

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:

Cameia Davis
Debtor.

In Proceedings Under Chapter 7
Case No.: 08-19602

JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

The matter before this Court is the U.S. Trustee's Motion to Dismiss pursuant to §707(a) and §707(b)(3) of the Bankruptcy Code (the "Motion"). The Debtor, Cameia Davis, filed an objection to said Motion. Core jurisdiction of this matter is acquired under provisions of 28 U.S.C. § 157(b)(2), 28 U.S.C. § 1334, and General Order No. 84 of this district. Upon a duly noticed evidentiary hearing and an examination of the record, generally, the following factual findings and conclusions of law are herein rendered:

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The Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code on December 7, 2008. The Debtor filed an earlier petition under Chapter 7 of the Bankruptcy Code on November 6, 2006. In her prior petition, the Debtor listed two (2) creditors. The majority of the debt listed on the prior petition was held by creditor, United Mortgage and Loan Investment on a mortgage against real property located at 1768 Noble Road, East Cleveland, Ohio. The Debtor classified this debt as primarily business in nature. Upon this classification, the U.S. Trustee filed a Motion to Dismiss the Debtor's bankruptcy case. The U.S. Trustee argued that the debts were primarily consumer in nature and, as such, the Debtor should be subject to the means test. After applying the means test, the U.S. Trustee asserted that the Debtor had

disposable income and granting her a discharge would constitute an abusive filing pursuant to §707 of the Bankruptcy Code. The Debtor objected to the U.S. Trustee's contentions. Upon a duly noticed evidentiary hearing, the Court entered a Memorandum of Opinion and Order. In that opinion, the Debtor's debts were determined to be primarily consumer in nature. Although, a presumption of abuse was not found pursuant to § 707(b)(2), abuse was found pursuant to §707(b)(3). Specifically, the Court denied the Debtor a discharge because she was found to have disposable income. [11 U.S.C. § 707(b)(3)].

In the case at bar, the Debtor lists five (5) secured creditors who hold secured claims against the same real property scheduled in the Debtor's earlier case. As in the prior case, the Debtor classified these debts as primarily business in nature. Upon this classification, the U.S. Trustee renewed his dismissal motion.

The U.S. Trustee asserts that the Debtor filed the current petition in an attempt to circumvent the Court's prior decision. He argues that the current petition is virtually identical to the prior petition because they both list the "same debts." The U.S. Trustee asserts that the nature of the Debtor's debts were previously litigated and determined to be primarily consumer in nature. He further asserts that the Court previously determined that granting the Debtor a discharge would be abuse under §707(b)(3). The Court's prior order was final and appealable, however, the Debtor did not file an appeal. Thus, the U.S. Trustee avers, the Debtor is collaterally estopped from re-litigating these issues. See Motion to Dismiss. The U.S. Trustee also asserts that the Debtor lacks the need for a discharge because she is gainfully employed, enjoys a stable source of income and has disposable income. Finally, the U.S. Trustee avers that the Debtor's financial condition has not changed since her prior bankruptcy case which was

dismissed for abuse under §707(b)(3), and no evidence was presented to show otherwise.

The Debtor objects to the U.S. Trustee's contentions. Firstly, the Debtor concedes that the debts listed on the Current Petition are primarily consumer in nature. Notwithstanding this concession, the Debtor asserts that the debts listed on the current petition are not the "same debts" listed on the prior petition. Specifically, the Debtor contends that the prior petition listed only two creditors, the largest holding a mortgage against the real property, while the current petition lists five creditors, four of which hold a secured claim against the Debtor's property.

Secondly, the Debtor argues that her income and expenses have changed since her prior bankruptcy case. According to the Debtor, her employer, the U.S. Postal Service, reduced overtime which decreased her monthly income. Simultaneously, she contends her expenses increased. Lastly, she asserts that, although her schedules indicate a net monthly disposable income of \$130.92, this amount does not accurately reflect her monthly income. The Debtor argues that her current monthly income mistakenly includes the \$192.00 Social Security benefit she receives for her minor daughter. After subtracting the Social Security benefit, the Debtor avers that her monthly disposable income, which is the difference between her current monthly income and her expenses, would be a negative \$61. Thusly, she contends that the presumption of abuse does not arise. Therefore, the Debtor asserts that the U.S. Trustee's Motion should be denied.

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The Court must determine whether a presumption of abuse arises to warrant dismissal of the Debtor's case pursuant to §707(a) and §707(b)(3) of the Bankruptcy Code.

