UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 06-13867
	)	
JESSE AUGENSTEIN,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**
	)	(Not for commercial publication)

The United States trustee moves to dismiss this chapter 7 case under 11 U.S.C. § 707(b)(2) and (b)(3).[1] The debtor Jesse Augenstein opposes the motion.[2] For the reasons stated below, the motion is granted.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered 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).[3]

ISSUES

1. Under 11 U.S.C. § 707(b), is a debtor entitled to deduct from his current monthly income the monthly payments that are contractually due as of the petition date on real estate that he proposes to surrender?

2. If a debtor's means test calculation does not result in a presumption of abuse, is a court permitted to consider the debtor's ability to pay as part of the totality of the circumstances analysis under 11 U.S.C. § 707(b)(3)?

3. If a court is permitted to consider a debtor's ability to pay under § 707(b)(3), then

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[1] Docket 19, 30.

[2] Docket 24, 31.

[3] In the court's view, the value of this opinion is solely to decide the dispute between the parties and not as an addition to the general jurisprudence. For that reason, the opinion is not intended for commercial publication.

under the totality of the circumstances, should this case be dismissed as an abuse of chapter 7?

I. § 707(b)(1) and (2)

The debtor's case is governed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Pub. L. No. 109-8, 119 Stat. 37 (BAPCPA). Bankruptcy code § 707(b)(1) states that the court may dismiss an individual chapter 7 case where the debts are primarily consumer debts if granting relief under the statute would be an abuse of chapter 7. A presumption of abuse arises if the debtor's monthly income, as reduced by certain expenses and then multiplied by 60, is not less than the lesser of 25% of the debtor's nonpriority unsecured claims, or $6,000.00 (whichever is greater); or $10,000.00. 11 U.S.C. § 707(b)(2)(A). The calculation is made on Form B22A titled "Statement of Current Monthly Income and Means Test Calculation" and is commonly known as the means test. If the calculation results in a presumption of abuse, the debtor may rebut the presumption by proving "special circumstances . . . that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative." 11 U.S.C. § 707(b)(2)(B)(i).

The bankruptcy code specifies the expenses that may be deducted from income in completing the means test. The category in dispute here is secured debt. The code states that the debtor's average monthly payments on account of secured debts are to be calculated to include:

> (I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition . . . .

11 U.S.C. § 707(b)(2)(iii)(I).

Form B22A gives these instructions to the debtor:

> **Future payments on secured claims.** For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, and state the Average Monthly Payment. The Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. Mortgage debts should include payments of taxes and insurance required by the mortgage.

The debtor listed secured debts owed to (1) Masnutten for real estate with a $116.67 mortgage payment; and (2) Washington Mutual/Providian for real estate with a $1,258.00 payment. The debtor states in this section and elsewhere in his petition that he intends to surrender both properties. If the debtor is entitled to these deductions despite the intention to surrender, then his filing does not come within the presumption of abuse. If, on the other hand, he is not entitled to the deductions, his filing is presumed to be an abuse.

Is there a presumption of abuse?

The United States trustee argues that the debtor did not fill out his means test correctly and that if he had, a presumption of abuse warranting dismissal would arise under 11 U.S.C. § 707(b)(2). Specifically, the trustee contends that the debtor may not deduct amounts payable to secured creditors because he intends to surrender the property securing the debts, and will not, therefore, be making those payments in the future. Without those deductions, a presumption of abuse would arise because the debtor has more than $166.67 of monthly disposable income.

The debtor responds that the plain language of § 707(b)(2) permits him to deduct the secured debt payments regardless of his intent to surrender the secured property.

A number of courts have considered this same issue. The majority view in this circuit is that a debtor may deduct payments for secured debt even if he intends to surrender the property. *See In re Graham*, No. 06-54764, 2007 WL 685945, at *3 (Bankr. S.D. Ohio March 7, 2007); *In re Zak*, 361 B.R. 481, 484–87 (Bankr. N.D. Ohio 2007); *In re Haar*, 360 B.R. 759 (Bankr. N.D. Ohio 2007); *In re Sorrell*, 359 B.R. 167, 184–87 (Bankr. S.D. Ohio 2007); *In re Simmons*, 357 B.R. 480, 487 (Bankr. N.D. Ohio 2006). The court agrees with the reasoning and the result in these cases and, therefore, adopts the same. *Accord In re Hartwick*, 352 B.R. 867, 869–70 (Bankr. D. Minn. 2006); *In re Walker*, No. 05-15010, 2006 WL 1314125, at *2–4 (Bankr. N.D. Ga. May 1, 2006). *Contra In re Ray*, No. 06-03988, 2007 WL 690131, at *3–6 (Bankr. D.S.C. Feb. 28, 2007); *In re Harris*, 353 B.R. 304, 308–10 (Bankr. E.D. Okla. 2006). As a result, the debtor properly completed Form B22A and there is no presumption of abuse.

II. § 707(b)(3)

Section 707(b)(3) provides that, even if there is no presumption of abuse, a case may be dismissed for abuse if (a) the debtor filed the case in bad faith; or (b) the totality of the circumstances of the debtor's financial situation demonstrates abuse. 11 U.S.C. § 707(b)(3)(A), (B).[4] The United States trustee seeks dismissal under § 707(b)(3)(B) based on the totality of the circumstances of the debtor's financial situation. The debtor argues that dismissal under this provision is not appropriate for a number of reasons.

Statutory Interpretation

The debtor first argues that a debtor who "passes" the means test may never have his case dismissed for abuse under § 707(b)(3) based on an ability to repay debt. His argument is that Congress intended § 707(b)(2) to be the only test of a debtor's ability to repay; he bases this on the general proposition of statutory interpretation that where a specific provision conflicts with a general provision, the specific provision controls. In other words, the means test should be interpreted to be the exclusive provision regarding a debtor's ability to pay. Where there is no presumption of abuse under § 707(b)(2), the United States trustee must show something more than ability to repay to justify a dismissal under (b)(3). The debtor suggests that this "something more" is some form of misconduct. As there has been no allegation of misconduct here, the debtor argues that the (b)(3) motion should be denied. The United States trustee did not specifically respond to this argument. Nevertheless, the debtor's argument fails because the plain meaning of § 707(b) "compels a conclusion that a court must consider a debtor's actual debt-paying ability in ruling on a motion to dismiss based on abuse where the presumption [of abuse] does not arise or is rebutted." *In re Mestemaker*, 359 B.R. 849, 855 (Bankr. N.D. Ohio 2007).

The starting point for interpreting § 707(b) is the language of the statute. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). "[A]s long as the statutory scheme

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[4] Section 707(b)(1) applies to cases filed by individual debtors whose debts are primarily consumer debts. There is no dispute in this case that the debtor's debts are primarily consumer debts and there is no allegation that he filed the case in bad faith.

is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240–41 (1989). "While legislative history may sometimes usefully add to [the] understanding of a statute where the statutory language is ambiguous, it cannot alter the plain meaning of the text." *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 912 (6th Cir. 2007). "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *Ron Pair Enters., Inc.*, 489 U.S. at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

Section 707(b) provides a coherent statutory scheme for addressing when a chapter 7 case may be dismissed for abuse and its terms are not ambiguous. Section 707(b)(1) provides for dismissal of a chapter 7 case where granting relief "would be an abuse of the provisions of [the] chapter." 11 U.S.C. § 707(b)(1).[5] Section 707(b)(2) establishes criteria for the imposition of a presumption of abuse and criteria for rebutting the presumption. 11 U.S.C. § 707(b)(2)(A), (B). Where the § 707(b)(2) presumption does not apply or has been rebutted, § 707(b)(3) provides that the court is to consider (1) whether the petition was filed in bad faith, or (2) whether the totality of the circumstances of the debtor's financial situation demonstrates abuse, to determine whether there is abuse under § 707(b)(1). 11 U.S.C. § 707(b)(3)(A), (B). Read in this way, subsections (b)(2) and (b)(3) provide two alternative ways for determining whether there is abuse under § 707(b)(1).

