

In re Falke

Case No. 301-41901-tmb7

September 30, 2002

TMB

Published

The US Trustee moved to dismiss the Debtor's Chapter 7 petition for substantial abuse under 707(b), contending that the Debtor had the ability to repay a substantial portion of his debt to creditors in a Chapter 13 if his non-debtor spouse paid her proportionate share of the couple's joint household expenses.

The Debtor and his spouse each had approximately \$3,600 in monthly income. The wife's income was used to pay her personal expenses, on which the Debtor was not liable, leaving the Debtor to pay all of the parties joint household expenses. In addition, the Debtor paid for music lessons and golf lessons for his wife's daughter.

The court, citing In re Attanasio, 218 B.R. 180, 235 (Bankr. N.D. Ala 1998), recognized that § 707(b) does not require that "a non-debtor spouse tighten his or her belt in order to assist the debtor in paying debts." However, it nonetheless concluded that in determining whether a debtor has sufficient income to fund a Chapter 13 plan the "court should assume that each party to a relationship, to the extent of his or her income, shares equally in paying the family living expenses and the court should attribute at least one half of the family living expenses to the debtor and the other half to the non-debtor spouse." Id. At 234-235.

Here the court found that "family" living expenses for the Debtor and his family totaled \$3,854.00 only half of which could be attributed to the Debtor for purposes of determining whether he had sufficient income to fund a Chapter 13 plan. In addition, it found that the Debtor's

expenses for his step-daughter's golf and music lessons were not reasonably necessary to the support and maintenance of the Debtor or his family and should be deleted from his budget.

As a result of these adjustments, the court found that the Debtor had a disposable income of \$1,228.00 per month. It further found that if the Debtor contributed this amount to a Chapter 13 plan for a period of 36 months, after payment of administrative costs and priority claims, there would be approximately \$34,314.00 for payment to unsecured creditors. The court noted that this payment would provide unsecured creditors with a dividend of approximately 58% on their claims. However, it found, citing Judge Alley's opinion in In re Davenport, Case No. 601-67522-fra7, April 25, 2002, that ability to repay should be determined based on whether the debtor had the ability to repay a substantial amount to his unsecured creditors, not whether that amount would result in a repayment of a substantial percentage of his debt. In doing so it noted that the percentage approach "rewards debtors with particularly high debts (and resulting low pay-outs), and, conversely, penalizes debtors whose debt load is relatively modest." It then found that under either test the debtor had the ability to pay a significant portion of his debt in a Chapter 13 and that, therefore, his Chapter 7 petition should be dismissed for substantial abuse.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Case No. 301-41901-tmb7
CHARLES FALKE,)
Debtor.) MEMORANDUM OPINION

This matter came before the court on the United States’s Trustee’s (“UST”) Motion to Dismiss this case on the grounds that the filing constitutes a substantial abuse of the bankruptcy system. The UST’s motion is based on its contention that the Debtor has the ability to repay a substantial portion of his debt to creditors in a Chapter 13 case, if his non-debtor spouse paid her proportionate share of the couple’s joint household expenses, a contention that the Debtor vigorously disputes.

A hearing on this matter was held on July 24, 2002. The Debtor was represented by Kelly Brown. The UST was represented by Vivienne Popperl. Following the hearing I took the matter under advisement.

I have reviewed my notes, the exhibits, and the pleadings and other submissions in the file. I also have read applicable legal authorities, both as cited to me and as located through my own research. I have considered carefully the oral testimony and arguments presented and have read

1 counsel's submissions in detail. The following findings of fact and legal conclusions constitute the
2 court's findings under Federal Rule of Civil Procedure 52(a), applicable in this proceeding under
3 Federal Rule of Bankruptcy Procedure 9014.

4 FACTS

5 The Debtor filed a Chapter 7 case on November 29, 2001. The UST filed a motion to
6 dismiss for substantial abuse on March 1, 2002. The UST filed a Memorandum in Support of its
7 Motion to Dismiss for Substantial Abuse on June 5, 2002, which included a "STATEMENT OF
8 AGREED UPON FACTS."

