

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
10 JUL -1 AM 10:48
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re: **In Proceedings Under Chapter 7**
ROSE MARIE D'ALLESANDRO **Case No.: 09-22238**
Debtor. **JUDGE RANDOLPH BAXTER**

MEMORANDUM OF OPINION AND ORDER

This matter is before the Court on the Motion to Dismiss Case Pursuant to 11 U.S.C. § 707(b)(1), (b)(2) and (b)(3) (the "Motion") filed by the United States Trustee for Region 9 (the "Trustee") over the objection of Rose Marie D'Allesandro (the "Debtor"). This Court acquires core subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a), (b)(1), 28 U.S.C. § 1334 and General Order No. 84 of the District. After the conclusion of a duly noticed evidentiary hearing, an examination of the evidence admitted and a review of the record, generally, the following factual findings and conclusions of law are hereby rendered:

*

On December 31, 2009, the Debtor filed a voluntary petition for relief under Chapter 7 of Title 11 of the United States Code (the "Bankruptcy Code"). The Debtor has been employed as an administrative assistant for Stephen Gold Corporation for nearly nine years. The Debtor is married and has two adult children. This petition is her only bankruptcy filing.

After filing her petition, the Debtor filed the required Statement of Current Monthly Income and Means Test Calculation, Form B22A (hereinafter, the "Means Test"). The Trustee reviewed the papers filed by the Debtor and determined that the Debtor's case is presumed to be an abuse pursuant

to 11 U.S.C. § 707(b) and filed the Motion herein. Two days prior to the scheduled evidentiary hearing in this matter, the Debtor filed Amended Schedules I and J and an Amended Means Test.

Changes made to the Debtor's Means Test include: 1) increasing her household size from two to three to reflect an adult son moving into the household post-petition; 2) reducing her husband's credit card payments included in the marital adjustment from \$350 per month to \$250 per month; and 3) reducing her husband's contributions to an adult child's expenses from \$350 per month to \$280 per month. According to her Amended Means Test, her gross monthly household income is \$6,699.27 for an annualized income of \$80,391.24, which exceeds the applicable median family income of \$61,772.00 for a family of three in Ohio. *See* www.usdoj.gov/ust/ for the median income of a family of three in Ohio. The applicable median income for a household of two in Ohio is \$52,216.00. *Id.*

**

The Trustee asserts that the Debtor's case should be dismissed because a presumption of abuse arises pursuant to 11 U.S.C. § 707(b)(2) and, under the totality of the circumstances, granting the Debtor a Chapter 7 discharge would be an abuse under 11 U.S.C. § 707(b)(3). The Trustee contends that the Debtor should not be allowed to claim a household size of three on her Amended Means Test because the adult son did not reside with the Debtor at the time of the petition filing. The Trustee further avers that the Debtor improperly takes the IRS standard deduction for the ownership of two vehicles, when the actual payment of the non-debtor husband's car should be included in the marital deduction. The Trustee alleges that once the appropriate deductions are entered on the Means Test, the presumption of abuse arises and the Debtor did not rebut this

presumption by introducing evidence to demonstrate special circumstances as provided under 11 U.S.C. § 707(b)(2)(B).

The Trustee further contends that even if the presumption of abuse does not arise, the Debtor has disposable monthly income that should be used to pay creditors. Specifically, the Trustee argues that the Debtor improperly deducts repayment of a 401(k) loan on Schedule J and that the Debtor should not be allowed a marital deduction for the non-debtor husband's credit cards while paying her creditors nothing. He states that under these circumstances, granting the Debtor a discharge constitutes an abuse and warrants dismissal pursuant to 11 U.S.C. § 707(b)(3).

The Debtor alleges that her deductions are proper. Without citation to any statutory or other authority, the Debtor alleges that the repayment of the 401(k) loan is appropriate because such repayment would be allowed in a Chapter 13 case and "the loans would become distributions and result in additional income tax and penalties owed which would again reduce disposable income." (Debtor's Trial Brief at 3). The Debtor does not specifically state by what amount disposable income would allegedly be reduced if the loans would "become distributions." The Debtor further alleges, without citation to any statutory or other authority, that the inclusion of the non-debtor spouse's vehicle expense as an IRS standard deduction and not a marital deduction is appropriate because "it cannot be said that the non-debtor spouse should get less of a benefit than if he were actually filing himself." (Debtor's Trial Brief at 3).

The dispositive issue before this Court is whether the Debtor's petition for relief constitutes an abusive filing.

Section 707 of the Bankruptcy Code provides for dismissal of a Chapter 7 case or conversion to a case under chapter 11 or 13. A case is dismissed where a court finds that the granting of relief would constitute an abuse of the Chapter 7 provisions. To meet the burden established in 11 U.S.C. § 707 (b) for dismissal, the Trustee must prove by a preponderance of the evidence that granting relief would constitute abuse. *In re Browne*, 253 B.R. 854, 856-7 (Bankr. N.D. Ohio 2000).

Title 11 U.S.C. § 707(b) states the following:

(b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a 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)).

(2)(A)(I) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—

(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or \$6,000, whichever is greater; or

(II) \$10,000.

Sections 707(b)(2)(A)(ii), (iii) and (iv) describe the applicable and actual expenses that a debtor may claim.

Sections 707(b)(2)(B), (C), and (D) identify the requirements for rebutting the presumption of abuse.

(B)(I) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

(ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide--

(I) documentation for such expense or adjustment to income; and

(II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.

(iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.

(iv) The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (I) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of--

(I) 25 percent of the debtor's nonpriority unsecured claims, or \$6,000, whichever is greater; or

(II) \$10,000.

(C) As part of the schedule of current income and expenditures required under section 521, the debtor shall include a statement of the debtor's current monthly income, and the calculations that determine whether a presumption arises under subparagraph (A)(I), that show how each such amount is calculated.

(D) Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing, if the debtor is a disabled veteran (as defined in section 3741(1) of title

38), and the indebtedness occurred primarily during a period during which he or she was--

(I) on active duty (as defined in section 101(d)(1) of title 10); or

(ii) performing a homeland defense activity (as defined in section 901(1) of title 32).

If the presumption of abuse does not arise or is rebutted, then the court considers the totality of the circumstances under 11 U.S.C. § 707(b)(3).

(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.

Section 707(b)(2)(A) of the Bankruptcy Code sets forth the criteria for a presumption of abuse and constitutes the means test for a debtor's ability to repay his debts. The means test is a form that presents a statement of the debtor's current monthly income and shows whether a presumption of abuse arises as a consequence of identifying monthly disposable income in excess of the limits described under Section 707(b)(2)(A)(ii), (iii) and (iv). A debtor's monthly disposable income is determined by deducting certain allowances and other expenses from the debtor's current monthly income. A presumption of abuse arises and the debtor fails the means test if the debtor's monthly disposable income is sufficient to show that he can repay at least \$100 monthly to unsecured creditors over 60 months or 25% of the debtors unsecured debts if that amount is greater than \$6,000,

or \$166.67 per month to unsecured creditors over 60 months if \$10,000 is less than 25% of the unsecured debt.

Title 11 U.S.C. § 101(10A) defines "current monthly income" as:

... 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 ending on--

(I) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii);

Section 707(b)(2)(A)(ii)(I), provides, in part:

The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief[.]

The standard expense allowances determined by the Internal Revenue Service ("IRS") for use in completing bankruptcy forms are posted at: <http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm>. There are standards listed for allowable living expenses including food, housekeeping supplies, apparel & services, personal care products & services, and miscellaneous items. The standards are based upon the number of members in the household and their gross monthly income.

The Trustee first moves to dismiss the Debtor's case on the basis that the presumption of abuse arises pursuant to 11 U.S.C. § 707(b)(2). In order for the presumption of abuse to arise, the Debtor would need to have disposable income of at least \$166.67 per month. 11 U.S.C. § 707(b)(2)(A)(i)(II). Herein, the Debtor and her non-filing spouse earn a gross annual income of

\$80,391.24, and she seeks to discharge \$77,215.87 in unsecured debt, the majority of which is for credit card debts she asserts were incurred as a result of a divorce in 2002. (Debtor, Cross).

