

Dated: May 21, 2009
The following is ORDERED:




Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re ANTHONY EUGENE BURSI,

Case No. 09-23915-L

Debtor.

Chapter 7

ORDER DENYING APPLICATION FOR WAIVER OF FILING FEE

THIS MATTER CAME before the court for hearing on May 14, 2009, upon the Application for Waiver of Filing Fee filed by the Debtor, Anthony Eugene Bursi. Although the Debtor has income below the statutory requirement, he was able to pay his attorney \$600.00 before the filing of this case. At the scheduled hearing, Debtor's counsel was unable to explain how the Debtor was able to pay an attorney fee but unable to pay the case filing fee. Following the hearing, the court announced that the application would be denied, but has taken the opportunity to thoroughly review again the application and other papers filed in this case. The court is left with the firm conviction that its initial decision was the correct one. The court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(b). This is a core proceeding. 28 U.S.C. § 157(b)(2)(A).

BACKGROUND

The Debtor commenced this case by filing a voluntary petition under Chapter 7 of the Bankruptcy Code on April 9, 2009. The petition was accompanied by an application using Official Bankruptcy Form 3B for waiver of the Chapter 7 filing fee. Doc. No. 3. The application indicates that there are two persons in the Debtor's family and that they have combined monthly income of \$1,300.00 consisting of unemployment compensation. Schedule I indicates that the Debtor's household consists of himself and his 8-year old son. At the hearing, Debtor's counsel announced that although the Debtor originally thought that his unemployment benefits were about to expire, they have been extended approximately 13 weeks. The Debtor lists monthly expenses at Schedule J of \$1,972.31. The Debtor's assets include a home which he intends to surrender, anticipated 2009 tax refunds in an unknown amount, and other personal property valued at \$1,249, only \$80 of which is liquid and all of which is claimed as exempt. The Debtor owes debts consisting of a home mortgage, unpaid child support in the amount of \$600, and other unsecured debts in the amount of \$21,902 including credit card debt, city court fines, and medical debts. The Debtor's Statement of Financial Affairs ("SOFA") indicates that he had income in 2007 of approximately \$30,716.00 consisting of wages, income in 2008 of \$23,731.00 consisting of wages and unemployment compensation, and income in the months leading up to the filing of his petition on April 9, 2009, of \$4,000 consisting of wages and unemployment compensation. The SOFA also indicates that he lost a car to repossession in February of 2009, and transferred a diamond valued at \$2,000 to Accent Jewelers in October of 2008. Prior to the filing of his petition, the Debtor paid his attorney \$600, which is the entire fee the attorney has agreed to accept for filing the petition. At the hearing, Debtor's counsel offered no explanation for how the Debtor was able to pay this amount, but argued

that failure to grant applications to waive the filing fee when attorney fees have been paid or promised to be paid would put a damper on the willingness of attorneys to file cases for truly needy individuals. The Debtor offered no proof that he is unable to work and no proof concerning the circumstances that he file his petition when he did.

DISCUSSION

Pursuant to 28 U.S.C. § 1930(f), the bankruptcy court may waive the bankruptcy filing fee under certain circumstances. That section provides:

Under the procedures prescribed by the Judicial Conference of the United States, the district court or the bankruptcy court may waive the filing fee in a case under chapter 7 of title 11 for an individual if the court determines that the individual has income less than 150% of the income official poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with § 673(2) of the Omnibus Budget Reconciliation Act of 1981) applicable to a family of the size involved and is unable to pay the filing fee in installments. For purposes of this paragraph, the term ‘filing fee’ means the filing fee required by subsection (a), or any other fee prescribed by the Judicial Conference under subsections (b) and (c) that is payable to the clerk upon the commencement of a case under chapter 7.

28 U.S.C. § 1930(f)(1). Section 1930(f) requires that an individual establish two facts in order to be entitled to proceed with a Chapter 7 bankruptcy case without paying the filing fee otherwise required. First, the debtor must establish that his income is below the income official poverty line. Second, he must establish that he is unable to pay the filing fee in installments. *See, e.g., In re Van Luvender*, 2008 WL 4716951, at *1 (Bankr. S.D. Fla. 2008); *In re Barrick*, 402 B.R. 39, 41 (Bankr. M.D. Fla. 2008); *In re Stickney*, 370 B.R. 31, 36 9Bankr. D. N.H. 2007). The debtor has the burden of showing that the application should be granted. Judicial Conference of the United States, *Interim Procedures Regarding the Chapter 7 Fee Waiver Provisions Regarding the Chapter 7 Fee Waiver Provisions of the Bankruptcy Abuse and Consumer Protection Act of 2005* (promulgated August 11, 2005), available at <http://www.uscourts.gov/bankruptcycourts/jcusguidelines.html> (“JCUS

Guidelines”). Because the decision to grant an application to waive the filing fee must be made early in a case, a court may vacate an order waiving the filing fee if later developments indicate that the waiver was unwarranted. JCUS Guidelines § III.B, citing Fed. R. Bankr. P. 9023 and 9024; and 11 U.S.C. § 105(a).

According to the Department of Health and Human Services 2009 Poverty Guidelines for the 48 Contiguous States and the District of Columbia, the poverty income for a family of two is \$ 14,750 (available at <http://aspe.hhs.gov/poverty/09poverty.shtml>). One hundred fifty percent of this amount is \$22,125, or \$1,843.75 per month. The Debtor’s income of \$1,300 per month is below this amount, and the Debtor has established the first of the two requirements for waiver.

