

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: ) BK. #90-50816  
)  
CHARLES EDWARD BENNETT, ) Chapter 7  
)  
Debtor. )

MEMORANDUM AND ORDER

The U.S. Trustee has filed a Motion to Dismiss this case pursuant to 11 U.S.C. § 707(b).

Charles Bennett filed a petition for relief under Chapter 7 of the Bankruptcy Code on October 16, 1990. The parties agree that Bennett has monthly "take home" income of \$2300.76 and monthly expenses of \$1971.79. The latter figure includes monthly charitable contributions of \$137.00 to the debtor's church. \$31,194.00 of Bennett's debts are priority or unsecured.

There is no dispute that Bennett's debts are primarily consumer debts. The U.S. Trustee contends that this case should be dismissed pursuant to § 707(b)<sup>1</sup> because the debtor has the ability to fund a Chapter 13 plan. As scheduled, Bennett has monthly disposable income

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<sup>1</sup>11 U.S.C. § 707(b). After notice and 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.

of \$328.97, which would allow repayment of only 38% of the priority and unsecured debts under a 36 month Chapter 13 plan. However, the U.S. Trustee challenges the debtor's scheduled expense of \$137.00 monthly charitable contribution. Without that expense, Bennett would have monthly disposable income of \$465.97, which would allow repayment over 36 months of 53% of the priority and unsecured debts.

A debtor's ability to repay his debts is the primary, although not exclusive factor, in determining whether substantial abuse exists under § 707(b). In re Johnson, 115 B.R. 159, 163 (Bankr. S.D. Ill. 1990). See also In re Walton, 866 F.2d 981 (8th Cir. 1989). Whether substantial abuse exists must be determined on a case-by-case basis taking into account (1) whether the bankruptcy petition was filed due to a sudden illness or unforeseen calamity; (2) whether debtor incurred cash advances and made consumer purchases far in excess of the ability to repay; (3) whether debtor has fully and accurately disclosed his monthly income and whether debtor's budget is excessive or extravagant; and (4) whether the information supplied on debtor's schedules and statements accurately reflects the debtor's true financial condition. Johnson, 115 B.R. at 163 (citations omitted).

Further, a debtor's ability to repay his creditors is to be analyzed in terms of whether the debtor can fund a Chapter 13 plan. Id. at 164. See also In re Walton, 866 F.2d 981 and In re Kelly, 841

F.2d 908 (9th Cir. 1988). For purposes of this analysis, 11 U.S.C. § 1325(b)(1)<sup>2</sup>, requires that all of the debtor's disposable income<sup>3</sup> be considered when determining whether a plan is confirmable.

Courts are divided as to whether charitable contributions are to be included in calculating a debtors disposable income under § 1325(b). The majority view is that charitable donations are not necessary for the maintenance or support of the debtor or a dependent of the debtor. See e.g. In re Tucker, 102 B.R. 219 (Bankr. D. N.M. 1989); In re Miles, 96 B.R. 348 (Bankr. N.D. Fla. 1989). Other courts have held that such contributions are reasonably necessary for the debtor's maintenance and support. See e.g. In re Bien, 95 B.R. 281 (Bankr. D. Conn. 1989) ; In re Gaukler, 63 B.R. 224 (Bankr. D. N.D. 1986).

This Court finds the reasoning of Tucker persuasive. "By allowing

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<sup>2</sup>11 U.S.C. § 1325(b) provides in pertinent part:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan

...

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

<sup>3</sup>11 U.S.C. § 1325(b)(2) provides:

For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended -

(A) for the maintenance or support of the debtor or a dependent of the debtor; ...

a chapter 13 debtor to deduct contributions to any organization, the Court necessarily is forcing the debtor's creditors to contribute to the debtor's church or favorite charity. Congress could have intended no such result." 102 B.R. at 220. In this Court's view, charitable contributions to any organization are unnecessary for the maintenance or support of a debtor.

Had this case been brought under Chapter 13, the debtor would have been able to obtain confirmation of a plan only by excluding the monthly expense of \$137.00 for charitable contributions. He would then be able to repay 53% of his priority and unsecured debt under a 36 month Chapter 13 plan. In this case there are no allegations that the debtor incurred cash advances or consumer purchases far beyond his ability to pay, or that the debtor's budget is inaccurate or excessive. Neither are there any mitigating factors in the debtor's favor, such as sudden illness or an unexpected calamity that necessitated the filing of the petition.

In the absence of any additional factors, the ability to repay more than one-half of the unsecured debt indicates a substantial abuse of the provisions of Chapter 7. The totality of circumstances in this case is sufficient to rebut the statutory presumption of § 707(b) that favors granting the relief sought by the debtors.

IT IS ORDERED THAT the debtor is granted leave to convert his case to one under Chapter 13 on or before February 15, 1991. Failure to do

so will result in the dismissal of this case under §707(b) without further hearing.

          /s/ Kenneth J. Meyers            
U.S. BANKRUPTCY JUDGE

ENTERED: February 1, 1991