


ORDERED.

Dated: November 13, 2015


Cynthia C. Jackson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:

KAMEL ARAFA,

Chapter 7

Case No. 6:15-bk-00295-CCJ

Debtor.

ORDER GRANTING MOTION TO DISMISS
FOR ABUSE ARISING UNDER 11 U.S.C. SECTION 707(b)(3)

This case came before the Court for evidentiary hearing on July 28, 2015, for consideration of the United States Trustee's ("UST") Motion to Dismiss the case under Section 707(b) of the Bankruptcy Code (Doc. No. 12; the "Motion to Dismiss"). At the hearing, the UST requested that the Court consider the Motion to Dismiss separately under both Section 707(b)(2) and 707(b)(3). The Court denied the Motion to Dismiss pursuant to Section 707(b)(2), finding that the Debtor was authorized to deduct payments contractually due in the 60 months after the date of filing on surrendered property (Doc. No. 26). In the same Order, the Court set an evidentiary hearing on the Motion to Dismiss under Section 707(b)(3) for September 9, 2015.

The Court having taken evidence and considered the pleadings, grants the Motion to Dismiss for the reasons set forth below.

Background

On January 13, 2015, the Debtor filed a Voluntary Petition for relief under Chapter 7 of the Bankruptcy Code. The Debtor is 37 years old and is married with four minor children. For the past three years, the Debtor has been employed as a finance director with Central Florida Chrysler Jeep Dodge where, according to his 2013 and 2014 tax returns, the Debtor earned a gross income of more than \$120,000 per year. The Debtor also averaged approximately \$10,000 per year in 1099 income during those years. On his Second Amended Schedule I, the Debtor listed his gross monthly income as \$11,247.65, with payroll deductions of \$2,479.41, resulting in a net income of \$8,768.24. This figure, however, does not account for the Debtor's quarterly 1099 income that he receives in his capacity as finance director.

On Schedule J, the Debtor indicated that his total monthly expenses are \$9,371.00. After deducting the Debtor's expenses from his listed income, the Debtor is left with a *negative* disposable income of \$602.76 per month. The Debtor listed his housing and utility expenses, consisting of rent, insurance, maintenance, telephone, cell phone, utilities, and internet and cable, as \$3,065.00 per month. The Debtor's food, clothing, and other expenses, which also include housekeeping supplies, personal care products and services, and miscellaneous, total \$3,779.00 per month. Among these expenses are annual Disney passes for the Debtor and his family, in the amount of \$179.00 per month, which the Debtor has indicated that he intends to renew in 2016. The Debtor also makes monthly payments on two luxury vehicles owned by his non-filing spouse which total more than \$1,300.00 per month. Both vehicles were obtained within the last two years when the Debtor's spouse traded in older, less expensive vehicles.

The Debtor scheduled \$66,315.00 in general unsecured debt on Schedule F, including a \$50,000 debt stemming from dishonored checks he issued in 2009. In the year before the petition date, the Debtor faced criminal charges in New York relating to this debt, which resulted in the Debtor incurring over \$5,000.00 in attorney fees, court costs, air fare, and taxi services. The criminal charges have since been dismissed, but the Debtor has not made any payments on the \$50,000 debt.

By the Motion to Dismiss, the UST argues that the Debtor's expenses are excessive, as they greatly exceed the IRS Collection Financial Standards.¹ The UST contends that the Debtor's expenses could be reduced to provide disposable income and a meaningful distribution to creditors in a hypothetical Chapter 13 plan. The UST concludes that, taking into account the facts surrounding this case, the totality of the circumstances demonstrates that the Debtor's case should be dismissed as an abuse under Section 707(b)(3)(B), because the Debtor has the ability to repay his creditors.

Discussion

Under Section 707(b)(1), a bankruptcy court "may dismiss a case filed by an individual debtor... if it finds that the granting of relief would be an abuse."² In making this determination, the bankruptcy court should consider whether "the totality of the circumstances... of the debtor's financial situation demonstrates abuse" under Section 707(b)(3)(B).³ The core inquiry of a Section 707(b)(3)(B) analysis is whether the debtor's financial situation indicates he has the ability to pay a substantial portion of his unsecured nonpriority debts.⁴ Courts utilize Section

¹ See www.justice.gov/ust/eo/bapcpa/20141101/meanstesting.htm (providing a breakdown of the pertinent IRS standards).

² 11 U.S.C. § 707(b)(1).

³ 11 U.S.C. § 707(b)(3)(B).

⁴ *In re Dowleyne*, 400 B.R. 840, 846 (Bankr. M.D. Fla. 2008).

1325's definition of "disposable income" in conducting the ability to pay analysis.⁵ Section 1325(b)(2), in pertinent part, defines "disposable income" as:

- (2) Current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonable necessary to be expended for such child) less amounts *reasonably necessary* to be expended—
 - (A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed.⁶

Though a debtor's ability to repay creditors is a primary factor in determining whether abuse exists under Section 707(b)(3)(B), it is not conclusive.⁷ Other relevant factors include, but are not limited to:

- (1) whether unforeseen or catastrophic events such as sudden illness, disability, or unemployment propelled the debtor into bankruptcy;
- (2) whether the debtor's standard of living has substantially improved as a result of the bankruptcy filing or essentially remained the same;
- (3) the debtor's age, health, dependents, and other family responsibilities;
- (4) the debtor's eligibility for Chapter 13 relief and whether creditors would receive a meaningful distribution in a Chapter 13 case;
- (5) the age of the debts for which the debtor seeks a discharge and the period over which they were incurred;
- (6) whether the debtor incurred cash advances and made consumer purchases far in excess of the ability to repay;
- (7) whether the debtor made any payments toward the debts or attempted to negotiate with [his] creditors;
- (8) the accuracy of the debtor's schedules and statement of current income and expenses;
- (9) whether the debtor filed the petition in good faith;
- (10) employment stability;
- (11) retirement plan contributions and the debtor's age;

⁵ *In re Ricci*, 456 B.R. 89, 106 (Bankr. M.D. Fla. 2009).

⁶ 11 U.S.C. § 1325(b)(2) (emphasis added).

⁷ *In re Norwood-Hill*, 403 B.R. 905, 912 (Bankr. M.D. Fla. 2009).

- (12) whether living expenses can be reduced without depriving the debtor or his dependents of adequate food, clothing, shelter, and other necessities; and
- (13) the availability of non-bankruptcy remedies including state law relief, private negotiations, and “good, old-fashioned belt tightening.”⁸

In the present case, the Debtor is eligible for Chapter 13 relief and has a meaningful ability to repay his debts. The Debtor’s annual salary of more than \$120,000 is greater than the median family income for a family of six living in Florida which, per the Census Bureau, is \$82,661.00 per year.⁹ Further, the Debtor’s expenses for housing and utilities, totaling \$3,365.00 per month, surpass the allowed IRS local standard of \$2,291.00 for a household of six in Orange County.¹⁰ The Debtor’s expenses, in the amount of \$3,779.00, for food, clothing and entertainment, also far exceed the allowable IRS National Standard of \$2,078.00 for a household of six.¹¹ The substantial discrepancies between the Debtor’s expenses and the local and national standards are outside the scope of the amounts “reasonably necessary to be expended” for maintenance or support which is contemplated by Section 1325(b)(2) of the Bankruptcy Code. If the Debtor reduces his expenses accordingly and eliminates expenses related to luxury vehicles and annual theme park passes, he will have sufficient disposable monthly income to fund a hypothetical Chapter 13 plan.

In addition to the Debtor’s ability to repay his debts, other factors surrounding this case support dismissal under Section 707(b)(3)(B). Most notably, the Debtor’s standard of living has improved as a result of the bankruptcy filing. Not only has the debtor failed to reduce any of his living expenses, despite having the ability to do so without depriving himself and his family of

⁸ *In re Ricci*, 456 B.R. at 106-07 (citing *In re Krohn*, 886 F.2d 123, 126–28 (6th Cir. 1989); *In re Norwood–Hill*, 403 B.R. at 912–913; *In re Carney*, No. 07–31690, 2007 WL 4287855, at *3, 7–10 (Bankr. N.D. Ohio Dec. 5, 2007)).

⁹ See www.justice.gov/ust/eo/bapcpa/20141101/meanstesting.htm (providing a breakdown of the pertinent IRS standards).

¹⁰ See *id.*

¹¹ See *id.*

necessities, but he also has not taken responsibility for any expenses associated with the \$50,000 unsecured debt. The \$50,000 debt comprises the majority of the Debtor's scheduled unsecured debt, and the Debtor has neglected to make any payments on the debt since it was incurred more than five years ago. Because the Debtor could hypothetically repay this debt, along with the remainder of his unsecured debt, by reducing his inflated monthly living expenses, the Court finds that the present case demonstrates abuse under 11 U.S. C. § 707(b)(3)(B).

Conclusion

For the reasons set forth above, it is ORDERED that:

1. The Motion to Dismiss is granted.
2. This case is dismissed.
3. The Debtor is allowed fourteen (14) days from the date of this Order to convert his Chapter 7 case to a Chapter 13 case.

Clerk's office to serve