9 1. Assets

10 According to the Debtor's schedules he owns no real property. His personal property is
11 valued at \$3,185.00, virtually all of which he has claimed as exempt.

12 2. Liabilities

13 a. Secured. The Debtor scheduled one secured debt in the amount of \$9,454.00 owed to
14 World Mark/Eagle Crest for a time share. He valued his interest in the time share, which he owns
15 jointly with his wife, at \$50.00.

16 b. Priority Debts. The Debtor scheduled \$5,473.00 in priority unsecured debt. All of this is
17 owed to the Oregon Department of Revenue for unpaid taxes for 1999 and 2000.

18 c. Unsecured Debts. The Debtor scheduled \$59,152.00 in general unsecured debt.
19 \$16,392.00 of the Debtor's unsecured debt consists of a deficiency on a "short sale" of his residence.
20 The bulk of the remaining unsecured debt is credit card debt.

21 3. Income

22 a. Debtor. The Debtor is a retired school teacher. The Debtor's gross pay for 2001 from
23 the State Teachers' Retirement System of California was \$49,882.60. \$9,442.84 was withheld for
24 payment of federal taxes. In addition, he received \$1,782.00 in social security income. The Debtor
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1 continues to receive net monthly payments of \$3,409.00 on account of his retirement and \$152.00 per
2 month Social Security, for a total of \$3,561.00.

3 b. Debtor's Spouse. The Debtor's spouse is employed by Nike. Her net monthly income
4 after taxes is \$3,663.00.

5 4. Expenses

6 According to the Debtor's Amended I Schedule, the parties have a joint net monthly income
7 of \$7,275.00. The Debtor contributes \$3,612.00 of this amount. The balance, \$3,663.00, comes from
8 his wife's income. According to the Amended J Schedule, the Debtor and his wife have expenses of
9 \$6,991.00. Additionally, the Debtor's wife has deductions taken out her paycheck for daycare (\$800),
10 401(k) contributions (\$361), insurance (\$663), loan payment (\$97), car insurance (\$94). Therefore,
11 they argue that they have expenses totaling \$9,006.00, leaving them with a negative monthly income of
12 \$1,731.00.

13 According to the UST, the Debtor and his spouse divide payment of their expenses as
14 follows:

Expense Item	Amount	Responsible Party	Debtor's Monthly Family Expense	Spouse's Monthly Family Expense
Rent	\$1200.00	Debtor	\$1200.00	\$-0-
Electricity and heating fuel	121.00	Debtor	121.00	-0-
Water and sewer	55.00	Debtor	55.00	-0-
Telephone	33.00	Debtor	33.00	-0-
Garbage	32.00	Debtor	32.00	-0-
Cable	48.00	Debtor	48.00	-0-
Phone Cards	35.00	Spouse	-0-	35.00
Home maintenance	25.00	Debtor	25.00	-0-
Food	650.00	Debtor/Spouse	450.00	200.00

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Expense Item	Amount	Responsible Party	Debtor's Monthly Family Expense	Spouse's Monthly Family Expense
Clothing	95.00	Debtor	95.00	-0-
Laundry	65.00	Debtor	65.00	-0-
Medical and dental	220.00	Debtor	220.00	-0-
Transportation	350.00	Debtor/Spouse	200.00	150.00
Recreation	160.00	Debtor/Spouse	140.00	20.00
Charitable contributions	40.00	Debtor	40.00	-0-
Spouse's car insurance	94.00	Spouse	-0-	94.00
Spouse's auto	575.00	Spouse	-0-	575.00
Insurance (unspecified)	663.00	Spouse	-0-	663.00
Daughter's music lessons	65.00	Debtor	65.00	-0-
Daughter's golf lessons	170.00	Debtor	170.00	-0-
Credit card payments	1682.00	Spouse	-0-	1,682.00
Time-share loan	227.00	Spouse	-0-	227.00
Current taxes on Debtor's pension	277.00	Debtor	277.00	-0-
Spouse's 401(k)	361.00	Spouse	-0-	361.00
Spouse's loan repayment	97.00	Spouse	-0-	97.00
Daycare	800.00	Spouse	-0-	800.00
Payment for support of spouse's adult son	250.00	Spouse	-0-	250.00
Orthodontist (daughter)	125.00	Debtor	125.00	-0-
Totals	\$8515.00		\$3361.00	\$5154.00

1 DISCUSSION

2 1. Substantial Abuse Standard

3 Bankruptcy Code § 707(b) provides, in pertinent part, that

4 The court ... may dismiss a case filed by an individual debtor under this chapter
5 whose debts are primarily consumer debts if it finds that the granting of relief
6 would be a substantial abuse of the provisions of this chapter. There shall be a
7 presumption in favor of granting the relief requested by the debtor.

8 The Ninth Circuit has held that substantial abuse may be found if the debtor has the ability to
9 pay a significant portion of debt through a Chapter 13 without undue hardship. In re Kelly, 841 F.2d
10 908, 914-15 (9th Cir. 1988). While there is no threshold repayment percentage for a finding of
11 substantial abuse where the “ability to pay” is applied, the Ninth Circuit Bankruptcy Appellate Panel
12 has held that substantial abuse exists where the debtor has the ability to fund a Chapter 13 plan with a
13 43% return to unsecured creditors. In re Gomes, 220 B.R. 84, 87 (9th Cir. BAP 1998).

14 A debtor’s ability to repay his or her debts within the context of 707(b) is determined by
15 applying the same test that is used to determine whether a debtor is contributing all of his or her
16 disposable income to a proposed plan. In re Kelly, *supra*, 841 F.2d at 915.

17 2. Disposable Income

18 The UST contends that the Debtor is paying the bulk of the household expenses, and that,
19 as a result, the Debtor’s creditors are, effectively, subsidizing the life style of the Debtor’s non-debtor
20 spouse. In addition he contends that some of the Debtor’s expenses, including those for music lessons
21 and golf lessons, are not reasonably necessary for the support and maintenance of the Debtor or his
22 dependents.

23 The Debtor disagrees with the UST’s assessment of how expenses are divided in his
24 household. He contends that he and his wife “pay all of the bills between themselves, as best they can,
25 with all income contributing to the household bills.” He further contends that costs of the music and
26 golf lessons, “are negligible relative to the total household costs” and [do] not alter the basic fact that

1 there is still insufficient income to pay normal household bills, much less any money to pay toward [the
2 Debtor's] general unsecured creditors.”

3 Were the parties equally liable on all of the obligations listed on their Schedule J, I would
4 agree with the Debtor. However, they are not. The scheduled expenses shown on the Amended
5 Schedule J include \$2,448.00 for items on which the Debtor apparently either has no liability now or
6 will have no liability if he obtains a Chapter 7 discharge, including his spouse's car payment, car
7 insurance, loan repayment and credit card payments. In addition, his spouse contributes \$361.00 per
8 month toward her retirement plan, \$250.00 per month toward the support of her adult son, \$663.00
9 per month toward her unspecified insurance, and \$800.00 towards a step grandson's daycare. In fact,
10 her individual expenses, which total \$4,522.00 exceed her monthly net income by \$859.00, leaving her
11 with nothing to contribute toward the parties' joint expenses, including rent, utilities, food, clothing,
12 transportation or medical and dental expenses. Consequently, I find that the Debtor is paying all of the
13 parties' day to day living expenses, with his wife contributing nothing from her earnings toward their
14 joint expenses. I must, therefore, determine whether, given these facts, the Debtor has the ability to
15 fund a Chapter 13 plan.

