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UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA

UNITED STATES BANKRUPTCY COURT

IN AND FOR THE DISTRICT OF ARIZONA

In Re **JOHN CHAPMAN and BARBARA CHAPMAN,** **Debtors.**	***Chapter 7 Proceedings*** **Case No. 02-04-BK-06706-PHX-CGC** **UNDER ADVISEMENT DECISION RE: MOTION TO DISMISS FOR SUBSTANTIAL ABUSE UNDER 11 U.S.C. §707(b)**

I. INTRODUCTION

The United States Trustee has brought a motion to dismiss the Debtors' Chapter 7 case for "substantial abuse" pursuant to 11 U.S.C. §707(b). The matter was tried to the Court on December 7, 2004, at which point it was taken under advisement.

II. FACTS

Many of the facts are not disputed. The Debtors filed their petition for relief under Chapter 7 on April 19, 2004. They filed their schedules of assets and liabilities on April 26, 2004, and the United States Trustee ("UST") brought this motion on August 3, 2004.

The Debtors are a married couple with one 17 year old dependent. Mr. Chapman is currently employed as an account executive in sales for Insight Technologies. Mrs. Chapman is employed full-time as a registered nurse in radiation oncology at St. Joseph's Hospital. In addition, she works approximately 12 hours every 2 weeks for Hospice of the Valley. Their schedules reflect that they have total unsecured debt in the amount of $101,554.00.

In the recent past, Mr. Chapman was briefly involved in the real estate business. He testified that he is trying to restart that business at this point. He went into an arrangement with a partner pursuant to which the parties would buy homes, rehabilitate them, and then sell them for a profit. Unfortunately, the business was not profitable and in February, 2004, Mr. Chapman and his partner ceased doing business. From that time Mr. Chapman, who continues to hold a real estate agent's license has had sporadic involvement in the real estate business. He has listed and sold one house for a friend, listed and sold another house for a relative and has one or two other transactions in the works. He continues to maintain his license and he rents office space for $50.00 per month.

At the time the Debtors filed their schedules, their combined gross annual income was $109,272.00. Their average net monthly income was $6,269.00. Subsequently, Mrs. Chapman received a raise from St. Joseph's Hospital and began working part time at the Hospice of the Valley. As a result of these changes, the Debtors' current combined gross annual income is $119,971.00 and their current average net monthly income is $7,369.00.

The Debtors average monthly expenses, with the exception of business expenses that may be related to real estate, certain medical expenses and an amount representing pre-petition income taxes, is $4,583.75.[1] The Debtors claim of $336.00 a month for medical expenses was originally contested by the UST but at the time of the hearing, that amount was agreed to. Depending upon which income figures and/or expense figures are used, the Debtors could repay between 27% and 90% of their unsecured debt.

III. DISCUSSION

This case boils down to four issues: whether the Debtor should be allowed to deduct real estate expenses for a business that he no longer operates and from which he derives no income; whether his wife's post-petition raise should be taken into consideration for disposable income purposes; whether the Debtor should be allowed to deduct $333.00 a month as a necessary expense for repayment of income taxes; and whether the resulting amount that could be repaid under a Chapter 13 is sufficiently "meaningful" to require dismissal.

A. Real Estate Expenses

The Debtors' argument is that they should be entitled to deduct expenses related to a real

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[1]The Debtors have a pre-petition income tax obligation of approximately $3,800.00. While their calculation of expenses includes a payment of $333.00 per month, Mr. Chapman testified that they are not actually making that payment and that they have no agreement with the Internal Revenue Service concerning resolution of this pre-petition tax debt.

estate business that they no longer operate and that was never successful. This is unreasonable. Any such expenses could only be considered "reasonable" if they generated income, and, if such income were generated, it would have to be included on the other side of the ledger. The record reflects no income currently being derived. Under these circumstances, there should be no deduction allowed for the expenses beyond a minimum amount. The Court therefore accepts the proposed amount of the United States Trustee of $113.58 a month.

B. Mrs. Chapman's Raise

The Debtors argue that their income should be judged as of the date of the filing of the schedules. At that time, Mrs. Chapman had not received a raise and had not begun a part-time job. While, on the one hand, there is some attraction in the argument the Debtors should not be punished for generating additional income, the other side of the coin is that the Debtors' true economic circumstances should be assessed. The reality is that Mrs. Chapman did receive a raise and did take on a part-time job. In a Chapter 13, she would be required to file an amended Schedule I to reflect those amounts and her plan payments would be adjusted accordingly. In the same way, for purposes of a Rule 707(b) analysis, it is necessary to determine the true financial condition of the Debtors. Under these circumstances, the raise and the part-time job should be taken into account.

C. The Income Tax Deduction

Debtors seek a deduction of $333.00 a month to amortize a pre-petition tax obligation of approximately $3,800.00. However, they admit that they are not actually paying such amount and they have no agreement with the Internal Revenue Service for the payment of such an amount. Rather than an ongoing expense for Chapter 13 purposes, this should be treated as a claim in the Chapter 13 and would be paid in accordance with applicable priorities. Therefore, it is incorrect to deduct the $333.00 a month as an expense.

D. Is There a Meaningful Repayment?

If the Debtors were to succeed on each of the three above issues, then they argue that they have no disposable income that could be diverted towards a Chapter 13 plan. However, given the Court's resolution of those issues, a "meaningful" amount could clearly be repaid. Thus, taking as a starting point the $769.00 per month stated in their "Supplement to the Joint Pre-Trial Statement" and adding to that the disallowance of $333.00 for the income tax payment and the additional salary of approximately $1,100.00 per month, the amount yielded would be approximately $2,200.00 a month or in excess of $79,000.00 in repayment. Under any standard, this is a "meaningful amount."

III. CONCLUSION

For the foregoing reasons, the Motion to Dismiss will be granted. The United States Trustee is to lodge a form of order.

So ordered.

DATED: January 26, 2005

CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

COPY of the foregoing sent via facsimile and/or mailed this 20 day of December, 2004, to:

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