased his withholdings in order to avoid owing taxes in 2002. When further questioned by the Court about this matter, Beavers testified that he owed \$500.00 in taxes in 2001 after filing his return.

B. Home Mortgage

On August 25, 2000, Beavers obtained a second mortgage on his home in the approximate amount of \$45,000.00. The mortgagee disbursed \$27,000.00 of these funds to Beavers' creditors and

remitted \$11,498.75 to Beavers. When questioned by the Assistant U.S. Trustee about what he did with these funds, Beavers testified that he used the money to pay off debts, but that he could not recall what specific debts or what type of debts he paid off with the money. Beavers’ house was foreclosed upon in August 2002. At the time of foreclosure, Beavers owed \$115,494.68 on the first mortgage and \$44,818.29 on the second mortgage. The successful bid at the foreclosure sale was \$100,678.56, leaving deficiency balances on the first mortgage in the amount of \$14,846.12 and on the second mortgage in the amount of \$44,818.29.

C. 2002 Chevrolet Silverado

On December 21, 2001, Beavers purchased a 2002 Chevrolet Silverado extended cab pickup truck. The total purchase price was \$29,451.33. Beavers financed \$28,846.48 of this amount. Beavers has reaffirmed this debt in this case in the amount of \$28,554.74. At the time of purchasing the 2002 Silverado, Beavers was driving a 1995 Chevrolet pickup. Beavers did not trade the 1995 pickup in on the 2002 Silverado, but instead kept the 1995 pickup for his seventeen (17) year old son to drive. Union Planters holds a lien on the 1995 pickup along with a Polaris jet ski in the amount of \$4,800.97. Beavers has reaffirmed that debt in this case for a monthly payment of \$167.00. Since the filing of his chapter 7 petition, Beavers’ son has totaled the 1995 pickup.

At the hearing in this matter, Beavers testified that he purchased the 2002 Silverado after consulting an attorney about filing for bankruptcy relief. Beavers further testified that at the time of purchasing the new pickup he knew he was in financial trouble and that he would have to file for bankruptcy relief. Despite this knowledge, Beavers testified that he decided to purchase the Silverado for several reasons. First, Beavers stated that the 1995 pickup, which he kept for his son to drive rather than trade-in on the Silverado, was in constant need of repair. Second, Beavers stated that, because he knew he was going to file for bankruptcy relief, he would not be able to finance a new vehicle at a good rate for awhile.

When questioned by the Assistant U.S. Trustee about why he chose to buy such an expensive truck rather than a less expensive car, Beavers offered several reasons. First, Beavers felt that he needed an extended cab vehicle so that he would have plenty of room for his two children and their activities. Secondly, Beavers testified that he got a discounted rate on the vehicle through his job. When questioned about whether or not he had to purchase the 2002 Silverado in order to get the discount, Beavers testified that he did not. Third, Beavers testified that he chose to get the Silverado because he is a “man” and he hunts and fishes. Beavers admitted that he did not need or use the Silverado for his job. When told by his

attorney to explain the purchase, Beavers admitted that he knew the Silverado was an expensive vehicle, but that he did not get all of the available options such as leather seats, push button 4-wheel drive or a cd player.

D. Divorce

Beavers and his now ex-wife, Brenda Ann Beavers, were divorced in September 2001. Beavers has custody of the couple’s oldest son while Beavers’ ex-wife has custody of the younger one. Beavers testified that he first consulted his divorce attorney, Skip Riley, in January 2001, about the divorce. Beavers further testified that at that meeting, Skip Riley, advised him he would likely have to file for bankruptcy relief. Beavers refused to do so until January 2002.

II. CONCLUSIONS OF LAW

Section 707(b) of the Bankruptcy Code provides:

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). In the Sixth Circuit, whether or not a debtor is guilty of “substantial abuse” is to be decided by looking at a totality of the circumstances. *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989). Factors to take into consideration when making such an inquiry include the “debtor’s good faith and candor in filing schedules and other documents, whether he has engaged in ‘eve of bankruptcy purchases,’ and whether he was forced into Chapter 7 by unforeseen or catastrophic events.” *Id.*; *In re Zick*, 931 F.2d 1124, 1126-27 (6th Cir. 1991). A party seeking dismissal of a case under § 707(b) has the burden of proof by a preponderance of the evidence. *In re Summer*, 255 B.R. 555, 563 (Bankr. S.D. Ohio 2000).

In the case at bar, the debtor took out a second mortgage on his house seventeen months prior to filing for bankruptcy relief. The mortgagee disbursed over \$25,000 to Beavers’ creditors and then remitted over \$11,000.00 to the debtor himself. Beavers testified that he could not recall exactly how he used this money. He was pretty certain he used it to pay bills, but could not remember what bills or what types of bills he paid with the funds. Upon filing for bankruptcy relief, Beavers’ house was foreclosed upon with a deficiency balance of almost \$60,000.00.

Beavers testified at the hearing in this matter that at the time of purchasing the 2002 Silverado he knew he was going to have to file for bankruptcy relief. He admitted that he did not have to purchase that exact vehicle. In fact, he admitted that he could have purchased a much cheaper vehicle. Beavers’s assertion that he did not get the truck fully loaded do little to sway the court that he was being financially prudent on the eve of filing for bankruptcy relief. Additionally, the Court finds it difficult to believe Beavers’s testimony about needing the new vehicle because his old one kept breaking down. Had Beavers’ traded the 1995 pickup in on the 2002 Silverado, his assertion may have had some weight; however, the fact that Beavers kept the 1995 pickup for his son, and thereby presumably still kept paying for the repairs, leads the Court to doubt Beavers’ reasoning.

Beavers ardently urged the Court to believe that his divorce in 2001 led to his financial troubles. While the Court understands that divorce can be both financially and emotionally devastating, the Court simply does not believe that Beavers’ divorce rises to the level of an “unforeseen or catastrophic event” as contemplated by § 707(b). True, Beavers’ household income was reduced by the divorce, but only by approximately \$20,000 a year. After his ex-wife left the household, Beavers was still making over \$55,000.00 a year.

As a result of these findings, the Court concludes that the debtor has substantially abused the provisions of the bankruptcy code by filing for Chapter 7 relief; however, because the Court additionally finds that Beavers’ case is an appropriate one for Chapter 13, the Court will conditionally deny the U.S. Trustee’s Motion to Dismiss and give Beavers fifteen days to convert to Chapter 13. Should Beavers fail to convert within the proscribed period, his case will be dismissed.

III. ORDER

It is therefore **ORDERED** that the U.S. Trustee’s Motion to Dismiss is **CONDITIONALLY DENIED**. The Debtor shall have fifteen (15) days from the entry of this order to convert to Chapter 13 or his case will be dismissed.

It is so ordered.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: December 12, 2002

cc:

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