Two days prior to the scheduled evidentiary hearing in this matter, the Debtor filed an Amended Means Test and Amended Schedules I and J. Notably, the timing of the filing of the Debtor's Amended Schedules is significant. That is, the subject amendments were only filed after the United States Trustee filed his motion to dismiss Debtor's case. One significant change to the Debtor's Means Test is an increase in the household family size from two to three. This increase reflects that her adult son moved back into the household post-petition. (Debtor, Cross). On her original Means Test, the Debtor showed disposable income in the amount of \$158.27 per month. On her Amended Means Test, with the increased household size, the Debtor shows a negative disposable income of \$130.02 per month.

The inclusion of the son in the Debtor's Amended Means Test is improper because the household expenses are tolled as of the petition filing date. *See* 11 U.S.C. § 707(b)(2)(A)(ii)(I) ("the debtor's monthly expense amounts shall be specified under the [standards] . . . as in effect on the date of the order for relief.") The Debtor filed her petition on December 31, 2009 and she testified that her son moved into her home in mid-January 2010. (Debtor, Cross). Accordingly, the son is not properly included in the Debtor's household size. *In re Ellinger*, 370 B.R. 905, 910 (Bank. D. Minn. 2007) ("the means test is not meant to be continually updated as debtors' circumstances change. . . . household size should also be determined on the same day that the other elements of the means test are fixed.")

Additional changes to the Amended Means Test include a decrease in certain expenses included in the marital deduction. Specifically, the Debtor's Amended Means Test reduced the

payment of the non-debtor husband's credit cards from \$350 to \$250 per month and payment towards children's expenses from \$350 to \$280 per month. At the evidentiary hearing on this matter, the Debtor confirmed that those amounts for the marital deduction were correct. (Debtor, Cross.)

The Trustee submitted a Means Test completed by his office, which shows the presumption of abuse arises. (Trustee's Exhibit 8). The Trustee's Means Test reflects reduced amounts for the husband's credit card payments and children's expenses. *Id.* The Trustee's Means Test also includes the non-debtor husband's car expense as a line item in the marital deduction for \$518.00 per month. *Id.* This amount reflects the husband's actual car payment (\$268) and actual operation of expense (\$250). (Debtor's Schedule J). The Debtor does not include the husband's car payment and operation expense as a marital deduction in her Means Test, but instead takes a second ownership and operation expense per the IRS standards, which results in a total deduction of \$675 per month for the husband's vehicle. (Debtor's Amended Means Test, Lines 22A and 24).

It is undisputed that the Debtor is not financially obligated with respect to her husband's vehicle. (Debtor, Cross.) Accordingly, it is improper for the Debtor to include the husband's vehicle as an ownership expense on her Means Test. The plain language of 11 U.S.C. § 707(b)(2)(A)(ii)(I) states that the Debtor's monthly expenses "shall be the *debtor's* applicable monthly expense amounts . . . as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the *spouse of the debtor in a joint case.*" (emphasis added). The Debtor is only allowed *her* applicable monthly expense amounts. If this were a joint case, then the IRS standards would be properly used with respect to the spouse's vehicle expenses. The Trustee's removal of the IRS standard amount for a second vehicle and inclusion of the husband's actual car payment and actual operating expenses as part of the marital deduction is consistent with the plain language of § 707(b)(2)(A)(ii)(I). *In re*

Shahan, 367 B.R. 732, 734-36 (Bankr. D. Kan. 2007)(finding it improper for debtor husband to claim Transportation Ownership Expense deduction on non-debtor wife's vehicle where vehicle was sole obligation of wife).¹

As reflected on the Trustee's Means Test, the Debtor has \$307.48 per month in disposable income. (Trustee's Exhibit 8). This reflects the household size of two, the husband's actual monthly credit card payments of \$250, the husband's actual payment of the children's expenses of \$280, and the deletion of the IRS standards for the expense of a second vehicle, with an increase in the marital deduction to reflect the husband's actual ownership and operating expenses. *Id.* Over 60 months, \$307.48 per month would result in a payment of \$18,448.80 to unsecured creditors and the presumption of abuse arises. 11 U.S.C. § 707(b)(2)(A)(i)(II). The Debtor has shown no special circumstances that would rebut the presumption of abuse.