The U.S. Trustee seeks dismissal pursuant to §707(a) and §707(b)(3), which provide in pertinent part:

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including- (1) unreasonable delay by the debtor that is prejudicial to creditors; (2) nonpayment of any fees or charges required under chapter 123 of title 28; and (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

(b)(3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(I) of such paragraph does not arise or is rebutted, the court shall consider – (A) whether the debtor filed the petition in bad faith; or (B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

11 U.S.C. §707(a), (b)(3). The party moving for dismissal under §707(a) or §707(b)(3) bears the burden of proof by a preponderance of the evidence standard. *In re Oot*, 368 B.R. 662, 665 (Bankr.N.D. Ohio 2007); *In re Baker*, 400 B.R. 168 (Bankr.N.D. Ohio 2009).

Section 707(a) :

Pursuant to §707(a), a court may dismiss a case filed under Chapter 7 of the Bankruptcy Code for cause. Cause may be determined by the factors listed in §707(a), *supra*, but may also include a “lack of good faith.” *In re Zick*, 931 F.2d 1124, 1127 (6th Cir.1991). Dismissal based on a lack of good faith must be undertaken on an ad hoc basis. *In re Weeks*, 306 B.R. 587, 590 (Bankr.E.D. Mich. 2004). It should be confined carefully and is generally “utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and an intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence.” *Zick* 931 F.2d at 1129.

In other words, dismissal for “lack of good faith” or, more simply put, “bad faith”, in the context of § 707(a) may only be utilized in cases where the debtor’s motives are clearly inconsistent with the established purpose of the Bankruptcy Code. *In re Motaharnia*, 215 B.R. 63, 68 (Bankr.C.D. Cal. 1997).

Herein, the U.S. Trustee asserts that the Debtor’s case was filed in bad faith because the Debtor is not needy. Specifically, she contends that the Debtor’s financial condition has not changed since her prior bankruptcy case, which was dismissed for abuse upon a finding that the Debtor was found to have disposable income. Therefore, the U.S. Trustee argues the Debtor’s current case should be dismissed because she has disposable income and lacks the “need” for a discharge.

Dismissal of a bankruptcy case based solely on a lack of need is not explicitly addressed in the language of §707(a). It is, however, discussed within the legislative history of §707(a). The Senate and House Reports provide that “§707(a) does not contemplate...that the ability of the debtor to repay his debts in whole or in part constitutes adequate cause for dismissal.” H.R.Rep. No. 595, 95th Cong., 1st Sess.380 (1977); S.Rep.No.95-989, 95th Cong., 2d Sess. 94 (1978). Other than the Debtor’s disposable income, the U.S. Trustee presented no other evidence to show that the Debtor’s petition was filed in bad faith due to egregious circumstances or to a misrepresentation in assets or to fraud in connection with seeking a discharge of a large single debt. Therefore, the U.S. Trustee failed to meet his burden to dismiss the Debtor’s case on bad faith grounds pursuant to§707(a).

The ability to pay alone is insufficient to warrant a dismissal pursuant to §707(a) or §707(b)(3). Courts may, however, use this factor in determining whether the totality of the

circumstances warrants dismissal pursuant to §707(b)(3). *In re Pandl*, 407 B.R. 299, 301 (Bankr.S.D. Ohio 2009).

Section 707(b)(3) :

A debtor's ability to repay his or her debts for purposes of § 707(b)(3) is commonly determined by examining whether a debtor could adequately fund a Chapter 13 plan. *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 434-35 (6th Cir.2004); *In re Glenn*, 345 B.R. 831, 836 (Bankr.N.D. Ohio 2006). Funding for a Chapter 13 plan is determined by the amount of “disposable income” the debtor has available. Section 1325(b)(2) of the Bankruptcy Code provides the guidelines for computing disposable monthly income. It provides in pertinent part:

(2) For purposes of this subsection, the term “disposable income” means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable non-bankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended - **(A)(I)** for the maintenance or support of the debtor or a dependent of the debtor[.]

11 U.S.C. § 1325.

Section 101(10A) defines current monthly income to be:

(A) the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period... but excludes benefits received under the Social Security Act[.]

11 U.S.C.A. § 101.

Courts may also look to the totality of the circumstances to determine whether to dismiss a case for cause under §707(b)(3). *In re Mestemaker*, 359 B.R. 849 (Bankr.N.D. Ohio 2007).

The Sixth Circuit has articulated a non-exclusive list of factors to be considered in reviewing the totality of the circumstances for lack of good faith. This includes: 1) the debtor’s good faith and candor in filing schedules and other documents; 2) whether the debtor has engaged in “eve of

bankruptcy” purchases; or 3) whether the debtor was forced into Chapter 7 by unforeseen or catastrophic events. *In re Krohn*, 886 F.2d 123, 126 (6th Cir.1989); *Pandl*, 407 B.R. at 301.

