UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:	)	Bankr. No. 01-50009
	)	Chapter 7
SAMUEL DORSEY THOMPSON	)	
Soc. Sec. No. 453-74-3202	)	DECISION RE: U.S. TRUSTEE'S
	)	MOTION FOR JUDGMENT
Debtor.	)	ON THE PLEADINGS

The matter before the Court is the United States Trustee's Motion for Judgment on the Pleadings. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court concludes that the Motion shall be granted.

I.

Samuel D. Thompson ("Debtor") filed a Chapter 7 petition and his schedules and statement of financial affairs on January 9, 2001. Debtor stated he did not have any real property. He stated he had limited personal property, valued at only $736, and that he was living with his wife, Catherine A. MacDonald, in an "RV" that she had purchased prior to the marriage. He valued the RV at $1.00. Debtor declared all his personalty exempt. Debtor stated his monthly income was $3,707.90, which was exclusively disability payments from the Veterans' Administration and the railroad. He stated his wife's monthly income was $1,000 in unspecified retirement benefits. Neither was presently employed, and Debtor's wife was currently applying for disability payments. Debtor stated

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their monthly expenses were $4,690 which included $1,500 in payments on three credit cards apparently held by Debtor's wife. The couple had no dependents.

Debtor did not schedule any secured creditors. He stated the IRS was a priority unsecured creditor holding claims of $70,230.59. He scheduled 24 different general unsecured claim holders, whose claims totaled $78,056.59. Two general unsecured claims were not valued. In his statement of financial affairs, Debtor did not disclose any pending lawsuits or any property that was subject to a legal or equitable action.

On April 4, 2001, the United States Trustee's office filed a motion under 11 U.S.C. § 707(b) seeking dismissal of Debtor's case on the grounds that granting him relief under Chapter 7 constituted a substantial abuse of the Chapter 7 process. The United States Trustee argued Debtor had $1,245.50 in monthly disposable income that would allow him to partially pay his unsecured creditors through a Chapter 13 plan. The United States Trustee's calculations did not include payment of the IRS's claim as a priority claim based on Debtor's testimony at the meeting of creditors. The United States Trustee's calculations also reflected the United States Trustee's argument that Debtor should pay only 81% of his and his wife's total joint monthly expenses, which reflected his proportionate share of income contributed to the

family. The United States Trustee also did not include within Debtor's expenses the monthly $1,500 in payments on credit cards held by his wife since they apparently were not joint expenses.

Debtor responded on April 24, 2001. He argued that the credit card debts held by his wife represented joint debts incurred by the couple for necessary living expenses and travel related to medical treatment for Debtor.

An evidentiary hearing was scheduled for June 5, 2001. The matter was taken off the calendar, however, after a telephonic hearing with counsel on June 4, 2001, when it was learned that few facts were in dispute. In lieu of an evidentiary hearing, the parties agreed that the matter could be resolved through a motion for judgment on the pleadings by the United States Trustee and stipulated exhibits (Debtor's Exhibits A, B, C, D, E, F, and G; United State's Trustee's Exhibit 5). The legal issue presented was whether Debtor had an obligation to make certain payments to his now estranged wife ahead of general unsecured creditors.

The United States Trustee filed her Motion for Judgment on the Pleadings on June 18, 2001. Therein, the United States Trustee stated that she had just learned, through the exhibits that Debtor had prepared for the June 5, 2001 hearing, that Debtor and his wife had separated on March 15, 2001; that a divorce action was pending; and that Debtor claimed he would now have to pay his wife monthly

$2,200 as a property settlement and $600 for alimony based on a pre-nuptial agreement.

Predicated on this new information, the United States Trustee argued that Debtor should have $2,586.57 per month to pay general unsecured claim holders. This calculation was based on the premise that neither the $2,200 debt repayments nor the anticipated $600 alimony payments to his wife are priority claims under 11 U.S.C. § 507(a)(7). This calculation reflected estimated monthly living expenses that were $220 *higher* than what Debtor estimated they would be in his exhibits.

Debtor responded to the United States Trustee's Motion for Judgment on the Pleadings on June 27, 2001. He argued that the $2,200 payment to his soon to be ex-wife is a priority debt under § 507(a)(7) and also a nondischargeable debt under § 523(a)(5). His arguments under § 523(a)(5) were premised on his and his wife's divorce-related agreement that she would assume all the couple's joint credit card debts and the 20-year debt on the RV. His argument assumed that his wife would not have sufficient income to meet the credit card and RV debts but for Debtor's monthly payment to her of $2,200. Debtor also argued that the Court should deny the United States Trustee's Motion for Substantial Abuse in recognition of Debtor's "unfortunate psychiatric problems" and the "medical necessity to alleviate the stress of the financial

problems," in addition to the "required support for his soon to be ex-wife."

The matter was taken under advisement.

II.

Section 707(b) of the Bankruptcy Code permits the dismissal of a Chapter 7 case upon a showing that granting the debtor relief would be a substantial abuse of the Bankruptcy Code. The section is intended to promote fairness to creditors and prevent the use of Chapter 7 by non needy debtors. *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1288 (8th Cir. 1997). "Substantial abuse" is not defined within the Bankruptcy Code. In interpreting the section, the Court of Appeals for the Eighth Circuit has held that the primary inquiry is whether the debtor has the ability to pay creditors under a Chapter 13 plan. *Id.* (citing *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989)); *Nelson v. Siouxland Federal Credit Union (In re Nelson)*, 223 B.R. 349, 353 (B.A.P. 8th Cir. 1998). A debtor's ability to pay is measured by evaluating the debtor's financial condition in a hypothetical Chapter 13 case. *Id.* The analysis includes the expectation that the debtor will put forth his best effort in a Chapter 13 plan. *In re Shelley*, 231 B.R. 317, 319 (Bankr. D. Neb. 1999); *In re Beauchamp*, Bankr. No. 97-50487, slip op. at 6 (Bankr. D.S.D. May 28, 1998)(citing *Hagel v. Drummond (In re Hagel)*, 184 B.R. 793, 798 (B.A.P. 9th Cir. 1995), and *In re*

Schnabel, 153 B.R. 809, 818 (Bankr. N.D. Ill. 1993)).

III.

Based on Debtor's present financial obligations, he has the ability to fund a Chapter 13 plan. His monthly income is $3,706.57 (Debtor's Exhibits D and E). His monthly living expenses are $900 (Debtor's Exhibit G). That leaves Debtor with $2,806.57 a month to pay his pre-petition creditors, whose claims total $148,287.18[1], plus the 10% trustee's commission, over the course of a three or five-year plan. The repayment would be significant: Debtor could pay 62% of the unsecured claims over a 36 month plan; or 100% over 59 months.

Debtor's pre-petition, general unsecured creditors include his wife, whom Debtor apparently owes $2,222 per month based on an unsecured note dated March 31, 2000, which was listed in Debtor's schedules as an unsecured debt of $20,000. This debt is not a priority debt because it was not "in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State ... law..., or property settlement agreement," as required by § 507(a)(7). Presently, the $2,200 monthly note payment represents only a "reimbursement for a

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[1] The Court included the I.R.S.'s claim as a general unsecured claim based on the apparent conclusion reached at the meeting of creditors that the claim no longer qualified as a priority claim.

personal loan" between Debtor and his wife; it does not arise from a court order, by statute, or by a property settlement agreement.[2]

Whether the $2,200 monthly debt is nondischargeable is not a key question in a Chapter 13 analysis; whether the claim is entitled to priority under §§ 507 and 1322(a)(2) is the important question. And as noted above, it is not a priority claim.

At this time, there is also no present obligation for Debtor to pay his soon to be ex-wife any alimony. *See Arleaux v. Arleaux (In re Arleaux)*, 229 B.R. 182, 184-86 (B.A.P. 8th Cir. 1999)(a divorce-related claim does not come into existence until the divorce court enters a dispositive order). Should an alimony obligation be imposed, Debtor's disposable income would decrease. By what amount would only be speculation at this point. Even if it is $600, as proposed by Debtor's wife in the divorce petition, Debtor would still have at least $2,206.57 to pay creditors monthly.

Finally, the Court took Debtor's expenses as he stated them to be in his exhibits. The Court can only presume that Debtor included the expenses he regularly incurs for medical and psychiatric care and for any financial management assistance he may

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[2] If the source of the note fit one of these three categories, the next question would be whether the note reflected a debt in the nature of support to his wife.

need. Accordingly, those special circumstances and needs cited by Debtor have been factored into the Court's hypothetical Chapter 13 analysis.

Debtor will be given ten days to voluntarily convert to a Chapter 13 case. Otherwise, this case will be dismissed under § 707(b).

So ordered this 19 day of July, 2001.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
JUL 19 2001
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

ATTEST:

Charles L. Nail, Jr., Clerk

By: Juanita Jarvis
Deputy Clerk

(SEAL)

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

JUL 19 2001

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By

Case: 01-50009 Form id: 122 Ntc Date: 07/19/2001 Off: 3 Page : 1
Total notices mailed: 5

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