The inquiry for a motion to dismiss pursuant to § 707(b) of the Bankruptcy Code does not end with the determination of whether the presumption of abuse arises. Section 707(b)(3) grants a court the authority to dismiss a Chapter 7 case, where the presumption of abuse does not arise, for either bad faith or the totality of the circumstances if the debtor's financial situation demonstrates abuse. 11 U.S.C. § 707(b)(3). Since there has been no allegations of bad faith brought by the Trustee against the Debtor, this Court renders its decision on the basis of the totality of the circumstances.

The Bankruptcy Code does not define the term "totality of the circumstances." However, two Sixth Circuit Court of Appeals decisions, *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429 (6th Cir.2004)

¹The Debtor argues that "it cannot be said that the non-debtor spouse should get less of a benefit than if he were actually filing himself." (Debtor's Trial Brief at 3). That is however, exactly what § 707(b)(2)(A)(ii)(I) does say.

and *In re Krohn*, 886 F.2d 123 (6th Cir.1989), provide guidance on the totality of the circumstances basis for dismissal under § 707(b). Among the factors to be considered in deciding whether the totality of the circumstances warranted a dismissal of the debtor's case under § 707(b), the *Krohn* court opined:

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. Other factors relevant to need include whether the debtor enjoys a stable source of future income, whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code, whether there are state remedies with the potential to ease his financial predicament, the degree of relief obtainable through private negotiations, and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities.

In re Krohn, 886 F.2d at 126; accord *Behlke v. Eisen*, 358 F.3d at 435.

In the present case, the Debtor is gainfully employed and has been so employed for a period nine years. She earns an above-median income for her family size and geographical location. According to her Amended Means Test, her gross monthly household income is \$6,699.27 for an annualized income of \$80,391.24 and the median income for a household of two in Ohio is \$52,216.00.

Her Amended Schedules I and J show a negative monthly income of \$75.37. However, the Debtor improperly deducts from her income the repayment of a 401(k) loan in the amount of \$166.83 per month. The Sixth Circuit Court of Appeals has held that loan repayments for these types of accounts cannot be deducted from the debtor's disposable income because "it would be unfair to the creditors to allow the [d]ebtors ... 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.” *Behlke v. Eisen (In re Behlke)*, 358 F.3d at 435.

Furthermore, the Debtor testified that she does not know what the \$50 per month in “unknown” insurance is for. (Debtor, Cross). Accordingly, that expense deduction is improper. The Debtor also includes \$300 per month for out of pocket health care expenses. The Debtor testified that she is diabetic and receives care every six to eight weeks. (Debtor, Direct). She also testified that she needs eyeglasses and some dental work. (Debtor, Cross). She did not, however, provide any itemization for such expenses that would support \$300 per month. This amount exceeds the IRS Standard by \$180 per month. Finally, the Debtor testified that she received a tax refund in the amount of \$1,900 for the tax year 2009. This reflects a substantially overstated tax expense on the Debtor’s Schedule I. The Debtor did state that her husband had owed taxes for 2009 and that he was going to “fix” it so he would not owe again. Her Amended Schedule I does show a reduction in his gross monthly income from his pension.

The Trustee conducted an analysis of Debtor’s Schedule J wherein he compares the Debtor’s expenses with that of the IRS standards for a household size of two. (Trustee’s Exhibit 10). In his analysis, the Trustee gives the Debtor the benefit of deducting the IRS standard for operation and ownership expense of two vehicles. *Id.* Ms. Lowman, a bankruptcy analyst for the Trustee, testified that when performing a Schedule J analysis, the Trustee gives the Debtor liberal deductions with respect to the IRS standards. The Court finds the testimony of Ms. Lowman credible. The Trustee’s Schedule J analysis shows that the Debtor’s total expenses exceeds the IRS standards by \$619 per month. (Trustee’s Exhibit 10). Debtor’s expenses, excluding mortgage expense, exceeds the IRS standards by \$759 per month. *Id.*

Given the totality of Debtor's financial circumstances, it is hereby determined that granting the Debtor relief under Chapter 7 would constitute abuse pursuant to § 707(b)(3).

Accordingly, the Trustee's motion to dismiss pursuant to 11 U.S.C. §§ 707(b)(2) and (b)(3) is granted and the Debtor's case is hereby dismissed. The Debtor's objection is hereby overruled. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dates this 1st day
of July, 2010


JUDGE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT