UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

IN RE: William Louis Bauer
and
Mary Joann Bauer

Chapter 7

BK 04-30933 GFK

MOTION AND MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS UNDER 11 U.S.C. § 707(b)

TO: The Trustees and other entities specified in Local Rule 9013-3.

1. The debtors captioned in this case move the court to deny and dismiss the motion submitted by the Trustee, which requested dismissal of Chapter 7 Bankruptcy Number 04-30933 GFK.

2. The debtors assert that their Chapter 7 bankruptcy is not a substantial abuse of the bankruptcy code as stated in Section 707(b).

4. The petition commencing this Chapter 7 case was filed on February 19, 2004 and the case is now pending in this court.

5. The debtors filed amended Summary of Schedules, Schedule F, and Schedule J on June 10, 2004. These amended documents were filed to add inadvertently omitted data and information on Schedules F and J and to provide the new correct totals on the Summary of Schedules.

6. The debtors list the following debts:

(a) On Schedule D, Creditors Holding Secured Claims, the debtors list two claims totaling $204,000.00 secured by 2002 Q45 Infiniti and a mortgage on the homestead.

(b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtors list no claims.

(c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtors list six claims totaling $88,475.68.

7. The debts listed in the debtors' Schedule of Liabilities are primarily consumer debt and they checked on the Petition that the nature of the debts is consumer/non-business.

8. The debtors submitted an amended Schedule I that was properly filed with the court and served by mail on the bankruptcy trustees on May 13, 2004. The listed net monthly income on the amended Schedule I is $4,825.26. This schedule was amended because of temporary hospitalization, continuing illness, and current unemployment of Mrs. Bauer. Her current stated income of $1,223.87 is from disability insurance. The figures for Mr. Bauer are based on the averages of a number of his pay stubs computed over the time they were actually paid rather than extrapolating out to a 26 period year. Such extrapolations ignore vacations and other missed time from work providing unrealistically high computations. Further, the computations do not include the reductions for the deferred compensation/retirement/pension. They do so, with citations, stating that voluntary contributions to retirement/pension accounts are not reasonable or necessary expenses for determining disposable income. However, as a state employee, these are not voluntary for Mr. Bauer. They are mandatory.

9. The amended Schedule J lists the debtors' monthly expenditures as $6,167.25. This document was amended because the debt and payments to the Social Security Administration was inadvertently omitted in the originally filed petition documents. Payments

of $50.00 per month against a $14,088.00 social security overpayment debt are now listed. Additionally omitted from the originally filed documents were payments toward two term life policies totaling $155.00 in premiums. These policies have no cash value.

The Trustees argue that the $40.00 monthly expense for the ADT alarm system should be eliminated. They claim this expense is not necessary for the support of the debtors and is not reasonable. This depends upon one's perspective. We maintain that a $40.00 monthly expense for security is quite reasonable. Particularly since Mr. Bauer is blind. We believe that the ability to be aware of intruders that he would be unable to see is reasonable. In fact, it could be the difference between life and death in both allowing Mr. Bauer the time to call 911 and in the possibility that an alarm could frighten intruders away.

The Trustees argue that the car payment of $912.00 per month is excessive and should be reduced by $500.00 or more. They base this on citations that are eight and nine years old respectively. The 1996 citation claims that the "debtor should be able to "obtain, finance, and operate a perfectly serviceable [automobile] for no more than $300.00 per month, and possible less." (*In re Mathes*, 1996 WL 1055813, *3 (Bankr. D. Minn. Aug. 21, 1996)) Their second cite from the following year held, "that $275.00 – 300.00 for installment payments, $75.00 - $100.00 for costs of operation of vehicle, and insurance was sufficient." (*In re Wilkens*, 1997 WL 1047545, *3 (Bankr. D. Minn. March 26, 1997)) They also assert that the listed transportation expense of $300.00 per month is excessive and should be reduced by $100.00. We maintain that their assertions ignore too many facts.

The assertion regarding reducing the car payment ignores the changes in inflation. The second citation claims that costs of operation and insurance should cost $75-100 per month.

However, gas was not $2.00 per gallon in 1996. The costs of servicing a vehicle have surely increased in that time. Insurance is certainly higher priced now as well. Nor do those figures account for licensing expenses.

The assertion regarding installment payments ignores that the debtors own only one car between them. They could reasonably own two. Particularly since they are employed at different locations. Even using the above cites, this would leave a car payment of just over $300.00 more than called for in the cites rather than the $500.00 reduction called for by the Trustees.

Mr. Bauer is blind. He could still own a car for employment purposes and use a driver. In fact, such driver expenses would be deductible as a necessary expense when used to maintain employment as a person with blindness.

Regarding the objected to transportation expenses, the objections ignore the use of cash or credit cards in payments not reflected in the submitted check stubs. Mr. Bauer also pays fees for Metro Mobility for those times when one car between the two debtors is not sufficient to provide their transportational needs. Nor do the objections account for payments to friends or co-workers that may be occasionally made when obtaining rides.

Not computed for in the Trustees' analysis is the fact that, should the car be surrendered, the Schedule F debt would be increased. This would lower to percentage of payout against total debt of any discretionary income were available with which to pay creditors.

The Trustees objection to the home maintenance/association fees only takes into account the special assessment fees. The balance of the $750.00 claimed amount is for regular maintenance such as when repairs are effected within the home, carpets replaced, repainting occurs, and any other regular maintenance that may be called for.

The Trustees submit that the listed food expenses of $800.00 per month should be reduced by $100.00 per month based on the receipt of checks averaging $690.99 for food expenses. This ignores that not all food eaten by people is paid for by check. As was stated on both the original and amended Schedule I, food expenses are high because of Mr. Bauer's diabetes related diet. His need for particular care in his diet does not dissipate when he eats out on a quick lunch break from work or in similar situations.

10. The current average net monthly income is as listed on Schedule J. It is $4,825.25. This figure is accurate and reflects the Bauers' actual income. This is the flaw in the Trustee's calculations in their call for dismissal of this bankruptcy case. The correct monthly expenditures from Schedule J, as amended, is $6,167.25.

11. Starting from the actual figures from #10 above, let's compute in some of the changes argued by the Trustees. To start, there is no discretionary income so a feasible Chapter 13 bankruptcy is apparently not possible to begin with since there is a deficit of $1,342.00. Please note, these calculations are arguendo only. We do not concede the validity of any of the assertions made for modification by the Trustees.

Assume the debtors returned their automobile, purchased a replacement as suggested, and reduced their payments by $500.00. The deficit would still be $842.00.

Then assume that the debtors decreased their home maintenance fees were reduced by $300.00. This would leave a deficit of $542.00.

Next, assume that the transportation expense was reduced, as suggested, by $100.00. This would leave a deficit of $442.00.

Finally, assume that charitable contributions were reduced by $75.00 per month. This would leave a deficit of $367.00.

We will not concede, even for arguments sake, that the changes suggested by the Trustees have any merit whatsoever. However, a reduction in the home security and food as suggested would leave would still leave a deficit of $227.00. There is certainly no discretionary income with which to fund a Chapter 13 bankruptcy.

12. Contrary to the assertion by the Trustee's Motion in #13, both debtors are not currently employed. The Trustee's were on notice of this at the time they filed their motion. Rather than it being unlikely that their employment will be terminated, it is unknown whether Mrs. Bauer will be able to return to work. If she is unable to return to employment, her income could even decline from its current amount should her stated insurance benefits end and she obtains social security disability benefits instead.

13. The debtors do not have the ability to repay their general unsecured debt.

14. The inability of the debtors to repay their general unsecured debt preclude a conversion to a Chapter 13.

WHEREFORE, the debtors, William Louis and Mary Joann Bauer, respectfully request that the Motion to Dismiss their Chapter 7 bankruptcy be denied and dismissed.

Respectfully submitted:

Dated: 6/10/04

Signed: Terry A. L. Graff

Terry Graff
Atty for William Louis & Mary Joann Bauer
Graff Law Office Incorporated
1001 Center Avenue, Suite H-1
Moorhead, MN 56560-2000
(218) 291-1429
MN License Number 0255063

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

IN RE: William Louis Bauer and Mary Joann Bauer	**Chapter 7**
	BK 04-30933 GFK

ORDER

At St. Paul, Minnesota, this _________ day of ____________________, 2004, the United States Trustee's Motion to Dismiss under 11 U.S.C. § 707(b) came before the Court for hearing. Appearances were noted in the record.

The Court made its findings of fact and conclusions of law on the record pursuant to Rule 52 of the Federal Rules of Civil Procedure and Bankruptcy Rule 7052.

IT IS HEREBY ORDERED:

That the Trustee's Motion to Dismiss under 11 U.S.C. § 707(b) in the Chapter 7 bankruptcy case filed by the above-captioned debtors is denied pursuant to 11 U.S.C. Section 707(b).

____
The Honorable Gregory F. Kishel
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
District of Minnesota

IN RE: William Louis Bauer	)	
and	)	**AFFIDAVIT OF SERVICE BY MAIL**
Mary Joann Bauer	)	Bankruptcy Case No. 04-30933

The undersigned, being first duly sworn, deposes and says that s/he is of legal age and that on June 10, 2004 s/he served and filed the following attached documents:

1. Motion and Memorandum In Opposition To Motion To Dismiss Under 11 U.S.C. § 707(b)
2. Proposed Order
3. Amended Summary of Schedules
4. Amended Schedule F
5. Amended Schedule J
6. Cover Letter from Graff Law Office Incorporated to Clerk of Bankruptcy Court
7. Affidavit of Service

upon the following person or entities:

Trustee John A. Hedback
2855 Anthony Lane S., Ste. 201
St. Anthony, MN 55418

Office of the US Trustee
1015 US Courthouse
300 S. 4th Street
Minneapolis, MN 55415

US Bankruptcy Court
US Courthouse Rm. 200
316 N. Robert St.
St Paul, MN 55101

by first-class mailing of a properly addressed envelope and depositing it at the U.S. Post Office in Moorhead, MN 56560

Dated: June 10, 2004

Paula Strom-Sell
Paula Strom-Sell

Subscribed and sworn to before on June 10, 2004

Terry A. Graff
Notary

TERRY A. GRAFF
NOTARY PUBLIC—MINNESOTA
My Commission Expires JAN. 31, 2005