UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re:	)	
	)	**JUDGE RICHARD L. SPEER**
Shelly Marie Dile	)	
	)	Case No. 05-30708
Debtor(s)	)	
	)	

<u>DECISION AND ORDER</u>

This matter comes before the Court after a Hearing on the Motion brought by the United States Trustee to Dismiss the Debtor's Case pursuant to 11 U.S.C. § 707(b). At the conclusion of the Hearing, the Court took the matter under advisement so as to afford time to thoroughly review the evidence and applicable law. The Court has now had this opportunity and finds, for the reasons herein stated, that the weight of the evidence supports the Motion of the United States Trustee, and thus the Debtor's case is forthwith Dismissed.

DISCUSSION

The Motion of the United States is brought pursuant to 11 U.S.C. § 707(b) which provides:

> After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter.

As a determination of dismissal under this section directly involves the ability of a debtor to receive a discharge and directly affects the creditor-debtor relationship, this matter is a core proceeding over which this Court has the jurisdictional authority to enter final orders. 28 U.S.C. §§ 157(b)(2)(J)/(O); 1334.

Broken down, § 707(b) contains three overall elements: (1) the debtor must be an individual; (2) the debts must be primarily consumer debts; and (3) granting relief to the debtor under Chapter 7 would be a "substantial abuse." As it regards the applicability of these elements, § 707(b) provides that "[t]here shall be a presumption in favor of granting the relief requested by the debtor." At the Hearing held in this matter, the applicability of the first two elements was not controverted, with the arguments of the Parties focused solely on the third element of § 707(b): the existence of "substantial abuse."

Section 707(b) was added by the Congress of the United States in 1984 in response to concerns that some debtors who could easily pay their creditors might resort to chapter 7 to avoid paying their obligations. To this end, § 707(b) seeks to limit the use of the bankruptcy process to only those debtors truly in need of relief, thereby helping to preserve the integrity of the process. *See, e.g., In re Duncan*, 201 B.R. 889 (Bankr. W.D.Pa.1996). With this aim in mind, the Sixth Circuit Court of Appeals, in the case of *In re Krohn*, first addressed the element of "substantial abuse" under § 707(b), holding that it may "be predicated upon either a lack of honesty or want of need." 886 F.2d 123, 126 (6th Cir.1989). Later, in the case of *Behlke v. Eisen (In re Behlke)*, the Sixth Circuit clarified this holding, making it clear that a lack of both "honesty" and "need" would constitute separate and independent sources for the dismissal of a case under § 707(b). 358 F.3d 429, 434-35 (6th Cir. 2004)

The former source for dismissal, a lack of honesty, is subjective in its approach, looking to a debtor's relationship with creditors and whether it has been marked by essentially honorable and undeceptive dealings or whether the debtor merely seeks an advantage over creditors. *In re Krohn*, 886

F.2d at 126. Commonly, such a determination will be made by examining whether the debtor lacked "good faith and candor in filing schedules and other documents[.]" *Id*. And in this matter, a serious concern arises regarding the debtor's honesty when looking at those documents she filed with the Court, particularly, her schedules I & J regarding income and expenses.

On February 3, 2005, when the Debtor filed her bankruptcy petition, the Debtor set forth in her schedules I & J, a net monthly income of $3,450.31 and monthly expenses of $2,248.15. The Debtor also set forth unsecured debt totaling $66,488.13. Hence, based upon these figures, as originally filed with the Court, the Debtor exhibited an excess income of $1,202.16 per month, thereby affording her the ability to fully repay her unsecured creditors in a little under five years. (Doc. No. 1).

It was then predicated on these figures that the United States Trustee commenced the instant action to dismiss under § 707(b). (Doc. No. 15). However, just five days after filing its Motion, the Debtor submitted to the Court an amended schedule I & J. These amended schedules set forth that her net monthly income had decreased to $2,840.33, while her monthly expenses had increased to $2,830.98, thereby effectively eliminating the availability of any excess income to repay her unsecured obligations. The Debtor ascribed the need for these revisions to inadvertence when providing those figures contained in her original petition. The Court, however, views this explanation with suspicion.

In *In re Pier*, this Court, in the § 707(b) context, explained that the "integrity of the bankruptcy process rests upon a debtor in both their petition and schedules making a complete and accurate disclosure of all required information." 310 B.R. 347, 352 (Bankr. N.D.Ohio 2004). And while a debtor is permitted to later revise their schedules as the result of an inadvertent mistake(s), doubts as to the inadvertence of the mistake will arise when considerations such as these are present: (1) relatively speaking, the change in income and expenses is significant; (2) the revised income and expense figures conveniently eliminate all or most of a debtor's disposable income; and (3) the debtor's occupation requires "attention to detail." In this matter, all three of these indicia are firmly present.

