

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

MARK ALLEN FRIZZELL
NORMA GALE FRIZZELL

No. 03-13261
Chapter 7

Debtors

**MEMORANDUM OPINION ON
U.S. TRUSTEE'S MOTION TO DISMISS**

APPEARANCES: Shannon L. Clark, Hixson, Tennessee, Attorney for Debtors
William R. Sonnenburg, Office of the United States Trustee,
Chattanooga, Tennessee, Attorney for United States Trustee

HONORABLE R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

This case is before the court on the United States Trustee's motion to dismiss pursuant to Section 707 of the Bankruptcy Code. Having considered the proof and arguments of the parties, the court now reports its findings of fact and conclusions of law pursuant to Rules 9014(c) and 7052 of the Federal Rules of Bankruptcy Procedure.

FINDINGS OF FACT

Mr. Frizzell has been employed as a teacher at Orange Grove Center for 12½ years, and Ms. Frizzell has been employed as a customer service representative at SunTrust

Bank for 8½ years. Mr. Frizzell also has a part-time job through Orange Grove.¹ The debtors' 2002 combined gross income totaled approximately \$70,000. They have one child, age seven, who attends private school. The debtors live in a home valued at \$100,000 and make mortgage payments of nearly \$1,300 per month. They lease a 2000 Honda CRV and own a 2004 Mitsubishi Endeavor valued at \$28,440.08. The lease payments on the Honda are about \$335 per month and the payments on the Mitsubishi – purchased seven days before the debtors filed their bankruptcy petition – are \$634.83 per month. The debtors have surrendered a 1999 Dodge Durango, the lease payment on which was \$534.98 per month

The debtors have a combined net monthly income of \$5,111.82 according to their original Schedule I and \$3,984.02 according to the amended Schedule I, which the debtors filed two months after the U.S. Trustee filed the motion before the court and one week before the hearing on the motion. Disregarding loan repayments deducted from Mr. Frizzell's paychecks, the check stubs reflect a combined monthly net income of approximately \$4,859 per month.²

The debtors' original Schedule J listed monthly expenses totaling \$4,995.74. Included in those expenses, including the \$1,265 house payment and the \$970 in car payments, were the following items:

¹Mr. Frizzell asserts that “[t]he availability of this [part-time] income is dictated by the Federal Government through a Medicaid waiver and is not guaranteed,” but offered no evidence that the position will be discontinued in the foreseeable future.

²When the credit union payment on the Mitsubishi Endeavor is added back in, Mr. Frizzell's bi-weekly paycheck reflects a net amount of \$1,331.01, so his net income comes to \$34,606.26 per year or \$2,883.86 per month. Ms. Frizzell's semi-monthly paycheck (excluding relatively small bonuses) reflects a net amount (including a United Way contribution) of \$987.51, so her net income comes to \$1,975.02 per month.

| Expense | Amount |
|---|---------------|
| Telephone Service | \$124 |
| Home Maintenance | \$100 |
| Clothing | \$150 |
| Transportation (not including car payments) | \$255 |
| Private School Tuition | \$416. |

In addition, original Schedule J Also includes the \$534.98-per-month lease payment on a 1999 Dodge Durango, which the debtors proposed to surrender to the lessor.

The amended Schedule J deleted the lease payment and also deleted the payment on the Mitsubishi Endeavor (because it is deducted from Mr. Frizzell's paycheck). However, virtually every other expense item was increased, the increases ranging from \$25 per month for clothing and medical expenses to \$45 per month for private school tuition and \$146 per month for child care and school lunches. In addition, the debtors added a \$100-per-month payment to repay Mr. Frizzell's parents a loan for the debtors to purchase a new central heat and air conditioning system and a \$75-per-month anticipated expenditure for their daughter's dental work. As a result, the expenses (adding in the Endeavor payment) total \$5,152.49 according to the amended Schedule J – an increase of nearly \$700 per month, adjusting the original schedule to delete the Durango payment and adjusting the amended schedule to add the Endeavor payment. However, at the hearing on the U.S. Trustee's motion, the debtors testified that the private school tuition is now paid by Mr. Frizzell's parents. Deleting that expense produces an adjusted amended Schedule J total of \$4,692.49.

Unsecured debts total \$21,869 (plus two debts listed as being in "unknown" amounts). At least 73% of that debt consists of credit card debt. The U.S. Trustee argues that

granting discharge relief in this case would be a substantial abuse of the provisions of Chapter 7 because the debtors can easily afford to pay a large portion of their debts in a Chapter 13 plan.

CONCLUSIONS OF LAW

The U.S. Trustee's motion is based on the provisions of Section 707(b) of the Bankruptcy Code, which provides as follows:

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. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

There is no dispute that the debtors are individuals or that their debts are primarily consumer debts, and the U.S. Trustee does not question the debtors' charitable contributions.

Accordingly, the issue before the court is whether this case constitutes a "substantial abuse" of Chapter 7 of the Bankruptcy Code.

The Sixth Circuit has explained the meaning of that term:

Those courts which have reviewed the legislative history, have generally concluded that, in seeking to curb "substantial abuse," Congress meant to deny Chapter 7 relief to the dishonest or non-needy debtor. In determining whether to apply § 707(b) to an individual debtor, then, a court should ascertain from the totality of the circumstances whether he is merely seeking an advantage over his creditors, or instead is "honest," in the sense that his relationship with his creditors has been marked by essentially honorable and undeceptive dealings,

and whether he is “needy” in the sense that his financial predicament warrants the discharge of his debts in exchange for liquidation of his assets. Substantial abuse can be predicated upon either lack of honesty or want of need.

In re Krohn, 886 F.2d 123, 126 (6th Cir. 1989) (citations omitted). The court went on to list some of the factors to be considered in evaluating a debtor’s honesty and some of the factors to be considered in evaluating a debtor’s need for Chapter 7 relief. In the latter regard, the “totality of the circumstances” include (a) the debtor’s “ability to repay his debts out of future earnings,” (b) “whether the debtor enjoys a stable source of future income,” (c) whether the debtor is “eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code,” (d) “whether there are state remedies with the potential to ease [the debtor’s] financial predicament,” (e) “the degree of relief obtainable through private negotiations,” and (f) whether the debtor’s “expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities.” *Id.* at 126-27.

In determining the debtors’ ability to repay their debts, the court must determine the amounts of monthly living expenses “reasonably necessary to maintain the debtor or the debtor’s dependents.” It has been held that “Debtor’s amendment of the schedules when faced with the U.S. Trustee’s motion to dismiss also renders their veracity suspect.” *In re Lee*, 162 B.R. 31, 43 (Bankr. N.D. Ga. 1993). The importance of filing accurate schedules at the outset of the case cannot be overemphasized. “The veracity of the statements filled out by the debtor is essential to the successful administration of the Bankruptcy Code.” *Job v. Calder (In re Calder)*, 93 B.R. 734, 738 (Bankr. D. Utah 1988), *aff’d*, 907 F.2d 953 (10th Cir. 1990) (citing *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 618 (11th Cir. 1984)); *accord, e.g., Bailey v. Ogden (In re Ogden)*, 251 B.R. 441 (Table), 1999 WL 282732, at **14 (B.A.P. 10th Cir. Apr. 30, 1999). “[T]he petition, including 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); *accord, e.g., Ogden*, 1999 WL 282732, at **14; *Camacho v. Martin (In re Martin)*, 88 B.R. 319, 323 (D. Colo. 1988). “To a substantial extent, the trustee’s ability to perform the duties set forth in 11 U.S.C. § 704 depends on the accuracy and completeness of the debtor’s disclosures.” *In re Colvin*, 288 B.R. 477, 481 (Bankr. E.D. Mich. 2003). The bankruptcy system’s need for accurate schedules would not be fulfilled were a debtor free to “correct” the schedules once they are called into question.

The court finds that the expenses set forth in the debtors’ original Schedule J more accurately reflect their actual spending. For example, while the amendment raised the “electricity” by \$50 per month to \$175, Mr. Frizzell testified that he did not recall any electric bill higher than \$150 and Ms. Frizzell testified that she thought she recalled one or two bills that fell into that category. Moreover, the court concludes that the expenses set forth in the debtors’ original Schedule J more closely represent reasonable expenditures under the facts of this case. Even if the payments to Mr. Frizzell’s parents and the anticipated dental expense are added in, the expenses shown on the adjusted original Schedule J after deducting the lease payment would total \$4,221 (excluding the private school tuition, which is now paid by Mr. Frizzell’s parents³).

Accordingly, even based on their present spending habits, the debtors have a substantial ability to repay their debts. The debtors “enjoy a stable source of future income” and are “eligible for adjustment of [their] debts through Chapter 13 of the Bankruptcy Code.”

³Some courts have held that private school tuition must be included in disposable income because it is not reasonably necessary to maintain the debtor or the debtor’s dependents. *Compare In re Burger*, 280 B.R. 444, 448-49 (Bankr. S.D. Ind. 2002), with *In re Attanasio*, 218 B.R. 180, 231-32 (Bankr. N.D. Ala. 1998).

The debtors' combined monthly take-home pay (excluding Ms. Frizzell's bonuses) is \$4,859 per month and the family's monthly living expenses total \$4,221 per month, leaving disposable income of \$638 per month. Assuming a 36-month plan, the total that the debtors could be required to pay to unsecured creditors in a Chapter 13 case would be more than \$22,950, an amount sufficient to pay all of the debtors' unsecured debts in full (although the unsecured debts may increase somewhat if the surrender of the Durango results in a claim for damages for breach of the lease).

The Sixth Circuit has made it very clear that the debtor's ability to repay his debts may *alone* be sufficient to support a finding of substantial abuse:

Among the factors to be considered in deciding whether a debtor is needy is his ability to repay his debts out of future earnings. *That factor alone may be sufficient to warrant dismissal.* For example, a court would not be justified in concluding that a debtor is needy and worthy of discharge, where his disposable income permits liquidation of his consumer debts with relative ease.

Krohn, 886 F.2d at 126 (emphasis added). Considering the totality of circumstances in this case, namely the debtors' salaries, their job stability, their eligibility for Chapter 13, and their expense items, the court believes that the debtors can pay all or substantially all of their consumer debt with relative ease from future income, and that permitting a Chapter 7 discharge of all of the debtors' debt would represent a substantial abuse of Chapter 7 of the Bankruptcy Code. Accordingly, irrespective of whether the debtors are guilty of bad faith, the U.S. Trustee is entitled to relief under Section 707(b) of the Bankruptcy Code.

CONCLUSION

Accordingly, the court will enter a separate order granting the United States Trustee's motion to dismiss this case, but will afford the debtors a reasonable opportunity to convert the case to a case under Chapter 13 of the Bankruptcy Code.

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P. 7052*.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

MARK ALLEN FRIZZELL
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No. 03-13261
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ORDER

In accordance with the court's memorandum entered this date,

It is ORDERED that the debtors will have twenty (20) days from the entry of this order within which to convert this case to a case under Chapter 13, failing which an order will enter dismissing this case under the provisions of 11 U.S.C. § 707(b).

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

(Entered 10/08/03)