

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

**In re:
KELVIN W. RICHARDSON,
Debtor.**

**Case No. 03-33600whb
Chapter 7**

OPINION AND ORDER ON § 707(b) MOTION

On October 25, 2004, the Court heard and took under advisement the evidence presented on the motion to dismiss this case under 11 U.S.C. § 707(b), filed by the United States Trustee. This opinion contains the Court's findings and conclusions.

ISSUE

The issue for decision is whether it would be a substantial abuse to permit this Debtor to proceed under chapter 7 of the Bankruptcy Code.

DISCUSSION AND FINDINGS

The evidence presented on this motion presents a factual dispute as well as requires an application of Circuit authority to the Court's findings of fact. The question is whether it would be a substantial abuse to permit this Debtor to remain in chapter 7 rather than dismissing his case based upon a possible ability to pay a significant amount to his unsecured creditors. The authority from the Sixth Circuit instructs us that the "totality of circumstances" must be examined for each debtor,

to determine if that debtor has dealt honestly with creditors or is seeking an advantage over them unfairly, and whether the debtor is “needy.” *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989). There has been some evidence presented in this case that Mr. Richardson had been less than complete or accurate in his bankruptcy schedules; thus, an issue of the Debtor’s honesty is presented. Moreover, in both *Krohn* and *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 435 (6th Cir. 2004), the Circuit panels acknowledged that a debtor’s ability to pay creditors could alone support a finding that a debtor was not “needy” and that chapter 7 relief would be a substantial abuse. That legal conclusion, however, does not mean that every debtor who on paper has some ability to repay some percentage of unsecured debt is substantially abusing chapter 7 by seeking relief under that chapter. The trial court must evaluate ability to pay in the light of the total circumstances presented in each particular case.

This Debtor filed his chapter 7 petition while he was employed by Buckeye Technologies, Inc., where he earned a relatively high salary of approximately \$88,000 in 2003. Unfortunately, he lost his job in a transition phase by his employer. He had moved to Memphis for that position, which was a promotion, believing that his employment at Buckeye would be secure and being led to believe that he would be promoted further within the company. Before he and his family moved to Memphis, the Debtor was in financial difficulty. He and his wife (who has not filed for bankruptcy relief) owed about the same on their Florida home as they owe on two mortgages on the Tennessee home, and the Debtor had close to \$100,000 in unsecured debt. Although the United States Trustee correctly points out that the Debtor had lived beyond his means, that in itself does not mean that chapter 7 relief would be a substantial abuse. Rather, the Court must evaluate whether the Debtor’s life style indicated that he had been dishonest or deceptive with his creditors and whether he continued an excessively lavish lifestyle with no attempts to reduce his expenses up until and past his bankruptcy filing. The evidence supports a finding that this Debtor has been in substantially the same amount of debt for years, and there is no indication that he ran up his debt just before filing. If every Debtor who lived beyond their means was denied chapter 7 relief, there likely would be very few bankruptcies under that chapter.

Upon being told by Buckeye that his position in Memphis would terminate, the Debtor was offered a transfer back to a manufacturing position within Buckeye at the same \$88,000 salary, but that would have required another move for his family. The Debtor testified that his wife did not

want to move again and that she was employed in Memphis with no promise of getting comparable employment if they moved. Moreover, the family, which includes a minor child, had settled into a house and community that they enjoyed and that was good for the child. The Debtor testified that he would be putting his family at more financial risk by moving back to Florida than if they stayed in Tennessee. Although the United States Trustee, and the Court, might disagree with that decision in hindsight, especially since the Debtor lost his job with Buckeye by declining the transfer, that doesn't necessarily mean that the Debtor's decision was an indicia of substantial abuse of bankruptcy. Rather, the Court sees the Debtor's poor financial choices as an indicia that he needs a fresh financial start.