A debtor’s inability to pay the filing fee in installments is evaluated based on the totality of the circumstances. JCUS Guidelines § II.A.5. A debtor is not disqualified for a waiver solely because he has paid or promised to pay an attorney fee in connection with the filing. *Id.* This does not mean, however, that the payment of an attorney fee prior to the filing or the promise to pay an attorney fee after the filing are not relevant to the court’s analysis of the debtor’s ability to pay the filing fee in installments. *See, e.g., In re Spisak*, 361 B.R. 408, 414 (Bankr. D. Ver. 2007); *In re Robinson*, 2006 WL 3498296, at *3 (Bankr. S.D. Ga. 2006). The ability of a debtor to pay an attorney fee prior to the filing of his bankruptcy case calls into question the debtor’s assertion that he is unable to pay the filing fee in installments. Because the debtor always carries the burden to show that he is entitled to a waiver of the filing fee, it is up to the debtor to provide an explanation for how he was able to pay an attorney fee but will be unable to pay the filing fee. It is reasonable to require the debtor to give this explanation, preferably in his application, but certainly at a hearing scheduled to consider his application.

Other factors that the court may consider in evaluating a debtor's eligibility for waiver of the filing fee include whether there were any discrepancies between the debtor's application and his schedules, whether the debtor has collateral sources of income, whether the debtor listed unreasonable expenses that might be redirected to paying the filing fee, whether the debtor agreed to pay a portion of the attorney fee after the filing, and whether the debtor has exempt property that might be used to pay the filing fee. *Spisak*, 361 B.R. at 413-14 (Bankr. D. Ver. 2007 (citations omitted)). The court also may consider any exigent circumstances that necessitated the bankruptcy filing. *Robinson*, 2006 WL 3498296, at *4.

For cases filed after April 9, 2006, the total fee due at filing for a chapter 7 case is \$299, consisting of the statutory filing fee of \$245, a \$39 administrative fee and a \$15 case trustee fee. Appendix to 28 U.S.C. § 1930, *Fee Issues in Bankruptcy Courts*. Pursuant to Bankruptcy Rule 1006(b), the court may approve payment of the filing fee in up to four installments, with the final installment payable not later than 120 days after the filing of the petition. Fed. R. Bankr. P. 1006(b)(2). For cause, the court may extend the time for paying any installment, provided that the final installment may not be paid later than 180 days after filing the petition. *Id.* The 120th day after the filing of this case is Friday, August 7, 2009, and the 180th day after the filing of the Debtor's petition in this case will be Tuesday, October 6, 2009. Dividing the filing fee into four equal installments would require the Debtor to make four payments of \$74.75 between now and August 7, with the possibility of an extension to pay any installment up to October 6, 2009.

When the Debtor filed his petition, he apparently believed that his sole source of income, unemployment compensation, was about to end. At the hearing, however, the Debtor acknowledged through counsel that he will continue to receive these benefits for approximately 13 weeks. The

Debtor offered no explanation for his inability to find work. The court, therefore must infer that the Debtor is capable of working and actively seeking employment. The Debtor's schedules indicate that in the year before he began receiving unemployment benefits, he was able to earn income in excess of \$30,000.00. The court does not know what type of work the Debtor is qualified to perform, only that the Debtor was able to earn enough to place him beyond the applicable eligibility guideline for waiver of the filing fee when he last worked.

Although the Debtor's listed expenses exceed his income by \$672.31, they include \$544.31 for the mortgage payments on property the Debtor intends to surrender. The Debtor provided no indication of the amount he expects to spend for shelter when he surrenders his home. The court will nevertheless treat the amounts that the Debtor has scheduled for housing (\$544.31), utilities (\$200), and life insurance (\$28) as fixed amounts. In addition to these, the Debtor scheduled the following amounts for discretionary expenses: \$90 for cell phone, \$60 for cable, \$450 for food, \$100 for clothing, \$300 for medical and dental expenses, \$100 for transportation, and \$100 for miscellaneous expenses. None of these is unreasonable, but each of these is flexible. For example, the Debtor gave no indication that either he or his son has ongoing medical needs that will require the expenditure of the full \$300 he has budgeted for medical expenses each month. And there is no indication that the Debtor must spend \$100 each month for clothing.

It is important to note that the court is not being asked to determine whether the Debtor has disposable income that might be used to fund a Chapter 13 plan, but only to determine that the Debtor has shown that he is unable to pay a fixed and relatively small amount (\$299) in installments over a period of up to six months. The waiver of the filing fee is not without consequences. The filing fee is the source of compensation for the case trustee in a no-asset case. *See* 11 U.S.C.

§ 330(b)(1) and (2). The court must carefully consider applications for waiver in cases such as this one where the Debtor has elected to pay his attorney but not his case trustee, who must nevertheless perform all of his or her statutory duties. *See* 11 U.S.C. § 704. It is clear from the various documents filed in this case that the Debtor has suffered serious financial reversals. Nevertheless, the court does not know why the Debtor decided to file his case when he did, and thus does not know whether he would have been able to save the funds needed to pay his filing fee had he waited a bit longer. The Debtor is not disabled and has regular income. Under all the facts and circumstances of this particular case, the Debtor simply failed to prove that he is unable to pay the filing fee in installments, and thus that he is eligible for waiver of the filing fee.

CONCLUSION

For the foregoing reasons, the application is **DENIED**. The Debtor shall be given a period of ten days from the entry of this order to pay the filing fee or file an application to pay the filing fee in installments, failing which, the case will be dismissed.