Herein, the U.S. Trustee asserts that the Debtor enjoys a stable income and has disposable income that could contribute to repaying unsecured debt. To support this contention, the U.S. Trustee introduced the Debtor’s Schedules I & J into evidence, which provides the Debtor’s regular monthly income and disposable monthly income. During the evidentiary hearing, however, the Debtor’s counsel stated that he inadvertently included the Debtor’s social security benefits she receives for the benefit of her minor daughter in her monthly income. By definition, currently monthly income excludes benefits received from the Social Security Act. *See* §101(10A). It is, therefore, improper to include the social security benefits in the Debtor’s disposable income.

The U.S. Trustee also asserts that the Debtor’s expenses listed on Schedule J are not reasonable. He contends that the inflated expenditures unduly reduces the Debtor’s potential disposable monthly income. Lowman, Direct. Specifically, the U.S. Trustee argues that the Debtor’s monthly charitable contributions are high considering she is seeking a discharge. *Id.* Once her expenses are adjusted, the U.S. Trustee argues that the Debtor will have more income to devote to a Chapter 13 plan.

The median income level of the debtor determines whether the expenses listed on Schedule J are reasonably necessary. Necessary expenses for a below median debtor are determined to be reasonable by reference to the figures provided in Schedules I and J. *In re Marchionna*, 393 B.R. 512, 518 (Bankr.N.D. Ohio 2008); *In re Upton*, 363 B.R. 528, 532 (Bankr.S.D. Ohio 2007). If a Debtor is an above median income debtor then, “amounts

reasonably necessary to be expended” are determined by reference to the applicable deductions found in §707(b). 11 U.S.C. 1325(b)(3); *Marchionna*, 393 B.R. at 518. The median annual income for a household of the same size as the Debtor in Ohio is \$47,874.¹ The Debtor’s current monthly income, without the Social Security benefit is \$3,180.29 and her yearly income is \$38,163.48. The Debtor’s income is below median and, therefore, her reasonably necessary expenses are determined by Schedule I & J.

After reviewing the Debtor’s Schedules I & J and her testimony, which was found to be credible, the subject expenses are determined to be reasonable in amount. The Debtor’s disposable monthly income which is the difference between the Debtor’s currently monthly income and her reasonably determined expenses (\$3,180.29 - \$3,241.67) is a negative \$61.38.

Finally, the U.S. Trustee moves for dismissal under §707(b)(3) due to the Debtor’s potential increase in disposable income. Specifically, the U.S. Trustee contends that because the Debtor no longer has a vehicle payment, she should have “extra disposable income.” See, Motion to Dismiss. He asserts that the Debtor had disposable income in the previous bankruptcy despite a monthly vehicle payment. Therefore, the U.S. Trustee avers that since her expenses and income have not significantly changed in the past two years, her disposable income should have increased. Lowman, Direct. This reasoning, however, is without merit. Although the Debtor no longer has a vehicle payment, her disposable income has not increased because her expenses have increased. See, Schedule J.

Despite the U.S. Trustee’s assertions, the Debtor’s Schedule J clearly details the increase in her expenses since her 2006 bankruptcy case. These increases include: 1) rent by \$180, 2) a

¹Median income is the product of the debtor’s current monthly income multiplied by twelve (12). See 11 U.S.C. § 1325(b)(3).

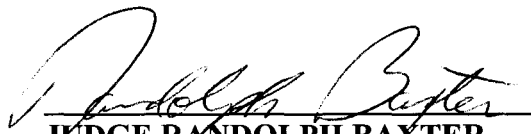
local income tax expense of \$125 on the current schedule J that was not listed on the prior schedule J and 3) an increase in food expense from \$225 to \$550 per month.² The Debtor also testified that, because of a job transfer, her daily work commute has increased causing an increase in her gasoline expense. Such testimony was unrefuted.

The U.S. Trustee provided no other evidence to support his contention that the Debtor enjoys more disposable income than what is provided in her schedules. The Debtor's income and expenses have been sufficiently explained and the calculations distinguish the current case from her previous bankruptcy filing. Furthermore, no evidence was adduced to show that the Debtor is attempting to circumvent this Court's previous order issued in the prior case. Nor has the U.S. Trustee shown by a preponderance of the evidence that the Debtor lacks need. Thusly, in assessing the totality of the circumstances, the U.S. Trustee has failed to meet the requisite burden of proof to support a prima facie case which warrants dismissal of the Debtor's case pursuant to §707(b)(3).

Accordingly, the Motion to Dismiss is hereby denied. The Debtor's Objection is hereby sustained. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated, this 9th day of
December, 2009


JUDGE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT

² As a below median Debtor, her monthly food expense is not bound to the IRS guidelines, but her listed monthly food expense of \$550 is slightly above the 2009 IRS Monthly National Standards for Food for Two Persons which is \$537.