16 As noted, the test for determining whether a debtor has the ability to fund a Chapter 13 plan
17 is identical to that used to determine whether the debtor is committing all of his disposable income to a
18 proposed Chapter 13 plan. Disposable income is defined as “income which is received by the debtor
19 and which is not reasonably necessary to be expended—

20 (A) for the maintenance or support of the debtor or a dependent of the debtor”

21 11 U.S.C. § 1325(b)(2)(A).

22 The Ninth Circuit has not addressed the issue of whether the income of a non debtor spouse
23 should be included with that of the debtor for purposes of this test. However, most courts which have
24 addressed the issue have, at a minimum, required the consideration of the non debtor spouse's income,
25 see, e.g., In re Engskow, 247 B.R. 314 (Bankr. M.D. Fla. 2000); In re Cardillo, 170 B.R. 490 (Bankr.

1 D. N.H. 1994); In re Bottorff, 232 B.R. 171 (Bankr. W.D. Mo. 1999) while others have required that
2 the income of the non debtor spouse be included with that of the debtor. In re Staub, 256 B.R. 567
3 (Bankr. M.D. Pa. 2000), In re Carter, 205 B.R. 733 (Bankr. E. D. Pa. 1996); In re Saunders, 60 B.R.
4 187 (Bankr. N.D. Ohio 1986).

5 “Congress expressed no intention that 707(b) should effect a non-debtor or that any non-
6 debtor should be required to tighten his or her belt in order to assist the debtor in paying debts.” In re
7 Attanasio, 218 B.R. 180, 235 (Bankr. N.D. Ala. 1998). Nevertheless, “[i]n calculating whether there
8 is discretionary income available . . . one must, of necessity, observe to what degree a debtor’s daily
9 living expenses are shared as co-obligations of the non-debtor spouse” In re Staub, 256 B.R. at
10 571. Consequently,

11 “. . . a court should assume that each party to a relationship, to the extent of his or
12 her income, shares equally in paying the family living expenses and the court
13 should attribute at least one-half of the family living expenses to the debtor and
14 the other half to the non-debtor spouse. The appropriate measure of the debtor’s
15 ability to pay for purposes of 707(b) would then be the debtor’s sole income
16 minus a one-half share of the family living expenses”

17 In re Attanasio, 218 B.R. at 234-235. See also In re Saunders, 60 B.R. at 188 (plan under which
18 debtor paid all of the living expenses for he and his wife, even though she could afford to pay her
19 share, effectively forced debtor’s creditors to subsidize the wife’s daily living expenses and was not
20 confirmable) and In re Reese, 236 B.R. 371 (Bankr. N.D. Ohio 1999) (court should assume that a
21 non-debtor spouse is paying a proportionate share of the parties joint household expenses, but is not
22 required to consider the entirety of the non-debtor spouse’s income in determining whether a debtor
23 has sufficient income to fund a Chapter 13 plan.)

24 In this case the Debtor’s net monthly income, \$3,612.00 is substantially the same as that of
25 his non-debtor spouse whose net monthly income is \$3,663.00. Consequently, each party should share
26 equally in paying the family’s joint living expenses. Those expenses include the following:

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Rent	\$1200.00
Electricity and heating	121.00
Water and sewer	55.00
Telephone/Phone Cards	68.00
Garbage	32.00
Cable	48.00
Home maintenance	25.00
Food	650.00
Clothing	95.00
Laundry	65.00
Medical and dental	220.00
Transportation	350.00
Child care	800.00
Orthodontist	125.00
Total of Joint Living Expenses	\$3854.00

The debtor is responsible for payment \$1,927.00, which constitutes one half of those expenses and that amount must be deducted from his net monthly income to determine his disposable income. In addition, the Debtor has the following individual expenses:

Recreation	\$140.00
Charitable contribution	40.00
Music lessons	65.00
Golf lessons	170.00
Current taxes on Pension Income	277.00
Total of Debtor's Individual Expenses	\$692.00

However, I find that the expenses for golf and music lessons are not reasonably necessary to the support and maintenance of the Debtor or his dependents and should be deleted from the Debtor's budget. Consequently, his individual monthly expenses total \$457.00 which should be added to his

1 share of the joint household expenses for purposes of determining his disposable income. Accordingly,
2 his total monthly expenses are \$2,384.00 (\$1,927.00 plus \$457.00). After this amount is deducted
3 from his net monthly income of \$3,612.00, the debtor is left with a disposable income of \$1,228.00 per
4 month.

5 3. Ability to Pay

6 As noted by Judge Frank R. Alley in In re Davenport, Case No. 601-67522-fra7, April 25,
7 2002:

8 “Courts have rejected the ‘percentage of payment’ argument on the grounds that
9 it rewards debtors with particularly high debts (and resulting low pay-outs), and,
10 conversely, penalizes debtors whose debt load is relatively modest. In re
11 Praleikas, 248 B.R. 140, 145 (Bankr. W.D. Mo. 2000). In Praleikas, the debtor’s
12 position was that there was no substantial abuse because her disposable income
13 would only permit payment of \$5,540.00, or 20% of her debt, through a chapter
14 13 plan. The court held that:

15 ‘Although a number of courts have taken into consideration the
16 percentage of a debtor’s debt that could be paid from future
17 earnings, there is no bright line test. While it may be true that
18 the higher the percentage of debt a debtor could pay with future
19 earnings, the more likely it is that a court would find substantial
20 abuse, the converse is not true. Otherwise debtors would be
21 rewarded for having more debt, rather than less. Instead of
22 percentage of debt, the determination of a debtor’s ability to
23 fund a chapter 13 plan is based on a consideration of the
24 debtor’s ability to make a substantial effort in repaying his or her
25 debts.’

26 248 B.R. at 145 [Internal citations omitted]. The Praleikas court held that the
debtor’s ability to repay at least \$5,540 would ‘constitute a substantial effort to
pay off her Debts [sic], and therefore, [found that she had] the ability to fund a
Chapter 13 plan.’ Id. It is the ability to make a substantial effort to pay, rather
than the ability to pay a particular percentage of claims, which precludes the
debtor from relief under Ch. 7.”

Here, if the Debtor were to pay all of his disposable income into a Chapter 13 plan for a period of 36
months he would pay a total of \$44,208.00. Assuming administrative costs of 10%, this would leave
the Debtor with \$39,787.20 with which to pay his creditors.

The Debtor has scheduled \$5,473.00 in priority tax debt which would be paid in full from
the Debtor’s monthly plan payments, leaving a balance for general unsecured creditors of

1 approximately \$34,314.20. The Debtor's scheduled general unsecured debt totaled only \$59,152.00.
2 If the Debtor paid all of his disposable income into his plan for a period of 36 months that he could pay
3 approximately 58% of his general unsecured debt.

4 Payments of over \$34,000.00 towards unsecured debt for a total of approximately 58
5 percent would constitute a substantial effort and I find that the Debtor has the ability to fund a Chapter
6 13 plan.

7 CONCLUSION

8 The Court finds that allowing the Debtor to proceed under Chapter 7 of the Code would be
9 a substantial abuse of that chapter given his ability to pay \$44,208.00 over three years toward payment
10 of debts in a Chapter 13 plan. It follows that the Trustee's motion must be allowed.

11 While the conversion of the case to another Code chapter is not mandated, the debtor
12 should not be denied the opportunity to do so if he wishes. The order allowing the UST's motion
13 should provide that the case be dismissed 10 days of the date the order is docketed, unless prior to that
14 time the Debtor files a motion seeking conversion of the case to another chapter.

15 This memorandum constitutes the findings of fact and conclusions of law required by
16 Fed.R.Bankr.P. 7052. Counsel for the UST shall lodge a form of order consistent with the foregoing.

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19 _____
Trish M. Brown
United States Bankruptcy Judge

20 cc: Kelly K. Brown
21 M. Vivienne Popperl
22 John Mitchell
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