The United States Trustee points to the value of the Debtor's home in Germantown, Tennessee, \$240,000, and argues that the Debtor's failure to sell that home and reduce living costs was an indicia of his chapter 7 being a substantial abuse. The Court does not agree that this is necessarily the result. As stated, the Debtor and his wife owed approximately the same in mortgage debt in Florida as Tennessee, and they refinanced their first mortgage on the Germantown home within a few weeks of filing bankruptcy. That refinancing was not an effort to increase debt but rather was an attempt to hold on to the home and keep the first mortgage current. The first mortgage is \$1,400 a month and a second financed by the seller is \$377 per month. The Court can't say that a total mortgage note of \$1,800 a month is excessive for this family, nor was there proof presented that the Debtor and his family could obtain suitable housing in the Memphis market for substantially less. The United States Trustee did introduce exhibits of census reports on the population and housing profile of Memphis, but that 2001 profile's median housing costs for mortgaged owners of \$941 is tied to the median household income of \$31,842. Those raw numbers in themselves do not establish that this Debtor was abusive in putting his family into more expensive housing, nor does it drive the Court to find that all debtors, in order to not be financially abusive, must live in \$1,000 per month homes. Reliance upon such raw profile numbers alone would undercut the Court's duty to evaluate each debtor in the light of the circumstances surrounding that debtor. Those circumstances include the fact that this Debtor's spouse is not in bankruptcy, and the Court can't presume to decide for the spouse where she or the minor child must live.

Another poor financial choice by this Debtor was taking title to an old family home in Jackson, Mississippi. The Debtor testified that his grandmother "gave" him that home while he was

living in Florida in an attempt to give him some equity. He had a second mortgage on his Florida home and apparently used the Mississippi property to transfer that mortgage debt. The result was a \$50,000 debt on the Mississippi property, which is worth only \$20,000. Although it is easy to say that this was a poor financial move, that doesn't equate to a conclusion that it is an indicia of substantial abuse. There have been no filings in this bankruptcy case by creditors asserting that the Debtor was deceptive with them or that they objected to his discharge. The Court assumes that the secured creditor on the Mississippi property will eventually foreclose on that property and that the Debtor will seek a discharge of his personal liability on that debt. That is the only result that makes financial sense. The Court would hope that this Debtor would not reaffirm his debt on the Mississippi property, a decision that would perpetuate unnecessary financial pressure.

After losing his Buckeye employment, the Debtor was called into active duty in the Navy, and he is currently a Lt. Commander, earning approximately \$86,000 annually. His duty tour will terminate in May, 2005, and he has no expectation of being able to stay in the military, nor does he expect to be eligible for reserve pay after that date. At the present time, the Debtor has no employment expectations after his Navy duty ends. The Court points out that neither party to this motion mentioned the effect of the Servicemembers' Civil Relief Act of 2003 on this case. That Act, which expanded the reach of the Soldiers' and Sailors' Relief Act of 1940, has broad relief for members on active duty. There is some question whether the Court could enforce the § 707(b) provisions against an active member of the military, since the Act applies to any civil judicial or administrative proceeding commenced in any court, but without reaching that issue, the Court notes that should this case be dismissed for substantial abuse, there would be a more serious issue of whether a creditor could take substantial actions against the Debtor while he is in active duty, since the Act places restrictions on foreclosures and other civil remedies. That could merely prolong the Debtor's financial plight, since upon his release from active duty, creditors would renew their collection efforts.¹

The fact that the Debtor is currently earning approximately what he earned at Buckeye does not translate into a finding of substantial abuse of bankruptcy relief. As the Debtor testified, and as

¹The Court observes, however, that the Debtor should investigate benefits that he and his spouse might still obtain from the Act.

other evidence indicates, the Debtor and his spouse were drowning in debt well before filing for bankruptcy and, at best, barely manage now to swim in the same pool of debt. A very significant factor in this case is that both the Debtor and his wife engaged in an effort to control their debt through a debt management service. The spouse continues in that effort rather than seeking bankruptcy relief. The Debtor testified that his debt management counselor advised him that the effort was not working and that he needed to file bankruptcy. Congress has before it a bankruptcy reform bill that would require all debtors to seek credit counseling before filing bankruptcy. This Debtor attempted that, and his effort speaks in favor of his bankruptcy being non-abusive. Although the argument is made that the Debtor could “belt tighten” and not need chapter 7 relief, the Court can’t say that “belt tightening” would relieve the financial pressure. Even if the Debtor sold his house (and there was no proof that a ready market exists for such a sale), that would not solve his \$111,000 debt to unsecured creditors. Could he pay something to those unsecured creditors in a chapter 13 bankruptcy? Perhaps, but his funding of a plan could be, at best, short-term until his active duty ends, at which point he has no assurance of employment.² And, as previously noted, there is a serious issue of whether the bankruptcy court can consider encouragement of a chapter 13 for an active duty servicemember in light of the Servicemembers’ Civil Relief Act of 2003; dismissal of a chapter 7 case on the grounds that the Debtor could pay something to his unsecured creditors in a chapter 13 plan seems to offend the protection given to active duty servicemembers. It is also not clear that unsecured creditors would benefit from a chapter 13 plan, since the Debtor would first be required to provide for his secured creditors, and it is not clear what those creditors would demand in such a plan. As the *Krohn* Court noted, if a debtor could liquidate consumer debt with “relative ease,” that would support a substantial abuse finding, but this Debtor could not liquidate his debt with such relative ease. *Krohn*, 886 F.2d at 126.

The United States Trustee also pointed to the Debtor’s incurring of debt for a replacement vehicle shortly before bankruptcy, but the proof established that the Debtor’s Mother used her name and credit to permit the family to acquire a used but reliable vehicle. Although the Debtor is attempting to pay this debt rather than permitting his Mother to do so, there was proof that his family

²The Debtor would not be eligible as a chapter 13 debtor if he lacked regular income. 11 U.S.C. § 109(e).

needed a reliable vehicle and its acquisition was not an act of luxury.

The United States Trustee points to errors and omissions from the Debtor's bankruptcy schedules as indicia of his "lack of candor." The Court is concerned that the Debtor did not accurately state his income and that his original schedules failed to disclose his retirement account at Buckeye. In light of the apparent exclusion from the bankruptcy estate of his retirement account, this omission may be of no significant effect, but if it were significant it is more grounds for a discharge objection than for substantial abuse dismissal. The Debtor was a credible witness, who testified that he was confused to some extent about his income, both from Buckeye and the Navy, and that he did not intend to deceive in any inaccuracies in his schedules. The Debtor appeared to be cooperative with the Court, and it is this Court's experience that debtors under great financial pressure can be confused on financial matters. The Court does not find a basis for dismissal of this case under § 707(b) due to any inaccuracies in the schedules. Those inaccuracies have now been explained satisfactorily for purposes of this motion, and the Court does not make a finding of dishonesty on the part of this Debtor for purposes of this motion.

Finally, the United States Trustee alludes to the lack of catastrophic events that forced the Debtor into bankruptcy. Although no single event forced that decision, the evidence is persuasive that the accumulated financial pressure led to that result, and, as observed, the Court can't say that the Debtor acted deceptively with his creditors in his path to bankruptcy. His debt management efforts were an indication of his good faith, and his poor financial decisions are merely an indication of the results financial pressure may produce. As one debtor once said to this Court: You can only pour water so long into the boat before it sinks. There is no proof that this Debtor intentionally sank his boat, nor is there persuasive proof that he could have kept the boat afloat through further efforts.

CONCLUSION AND ORDER

Based upon the particular circumstances for this Debtor, the Court concludes that it is not a substantial abuse for this particular Debtor to seek relief under chapter 7 of the Bankruptcy Code. It is therefore **ORDERED** that the motion to dismiss this case is **DENIED**. The case shall proceed under chapter 7.

The Court observes that there were significant issues in this case that deserved the filing of this motion, and the efforts of the United States Trustee in investigating and litigating such § 707(b) matters is commendable.

Service List:

Debtor

Debtor's attorney

United States Trustee

Chapter 7 Trustee

Creditors on Matrix