

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:) Bankr. No. 00-40227
)
GARY B. DEZELL) Chapter 7
f/d/b/a G-F Vending)
Soc. Sec. No. [REDACTED]-9400)
)
and) DECISION RE:
) UNITED STATES TRUSTEE'S
FLORANCE E. DEZELL) MOTION FOR JUDGMENT ON
f/d/b/a G-F Vending) THE PLEADINGS REGARDING
Soc. Sec. No. [REDACTED]-3670) HER MOTION TO DISMISS
) FOR SUBSTANTIAL ABUSE
)
Debtors.)

The matter before the Court is the Motion for Judgment on the Pleadings filed by the United States Trustee. 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 F.R.Bankr.P. 7052. As set forth below, the Court concludes that the United States Trustee's Motion for Judgment on the Pleadings and Motion to Dismiss for Substantial Abuse must both be granted.

I.

Gary B. and Florance E. Dezell ("Debtors") filed a Chapter 7 petition. On their schedules and amendments, they listed \$94,779.43 in unsecured claims against them. Most were for credit card charges or returned checks. They also included some medical bills. For assets, Debtors included a heavily mortgaged home, which they intend to surrender, and personal property valued at \$14,360, which included a 401k account holding \$11,000. All their personal property was declared exempt without objection. Debtors stated that their combined monthly take-home pay was \$3,779.63 and that their monthly

expenses, maintaining separate households, totaled \$3,164.56. The separate households is, at present, a temporary situation due to out-of-state employment by one spouse.

Since the petition date, Debtors have reaffirmed debts for a small television and computerized game system valued at \$110 (\$10 per month at 21% interest), an unsecured debt of \$573.74 (\$17 per month at 0% interest), a secured debt of \$249.81 for jewelry (\$35 per month; no interest stated), and another unsecured debt for \$239.44 (\$20 per month; no interest stated). Two other reaffirmation agreements on their home were filed but later rescinded.

The United States Trustee timely filed a motion to dismiss the case under 11 U.S.C. § 707(b). The U.S. Trustee alleged, based on Debtors' original Schedules I and J, that Debtors had monthly disposable income of \$784.78, which would allow them to pay 42% of their unsecured debt over a three-year Chapter 13 plan or 70% of their unsecured debt over a five-year Chapter 13 plan. Based on Debtors' ability to fund a Chapter 13 plan, the U.S. Trustee prayed that their Chapter 7 case would be dismissed as a substantial abuse of the Chapter 7 process.

Debtors filed a response. They stated that they had recently amended several of their schedules, including I and J. Based on those amendments, they acknowledged that they had \$615.07 in disposable income per month but stated the excess may be needed this autumn if Debtors decide to continue maintaining separate households.

The U.S. Trustee moved for a judgment on the pleadings. She

argued that the priority debt of the I.R.S., added by an amendment to schedules, will be paid within one year, that no unsecured deficiency has been declared regarding the secured debt of \$14,987.94 to Chrysler Financial Company that was added by amendment, and that the repayment of the added debt to one of their employers was already recognized in a payroll deduction included on Debtors' original Schedule J. The U.S. Trustee also argued that based on the \$615.07 in acknowledged monthly disposable income, Debtors can still fund a Chapter 13 plan and that this will allow them to pay 33% of their unsecured debt in three years or 55% of the unsecured debt over five years.

II.

The governing case law in this Circuit is clear. A motion to dismiss under § 707(b) should be granted if the debtor has a substantial ability to pay creditors. *Stuart v. Koch (In re Koch)*, 109 F.3d, 1285, 1288 (8th Cir. 1997) (citing *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989)). Based on the current record, Debtors have available income (after payment of necessary living expenses) of at least \$615 per month to pay unsecured claim holders. To allow Debtors to remain in a Chapter 7 when these significant funds are available to pay claims through a Chapter 13 plan would be a substantial abuse of the bankruptcy process. It would also be inequitable, when \$615 per month is available to pay debt, to allow Debtors to pick and choose several claims for non essentials to reaffirm in a Chapter 7 case while letting all other creditors go


unpaid. Accordingly, Debtors will be given an opportunity to voluntarily convert their case to a Chapter 13. If not, this Chapter 7 case will be dismissed.

The Court is cognizant of the fact that Debtors may choose to maintain separate households later this year. Dual expenses for everything but a rent or mortgage payment is already included in their budget. It is unfair to make creditors sit idle waiting for that contingency. If Debtors convert to a Chapter 13, any added expense created by the continued dual households may be considered through a motion to modify their confirmed Chapter 13 plan. If Debtors do not voluntarily convert and their Chapter 7 case is dismissed, they can again seek relief under Chapter 7 or under another chapter for which they are eligible. The good faith nature of their new petition can be considered at that time.

An order giving Debtors until July 17, 2000 to voluntarily convert their Chapter 7 case to a Chapter 13 case shall be entered. If they choose not to do so, this case shall be dismissed on July 18, 2000.

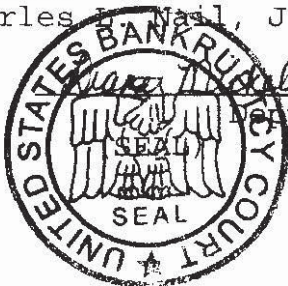
Dated this 5 day of July, 2000.

BY THE COURT:


Irvin N. Hoyt
Bankruptcy Judge


ATTEST:
Charles L. Nail, Jr., Clerk

By: 
Deputy Clerk



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 06 2000

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

NOTICE OF ENTRY
Under F.R. Bankr. P. 9022(a)
Entered

JUL 06 2000

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

Case: 00-40227 Form id: 122 Ntc Date: 07/06/2000 Off: 4 Page : 1

Total notices mailed: 8

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**FACSIMILE
TRANSMITTAL
SHEET**

To: Debra M. Voigt
Company: GALLAND LEGAL CLINIC
Fax Number: 9-334-5388
Phone Number:

From: Diane Mickelson
Fax Number: 605-330-4548
Phone Number: 605-330-4541

Time Sent: Thursday, Jul 6, 2000 09:52AM
Pages: 6
Description:

CONFIRMATION INFORMATION
Sent at: 10:09AM, 7/6/2000
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To: **ROBERT E. HAYES**
Company: **DAVENPORT, EVANS LAW FIRM**
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Phone Number:

From: **Diane Mickelson**
Fax Number: **605-330-4548**
Phone Number: **605-330-4541**

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**FACSIMILE
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To: Donald H. Breit
Company: BREIT LAW OFFICE
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Phone Number:

From: Diane Mickelson
Fax Number: 605-338-4548
Phone Number: 605-338-4541

Time Sent: Thursday, Jul 6, 2000 09:51AM
Pages: 6
Description:

Attn: Robert J. Breit
Re: 00-40227/Gary B. Florence Desell
Chapter 7

CONFIRMATION INFORMATION
Sent at: 9:59AM, 7/6/2000
Number of pages: 6
Resolution: FINE
Fax number: 9-336-1123
Destination name: BREIT LAW OFFICE
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