

IT IS SO ORDERED.



**Dated: November 02, 2007
12:52:59 PM**

**Honorable Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:

MICHELE L. NEWSOM,

Debtor.

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CASE NUMBER 07-40828

CHAPTER 7

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING U.S. TRUSTEE'S MOTION TO DISMISS
Not Intended for National Publication

The following memorandum opinion and order are not intended for national publication and carry limited precedential value. The availability of this opinion by any source other than www.ohnbuscourts.gov is not the result of direct submission by this Court. The opinion is available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This cause is before the Court on United States Trustee's Motion to Dismiss Case For Abuse ("Motion to Dismiss")(Doc. #11) filed by Saul Eisen, United States Trustee for Region 9 ("UST") on June 6, 2007. The Motion to Dismiss is premised upon § 707(b)(2) and (3). On June 8, 2007, Debtor Michelle Newsome ("Debtor") filed Debtor's Response to United States Trustee's Motion to Dismiss Case Pursuant to 11 U.S.C. Section 707(b)(2) and (b)(3) ("Response") (Doc. # 13).

The Court held an evidentiary hearing on the Motion to Dismiss on August 20, 2007 ("Hearing"). At the Hearing, UST waived any argument that Debtor's case is presumed abusive under 11 U.S.C. § 707(b)(2) in light of this Court's opinion in *In re Zak*, 361 B.R. 481 (Bankr. N.D. Ohio 2007)¹. UST limited his argument to § 707(b)(3) - *i.e.*, that the "totality of the circumstances" indicate Debtor's conduct in this case is an abuse of the bankruptcy system.

The Court received testimony at the Hearing from Debtor and Christopher Sonson, bankruptcy analyst in the office of UST. The Court also received and admitted the following exhibits: (i) UST Ex. 1, case docket; UST Ex. 2, collectively the petition and schedules; UST Ex. 3, Form 22A; UST Ex. 4, amended Summary of

¹In *Zak*, this Court held that "in applying the means test, the mere act of declaring an intent to surrender collateral . . . does not extinguish the right to deduct those payments[.]" *In re Zak*, 361 B.R. at 485. This Court also held that debtors were entitled to take the Local Standards vehicle ownership expense whether or not they were making payments on a vehicle. *Id.* at 488-89.

Schedules, Schedule J, Declaration Concerning Debtor's Schedules, Amended Form 22A, and Certificate of Service; Debtor's Ex. A, five checks to Jessica Ondrusek²; and Debtor's Ex. B, letter dated August 17, 2007, from John Ashton of Ashton Insurance regarding insurance for a 2007 Toyota RAV4 ("RAV4"). The Court, having considered all pleadings, arguments, testimony, and exhibits in this case, even if not specifically mentioned in this decision, and having reviewed the entire record in this case, finds that UST has not carried his burden of proof that the totality of the circumstances requires dismissal of Debtor's chapter 7 case.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. FACTS

On April 13, 2007 ("Petition Date"), Debtor filed: (i) voluntary petition pursuant to chapter 7 of the Bankruptcy Code; (ii) various schedules, including Schedules I and J; (iii) Form 8, Chapter 7 Individual Debtor's Statement of Intention

²Jessica Ondrusek is Debtor's daughter-in-law. The checks are numbered 523, 530, 535, and 540 and dated from April 18, 2007, through August 10, 2007.

("Statement of Intent"); and (iv) Form 22A, Chapter 7 Statement of Current Monthly Income and Means-Test Calculation ("Form 22A") (collectively, Doc. # 1). Before the Hearing, on June 28, 2007, Debtor filed amended Schedule J and amended Form 22A (Doc. # 19).

Debtor's Schedules show total assets of \$101,500.66, of which \$100,000.00 is the value of Debtor's former residence at 750 Indiana Ave., McDonald, Trumbull County, Ohio ("Real Property").³ Debtor's liabilities of \$155,456.00 include \$112,903.00 in secured debt and \$42,553.00 in unsecured nonpriority debt. Debtor does not list any priority unsecured debt. The secured debt relates entirely to the mortgage on the Real Property. Debtor's Statement of Intent sets forth her intention to surrender the Real Property. Debtor lists Beneficial (\$19,400.00) and HSBC Auto Finance for "Auto Loan Deficiency" (\$14,000.00) as her largest unsecured claims. The remainder of Debtor's unsecured debt is listed as "collections," "medical services," "phone services," "credit card," or "credit." At the Hearing, Debtor was unable to recall the circumstances of the Beneficial debt except to state that she incurred a portion of the debt to air condition her house in 2002.

Debtor is employed as a secretary for a construction company, and expects this employment to continue for the foreseeable future. In addition to gross income of \$2,600.00 per month from employment,

³On her Petition and at the Hearing, Debtor indicated she currently resides at 4243 Pembroke Dr., Austintown, Mahoning County, Ohio. Debtor testified that she has not occupied the Real Property since the end of December 2006.

Debtor lists income of \$1,068.00 from "Worker's Compensation Death Benefits" ("WC benefits") on line 11 of Schedule I. Debtor's average monthly income from line 16 of Schedule I, which has not been amended, is \$2,986.00.

Debtor's original Form 22A did not include the WC benefits as income, and UST's Motion to Dismiss focused on this issue in arguing for dismissal under § 707(b)(2). (Mot. to Dismiss ¶¶ 4-7.) As referenced above, UST waived the argument that a presumption of abuse arises under a § 707(b)(2)(A)(i).

UST does not argue that Debtor has filed her petition in bad faith. Rather, UST relies entirely on the totality of the circumstances of Debtor's financial situation in arguing that Debtor's case should be dismissed as abusive pursuant to § 707(b)(3). Unlike the means test analysis,⁴ in analyzing the totality of the circumstances, the Court may subjectively review Debtor's income and expenses based upon prepetition events and postpetition forecasts.

As originally filed, Debtor's Schedule J included \$1,200.00 and \$0.00, respectively, in mortgage and auto installment payments. In addition, Debtor included \$160.00 in property taxes, \$0.00 in

⁴See *In re Haar*, 360 B.R. 759, 767 (Bankr. N.D. Ohio 2007) ("The 'means test,' - although enacted as a device to ensure that debtors with an ability to pay their debts, would actually do so - is a strict mechanical test. Its function, in essence, is to limit the court's discretion." (internal citations omitted)); *In re Gress*, 344 B.R. 919, 922 (Bankr. W.D. Mo. 2006) ("In enacting the means test, Congress intended to take away discretion from the courts as to higher income debtors, who were seen as abusers of the system.").

auto insurance, and \$240.00 in transportation expenses on Schedule J. Debtor's Amended Schedule J (i) eliminated mortgage and property tax expenses, (ii) added \$410.00 for auto installments and \$184.00 for automobile insurance, (iii) increased her transportation expense from \$240.00 to \$300.00, and (iv) made several small dollar amount changes in her other expenses.⁵ Debtor testified that: (i) Ondrusek purchased a 2007 RAV4 for Debtor's exclusive use at or around the Petition Date, (ii) Debtor makes monthly payments to Ondrusek for the RAV4, and (iii) Debtor is responsible for insurance and maintenance of the RAV4. As discussed more fully later in this Opinion, Debtor was unable to explain why her 1999 Chevy S-10 and 2005 Ford F-150 were not listed in her schedules, and her testimony at the Hearing was similarly confused about when these vehicles were repossessed.

UST's argument for dismissal under § 707(b)(3) focused on Debtor's vehicle expenses, including insurance. UST specifically argued that Ondrusek's purchase of the RAV4 for Debtor's use constituted abuse of the bankruptcy system.

⁵For example, Debtor increased her water and sewer expense from \$42.00 to \$80.00, her food expense from \$200.00 to \$250.00, and reduced her homeowner's or renter's insurance expense from \$58.00 to \$54.00. Debtor also increased laundry and dry cleaning expenses by \$20.00, and added \$50.00 in pet care expenses to bring her miscellaneous expense total on line 17 of Amended Schedule J to \$350.00.

II. ANALYSIS

Section 707 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") provides for dismissal of a chapter 7 case for abuse. A presumption of abuse may arise based upon a detailed calculation of the debtor's income and expenses over the course of the six-month period preceding the petition date - commonly referred to as the "means test." See 11 U.S.C. § 707(b)(2) (West 2007).

In the event the means test does not give rise to a presumption of abuse, or the presumption is successfully rebutted by the debtor, § 707(b)(3) provides an alternative rationale for dismissing the debtor's chapter 7 petition:

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 . . . of the debtor's financial situation demonstrates abuse.

11 U.S.C. § 707 (West 2007).

"[T]he two grounds for dismissal under § 707(b)(3) are best understood as a codification of pre-BAPCPA case law[,] and as such, pre-BAPCPA case law applying these concepts is still helpful in determining whether there is abuse pursuant to § 707(b)(3). In

re Wright, 364 B.R. 640, 643 (Bankr. N.D. Ohio 2007); accord *In re Mestemaker*, 359 B.R. 849 (Bankr. N.D. Ohio 2007), and *In re Simmons*, 357 B.R. 480 (Bankr. N.D. Ohio 2006). However, Congress has changed the standard for dismissal under BAPCPA from "substantial abuse" to "abuse." *In re Fisher*, 2007 WL 2079781 at *2 (Bankr. N.D. Ohio 2007)("[U]nder BAPCPA, Congress has clearly lowered the standard for dismissal in changing the test from 'substantial abuse' to 'abuse.'"); *In re Wright*, 364 B.R. at 642 ("[A] debtor's Chapter 7 case may [now] be dismissed for just 'abuse,' as opposed to 'substantial abuse'").

The Sixth Circuit, interpreting pre-BAPCPA § 707(b), held that Congress intended to deny chapter 7 relief to the "dishonest or non-needy debtor." *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989). The *Krohn* Court reasoned that a debtor's ability to repay his debts out of future earnings may be sufficient to warrant dismissal based upon lack of need, particularly "where [a debtor's] disposable income permits liquidation of his consumer debts with relative ease." *Id.*, See also *Mestemaker*, 359 B.R. at 856 (Bankr. N.D. Ohio 2007)("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."). Other factors to be considered in determining whether a debtor is "needy" 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 126-127.

Courts and commentators alike have recognized that the § 707(b)(3) "totality of the circumstances" analysis requires a bankruptcy court to undertake an analysis of a debtor's "actual debt paying ability" independent of the means test analysis under § 707(b)(2). *In re Mestemaker*, 359 B.R. at 853-56. As Judge Wedoff, Bankruptcy Judge for the Northern District of Illinois, wrote in the introduction to his leading article on the subject:

[I]f a section 707(b) motion properly raises the question, a bankruptcy judge has a duty to consider the actual financial situation of a debtor who is not subject to a means test presumption; . . . the judge should find abuse where the debtor can repay a sufficient amount of unsecured debt[.] . . . [T]he means test serves to guide, rather than foreclose, such determinations of abuse.

Hon. Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under Section 707(b)(3)*, 71 Mo. L. Rev. 1035, 1037 (2006). The Court's analysis of the totality of the circumstances also allows it to consider both prepetition and postpetition circumstances of the Debtor. *In re Fisher*, 2007 WL 2079781 at *2 (citing *Trustee v. Cortez (In re Cortez)*, 457 F.3d 448, 455 (5th Cir. 2006)); *In re*

Mestemaker, 359 B.R. at 855-56; *In re Hartwick*, 359 B.R. 16, 21 (Bankr. D.N.H. 2007).

Congress also eliminated the pre-BAPCPA express statutory presumption in favor of granting debtor the requested relief. Neither party enjoys a presumption concerning abuse in a post-BAPCPA § 707(b) analysis. See *In re Nockerts*, 357 B.R. 497, 505 (Bankr. E.D. Wis. 2006) ("The UST does not enjoy the benefit of a presumption of abuse when pursuing a § 707(b)(3) motion."); *In re Wright*, 364 B.R. at 642 (Congress eliminated in BAPCPA the presumption in favor of the debtor, which existed in former § 707(b)). As the party bringing the Motion to Dismiss, therefore, UST carries the burden of proof to demonstrate that dismissal is appropriate under § 707(b)(3). *In re Graham*, 363 B.R. 844, 853 (Bankr. S.D. Ohio 2007); *In re Wright*, 364 B.R. at 642.

A. Debtor's Debts are Primarily Consumer Debts

The Court first finds that UST met the initial threshold under § 707(b)(1) by establishing that Debtor's debts are primarily consumer debts. On her petition Debtor indicated that her "[d]ebts are primarily consumer debts . . . incurred by an individual primarily for a personal, family, or household purpose" by checking the corresponding box. (UST Ex. 2-1.) Further, upon direct examination by UST, Debtor affirmed her debts were primarily consumer debts.

B. Debtor's Vehicle Ownership and Insurance Expenses

Debtor's testimony regarding her vehicles was at times unclear, but she appeared forthright throughout and simply confused rather than deceptive. When UST questioned Debtor about the Ford F-150 and Chevy S-10 that she owned on the Petition Date, her testimony was consistent, although confusing at times. Although Debtor testified that the two trucks were repossessed "last year," she nevertheless steadfastly maintained she possessed these two vehicles on the Petition Date, despite failing to list them (or the related secured debts) on Schedules B or D.⁶ Debtor appeared honestly confused about the failure to list these vehicles on her schedules, repeatedly stating she "filed on everything, . . . on my house, my vehicles, my credit cards, everything."

Although her testimony was similarly inexact about the date, Debtor was clear that, either shortly before or after filing her petition, she "purchased" the RAV4.⁷ UST argues that the Court should view this purchase as being excessive, as well as "on the eve of bankruptcy." As a consequence, UST argued that, pursuant to

⁶At one point during the Hearing, Debtor testified that the Ford was repossessed in June or July 2006, almost one year prior to the Petition Date. Upon further questioning by UST, Debtor stated both trucks were repossessed after the Petition Date, the Ford in June or July, and the Chevy "before the Ford."

⁷Ondrusek, Debtor's daughter-in-law, is the titled owner of the RAV4; however, it is uncontested that (i) the vehicle was purchased for Debtor's exclusive use, (ii) Debtor pays Ondrusek \$410.00 per month for the RAV4, and (iii) Debtor keeps the RAV4 insured and maintained. UST argued, and the Court agrees, that this is functionally equivalent to Debtor's purchase of the vehicle for herself. In fact, Debtor should have listed Ondrusek as an unsecured, nonpriority creditor in her schedules.

Krohn, Debtor has abused the bankruptcy process. UST alternatively argued that, knowing she was going to file for chapter 7 relief, Debtor could have purchased a less expensive car, which would have left money for her to repay creditors.

Debtor testified that she needs a safe and reliable car to get to work. She further testified that she considered other cars, but she found the RAV4 to be both "good on gas" and safe, which were features that caused her to purchase the RAV4. Debtor proclaimed an ability to pay Ondrusek \$410.00 per month for the car for the foreseeable future.

The Court finds that Debtor requires a vehicle to travel to and from work and, thus, maintain her employment. UST argued throughout the Hearing that IRS standards used in means test computations provide an upper "reasonableness" limit for Debtor's expenses. Debtor's car payment of \$410.00 falls below the IRS standards for vehicle ownership costs of \$471 for one vehicle. Although UST argued that Debtor could have purchased a less expensive vehicle, UST offered no evidence concerning expenses associated with any other vehicle or that any other vehicle was available to Debtor. Therefore, this Court does not find Debtor's purchase of the RAV4 to be unreasonable or abusive in light of the totality of the circumstances.

UST focused separately on Debtor's automobile insurance expense of \$184.00 from line 11(d) of Schedule J. Specifically,

UST argued that the \$184.00 expense Debtor claimed for insurance should have been listed as \$120.00.

UST questioned both Debtor and Sonson in an attempt to establish that the actual amount of Debtor's monthly insurance payments is (or should be) \$120.00 per month, which would free an additional \$64.00 for Debtor to repay creditors. UST focused on page two of Debtor's Ex. B, which listed a \$162.00 premium increase. Sonson testified that this increase would result in about a \$15.00 per month change in Debtor's insurance payment, for a total payment of approximately \$120.00 per month.⁸ While it is true, as Sonson testified, that a premium increase of \$162 per year (Debtor's Ex. B, pp. 2-3), would equal a monthly increase of less than \$15.00, Debtor's Ex. B also shows a monthly payment due of \$185.00 (Debtor's Ex. B, p. 6). Furthermore, Debtor's Ex. B consists of a patchwork of bills, letters, statements, and payment notices. This Court cannot, based on the testimony and Debtor's Ex. B, find that the \$184.00 expense on line 11(d) of Schedule J is not the actual amount Debtor pays for insurance.

C. UST's Remaining Arguments Regarding the Reasonableness of Debtor's Expenses

UST further argued that Debtor's transportation expenses and miscellaneous expenses exceed the IRS standards used in means test

⁸Both sides apparently agree that, although not originally scheduled, Debtor's insurance premiums were \$104.00 per month.

calculations to determine presumed abuse. UST contended that Debtor would have disposable income to repay creditors if she reduced those expenses to amounts within IRS Standards. Therefore, UST argued, Debtor's filing should be found to be abusive.

IRS Standards, however, are just that - mandatory standards for completing the means test, but simply a guide for the court to use in its evaluation of the totality of the circumstances of a Debtor's filing. See *In re Haar*, 373 B.R. 493, 501 (Bankr. N.D. Ohio 2007) ("The 'means test' . . . is a strict mechanical test, while § 707(b)(3)'s approach is grounded in equity.").

Debtor's transportation expense of \$300.00 is \$25.00 more than the IRS standard of \$275.00 for one vehicle. Although Debtor lists \$350.00 in miscellaneous expenses, her undisputed testimony was that she actually spends even more than the \$250.00 she allocates for cigarettes - "I smoke two cartons a day, \$41.00 a carton, \$320.00 a month." Debtor's other amounts in this category appear to be reasonable, *i.e.*, \$50.00 for pet care and \$50.00 for personal grooming. Thus, the Court's examination of Debtor's transportation and miscellaneous expenses does not result in a finding that Debtor's filing is an abuse of the bankruptcy system.

As a final point, this Court was only minimally troubled by Debtor's lack of recall on several issues at the Hearing, because it believes Debtor's confusion to be genuine and not contrived. Debtor's lack of information in response to UST's questioning

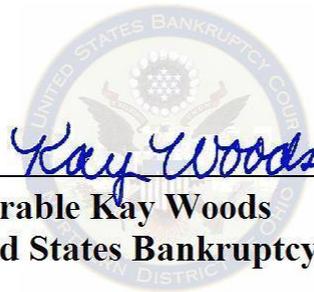
appeared in some instances to be due to a lack of sophistication and knowledge of the bankruptcy process, as well as Debtor's claimed poor memory for dates and times. The Court had the opportunity to observe Debtor during her testimony at the Hearing, and from her appearance and demeanor, Debtor appeared to be truthful and genuinely attempting to recall events.

III. CONCLUSION

The Court finds that, based on the totality of the circumstances, as required by § 707(b)(3), Debtor's conduct does not demonstrate an abuse of the provisions of the Bankruptcy Code. Accordingly, the Motion to Dismiss is denied. An appropriate Order will follow.

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IT IS SO ORDERED.



Dated: November 02, 2007
12:52:59 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

MICHELE L. NEWSOM,

Debtor.

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CASE NUMBER 07-40828

CHAPTER 7

HONORABLE KAY WOODS

ORDER DENYING UNITED STATES TRUSTEE'S MOTION TO DISMISS CASE FOR
ABUSE

For the reasons set forth in this Court's Memorandum Opinion entered on this date, United States Trustee's Motion to Dismiss Case for Abuse is hereby denied.

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