First, when compared to her original figures, the Debtor revised her monthly income and expense figures by $1,192.81, a figure which constitutes 35% of the Debtor's total income as originally set forth in her petition.[1] In addition, these revisions conveniently eliminated all but ten dollars of her monthly disposable income. And as noted previously by this Court: "to withstand a § 707(b) motion a debtor has a substantial incentive to show his or her disposable income as low as possible." *In re Boyer*, 321 B.R. 457, 460 (Bankr. N.D.Ohio 2004). Finally, the Debtor's occupation is that of senior-account manager, for which she is responsible for emergency room management. If ever an occupation required great "attention to detail," this would be one.

At best, the cumulative effect of these considerations show that the Debtor did not take her bankruptcy case seriously – at least to the extent that it involved her side of the bargain of accurately disclosing in her bankruptcy schedules the required information. Bankruptcy is a privilege, not a right. And as pointed out by the First Circuit in *Boroff v. Tully (In re Tully)*: sworn statements in bankruptcy schedules "must be regarded as serious business" considering that "the system will collapse if debtors are not forthcoming." 818 F.2d 106, 112 (1st Cir.1987). Consequently, given the lack of seriousness she accorded to her duties, the Debtor's good faith and candor with respect to her schedules is in doubt, thereby raising questions as to the Debtor's honesty for purposes of § 707(b). However, besides these

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The Debtor's income decreased from $3,450.31 to $2,840.33, for a difference of $609.98. While the Debtor's expenses increased from $2,248.15 to $2,830.98, for a difference of $582.83. Together then these revisions total $1,192.81.

particular concerns pertaining to the Debtor's honesty, there exists a more fundamental defect with the Debtor's bankruptcy case: she simply has no "need" for the protections of the Bankruptcy Code.

The purpose of Chapter 7 is to give the truly needy debtor a fresh start, not to give those who can afford to meet their obligations a head start. *In Jarrell*, 189 B.R. 374, 377 (Bankr. M.D.N.C. 1995). In *In re Krohn*, the Court held that a determination of "need" is made by looking to whether truly the debtor's "financial predicament warrants the discharge of his debts in exchange for liquidation of his assets." 886 F.2d at 126. Of particular importance in this respect is whether a debtor has the ability to "repay his debts out of future earnings." With the Court then going on to state that "[t]hat factor alone may be sufficient to warrant dismissal. For example, a court would not be justified in concluding that a debtor is needy and worthy of discharge, where his disposable income permits liquidation of his consumer debts with relative ease." *Id*.

When looking to a debtor's ability to repay his debts out of future earnings, the question normally asked is whether the debtor has the ability to adequately fund a Chapter 13 plan of reorganization. *Accord In re Behlke*, 358 F.3d at 435 ("One way courts determine a debtor's ability to pay is to evaluate whether there would be sufficient disposable income to fund a Chapter 13 plan."). And when compared to the "honesty" component of the § 707(b) test, this analysis is inherently more objective: one simply takes the amount of "disposable income" a debtor has available and divides it by the plan length, between three and five years.

For purposes of this inquiry, that definition of "disposable income" as set forth in Chapter 13 of the Bankruptcy Code is utilized. *In re Behlke*, 358 F.3d at 435; *In re Pier*, 310 B.R. at 353. Therein, "disposable income" is defined as that "which is received by the debtor and which is not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor . .

.[.]" 11 U.S.C. § 1325(b)(2). Under this formula, those revised figures submitted to the Court by the Debtor set forth a net monthly income of $2,840.33, and necessary monthly expenses of $2,830.98, leaving the Debtor just under ten dollars in monthly disposable income – clearly not enough to adequately fund a Chapter 13 plan of reorganization where there exists over Sixty Thousand dollars in unsecured debt.

However, it is well established that this Court is not required to accept at face value a debtor's enumerated income and expense figures; instead, a bankruptcy court is under a duty to conduct its own independent inquiry into the propriety of such figures. *In re Pier*, 310 B.R. at 354. And under such an examination, the facts, as presented at the Hearing, show that the Debtor has understated her monthly disposable income by at least $940.00. Five revisions necessitate this conclusion.