The language used in § 707(b)(3)(B) does not preclude consideration of a debtor's ability to pay his creditors. To the contrary, it requires the court to consider the debtor's ability to pay. The standard is whether "the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse." 11 U.S.C. § 707(b)(3)(B). And as noted in the *Mestemaker* opinion, "[t]he

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[5] Alternatively, § 707(b)(1) provides for conversion of the case to chapter 11 or 13 if the debtor consents.

plain meaning of the phrase 'debtor's financial situation' must include a debtor's actual income and expenses, since such information is the starting point for any analysis of an individual's financial situation." *In re Mestemaker*, 359 B.R. at 854.

The argument that a debtor's ability to pay cannot be considered under § 707(b)(3) is based in large part on the suggestion that the means test was intended to be the exclusive test of a debtor's ability to repay and that any contrary reading of § 707(b) is at odds with congressional intent. *See* Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 678 (2005) (noting in the authors' view that "the language of the revised Code, the interaction among its sections, its legislative history, and the need for uniformity in consumer bankruptcy law all support the view that the means test is now the exclusive ability to pay test"). Based on the plain language of § 707(b), however, there is no reason to refer to the legislative history to interpret its meaning. Moreover, as noted in the following discussion from the *Mestemaker* opinion, the legislative history supports taking a debtor's ability to pay into account when considering a motion to dismiss where the debtor has passed the means test:

> Motivating factors in enacting BAPCPA's comprehensive consumer bankruptcy reform include Congress's concerns that "the present bankruptcy system has loopholes and incentives that allow and-sometimes-even encourage opportunistic personal filings and abuse" and that current law has "no clear mandate" requiring debtors who are able to repay a significant portion of their debts to do so. H.R.Rep. No. 109-31(I), at 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 92. Clearly, Congress intended debtors who actually have the ability to repay a significant portion of their debt to do so. *In re Hardacre*, 338 B.R. 718, 725 (Bankr. N.D. Tex. 2006).

In re Mestemaker, 359 B.R. at 855 (internal footnote omitted).

III. Is Dismissal Under § 707(b)(3)(B) Appropriate?

The United States trustee argues that the debtor's case should be dismissed under § 707(b)(3)(B) because he has sufficient disposable income which could be used to repay his creditors. The debtor argues that dismissal under this provision is not warranted.

Relevant Considerations

The pre-BAPCPA bankruptcy code included a different standard of dismissal under § 707(b). The earlier version (1) created a presumption in favor of granting chapter 7 relief to the debtor; and (2) required the objecting party to show that the debtor's case was a "substantial" abuse of the bankruptcy system. The current version eliminates both the presumption and the word "substantial." Despite these changes, the leading Sixth Circuit cases are still good precedent on the question of what factors should be considered in determining whether the debtor's case should be dismissed as an abuse. *In re Zayas*, No. 06-13070, 2007 WL 987240, at *2 (Bankr. N.D. Ohio April 2, 2007); *In re Mestemaker* 359 B.R. at 856. Those factors include: the debtor's ability to repay 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. *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 434 (6th Cir. 2004); *In re Krohn*, 886 F.2d 123, 126–27 (6th Cir. 1989).

The debtor argues that an ability to repay, standing alone, is an insufficient basis to dismiss under § 707(b)(3)(B). As support, he cites *In re Nockerts*, 357 B.R. 497 (Bankr. E.D. Wis. 2006), a decision which relied on Fourth Circuit precedent interpreting former § 707(b) which "rejected the notion that ability to pay alone is cause for dismissal as a substantial abuse of chapter 7." *In re Nockerts*, 357 B.R. at 506 (citing *Green v. Staples (In re Green)*, 934 F.2d 568, 572 (4th Cir. 1991)). The debtor's argument fails, however, based on Sixth Circuit case law. In the *Behlke* and *Krohn* decisions, the Sixth Circuit indicated that a debtor's ability to repay was a factor to be considered in determining whether a case would be dismissed for substantial abuse and that it was a factor which standing alone might be sufficient to warrant dismissal. *In re Behlke*, 358 F.3d at 434–35; *In re Krohn*, 886 F.2d at 126. Following Sixth Circuit precedent, therefore, this court concludes that under appropriate facts, a debtor's ability to repay alone may

be sufficient to warrant dismissal for abuse under § 707(b)(3)(B).

The Evidence[6]

The debtor first met with an attorney to discuss his financial situation in February 2006 and he filed his chapter 7 petition on August 29, 2006. He attributes his financial problems to a break-up with his then-girlfriend in October 2005. He purchased a home with this girlfriend in April 2005. He also purchased a car for her in his name and allowed her to use his credit cards. She helped him pay the bills until they separated in October 2005. After that, the debtor had a hard time maintaining the payments. He stopped paying the $1,254.00 mortgage payments in December 2005, moved out of the house, and lived with friends. He did not begin paying rent until May 2006 when he moved into an apartment. The debtor has been living there with his current girlfriend since June 2006. She is a college student who works part-time and pays her own expenses, but does not contribute to the household expenses. The debtor and his girlfriend just learned that she is pregnant; the debtor anticipates supporting the child and possibly getting married.

The debtor is employed by the Ohio Department of Youth Services and works with juvenile felons as an accident prevention coordinator in a correction facility. His employment with the state is unclassified and he works at the pleasure of the governor. He submitted his resume to the new governor earlier this year. Although his supervisor has been reappointed, the debtor has not yet been reappointed. His net monthly take home pay from the state is $2,680.09 based on gross monthly wages in the amount of $3,674.13. The debtor is also a police officer in the United States Army National Guard. His military income varies from month to month based on the number of drills in which he participates. He scheduled $428.15 as the average gross

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[6] The court held an evidentiary hearing on April 13, 2007. The United States trustee presented his case through cross-examination of the debtor and exhibits and the debtor testified on his own behalf. These findings reflect the court's weighing of the evidence, including determining the witness's credibility. The United States trustee bears the burden of proving abuse by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279 (1991).

monthly income from this job, although that amount is somewhat inflated because it was calculated based on a period of time which included a signing bonus and amounts attributable to a one month period in which he was deployed in response to Hurricane Katrina. His normal net monthly pay from this job fluctuates between $200.00 and $400.00.

The debtor's annual income increased from 2005 to 2006 by approximately $5,000.00. Going forward there is some uncertainty, however, because the debtor anticipates that his military unit will be deployed to Iraq by next year. It has been two years since his unit was last deployed and military police are in demand in Iraq. This would result in a change in his income, but that change was not explained. The debtor's schedule of current income does not indicate that he reasonably anticipated that his income would either increase or decrease in the year following his bankruptcy filing. *See* UST exh. 8.

The debtor scheduled monthly net income of $97.24 based on scheduled expenses totaling $3,011.00. Since the filing, however, his vehicle expense has been reduced because the truck on which he had been making $569.00 monthly payments was repossessed. Instead, he is paying $430.00 monthly for an automobile, freeing up $139.00. The United States trustee questioned the debtor about specific purchases which he made in the month following his bankruptcy filing and showed that the debtor spent $37.63 at The Bath & Body Shop, $8.45 for a muscle magazine subscription, and $54.85 for tickets to an Indian's game.

The United States trustee also questioned the debtor extensively regarding purchases which he made in the six month period leading up to his bankruptcy filing. *See* UST exhs. 1–6. During that time, the debtor frequently ate at restaurants, purchased vitamins and supplements, and bought sports apparel and tickets for sporting events. He also took his girlfriend to a concert in Philadelphia and prepaid for a November trip to Chicago for a power lifting competition. Although this evidence tended to show a lack of financial responsibility on the debtor's part, the United States trustee has not alleged that the debtor filed his petition in bad faith, *see* 11 U.S.C. § 707(b)(3)(A), and this evidence is not relevant to the decision at hand except insofar as those

types of expenses are included in the debtor's post-petition budget.

The debtor scheduled unsecured debt totaling $30,535.00 which is mostly credit card debt, but also includes $3,375.00 in student loan debt and other debts. He scheduled $197,149.00 of secured debt. This total includes his obligations to Masnutten and Washington Mutual/Providian. It also includes debt related to the repossessed truck and to jewelry and computer purchases. The undersecured portion of the secured debt is shown as $12,444.00.

