THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 05-12230
	)	
WILLIAM G. ALVEY and	)	Chapter 7
LINDA KAE ALVEY,	)	
	)	Judge Pat E. Morgenstern-Clarren
Debtors.	)	
	)	**MEMORANDUM OF OPINION**

The United States trustee moves to dismiss the chapter 7 case of joint debtor William Alvey,[1] alleging that granting him a discharge would be a substantial abuse of chapter 7. *See* 11 U.S.C. § 707(b). (Docket 9). The debtor opposes the motion. (Docket 15). For the reasons stated below, the motion is granted.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O).

11 U.S.C. § 707(b)

Bankruptcy code § 707(b) provides that:

> (b) After notice and a hearing, the court . . . on a motion by the United States trustee . . . may dismiss a case filed by an individual debtor under [chapter 7] 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. There shall be a presumption in favor of granting the relief requested by the debtor . . . .

11 U.S.C. § 707(b).

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[1] William Alvey filed jointly with his wife, Linda Alvey. The United States trustee does not ask to dismiss Ms. Alvey's case.

POSITIONS OF THE PARTIES

The United States trustee moves to dismiss on the grounds that William Alvey did not treat his creditors fairly, has not been honest in his bankruptcy case, and has the ability to repay his creditors. The debtor responds that he has met his obligations under the bankruptcy code, does not have the ability to repay his creditors, and is entitled to proceed under chapter 7.

THE EVIDENTIARY HEARING

The court held an evidentiary hearing on May 31, 2005. Both sides presented witnesses and exhibits.[2] These findings of fact reflect the court's weighing of the evidence, including determining the credibility of the witnesses. In doing so, the court considered the witnesses' demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression. *See* FED. R. BANKR. P. 7052, incorporating FED. R. CIV. P. 52 (applied to contested matters under FED. R. BANKR. P. 9014). When the court finds that a witness's explanation was satisfactory or unsatisfactory, it is using this definition:

> The word satisfactory 'may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation–he believes what the [witness] says with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.'

United States v. Trogden (*In re Trogden)*, 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990)

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[2] The UST called chapter 7 trustee Alan Treinish, the debtor, and Holly Scherf (as an expert witness). The debtor called Mary Stewart, Douglas Reichenbach, and Congressman Steven LaTourette (as a character witness), and also testified on his own behalf.

(discussing the issue in context of bankruptcy code § 727) (quoting *First Texas Savings Assoc., Inc. v. Reed*, 700 F.2d 986, 993 (5th Cir. 1983)).

FACTS

A. The debtor's original schedules

William Alvey filed his chapter 7 petition and schedules under oath on February 24, 2005. He scheduled $98, 211.81 in unsecured debt,[3] the vast majority of which is owed on 11 credit cards.[4]

Schedule B Personal Property gives all debtors this instruction: "Except as directed below, list all personal property of the debtor of whatever kind. If the debtor has no property in one or more of the categories, place an 'x' in the appropriate position in the column labeled 'None'. " The form then lists several specific types of property, including these categories:

Question 9. Interests in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each.

Question 11. Interests in IRA, ERISA, Keough, or other pension or profit sharing plans. Itemize.

Question 15. Accounts receivable.

In response to each question, the debtor checked the box under "None."

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[3] The debtor and his wife scheduled a total of $115,967.93 in unsecured debt. The lower number used here is arrived at by subtracting debt owed only by Linda Alvey.

[4] UST 2-13.

B. The debtor's testimony at the § 341 examination by the chapter 7 trustee

On March 30, 2005, the debtor appeared for examination under oath by the chapter 7 trustee. *See* 11 U.S.C. § 341. At the outset, the debtor confirmed that all information in his schedules was true to the best of his knowledge, information and belief and that he did not wish to change any of his answers. The trustee next asked a series of questions concerning the debtor's pre-filing activities. The debtor provided this additional information:

Interests in Insurance Policies: The debtor owns a life insurance policy on his wife's life and she owns a policy on his life.[5] One policy is a whole life policy with a cash surrender value of about $4,000.00. The debtor also owns a whole life policy on the life of each of his two granddaughters.

Interests in IRA, ERISA, Keough, or other pension or profit sharing plans: The debtor is the beneficiary of a pension program sponsored by his employer, The United Methodist Church. His balance in one part is $251,766.00 as of October 26, 2004 and there is $14,000.00 in the other part.[6]

Accounts Receivable: Tim Haggerty owes the debtor $500.00, which the debtor does not think is collectible.

The debtor testified that his only income is his monthly take-home salary of about $3,800.00.[7] He testified further that his credit card debt dates back to 1986 when he had about

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[5] UST 8 at 17, 28-29.

[6] UST 8 at 21, 30-31.

[7] UST 8 at 5.

$20-25,000.00 in debt.[8] He estimated that 90% of the present debt is from cash advances and 10% from merchandise advances.[9] In December 2004, he went on a five-day Caribbean cruise that cost about $2,000.00.[10]

The chapter 7 trustee adjourned the 341 examination so that the debtor could file amended schedules correctly reflecting his assets and liabilities. The debtor's counsel, however, soon returned to the hearing room and advised the trustee that the debtor felt he had not made full disclosure. The trustee went back on the record to permit the debtor to address this issue.

The debtor then added this information:[11]

1. He started receiving $1,006.00 a month in income from social security in January 2005. He plans to retire on June 30, 2005.

2. In addition to the life insurance policies discussed in the original exam, he owns a whole life policy on each of his two sons and he is the beneficiary.

3. In 2001, he loaned $10,000.00 to Mary Terriaco to help her buy a house. She has repaid $5,000.00.

C. Amendments to Schedules B, C, and I

On April 7, 2005, the debtor amended schedule B to list eight insurance policies (four of which have a cash surrender value); three interests in pensions relating to The United Methodist

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[8] UST 8 at 35.

[9] UST 8 at 27.

[10] UST 8 at 25.

[11] UST 8 at 37.

Church (totaling $247,438.00); and the loans to Terriaco and Haggerty. The debtor also amended schedule C to reflect exemptions and schedule I to disclose his social security income.[12]

D. The testimony at the evidentiary hearing

1. The debtor's prepetition conduct

The debtor traces his credit card debt to 1986 when his marriage was dissolved. According to the debtor's own testimony, he has not lived within his salary for many years. Instead, he "robs Peter to pay Paul"[13] by routinely taking cash advances or writing convenience checks on one credit card to pay down another credit card. He did not explain how he incurred such high balances in the first place. He made minimum payments on the credit card balances over the years, but never had a specific plan for paying the money back. In 2004, he wrote $16,000.00 in convenience checks, the same year he paid for a Caribbean cruise using a credit card and at a time when he knew he had more than $100,000.00 in credit card debt. The debtor charged the cruise to a credit card in April 2004 for the December 6, 2004 trip. He could have cancelled the trip without penalty up to 60 days before departure or with a 50% penalty up to 8 days before departure.

The debtor lives with his wife in a house that sits on about two acres of land. They bought the house in 2000[14] and refinanced it at least three times after that. In about 2002, as part of a refinancing, the debtor put an $80,000.00 addition on the house. He did not provide a

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[12] UST 4.

[13] UST 8 at 27.

[14] At the § 341 examination, the debtor testified that they paid $132,000.00 for the house. He withdrew money from one of his pension plans to make the downpayment.

satisfactory explanation for why he did this at a time when he owed considerable credit card debt and there were only two people living in the house. The debtor scheduled the house with a current value of $200,000.00. He owes about $199,000.00 on the note that is secured by a mortgage on the house. He is current with his note payments and plans to continue to live in the house.

The debtor first acknowledged he had a financial problem in August 2004 when he added up the credit card debt and compared it to his income. Nevertheless, he continued to write transfer balances between credit cards. He decided to file a chapter 7 on November 11, 2004 when he found that he could not refinance his house again. He went ahead and took the December 2004 cruise and then met with his bankruptcy attorney.

When he met with his attorney, he knew that he had an interest in pension plans from The United Methodist Church and that he intended to take early retirement in July 2005. He also knew that he had applied for social security benefits to begin in January. He knew further that he owned life insurance policies with some cash surrender value and that two people owed him money. None of this, however, appeared in his original bankruptcy schedules. He reviewed the schedules before he signed them.

2. The debtor's employment

The debtor has been employed by The United Methodist Church since 1964 and has been in his current post as pastor at Park United Methodist since 1995. As part of his responsibilities, he serves on Park's finance committee, although he does not have any specialized financial education.

The church's mandatory retirement age is 70. In the fall of 2004, the debtor decided that he would take early retirement in June 2005 after he turned 65 because he is "burned out and exhausted." He advised the church of his intentions and it has hired another minister to assume the debtor's position. He thinks it is unlikely that he would be able to find another church position this year because most posts for July are filled.

On retirement, he will receive a monthly pension of about $3,300.00. He will no longer get a housing stipend and will have to pay a share of his health care insurance premiums. He did not disclose in his schedules that he would be retiring, although there is an instruction on schedule I that says "[d]escribe any increase or decrease of more than 10% in any of the above categories anticipated to occur within the year following the filing of this document[.]"[15]

DISCUSSION

Bankruptcy code § 707 provides that an individual's case may be dismissed if the debts are primarily consumer debts[16] and "the granting of relief would be a substantial abuse" of chapter 7. 11 U.S.C. § 707(b). Determinations under § 707(b) regarding substantial abuse are equitable ones. *See Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 433-34 (6th Cir. 2004). There is a presumption that the debtor should be granted the relief requested. *See* 11 U.S.C. § 707(b).

Substantial abuse can be shown through "*either* a lack of honesty *or* a want of need." *Behlke*, 358 F.3d at 433 (emphasis in original). The UST argues that this case should be dismissed under both tests. In addressing this issue, courts are to review the totality of the circumstances to determine if the debtor is "merely seeking an advantage over his creditors, or

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[15] UST 2-19.

[16] The debtor acknowledges that his debts are primarily consumer debts.

instead is 'honest,' in the sense that his relationship with his creditors has been marked by essentially honorable and undeceptive dealings, and whether he is 'needy' in the sense that his financial predicament warrants the discharge of his debts in exchange for liquidation of his assets." *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989). An analysis of the debtor's honesty should include the debtor's "good faith and candor in filing schedules and other documents, whether he has engaged in 'eve of bankruptcy purchases,' and whether he was forced into Chapter 7 by unforeseen or catastrophic circumstances." *Id.* Whether the debtor is needy is also determined by examining all of the circumstances, including these factors: the debtor's ability to repay the debts out of future earnings; whether the debtor has a stable source of future income; whether he is eligible for chapter 13; whether there are state remedies available to him; whether he can obtain relief through private negotiations; and whether he can reduce his expenses significantly without being deprived of necessities such as food, clothing, and shelter. *Id.* at 126-27.

In this case, the debtor's chapter 7 filing is not the result of unforeseen or catastrophic circumstances. Instead, the debtor filed this case because he has lived beyond his means for many years. *Id.* at 127. For example, at a time when he knew he was deeply in debt, he decided to refinance his house and put on an $80,000.00 addition. He now has no equity in his house. His credit card debt started out in 1986 in the range of $20-25,000.00 and blossomed over the next 15 years or so to more than $100,000.00 with very little (if any) explanation for why he incurred the debt in the first place. Having incurred all of this debt, the debtor admits that his only plan was to continue to move credit card balances around to make minimum payments on each card or to consolidate the debts at a lower interest rate. He drew more than $16,000.00 in

convenience checks in the year before the filing when he knew he did not have any realistic way to repay it. He also inexplicably decided to take a Caribbean cruise at a time when he was making only minimum payment on large credit card balances. He could have cancelled this trip with no penalty up to 60 days before the December 2004 departure,[17] but did not. He could even have cancelled it with a 50% penalty up to eight days before departure, but he did not.[18] And finally, despite knowing that he was insolvent, he chose to take early retirement. There was no evidence that he was asked or encouraged by his employer to retire early (for whatever reason) or that health problems forced him to retire.[19] He could, therefore, have continued with his employment, received his salary and his tax-free parsonage allowance, and had his health care premiums paid in full. Instead, he voluntarily put himself in a position where he will have reduced income and increased health care expenses. These facts collectively show a lack of honesty in dealing with his creditors.

The debtor also showed a lack of candor by failing to file schedules that fully and completely disclosed all of his assets. He certainly knew that he had life insurance policies because the insurer withdrew the premiums automatically each month from his bank account and he received annual statements. The debtor testified that he did not schedule the policies because

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[17] UST 6-2.

[18] The debtor now says he would not have taken the trip if he had known his financial situation. The court does not give this much weight, particularly because by his own admission he knew no later than August 2004 that he had serious trouble and by November 2004 had decided to seek bankruptcy protection.

[19] If a debtor must retire for health reasons, that is a factor that the court would consider. Here, however, the debtor's testimony that he was exhausted and burned out is not sufficient to establish that he had to retire due to significant health issues.

he did not think they had a significant cash surrender value. That is not, however, what the schedules ask. The question specifically says to list all policies in which the debtor has an interest; it is not up to the debtor to decide if the value is "significant." Moreover, for someone in financial distress, the $4,000.00 cash surrender value of one of the policies is certainly significant. The debtor did not, therefore, provide a satisfactory explanation for the failure to schedule the life insurance policies. The same is true of the social security payments and the pensions. The debtor obviously knew that he had applied for and expected to receive social security benefits and yet he did not disclose this income. He also was well aware that he had an interest in three pension plans through his employer because he received yearly statements from each plan and had even withdrawn funds from one of them in the recent past. His explanation that he did not disclose the pensions because he did not expect to receive payments until he retired in June 2005 is beside the point. The question asked is whether he had any interest in the asset, not when he could gain access to it. He also failed to disclose the two accounts receivable although he testified that he knows what an account receivable is. At one point in his testimony, the debtor contradicted his schedules and his § 341 testimony by stating that the Terriaco transfer was a gift rather than a loan. This characterization has little credibility, however, because Terriaco repaid $5,000.00 of the $10,000.00 she borrowed, an indication of a loan not a gift. He also attempted to explain the failure to disclose by saying that he did not believe the accounts were collectible. As noted above, the bankruptcy schedules do not ask a debtor to make this determination. Instead, they instruct the debtor to disclose the asset and the trustee then determines how best to proceed with respect to collecting it.

The debtor argues that he did not make any of the statements or omissions fraudulently. That may be so, but that is not the standard under § 707(b). Instead, the question is whether the debtor was candid in filing his schedules. *See In re Krohn,* 886 F.2d at 126. The debtor was far from candid, a fact that weighs against his continuing in this chapter 7.

Based on the totality of the circumstances, and bearing in mind the statutory presumption in favor of granting the debtor the relief he requests, the court finds that the UST proved that the debtor did not behave honestly and that granting this debtor a discharge would be a substantial abuse of chapter 7. The UST's motion to dismiss will, therefore, be granted.

Given this conclusion, it is not necessary to decide whether the UST proved that the case should also be dismissed under the second, independent prong of *In re Krohn*; i.e. whether the debtor is needy and, in particular, whether the debtor would be able to fund a chapter 13 plan. A case may be dismissed for substantial abuse even if the debtor is not eligible for relief under any other chapter of the bankruptcy code. *See In re Krohn*, 886 F.2d at 126-127.

CONCLUSION

The United States trustee's motion to dismiss is granted and the debtor's opposition is overruled.

A separate order will be entered reflecting this decision.

Date: 13 June 2005

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center

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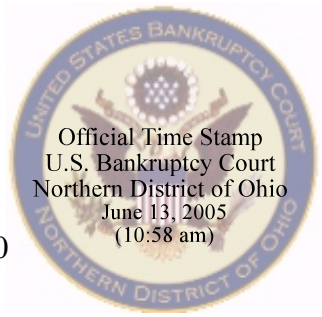
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 05-12230
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WILLIAM G. ALVEY and	)	Chapter 7
LINDA KAE ALVEY,	)	
	)	Judge Pat E. Morgenstern-Clarren
Debtors.	)	
	)	**ORDER**

For the reasons stated in the memorandum of opinion issued this same date, the United States trustee's motion to dismiss the debtor William Alvey's case under 11 U.S.C. § 707(b) is granted and his case is dismissed. (Docket 9).

IT IS SO ORDERED.

Date: 13 June 2005

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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