First, in her revised income figures, the Debtor admittedly excluded that income she receives for what was termed "beeper pay." "Beeper pay" was explained to the Court as that income the Debtor receives for being on call. In the year 2004, the Debtor's "beeper pay" totaled $5,227.44, an amount which, the evidence also shows, will be approximated this year. (U.S.T. Ex. 1). By simple math then, this comes to approximately $300.00 in additional monthly net pay, even afer accounting for a one-third reduction for mandatory deductions such as taxes.

The Debtor explained that she excluded "beeper pay" from her enumerated income figures, and that it should remain excluded, because it is not guaranteed, with such pay being considered by her employer as simply a bonus which may be withdrawn at any time. However, while both the documentary and testimonial evidence provided at the Hearing supported this characterization, such evidence also revealed that so long as the Debtor remains in her current position, – a fact which itself appears likely – there exists no imminent danger that the Debtor will have to forego her "beeper pay." Important here, the evidence revealed that the Debtor's employer has provided "beeper pay" to its qualifying employees for the better part of two decades, and that it does not foresee any imminent change to this policy. Query: would the Debtor have claimed "beeper pay" as income if it were to her advantage such as in an application for credit?

By law, this steady structure of the Debtor's "beeper pay" necessitates that it be counted as income for purposes of this Court's § 707(b) analysis. Under the "disposable income" test, the sureness of one's income is not the focus; if it were, many debtors would not qualify for relief. For example, the position taken by the Debtor could equally apply to any employee-at-will, for whom no vested right exists to their continued employment income. Rather, the "disposable income" requirement of Chapter 13, and hence by implication § 707(b), only requires that the individual's income be "regular." 11 U.S.C. § 109(e). And as used here, regular income simply means that income which is "sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 . . . [.]" 11 U.S.C. § 101(3). Given, therefore, its stable history, the Debtor's "beeper pay" falls well within that type of income which may be considered in a § 707(b) "substantial abuse" analysis. In this regard, it is noted that an escape valve does exist if one's source of income is later circumscribed; pursuant to § 1329(a)(1), a debtor may seek the court's permission to "reduce the amount of payments on claims of a particular class provided for by the plan[.]"

In addition to understating her income by at least $300.00, the Debtor also made an unallowable deduction from her gross income regarding the repayment of a 401(k) loan. In *Harshbarger v. Pees (In re Harshbarger)*, the Sixth Circuit Court of Appeals held that a debtor's voluntary repayment of loans to her ERISA-qualified profit sharing account should be treated as part of the disposable income in the bankruptcy estate. 66 F.3d 775, 777-78 (6th Cir. 1995). Later, *In re Behlke*, the Sixth Circuit extended this holding, finding that in the context of a § 707(b) motion, a debtor's contribution to a 401(k) plan should (at least in the absence that it was reasonably necessary for support) be included as "disposable income" in any "need" based analysis. 358 F.3d at 436.

While neither of these decisions directly addressed the issue as to whether a debtor's voluntary repayment of a 401(k) loan should be viewed as "disposable income" – *Harshbarger* involved a loan, but with an ERISA-qualified plan, not a 401(k); while *Behlke*, although involving a 401(k) plan, did not involve a loan, but rather a contribution – they both employ the same logic. As stated in both decisions:

> It is unfortunate that [the Debtor's] expected pension benefits may be diminished by a future setoff against the unpaid portion of her obligation to the ERISA-qualified account. However, this consideration does not alter the result under the bankruptcy laws. In these circumstances, it would be unfair to the creditors to allow the Debtors in the present case to commit part of their earnings to the payment of their own retirement fund while at the same time paying their creditors less than a 100% dividend.

In re Behlke, 358 F.3d at 435, *citing In re Harshbarger*, 66 F.3d at 778.

Thus taken together, the *Harshbarger* and *Behlke* decisions may be said to stand for this overall proposition: a debtor's voluntary remuneration to a retirement account, whether by contribution or in the repayment of a loan, cannot be excluded from a debtor's "disposable income." And contrary to this rule, the evidence presented at the Hearing shows that the Debtor has, on a bi-weekly basis, $116.30 deducted from her pay to repay a 401(k) loan, or approximately $250.00 per month.

In addition to those above changes needed with respect to her income, certain expenses of the Debtor must also be revised. The first concerns a claimed monthly deduction of $100.00 for charitable contributions. (U.S.T. Ex. No. 3). This amount, as now explained, must be reduced to just $20.00.

In 1998, Congress passed the Religious Liberty and Charitable Donation Protection Act. (Pub. L. No. 105-183 (1998)) This Act revised § 707(b) so as to allow a debtor to make charitable contributions without it effecting negatively on the issue of dismissal. Prior to this time, some cases had held that such contributions were not permissible. *See, e.g.*, *In re Faulkner*, 165 B.R. 644, 647, Bankr. W.D. Mo. 1994) (tithing is not a reasonably necessary expenditure). Yet, while now permissible, the ability to make charitable contributions without it affecting negatively on the debtor for purposes of § 707(b) is not endless; constraints exist.