Discussion

The United States trustees argues that this case is an abuse under § 707(b)(3)(B) because the debtor has the ability to repay his creditors based on the $97.24 monthly net income which he scheduled and the additional income of approximately $139.00 which is available as a result of the reduction in his vehicle payment. The United States trustee also argues that the debtor has included approximately $180.00 in his budget—including the gym expense—which could be eliminated or reduced. The debtor maintains that his case is not abusive. He also argues that anticipated changes in his financial circumstances should be considered.

Based on the evidence, the totality of the circumstances regarding the debtor's financial circumstances indicate that his chapter 7 filing is an abuse.[7] The debtor is eligible for chapter 13 relief and he has a relatively stable ongoing source of income. Based on the debtor's testimony, his actual net monthly military income is approximately $300.00, rather than the scheduled amount of $428.15. Considering this reduced amount, the debtor's actual monthly take home pay is $2,980.09, which is less than his scheduled monthly expenses of $3,011.00. Although the debtor stated that a number of things may adversely affect his circumstances going forward (including the birth of a child and his possible deployment to Iraq), he did not attempt to quantify

[7] Each party's argument assumes that the court's analysis of this issue must take into consideration the debtor's financial situation at the time of the hearing and there is case authority under BAPCPA to support that view. *See In re Henebury*, 361 B.R. 595, 610–11 (Bankr. S.D. Fla. 2007) (noting that post-petition changes in a debtor's financial circumstances may be considered under § 707(b)(3)(B)); *In re Pennington*, 348 B.R. 647, 650–51 (Bankr. D. Del. 2006).

that effect and there is no way to predict what effect those changes will have on his finances.

The evidence showed that the debtor's actual monthly expenses are less than the amount he scheduled because he has reduced his vehicle payment by $139.00. The United States trustee argued that the debtor's other scheduled expenses were excessive, including the gym membership. The debtor testified that both of his jobs require him to be in top physical condition. The military police, he explained, are expected to be strong enough to be intimidating. And as part of his duties with the Ohio Department of Youth Services, he is required most days to break up fights between youths, some of whom are bigger than he is. This testimony was not challenged and the court finds that it shows that the membership is not a luxury, but rather a necessity given his employment. The tanning cost of the membership ($20.00 a month) is a different story; the debtor is not required to be tan to perform either of his jobs and this amount can be devoted to his creditors. The United States trustee also questioned amounts which the debtor spent the month following his chapter 7 filing for a magazine subscription, entertainment, and personal care items. The evidence did not establish, however, that those expenditures exceeded the amounts which the debtor scheduled for recreation, entertainment, magazines, etc. ($100.00) and personal grooming/haircuts ($100.00), and the United States trustee did not show that the scheduled amounts were unreasonable.

Based on the revised numbers, the debtor has actual monthly income of $2,980.09 and actual monthly expenses of $2,852.00, resulting in actual net monthly income of $128.09. The debtor scheduled total nonpriority unsecured debt of $30,535.00 and his schedules also state that the undersecured portion of his secured debt is $12,444.00. Using these figures, and assuming that claims are filed for the full amount of this debt, the debtor is able to pay as much as 17% of his unsecured debt by devoting his actual net income to a chapter 13 plan for a 60 month period. Additionally, although the United States trustee did not establish that other amounts included in the debtor's budget were unreasonable, the evidence clearly showed that there was room for adjustment and some belt-tightening. The court also notes that if the debtor chooses to convert to

chapter 13 (rather than have his case dismissed) and later finds that his financial circumstances change for the worse due to deployment, the bankruptcy code permits a chapter 13 debtor to seek plan modification or to move to re-convert to chapter 7. The debtor is not, therefore, left without a safety net if he is called to active duty.

Based on these circumstances, the court concludes that the debtor's chapter 7 filing is an abuse under § 707(b)(3)(B).

CONCLUSION

The UST's motion to dismiss under § 707(b)(3) is granted. This decision does not preclude the debtor from filing a motion to reinstate for the sole purpose of converting to a case under chapter 13. A separate order will be entered based on this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 06-13867
	)	
JESSE AUGENSTEIN,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**
	)	(Not for commercial publication)

For the reasons stated in the memorandum of opinion issued this same date, the United States trustee's motion to dismiss this case under 11 U.S.C. § 707(b)(3) is granted and the case is dismissed. (Docket 19).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge