

**United States Bankruptcy Court
District of New Mexico**

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

MARGARET PEELER,
Debtor.

No. 7-02-10614 SA

In re:

DONALD J. FRANKLIN, and
SANDRA MAY FRANKLIN,
Debtors.

No. 7-02-11408 SA

In re:

DENNIS MASSEGEE, II,
Debtor.

No. 7-02-11571 SA

MEMORANDUM OPINION ON 707(b) MOTIONS

This matter is before the Court on the United States Trustee's Motions to Dismiss the above three cases under 11 U.S.C. § 707(b). The United States Trustee ("UST") appears through its attorney Leonard K. Martinez-Metzgar. All three defendants are represented by Bill Gordon & Associates (Stephen C.M. Long and Dennis A. Banning). These are core proceedings. 28 U.S.C. § 157(b)(2).

The Court has not conducted a trial on these motions. The UST seeks a ruling that 401(k) pension contributions and loan repayments to 401(k) plans constitute disposable income that should be taken into account in determining whether debtors have disposable income with which to fund a chapter 13 plan. The record consists of the motions that include facts gleaned from the Debtors' schedules (with an accompanying

brief), the Debtors' Memorandum in Opposition to the UST's Motion, and a Reply to Debtors' Memorandum. As discussed below, the Court does not have sufficient evidence to grant or deny the motion and will set the matters down for evidentiary hearings.

Stewart v. United States Trustee (In re Stewart), 175 F.3d 796 (10th Cir. 1999) is the controlling case. In Stewart the Court of Appeals for the Tenth Circuit adopted a "totality of the circumstances" standard for § 707(b) dismissals. Id. at 809. The Court stated that ability to pay is "a primary factor" in determining substantial abuse, but that "other relevant or contributing factors" must also be examined. Id. The substantial abuse analysis must be made on a case-by-case basis. Id.

A. Franklin

Based on the record before the Court, it is impossible at this point to determine the "primary" factor of ability to pay. Amended Schedule I shows net income of \$3,499 after a 401(k) contribution of \$439 and a 401(k) loan repayment of \$186. Amended Schedule J shows monthly expenses of \$3,607. The UST proposes that Debtors stop the 401(k) contribution and loan repayment. UST claims that there would be about a 28% tax on the funds no longer contributed to the 401(k) and that

there would be a resultant disposable income of \$393. UST's calculations ignore the tax impact of the Debtors' failure to repay the 401(k) loan. Failure to repay the loan would result in current taxable income for the amount of the loan plus, perhaps, a 10% penalty tax if the Debtors are not 59½ years old. This tax would be a priority expense that would have to be paid during the life of a chapter 13 plan. There is nothing in the record that specifies the amount of the loan, and the Court therefore cannot determine if there is an ability to pay.

Furthermore, Stewart counsels that ability to pay is only the first step in the substantial abuse analysis. Other factors that the Court should consider are: (1) unique hardships such as sudden illness, calamity, disability, or unemployment, (2) whether cash advances and consumer purchases far exceeded the Debtors' ability to pay at the time, (3) the stability of the future income source, (4) whether Debtors' expenses can be significantly reduced without depriving them of adequate food, clothing, shelter and other necessities and whether the Debtors' current expenses are excessive, and (5) the overall good faith of the debtors. This information is simply not in the record at this point.

B. Peeler

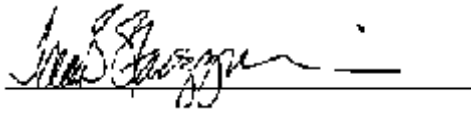
The Peeler case is similar. Ms. Peeler does not show a current 401(k) contribution, but lists a \$1,110 401(k) repayment. The Court cannot project this Debtor's disposable income, and the record does not support any findings on the 5 other Stewart factors.

C. Massegee

The Massegee case is slightly different from the prior two. Mr. Massegee lists an expense of \$1,269 for SERP/401K. This does not appear to involve a 401(k) loan on which there would be adverse tax consequences if the payment were not made. Debtor's gross income is listed at \$4,500, and net income at \$1,696. Schedule J shows expenses of \$1,815. The UST argues that adding back the 401(k) contribution (net of 28% income tax) would increase disposable income to \$794. Therefore, as an initial matter, it appears that Mr. Massegee has an ability to pay some creditors. However, the record lacks information regarding the other 5 Stewart factors, so the Court cannot find, as a matter of law, that there is substantial abuse.

CONCLUSION

The Court will set a pretrial conference to determine if there are any discovery matters and to set trial.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on October 14, 2003, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

William P Gordon
2501 Yale SE Ste 204
Albuquerque, NM 87106-4357

Leonard K Martinez-Metzgar
PO Box 608
Albuquerque, NM 87103-0608