Relevant here, § 707(b) provides a mechanism by which to forestall a debtor from manipulating the allowability of charitable contributions to their advantage. To this end, charitable contributions are only recognized in the § 707(b) context to the extent that "a debtor has made, or continues to make, charitable contributions . . . ." In straightforward terms, the permissibility of charitable contributions under § 707(b) requires a showing by the debtor that they have a history of making such contributions. Thus, charitable contributions made by a debtor who suddenly finds, in the moments leading up to bankruptcy, a philanthropic calling are not to be allowed.

In this matter, the full amount of the Debtor's charitable contributions does not stand up to such scrutiny. In her amended schedules, the Debtor submitted to the Court that her charitable contributions total $100.00 per month. But beyond her bald statement to this effect, no independent evidence was submitted to substantiate that this was a historical practice.

Instead, the only corroborative evidence before the Court regarding the Debtor's charitable contributions was her 2004 federal income tax return, wherein for the whole year just $240.00 was set forth as a deduction, or $20.00 per month. Besides its obvious evidentiary value, the $20.00 per month figure carries especially heavy weight: Recognition by the Internal Revenue Code as deductible for tax purposes is a necessary precondition for its applicability under § 707(b).[2] And when this consideration is

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The full portion of the charitable contribution provision of § 707(b) provides,"[i]n making a then combined with the lack of any substantiating evidence regarding the $100.00 figure put forth by the Debtor in her amended schedule J, the $20.00 per month figure as drawn from her income-tax return must be viewed as an inherently more reliable measurement of her regular charitable contributions. Accordingly, the Debtor's permissible charitable deduction must be reduced by $80.00.

Finally, two additional expenses of the Debtor must be proscribed. Most significantly, a $250.00 expense added by the Debtor in her amended schedule J for an automobile must be disallowed in its entirety. It is the Debtor's position that this additional expense should be an allowed expense because, although she owns her car free from any liens or other encumbrances, this is the amount that she will be required to pay on a monthly basis to buy her car back from the estate.

The inherent weakness, however, with this position is that it is premised on the liquidation of the Debtor's assets under the Chapter 7 process. But inapposite to this necessity, § 707(b)'s "disposable income" test is premised on the repayment of a debtor's obligations under a Chapter 13 plan of reorganization (or for that matter outside of bankruptcy), whereby a debtor is not required to purchase from the estate their encumbered property, but is instead permitted to keep such property free from the claims of creditors. The Debtor's position thus is a bootstrap argument by seeking to establish a "need" for bankruptcy simply by being in bankruptcy. As such, it cannot be allowed.

One final expense of the Debtor, as set forth in her amended schedules, must also be restricted. The Debtor claims a monthly expense of $90.00 for a cell-phone. But at the hearing, the Debtor admitted

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determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4))."

that all but $30.00 of this obligation is reimbursed to her by her employer as work related. Therefore, as a matter of law, $60.00 of this expense must be disallowed.

In line, therefore, with the above revisions to the Debtor's monthly income and expenses, a total of $940.00 must be added to the Debtor's disposable income, leaving the Debtor with approximately this amount of income available by which to pay her unsecured debts. When set then against her unsecured debt of just under $67,000.00, the Debtor has the ability to repay a significant portion of her unsecured debts in the 60 months contemplated in a Chapter 13. And while this does not *per se* create the existence of "substantial abuse" under § 707(b), it squarely places the burden on the Debtor to put forth a strong justification as to why such relief is necessary. In this matter, however, no such justification is readily apparent; the Debtor is young, has no children or dependents and is from all appearances in good health. In addition, beyond a vague assertion of needing such relief, the Debtor could not offer any viable reason why she needed the protections of Chapter 7 as opposed to Chapter 13. Therefore, at this time, such relief must be Denied.

In reaching the conclusions found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Decision.

Accordingly, it is

ORDERED that, pursuant to 11 U.S.C. § 707(b), this case, be, and is hereby, DISMISSED.

It is ***FURTHER ORDERED*** that, as is required under Bankruptcy Rule 2002(f)(2), the Clerk, United States Bankruptcy Court, is hereby directed to provide notice of this Order to the Debtor, attorney for the Debtor and all Creditors.

Dated:

Richard L. Speer
United States
Bankruptcy Judge