

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 07-13500
ROBERT P. MARIANI,)
Debtor.) Chapter 7
Judge Pat E. Morgenstern-Clarren
) **MEMORANDUM OF OPINION**
) (NOT FOR COMMERCIAL PUBLICATION)

The United States trustee moved to dismiss this chapter 7 case for abuse under 11 U.S.C. § 707(b)(3).¹ Robert Mariani, the debtor, opposes the motion.² For the reasons stated below, the motion to dismiss is granted.³

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).

ISSUES

1. Is the United States trustee required to file a § 704(b) statement as a prerequisite to filing a motion to dismiss under § 707(b)(3)?
2. If a debtor “passes” the means test and there is no presumption of abuse under § 707(b)(2), must the United States trustee show something more than ability to repay to prove abuse under § 707(b)(3)?

¹ Docket 20.

² Docket 23.

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.

3. Did the United States trustee meet his burden of proving that the totality of circumstances in this case shows that the debtor's filing is an abuse of the chapter 7 provisions?

FACTS AND DISCUSSION

I. The Evidence⁴

The debtor filed his chapter 7 petition on May 14, 2007. The meeting of creditors was scheduled for June 25, 2007 and was held and concluded on that date. The UST did not file a statement under § 704(b) as to whether the debtor's case would be presumed to be an abuse, but filed a motion to dismiss under § 707(b)(3) on July 23, 2007.

The debtor is a Ford Motor Company employee with 30 years of service. He is divorced and has three adult sons. He had gross income of \$75,523.00 in 2005 and \$81,775.00 in 2006. The debtor's net monthly take home pay at filing was \$4,139.21, as reflected in his schedules. The net income figure is based on gross monthly wages of \$4,766.67 and estimated monthly overtime of \$1,733.33 for a total of \$6,500.00, less certain payroll deductions. The payroll deductions include a TESPHE⁵ loan repayment of \$267.80 (the retirement loan repayment).⁶ The deductions also include a benefit recoupment amount of \$433.33; this is a repayment by the debtor for insurance coverage provided to his son at a time when he was not eligible for the coverage. This obligation will be repaid by May 2008 if the debtor makes the scheduled payments.

The debtor's scheduled monthly expenses total \$4,350.00 and exceed his scheduled net monthly income by \$210.79. Those expenses include a \$240.00 payment for a 2003 Ford Ranger and a \$318.00 lease payment for a Ford Explorer. Since filing, the debtor has

⁴ The court held an evidentiary hearing on October 3, 2007. The UST presented his case through the introduction of stipulated exhibits. Counsel for both parties presented oral argument.

⁵ TESPHE stands for Tax-Efficient Savings Plan for Hourly Employees. *See* Pl. exhs. 2-8.

⁶ The schedules state that TESPHE is an ERISA qualified pension plan. The parties both refer to the TESPHE as a retirement account, but did not provide any details.

surrendered the Explorer and is no longer making the lease payment. The debtor reaffirmed his debt on the Ranger, which requires him to pay \$267.83 a month for 29 months. The debtor submitted a statement in support of the reaffirmation agreement that says that after surrendering the Explorer, he has current monthly expenses of \$3,792.00, leaving \$347.00 each month to pay the reaffirmed debt. The debtor has, therefore, reduced his postpetition monthly expenses to \$4,059.83 (\$3,792.00 plus \$267.83).

The debtor's scheduled debt is primarily consumer debt. His unsecured debt totals \$21,479.25 and the unsecured portion of his \$224,374.00 in secured debt is scheduled as \$19,374.00. The debtor stated in his schedules that he did not anticipate a change in his income or expenses within the year following his bankruptcy filing.

II. The Positions of the Parties

The UST moves to dismiss under § 707(b)(3)(B) arguing that based on the totality of the debtor's financial circumstances, including his stable job, high income, and ability to repay his unsecured debts, granting relief to the debtor would be an abuse of chapter 7. The debtor opposes the motion on three grounds. First, he makes a procedural argument that this action is barred because the UST did not timely file the § 704(b) statement regarding abuse. Second, the debtor argues that the motion should be denied because any finding of abuse under § 707(b)(3)(B) must be based on something more than an ability to repay, and there is no such additional evidence here. Finally, the debtor contends that the facts do not warrant dismissal under a § 707(b)(3) totality of the circumstances analysis.

A. 11 U.S.C. § 704(b)

Historically, a chapter 7 bankruptcy case has always been subject to dismissal for abuse of the system. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) retained that general concept with some procedural and substantive modifications. Under bankruptcy code § 707(b)(1), the court may dismiss a chapter 7 case filed by a debtor whose debts are primarily consumer debts if the court finds that granting relief to the debtor

would be an abuse of the provisions of chapter 7. 11 U.S.C. § 707(b)(1). Section 707(b) now includes a presumption of abuse based on a mathematical exercise called the means test. *See* 11 U.S.C. § 707(b)(2). Under BAPCPA, the United States trustee must file a statement regarding presumed abuse:

(b)(1) With respect to a debtor who is an individual in a case under this chapter—

(A) the United States trustee . . . shall review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b) . . .

11 U.S.C. § 704(b)(1). And § 704(b)(2) provides that:

(2) The United States trustee . . . shall, not later than 30 days after the date of filing a statement under paragraph (1), either file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons the United States trustee . . . does not consider such a motion to be appropriate

11 U.S.C. § 704(b)(2). If there is no presumption of abuse or if it is rebutted, the UST may alternatively move to dismiss the case for abuse if (1) the debtor filed the petition in bad faith; or (2) the totality of the circumstances shows abuse. 11 U.S.C. § 707(b)(3)(A) and (B).

The UST did not file a § 704(b)(1) statement regarding presumed abuse in this case. The debtor argues that filing the statement was a prerequisite to the UST filing any motion to dismiss, whether under § 707(b)(2) or § 707(b)(3), and that the motion should, therefore, be denied. The UST argues that § 704(b) applies only to motions to dismiss based on presumed abuse under § 707(b)(2) and does not impose any duties with respect to motions brought under § 707(b)(3).

The debtor relies on *In re Robertson*, 370 B.R. 804 (Bankr. D. Minn. 2007) to support his position. In *Robertson*, the court held that a United States trustee is required to timely file a statement under § 704(b)(1) as a prerequisite to filing a § 707(b)(2) motion to dismiss based on the presumption of abuse. The *Robertson* decision did not deal with a § 707(b)(3) dismissal request and it is not instructive on the issue of whether § 704(b)(2) applies to such a motion. *Id.*

at 811 n.11 (noting that the motion under consideration was based solely on presumed abuse and was brought under § 707(b)(2)).

The starting point for determining the meaning of § 704(b) is the language used in the statute. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). A plain reading of § 704(b) shows that the requirement that a United States trustee file a statement regarding abuse under § 704(b)(1) is linked to the filing and timing of a motion to dismiss based on presumed abuse. Such is not the case, however, with respect to a motion made under § 707(b)(3).

After a United States trustee files the statement as to whether the debtor's case is presumed to be an abuse, the trustee has not more than 30 days to file either a motion to dismiss based on presumed abuse or a statement as to why such a motion is not appropriate. Although § 704(b)(2) refers to § 707(b) rather than the more specific § 707(b)(2) in setting the time for filing a motion to dismiss (or a statement why a motion is not appropriate), that reference must be read in context as a reference to a motion to dismiss based on presumed abuse. See *In re Byrne*, – B.R. –, No. 5:07-BK-70507, 2007 WL 2822901 (Bankr. W.D. Ark. Sept. 24, 2007); *In re dePellegrini*, 365 B.R. 830, 831 (Bankr. S.D. Ohio 2007); see also *In re Littman*, 370 B.R. 820, 827 n.20 (Bankr. D. Idaho 2007); *In re Close*, 353 B.R. 915 (Bankr. D. Kan. 2006). Therefore, even though the UST did not file a statement regarding presumed abuse in the debtor's case, that failure did not bar the UST from filing a § 707(b)(3) motion and it does not preclude the UST from prosecuting the motion he filed in this case.⁷

⁷ The UST's motion was filed within the time otherwise set by the bankruptcy rules for filing a § 707(b) motion to dismiss. See INTERIM FED. R. BANKR. P. 1017(e)(1) (providing that “[e]xcept as otherwise provided in § 704(b)(2), a motion to dismiss a case for abuse under § 707(b) . . . may be filed only within 60 days after the first date set for the meeting of creditors . . .”).

B. 11 U.S.C. § 707(b)(3)

The UST requests dismissal under § 707(b)(3) based on the debtor's financial circumstances. He has the burden of proof by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991).

1.

The debtor argues that because there is no presumption of abuse his case may not be dismissed for abuse under § 707(b)(3)(B) without proof of some type of misconduct on his part. The court resolved this issue of statutory interpretation in *In re Augenstein*, No. 06-13867 (Bankr. N.D. Ohio June 14, 2007) (unpublished), and adopts the same reasoning here. Both the plain language of § 707(b)(3)(B) and the legislative history support the conclusion that § 707(b)(3)(B) does not require proof of misconduct.

2.

The final issue is whether the totality of the debtor's financial circumstances warrants dismissal.

The debtor's bankruptcy filing states that his monthly expenses exceed his net monthly income and he does not have the ability to pay his creditors. The UST argues that the bankruptcy schedules do not present an accurate picture of the debtor's financial circumstances in two respects: (1) the debtor, who has a steady job, can repay his creditors through a chapter 13 plan which can be funded by terminating his retirement loan repayment and the benefit recoupment deduction and applying that income to a plan; and (2) the debtor's actual expenses are lower than stated.

The factors to be considered in deciding whether the totality of a debtor's financial circumstances demonstrates abuse are the same factors that courts looked to in determining whether a debtor was needy for purposes of determining substantial abuse before BAPCPA. *Id.* (citing *In re Zayas*, No. 06-13070, 2007 WL 987240, at *2 (Bankr. N.D. Ohio Apr. 2, 2007) and *In re Mestemaker*, 359 B.R. 849, 856 (Bankr. N.D. Ohio 2007)). 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 the debtor is eligible for chapter 13; whether there are state remedies available to the debtor; whether the debtor can obtain relief through private negotiations; and whether the debtor 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). “Courts generally evaluate as a component of a debtor's ability to pay whether there would be sufficient income in excess of reasonably necessary expenses to fund a Chapter 13 plan.” *In re Mestemaker*, 359 B.R. at 856–57. “The totality of the circumstances test allows the court to consider both prepetition and postpetition circumstances.” *In re Toney*, 2007 WL 2417335, No. 07-30637 (Bankr. N.D. Ohio Aug. 20, 2007).

Eligibility for chapter 13 relief

The debtor is eligible for chapter 13 relief. *See* 11 U.S.C. § 109(e).

State remedies and private negotiations

The UST did not identify any state remedies that are available to the debtor and he did not show that the debtor can obtain relief through private negotiations.

The debtor's income

The debtor is a long time Ford employee with a stable source of income. Although debtor's counsel argued that the debtor's employment situation is likely to change in the near future and that his overtime income going forward will decrease, the debtor stated in his schedules that he did not anticipate such a change and he did not present evidence that a change in his employment status or overtime income is either imminent or likely. Based on the current state of the automobile market, it is certainly possible that the debtor's income will fluctuate going forward. Without evidence on that point, however, there is no way to anticipate when that might happen or what the economic impact will be.

The debtor's expenses

The debtor reduced his expenses since filing when he surrendered the Explorer. Based on this change and considering the new monthly payment on the retained vehicle, the debtor's monthly expenses are now \$290.17 less than at filing. As a result, his monthly income exceeds his expenses by \$79.38. The debtor argued that this change should not be considered in determining abuse because he was required to make a decision regarding reaffirmation of the debt related to the Ranger under 11 U.S.C. § 524 and the expense reduction resulted from that decision. Any determination regarding the debtor's financial circumstances must, however, take into consideration his ability to reduce expenses going forward. *See In re Krohn*, 886 F.2d at 126–27.

The UST suggested in his motion and brief that the debtor's actual expenses are lower than stated in his schedules because relief from stay was granted with respect to his residence and also that he could reduce his telecommunication expenses. The UST did not present evidence on this point at the evidentiary hearing.

Paying debt out of future earnings

The UST argues that the debtor is able to fund a chapter 13 plan by devoting to it the amounts which are now being deducted from his income for benefit recoupment and repayment of his retirement loan.

The UST argues that the benefit recoupment deduction is not appropriate because the debtor did not schedule a corresponding obligation and no party filed a claim as to the debt. There was, however, no evidence submitted regarding the specifics of this obligation. As a result, there is no factual basis to support the UST's argument that the recoupment deduction is not appropriate. The evidence does, however, show that this deduction will end in May 2008 and that the amount currently deducted (\$433.33 each month) will then be freed up. The debtor argued that this amount should not be considered in analyzing his financial circumstances because it was not available to him at the time he filed his chapter 7 case. This argument is not

persuasive because, as noted above, a debtor's postpetition financial circumstances are relevant when doing the totality of the circumstances analysis.

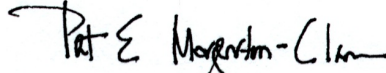
The UST also argues that the debtor's retirement loan repayment is considered income for purposes of the § 707(b)(3)(B) abuse analysis and there is case law to support that position. *See, for example, In re Croskey*, No. 06-33437, 2007 WL 1302571 (Bankr. N.D. Ohio May 1, 2007) (concluding that amounts debtors allocated for a 401(k) account and to repay a 401(k) loan were to be factored into the ability to repay analysis under § 707(b)(3)(B)); *see also In re Edighoffer*, – B.R. –, 2007 WL 2769631 at *9 (Bankr. N.D. Ohio Aug. 6, 2007) (holding that a debtor's voluntary retirement contributions were to be taken into consideration in the court's analysis of whether she had the ability to repay her debts). It is not necessary to address this issue, however, because the court concludes that granting the debtor chapter 7 relief is an abuse even if the loan repayment amount is not considered.

Based on the evidence and the totality of the debtor's financial circumstances, dismissal is appropriate in this case. The debtor has stable employment and a substantial, steady income. Although the debtor argued that his situation might change, there is no evidence that his job status or income will change in the foreseeable future. The debtor currently has \$79.38 a month to devote to pay his creditors; that amount will increase to \$512.71 in June 2008 when the debtor finishes paying the insurance recoupment through payroll deductions. Therefore, assuming the debtor filed a chapter 13 plan today, he would have approximately \$27,000.00⁸ to devote to a chapter 13 plan that paid his creditors over a five year period. *See* 11 U.S.C. § 1322(d)(1) (making 60 months the plan commitment period for an above median income debtor). As the debtor's scheduled unsecured debt is only \$21,479.00, it is clear that the debtor can fund a chapter 13 plan. Based on these circumstances, the court concludes that the debtor's chapter 7 case is an abuse under § 707(b)(3)(B).

⁸ This total is based on seven months of payments in the amount of \$79.38 and 53 months of payments in the amount of \$512.71.

CONCLUSION

The UST's motion to dismiss under § 707(b)(3)(B) 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

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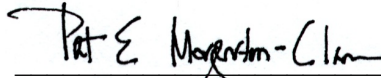
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 07-13500
)
ROBERT P. MARIANI,) 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 20).

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge