

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
2008 SEP -5 PM 2:10  
CLERK U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re: ) Case No. 08-12703  
)  
MARK A. HENDRICKS, ) Chapter 7  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
) **MEMORANDUM OF OPINION**

The United States trustee moves to dismiss this chapter 7 case for abuse under 11 U.S.C. §§ 707(b)(2) and (b)(3)(B). The debtor Mark Hendricks opposes the motion. For the reasons stated below, the motion is granted under 11 U.S.C. § 707(b)(3)(B).<sup>1</sup>

**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 (L).

**ISSUES**

Did the United States trustee meet his burden of proving (1) that the presumption of abuse arises, or (2) that the totality of the debtor's financial situation shows that granting him a discharge would be an abuse of chapter 7 relief?

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<sup>1</sup> In the court's view, the value of this opinion is to decide the dispute between the parties, rather than to add anything to the general bankruptcy jurisprudence. For that reason, the opinion is not intended for commercial publication.

## **PROCEDURAL HISTORY**

The debtor filed his chapter 7 case on April 15, 2008. On May 14, 2008, the United States trustee (UST) filed his motion to dismiss for abuse, to which the debtor objected, and the UST replied.<sup>2</sup> The court held an evidentiary hearing. Shortly before the hearing, the debtor filed amended schedules E and F, as well as an amended form 22A.<sup>3</sup>

## **THE EVIDENTIARY HEARING**

The UST presented his case through the cross-examination of the debtor and the testimony of Christopher Sonson, an analyst in the UST's office, as well as through documents. The debtor presented his case through his own testimony, cross-examination of Mr. Sonson, and documents.

These findings of fact are based on that evidence and reflect the court's weighing of the evidence presented, 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." *In re The V Companies*, 274 B.R. 721, 726 (Bankr. N.D. Ohio 2002). *See* FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P. 52 and applicable in 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:

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<sup>2</sup> Docket 10, 14, 15, 16, 18, 22, 25.

<sup>3</sup> Docket 26.

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] say[s] with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.

*United States v. Trogdon (In re Trogdon)*, 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990) (internal citations and quotation marks omitted).

## FACTS

### **A. The Debtor's Prepetition Money Management**

#### ***1. The Debtor's Employment and Income***

The debtor is divorced with no dependents. He has been employed as a machine operator at least for the past two years with an approximate salary of \$53,000.00 per year, which results in \$4,450.00 in gross monthly income. The debtor had \$53,000.00 in gross income in 2007 and \$48,000.00 in gross income in 2006.<sup>4</sup> He received only a nominal tax refund of \$44.00 for 2007, which was claimed as exempt.<sup>5</sup> The debtor anticipates receiving a possible cost of living increase in his wages in the near future.

#### ***2. The Debtor's Unsecured Debt***

The debtor scheduled \$36,078.42 in unsecured debt.<sup>6</sup>

#### ***3. The Debtor's Secured Debt***

The debtor scheduled \$124,242.96 in secured debt, comprised of a note secured by a

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<sup>4</sup> Statement of Financial Affairs ¶ 1.

<sup>5</sup> Schedules B, C.

<sup>6</sup> Schedule F.

mortgage on the debtor's residence and liens on two vehicles: a 2002 Chevrolet Cavalier and a 1997 Ford Taurus.<sup>7</sup> The debtor owns his house jointly with his former spouse, and intends to remain there. He is nearly current on the mortgage payments, and believes he can afford the house going forward. He plans to keep both vehicles.

#### ***4. The Debtor's Tax Debt***

The debtor owes money to the City of Parma Division of Taxation for his 2003, 2004, and 2006 taxes.<sup>8</sup> The total amount scheduled is \$6,834.27.

#### **B. The Debtor's Expenses**

##### ***1. The Vehicles***

The debtor uses the 2002 Cavalier, which is titled in his name, for day-to-day transportation. He owns the Cavalier subject to a lien held by JD Byrider, and claims both the ownership/lease cost and operating/public transportation cost for it under the IRS Local Standards. In addition, the debtor maintains a 1997 Taurus which is titled in his former spouse's name. Since January 2008, the Taurus has been sitting in his driveway, inoperable, because it has a broken axle and the debtor cannot afford the \$1,000 estimated repairs. The Taurus is encumbered by a CitiFinancial lien in the approximate amount of \$7,110.00 as of the petition date, for which the debtor and his former wife are both liable. Although the debtor's statement of intent says that the Taurus is to be surrendered, and it is not necessary for him to drive it to work, he testified that he must keep it because he is obligated under his divorce decree to pay the CitiFinancial debt. The debtor has not, however, made any payments on that debt since the

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<sup>7</sup> Schedule D.

<sup>8</sup> Statement of Financial Affairs ¶ 4; Schedule E.

petition date. The debtor claimed the ownership/lease and operating/public transportation costs for the Taurus on form 22A.

**2. *The 401(k) Contribution, Telecommunications Expense, and Emergency Reserve***

The debtor voluntarily contributes about \$220.00 a month to his 401(k) account and spends \$165.00 per month on telecommunications. He also saves \$60.00 per month for an “emergency reserve,” to pay for items that end up being “over-budget” for the month.<sup>9</sup>

**THE POSITIONS OF THE PARTIES**

The UST moves to dismiss under § 707(b)(2) arguing that the debtor has disposable income in excess of \$182.50 per month, the statutory limit for triggering the presumption of abuse. Although the debtor “passed” the means test with negative disposable income, the UST claims the debtor’s form 22A contains improper and excessive expenses. Specifically, the UST objects to the debtor’s ownership/lease cost and operating/public transportation cost for the Taurus, the debt payment for the Taurus, the 401(k) contribution, and the telecommunications expense. Not only is the Taurus not titled in the debtor’s name, the UST argues, the debtor has admittedly not been making the payments to CitiFinancial since the petition date. Further, the UST claims a single debtor is not permitted to have two vehicles under the Internal Revenue Manual (IRM)<sup>10</sup>. If such improper expenses were removed, the UST claims the debtor would have positive income in excess of the § 707(b)(2) threshold, and his case would be presumed to

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<sup>9</sup> Schedule J.

<sup>10</sup> The IRM is the Financial Analysis Handbook of the Internal Revenue Service, applied in the revenue collection process to evaluate a taxpayer’s ability to pay, subject to the discretion of the revenue officer evaluating the taxpayer’s expenses. *See Hildebrand v. Kimbro (In re Kimbro)*, 389 B.R. 518, 524-25 (B.A.P. 6th Cir. 2008).

be an abuse. The UST also moves to dismiss under § 707(b)(3) based on the totality of the debtor's financial circumstances, including his stable job, eligibility for chapter 13 relief, and earning ability. Because of these circumstances, the UST claims that granting the debtor relief would be an abuse of chapter 7.

The debtor replies that he is entitled to take the ownership/lease cost and operating/public transportation cost under the IRS standards for both the Cavalier and the Taurus. Further, even though the Taurus is not titled in the debtor's name, he claims an interest in it under his divorce decree.<sup>11</sup> He concludes that he has no ability to pay his creditors; therefore, he should receive a chapter 7 discharge.

### DISCUSSION

Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), 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 a debtor would be an abuse of the provisions of chapter 7. 11 U.S.C. § 707(b)(1). An abuse may arise by presumption under § 707(b)(2) if a debtor has disposable income in excess of \$182.50 per month according to the form 22A (the means test). Abuse may also be found under § 707(b)(3) if a debtor filed his petition in bad faith, or where the totality of the circumstances of a debtor's financial situation demonstrates abuse. 11 U.S.C. § 707(b)(3)(A), (B). The UST has the burden of proof by a preponderance of the evidence. *In re Edighoffer*, 375 B.R. 789, 793 (Bankr. N.D. Ohio 2007).

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<sup>11</sup> The debtor testified that he had both a separation agreement and a divorce decree. However, a divorce decree or a decree of dissolution incorporating a separation agreement have the same effect on the division of property.

**A 11 U.S.C. § 707(b)(2)**

A statutory presumption of abuse may arise in a chapter 7 case under 11 U.S.C.

§ 707(b)(2)(A)(I), which provides:

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 \$6,575, whichever is greater; or
- (II) \$10,950.

On its face, the debtor's form 22A shows that the presumption of abuse does not arise because his current monthly income as stated on line 50 is negative. The UST objected that the vehicle expenses for the Taurus, 401(k) contribution, telecommunications expense, and debt payment for the Taurus should not be deducted from income and that when those deductions are eliminated, the debtor has income to devote to his creditors. The debtor apparently agreed with part of this objection because he filed an amended form 22A<sup>12</sup> in which he eliminated the expense deduction for his 401(k) contribution and reduced his telecommunications expense to \$40 per month, the figure suggested by the UST. Form 22A as amended still shows that a presumption of abuse does not arise. The remaining, and dispositive issue, then, is whether the debtor properly claimed the Taurus expenses (operating/public transportation costs, the ownership/lease costs, and debt payment). The UST contends that the Taurus expenses cannot be deducted from income because (1) that vehicle is not titled to the debtor, and (2) the IRM does not permit a single debtor to deduct expenses for two vehicles. If the UST's position is correct and the expenses are

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<sup>12</sup> Docket 26.

disallowed, then the debtor has income which exceeds the threshold of § 707(b)(2), and the case should be dismissed as an abuse.

***1. The Taurus is held in Constructive Trust for the Debtor's Benefit***

Property interests in bankruptcy are determined by state law. *Butner v. U.S.*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979). The UST argues that under Ohio revised code § 4505.04, a certificate of title is conclusive evidence of motor vehicle ownership; and, without title, the debtor does not own the Taurus. However, the Sixth Circuit has held that § 4505.04 “does not preclude the existence of constructive trusts with regard to the ownership of such vehicles.” *U.S. v. Birns*, 395 F.2d 943, 947 (6th Cir. 1968); *but see In re Caddarette*, 362 B.R. 829, 837 (Bankr. N.D. Ohio 2006) (§ 4505.04 controlling as to rival claimants of vehicle ownership). A constructive trust exists under Ohio law against one who obtains or “holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.” *Morris v. Poss (In re Morris)*, 260 F.3d 654, 667 (6th Cir. 2001) (citing *Ferguson v. Owens*, 9 Ohio St.3d 223, 459 N.E.2d 1293, 1295 (1984)). For such a trust to be recognized in a bankruptcy case, a court must have imposed the trust on the assets pre-petition. *Amedisys, Inc. v. Nat'l Century Fin. Enterprises, Inc. (In re Nat'l Century Fin. Enterprises, Inc.)*, 423 F.3d 567, 575 (6th Cir. 2005); *XL/Datacomp, Inc. v. Wilson (In re Omegas Group, Inc.)*, 16 F.3d 1443, 1449 (6th Cir. 1994); *Bavely v. Powell (In re Baskett)*, 219 B.R. 754, 761 (B.A.P. 6th Cir. 1998). A constructive trust may arise by operation of law “where there is a valid Domestic Relations Court order predating the bankruptcy,” to convey property to the debtor. *See McCafferty v. McCafferty (In re McCafferty)*, 96 F.3d 192, 198 (6th Cir. 1996) (citing *In re McGraw*, 176 B.R. 149, 151-52 (Bankr. S.D. Ohio 1994)). Accordingly, a state court divorce decree that requires

one party to transfer title to another creates a constructive trust in favor of the beneficiary by operation of law.

The only evidence offered on this issue was the debtor's testimony, which the court finds to be credible. According to that testimony, while the certificate of title to the Taurus names the debtor's former spouse as the owner, the Taurus is located at the debtor's residence and the debtor plans to return it to operable condition once he has the means to do so. The debtor was awarded the Taurus by the divorce decree, and his former spouse was required to transfer title to him, but did not. The debtor is also legally obligated to pay the debt secured by the Taurus under his divorce decree. Based on (1) the divorce decree entered in the state court before the petition date requiring transfer of legal title in the Taurus to the debtor, (2) the former spouse's failure to comply with the court order; (3) the debtor's equitable ownership of the vehicle, and (4) the debtor's legal obligation to pay the debt, the court finds that the debtor's former spouse holds legal title to the Taurus in constructive trust for the debtor's benefit, and that this trust relationship existed before the debtor filed his bankruptcy case. As a result, the Taurus is property of the debtor's bankruptcy estate, and the debtor may deduct all appropriate expenses for this vehicle.

## ***2. The Inapplicability of the IRM***

The UST further objects to the debtor's deductions for the Taurus as a second vehicle, because the debtor has a household size of one. The cases cited by the UST sanctioning use of the IRM in evaluating the means test provide no rationale for its use in bankruptcy. *In re Aprea*, 368 B.R. 558, 564 (Bankr. E.D. Tex. 2007); *In re Turner*, 376 B.R. 370, 379 (Bankr. D.N.H. 2007). In contrast, the court finds persuasive those cases permitting expense deductions by a

single debtor for two vehicles, based upon the language of § 707(b). See *In re Barrett*, 371 B.R. 860, 863 (Bankr. S.D. Ill. 2007); *In re Zavorski*, 366 B.R. 758, 767-69 (Bankr. E.D. Mich. 2007). Further, the court agrees with the reasons set forth in *Kimbrow*, *supra*, holding that the IRM is inapplicable in bankruptcy. Accordingly, the UST's objection based on application of the IRM is overruled. Based upon *Kimbrow*, *Barrett*, and *Zavorski*, the court finds that the debtor may properly claim the vehicle expenses on the means test for the two vehicles that he owns, regardless of household size. As a result, the presumption of abuse under 11 U.S.C. § 707(b)(2) does not arise, and the portion of the UST's motion to dismiss based upon that subsection must be denied.

**B. 11 U.S.C. § 707(b)(3)(B)**

The UST also relies on the totality of the debtor's financial situation prong found in 11 U.S.C. § 707(b)(3)(B) to urge dismissal of the debtor's case. Pre-BAPCPA, a chapter 7 case could be dismissed as a substantial abuse of the system if the court found that a debtor was not needy or was dishonest. *In re Krohn*, 886 F.2d 123, 126-27 (6th Cir. 1989). The factors used to determine whether a debtor was needy before BAPCPA are relevant to determining whether the totality of a debtor's financial situation demonstrates abuse under BAPCPA. *In re Mestemaker*, 359 B.R. 849, 856 (Bankr. N.D. Ohio 2007). Those factors include, but are not limited to:

1. the debtor's ability to repay debts out of future earnings, based upon a hypothetical chapter 13 plan;
2. whether the debtor has a stable source of future income;
3. whether the debtor is eligible for chapter 13;
4. whether there are state remedies available to the debtor;
5. whether the debtor can obtain relief through private negotiations; and
6. 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). Despite an ability to pay, other factors may warrant dismissal. *Id.* at 438. Courts may consider the debtor's circumstances both before and after the bankruptcy filing. *In re Toney*, No. 07-30637, 2007 WL 2417335, at \*3 (Bankr. N.D. Ohio Aug. 20, 2007).

Examining the factors set forth in *Behlke*, the totality of the debtor's financial situation under § 707(b)(3)(B) demonstrates abuse. The debtor has relatively stable income, as shown by the last two and half years of income reported in the Statement of Financial Affairs, and the debtor's own admission. The debtor may also receive an annual cost of living increase of his above median income salary. Further, based upon the debt limits of § 109(e), he is eligible to be a debtor under chapter 13 of the Bankruptcy Code because he is an individual with regular income who owes less than the statutory limits for non-contingent, liquidated unsecured and secured debt. The debtor also maintains expenses for his 401(k) contribution and emergency fund which, if eliminated, would not deprive him of basic necessities such as food, clothing or shelter. In addition, the debtor originally attempted to manipulate the means test to include his *voluntary* 401(k) contribution, which is specifically excluded as a deduction from income. The totality of the debtor's financial situation demonstrates that granting him a chapter 7 discharge

would be an abuse of chapter 7 relief.

**CONCLUSION**

For the reasons stated, the presumption of abuse under § 707(b)(2) does not arise, and the portion of the UST's motion seeking dismissal on that ground is denied. Based upon the totality of the debtor's financial situation, however, the UST's motion to dismiss under § 707(b)(3)(B) is granted. Within 10 days after the date on which this opinion is entered, the debtor may if he chooses file a motion to convert to chapter 13. Absent that action, this chapter 7 case is dismissed. A separate order will be entered based on this decision.



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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

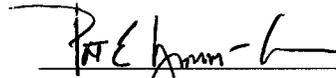
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In re: ) Case No. 08-12703  
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MARK A. HENDRICKS, ) Chapter 7  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
) **ORDER GRANTING MOTION TO**  
) **DISMISS UNDER 11 U.S.C. § 707(b)(3)**

For the reasons set forth in the separate memorandum of opinion, the United States trustee's motion to dismiss this chapter 7 case for abuse is denied under 11 U.S.C. § 707(b)(2), and is granted under 11 U.S.C. § 707(b)(3)(B).

IT IS SO ORDERED.

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge