

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:) Bankr. No. 00-40098
) Chapter 7
ABDUL T. WARD)
Soc. Sec. No. [REDACTED]-9248) DECISION RE: MOTION TO DISMISS
)
Debtor.)

The matter before the Court is the Motion to Dismiss filed by Paige Hofer-Ward and Debtor's response. 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.R.Bankr.P. 7052. As set forth below, the Court concludes that Hofer-Ward's Motion to Dismiss must be denied.

I.

Abdul T. Ward ("Debtor") filed a Chapter 7 petition. At the time of the filing, he was living separately from his wife, Paige Hofer-Ward. Divorce proceedings are pending. The couple shares custody of their minor son. Based on an interim court order, Debtor is presently obligated to pay \$390 per month for child support (that figure represents payment of a past-due amount and a credit for the days he has his son). Debtor has not reliably paid child support. A voluntary wage assignment was recently discontinued, though Debtor stated a willingness to reinstate it. The parties live in different towns and share the responsibility for traveling back and forth to exchange custody of their son about twice a week.

35-

Debtor's scheduled assets included \$320 in cash or deposits, \$360 in household goods, \$300 in clothes, and two newer vehicles valued at \$36,000. He has claimed exempt all the property but the vehicles. One scheduled vehicle has been returned to the secured creditor; he also plans to turnover the other. Besides the creditors holding secured claims on the vehicles, Debtor's only other secured creditor holds an interest in some furniture, most of which has been or will be turned over to the creditor. Debtor stated that he owed the Internal Revenue Service \$3,500 and that all of his expected tax refund would be applied to that debt or to his child support debt. Debtor's unsecured claims total \$53,014. A small amount is for business debts and medical care. The balance is for consumer goods. A majority of the debts is shared with Hofer-Ward; several claims reflect charges on credit cards that were issued only in her name but which both used.

Debtor earns \$1,447.94 per month (take home) as a restaurant cook. His attempts at post-secondary education over the past several years have not been successful. He recently gave up a part-time job to spend more time with his son. Debtor currently lives with a woman. She is an hourly employee at a discount store and has limited earnings. They split the rent, but do not share other expenses. Debtor and the woman recently had a child

together. Debtor's monthly expenses, including his share of the rent and a projected car payment of \$300 for a replacement vehicle, total \$1,870.40.

Hofer-Ward moved for dismissal of the case under 11 U.S.C. § 506(a). She argued that Debtor filed his Chapter 7 petition in bad faith as an attempt to force her into bankruptcy also. Debtor responded with a general denial.

An evidentiary hearing on the dismissal motion was held jointly with an adversary proceeding trial under 11 U.S.C. § 523(a)(15) commenced by Hofer-Ward.¹ At the hearing, Debtor reviewed his income and expenses, his present living arrangement, and the reasons he filed bankruptcy. Debtor stated that he did not foresee any appreciable increase in his income or a decrease in his expenses. His expenses will likely increase due to the additional child.

Hofer-Ward testified that she thought their jointly-owed debts could be repaid over time if both she and Debtor worked second jobs. She disputed Debtor's expenses for traveling to exchange custody of their son and the amount of taxes owed to the I.R.S.

¹ A separate interim decision and order will be entered in the adversary proceeding.

II.

Section 707(a) provides that a Chapter 7 case may be dismissed upon the motion of a party in interest for "cause." Cause is not defined by the statute, though the statute does include some examples. Lack of good faith in filing is not one of the enumerated instances of cause.

Cause for dismissal of a Chapter 7 case under § 707(a) was discussed in *G. Huckfeldt v. R. Huckfeldt (In re R. Huckfeldt)*, 39 F.3d 829 (8th Cir. 1994). The court acknowledged that

some conduct constituting cause to dismiss a Chapter 7 petition may readily be characterized as bad faith. But framing the issue in terms of bad faith may tend to misdirect the inquiry away from the fundamental principles and purposes of Chapter 7.

Id. at 832. Instead, the court needs to insure that the debtor is "honest, but unfortunate" and in need of Chapter 7 relief. However, an ability to pay debts alone is not cause. *Id.* (citing *In re Goulding*, 79 B.R. 874, 876 (Bankr. W.D. Mo. 1987)). Further, dismissal under § 707(a) for bad faith should be limited to extreme misconduct by the debtor. *Id.*

The Court of Appeals found extreme misconduct in *Huckfeldt*. There the debtor filed under Chapter 7 expressly to frustrate a divorce decree and to force his ex-wife into bankruptcy. *Id.* The debtor also manipulated his earnings to foster his Chapter 7

effort. *Id.* Such conduct was found "unworthy of bankruptcy protection." *Id.* at 833.

III.

In this case, there is no evidence that Debtor filed his Chapter 7 petition solely to force Hofer-Ward to file bankruptcy or to frustrate the divorce action. Though his bankruptcy may indeed force Hofer-Ward to also seek relief under Title 11, Debtor's financial circumstances constituted a legitimate reason for filing bankruptcy. There has been no showing that his request for relief under Chapter 7 was dishonest. Though he has reduced the number of hours he works, he still holds down a full-time job in the field for which he is most skilled. He had a valid reason for cutting his working hours.

Finally, as noted in *Huckfeldt*, a motion to dismiss under § 707(a) is not the appropriate means of determining whether Debtor has the ability to pay his debts. A motion by the United States Trustee under § 707(b) is the appropriate mechanism for determining if a Chapter 7 debtor should be in Chapter 13. An adversary proceeding under § 523(a)(15) is the appropriate mechanism for determining whether this Debtor can pay his property-related debts arising from the divorce. Hofer-Ward has already initiated that action.

An order denying Hofer-Ward's Motion to Dismiss will be entered.

Dated this 20th day of July, 2000.

BY THE COURT:



Irvin N. Hoyt
Bankruptcy Judge

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

JUL 20 2000

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

ATTEST:
Charles L. Nail, Jr., Clerk

By: *Norathy J. Naber*
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 20 2000

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

By: *[Signature]*

Case: 00-40098 Form id: 122 Ntc Date: 07/20/2000 Off: 4 Page : 1

Total notices mailed: 9

Debtor Ward, Abdul T. 3008 S. Louise, Apt #103, Sioux Falls, SD 57106
Aty Gerry, Clair R. PO Box 966, Sioux Falls, SD 57101-0966
Aty Schlingen, John A. PO Box 966, Sioux Falls, SD 57101-0966
Trustee Lovald, John S. PO Box 66, Pierre, SD 57501
Creditor Arcadia Financial Ltd, PO Box 1472, Minneapolis, MN 55440-1472
Aty Nadolski, David PO Box 1920, Sioux Falls, SD 57101-3020
Aty Bengford, Stephanie C. Assistant U.S. Attorney, PO Box 5073, Sioux Falls, SD 57117-5073
Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321
Aty Roth, Glenn L. PO Box 137, Olivet, SD 57052

Creditor Hofer-Ward, Paige 27029 440th Ave., Bridgewater, SD 57319