Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 08-32716
	)	
Jean A. Hosinski	)	Chapter 7
	)	
Debtor.	)	
	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION REGARDING MOTION TO DISMISS

This case is before the court on the United States Trustee's ("the UST") motion to dismiss Debtor's Chapter 7 case for abuse under 11 U.S.C. § 707(b)(1) and (3) [Doc. # 14] and Debtor's response [Doc. # 19]. The court held a hearing on the motion that Debtor, her counsel and counsel for the UST attended in person and at which the parties presented testimony and other evidence in support of their respective positions. The district court has jurisdiction over this Chapter 7 case pursuant to 28 U.S.C. § 1334(a) as a case under Title 11. It has been referred to this court by the district court under its general order of reference. 28 U.S.C. § 157(a); General Order 84-1 of the United States District Court for the Northern District of Ohio. Proceedings to determine a motion to dismiss a case under § 707(b) are core proceedings that this court may hear and decide. 28 U.S.C. § 157(b)(1), (b)(2)(J) and (O).

Having considered the briefs and arguments of counsel and having reviewed the record in this case, for the reasons that follow, the court will grant the UST's motion and dismiss Debtor's Chapter 7 case unless she converts it to Chapter 13.

BACKGROUND

Debtor is a single mother of four children, ages 10, 12, 13, and 16. She and her ex-husband have a shared parenting arrangement such that her children reside in her home every other week. Debtor is employed by Eli Lilly & Company as a pharmaceutical sales representative where she has worked for approximately one year. Although she describes jobs in the pharmaceutical industry as somewhat "precarious," she does not anticipate any layoffs in the near future.

On May 28, 2008, Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code, stating that her debts are primarily consumer debts. Her Schedule D shows total secured debt in the amount of $197,700, which includes home mortgage debt and a $1,200 debt secured by a bedroom set. She is current on her payments on two mortgages on her home and has stated an intention to reaffirm her mortgage debt. [*See* UST Ex. 2-30]. Her bankruptcy schedules also show assets totaling $7,656, including an interest in a 403(b) plan valued at $5,000 and minimal non-exempt assets, no unsecured priority debt and unsecured nonpriority debt in the amount of $57,763.41, consisting entirely of credit card debt. Debtor testified that she disputes a portion of her credit card debt because she was only an authorized user and was not named as an obligor on the account. She also testified that, in connection with her divorce in 2006, the domestic relations court ordered her ex-husband to pay a portion of the credit card debt shown on her bankruptcy schedules. According to Debtor, he has since filed for bankruptcy relief and has received a Chapter 7 discharge.

Debtor's amended Schedule I shows that she receives child support payments in the amount of $720 per month and total monthly wages after payroll deductions, which include only payroll taxes and social security, in the amount of $4,832.92, for a combined total of $5,552.92 per month. However, Debtor testified at the hearing that there are additional monthly payroll deductions in the amount of $260 for medical insurance and $386.88 for contributions to a 401(k) plan. Debtor offered a second amended Schedule I at the hearing setting forth these deductions and showing an increase in her monthly wages, resulting in net monthly take home pay in the amount of $4,433.88 . [Debtor's Ex. A]. With these adjustments, Debtor's total monthly income after payroll deductions and including child support is $5,153.88. In addition, Debtor testified that she receives quarterly bonuses if she makes certain quotas. In the past year, Debtor has succeeded in reaching those quotas and has received approximately $1,000 per quarter.

Debtor has filed several versions of Schedule J, with her total monthly expenses ranging from $4,232 in her original Schedule J to $5,357 in her second amended Schedule J. In a reaffirmation agreement signed

by Debtor with respect to her automobile lease, she states that her actual current monthly expenses are only $4,558. [UST Ex. 6-8]. According to her second amended Schedule J, the last version filed, Debtor's monthly expenses include, among other things, total mortgage expenses of $2,000, expenses of $350 for home maintenance, $800 for food, $500 for clothing, an automobile lease expense of $242, and an installment payment of $50 on the $1,200 debt secured by furniture. By comparison, Debtor's original Schedule J shows monthly expenses of only $290 for home maintenance, $550 for food, and $200 for clothing.

Debtor's Form B22A shows that, based on her earnings over the six month period before filing, her annualized current monthly income was $83,040, which is above the applicable median income of $77,432 for a family of five in Ohio. No presumption of abuse arose under § 707(b)(2) after the calculation of allowed deductions. Instead, the UST filed a timely motion to dismiss for abuse under § 707(b)(3) based on the totality of the circumstances.

LAW AND ANALYSIS

This case must be decided under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, ("BAPCPA" or "the Act") because it was filed on May 28, 2008, after the effective date of the Act. Where debts are primarily consumer debts, the court may, after notice and a hearing, dismiss a Chapter 7 petition "if it finds that the granting of relief would be an abuse of the provisions of [Chapter 7]." 11 U.S.C. § 707(b)(1). Before BAPCPA, courts considered whether to dismiss a case for "substantial abuse" under § 707(b) based on the "totality of the circumstances." *See, e.g., In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989); *In re Price*, 353 F.3d 1135, 1139 (9th Cir. 2004). The Sixth Circuit explained that "substantial abuse" could be predicated upon either a lack of honesty or want of need, to be determined by the totality of the circumstances. *Krohn*, 886 F.2d at 126. Congress incorporated this judicially created construct in § 707(b)(3) by requiring a court to 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(b)(3)(A) and (B). Although pre-BAPCPA case law applying these concepts is still helpful in determining abuse under § 707(b)(3), under BAPCPA Congress has lowered the standard for dismissal in changing the test from "substantial abuse" to "abuse." *In re Mestemaker*, 359 B.R. 849, 856 (Bankr. N.D. Ohio 2007).[1]

[1] As this court noted in an earlier opinion:
While Congress has clearly lowered the dismissal standard, articulation of what that change really means in decision-making in a particular case is a slippery enterprise at best. A totality of circumstances amounting to substantial abuse would obviously also amount to abuse. The converse is not necessarily true. Perhaps more

The UST contends that the totality of the circumstances show that Debtor is not needy and that she has the ability to repay a significant portion of her unsecured debt. A debtor is "needy" when "[her] financial predicament warrants the discharge of [her] debts" in a Chapter 7 case. *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 434 (6th Cir. 2004). Factors relevant to determining whether a debtor is "needy" include the ability to repay debts out of future earnings, which alone is sufficient to warrant dismissal under some circumstances. *Krohn*, 886 F.2d at 126. Other factors include "whether the debtor enjoys a stable source of future income, whether she is eligible for adjustment of her debts through Chapter 13 of the Bankruptcy Code, whether there are state remedies with the potential to ease her financial predicament, the degree of relief obtainable through private negotiations, and whether her expenses can be reduced significantly without depriving her of adequate food, clothing, shelter and other necessities." *In re Bender*, 373 B.R. 25, 30 (Bankr. E.D. Mich. 2007); *In re Burge*, 377 B.R. 573, 577 (Bankr. N.D. Ohio 2007); *see Krohn*, 886 F.2d at 126. "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." *Mestemaker*, 359 F.3d at 856 (citing *In re Behlke*, 358 F.3d 429, 435 (6th Cir. 2004)).

In arguing that Debtor has the ability to pay a significant portion of her unsecured debt, the UST asserts that deductions from Debtor's income for a voluntary monthly 401(k) plan contribution should be considered income available to fund a Chapter 13 plan. In *Behlke*, the Sixth Circuit affirmed the bankruptcy court's decision dismissing a Chapter 7 case as substantial abuse of the provisions of that chapter, finding that the debtors' voluntary 401(k) contributions in the amount of $460 per month were not necessary for the maintenance and support of the debtors or their dependents and, therefore, should be included as disposable income for purposes of determining their ability to pay their creditors out of future earnings. *Behlke*, 358 F.3d at 435-36. In so finding, the court considered the fact that the debtors had accumulated retirement savings as well as other personal and real property of potentially significant future value. *Id.* at 436. In *In re Tucker*, 389 B.R. 535 (Bankr. N.D. Ohio 2008), this court addressed the precedent established by *Behlke* and concluded that it, as well as the plain language of § 707(b)(3), requires consideration of the totality of the debtor's individual circumstances in determining whether a debtors' 401(k) contributions are reasonably necessary. *See Tucker*, 389 B.R. at 540-41 (citing *In re Beckerman*, 381 B.R. 841, 848-49

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telling legislative evidence of a Congressional intent that bankruptcy courts should now afford less deference to a debtor's choice of Chapter 7 relief is the elimination from amended § 707(b) of the language in former § 707(b) stating that "[t]here shall be a presumption in favor of granting the relief requested by the debtor." *In re Carney*, No. 07-31690, 2007 WL 4287855, *2, 2007 Bankr. LEXIS 4100, *7 (Bankr. N.D. Ohio December 5, 2007).

(Bankr. E.D. Mich. 2008); *In re Gonzalez*, 378 B.R. 168, 174 (N.D. Ohio 2007)). Factors relevant to this determination include: (1) the debtor's age and time left until retirement; (2) the amount of the debtor's existing retirement savings; (3) level of yearly income; (4) overall budget; (5) amount of monthly contributions; (6) needs of any dependents; and (7) other constraints that make it likely that retirement contributions are reasonably necessary expenses for this particular debtor. *Beckerman*, 381 B.R. at 848 (citing *Hebbring*, 463 F.3d at 907, *Taylor*, 243 F.3d at 129-30).

In this case, Debtor's income is above the median income. Her accumulated retirement savings is far from exorbitant. Nevertheless, although Debtor's age is not a part of the record, she appears to be relatively young such that interrupting her retirement saving at this time will not result in an inability to provide for herself in retirement. Rather, Debtor would have substantial time at the conclusion of a Chapter 13 plan to save for her retirement. The court is aware of no other constraints that would make Debtor's retirement savings at this time reasonably necessary. Under these circumstances, the court agrees that her 401(k) contributions could be applied to repay unsecured debt rather than to fund her own retirement plan without depriving Debtor or her dependents of any necessity. *See Behlke*, 358 F.3d at 435 (quoting *In re Jones*, 138 B.R. 536, 539 (Bankr. S.D. Ohio 1991) ("In these circumstances, 'it would be unfair to the creditors to allow the Debtors in the present case to commit part of their earnings to the payment of their own retirement fund while at the same time paying their creditors less than a 100% dividend.'").

Although Debtor has worked for her current employer for only one year, there is no indication that her employment is not generally stable. As an individual with regular, stable income, she is eligible for Chapter 13 should she choose to seek such relief as her debts are less than the statutory eligibility limits. *See* 11 U.S.C. §§ 109(e), 101(30). Debtor's total monthly income after payroll deductions, including child support payments received but excluding 401(k) contributions, is $5,540.76. Assuming Debtor's expenses are $5,357 as set forth in her second amended Schedule J, her income after expenses is $182.76. If she makes no other adjustment to her budget but applies this amount to fund a Chapter 13 plan over the sixty-month maximum plan duration for above-median income debtors, *see* 11 U.S.C. § 1322(d)(1), Debtor would have approximately $10,209 available after payment of the Chapter 13 Trustee's administrative expenses to pay on her remaining unsecured debt. Debtor's schedules show no unsecured priority debt and total unsecured nonpriority debt in the amount of $57,763. Under this scenario, unsecured creditors could potentially receive a dividend of approximately 17.6 percent. *See In re Behlke*, 338 F.3d at 437 (finding *substantial* abuse where debtors had the ability to pay at least a 14% dividend to their unsecured creditors); *In re Bender*, 373 at 30 ('"[t]here is an inherent unfairness in permitting a debtor to pay himself by funding

his own retirement account while paying creditors only a fraction [or, as in this case, no part] of their just claims."' (quoting *In re Keating*, 298 B.R. 104, 110-11 (Bankr. E.D. Mich. 2003)). Debtor also has received quarterly bonuses of approximately $1,000 per quarter that, at least potentially, could be made available to increase the return to unsecured creditors.

In addition, the court doubts the factual credibility of Debtor's schedules as presenting an accurate picture of her financial circumstances. As discussed above, Debtor has submitted three versions of Schedule J setting forth her monthly expenses in progressively greater amounts. Significantly, Debtor's original Schedule J shows expenses of $550 for food, $290 for home maintenance and $200 for clothing while those expenses are shown to have increased on her second amended Schedule J to $800 for food, notwithstanding the fact that her children reside with her only every other week, $350 for home maintenance and $500 for clothing. The court finds the increase in these expenses to be unreasonable.

And Debtor's reaffirmation agreement that she filed with respect to the automobile lease casts another shadow on the accuracy of her second amended Schedule J expenses. She states in the reaffirmation agreement that her actual monthly expenses total only $4,558 as compared to $5,357 shown on her second amended Schedule J. Debtor's post-petition representations are more closely aligned with representations made on her original Schedule J that her total expenses are $4,232. Accordingly, the court finds that the expenses reported on her most recent Schedule J are more likely than not inflated. In any event, the court finds that Debtor is able to reduce those expenses in order to make additional funds available to pay unsecured creditors without depriving herself or her four children of life's necessities. "While bankruptcy relief is not conditioned upon a debtor living in poverty, it does envision a sacrifice on the part of the debtor." *In re Felske*, 385 B.R. 649, 656 (Bankr. N.D. Ohio 2008).

The availability of debtors' remedies under state law and the relief that might be afforded through private negotiations with creditors are other factors the Sixth Circuit has identified as relevant in deciding whether it would be an abuse to grant a Chapter 7 discharge in a particular case. In this case, Debtor may challenge in state court or in private negotiations her liability on the credit card debt on which she contends she was not an obligor but only an authorized user. *See Bank One Columbus, N.A. v. Palmer*, 63 Ohio App. 3d 491, 493-94 (1989); *Heritage Bank, Inc. v. Barclay*, Case No. C-950476, 1996 Ohio App. LEXIS 1597, *5, 1996 WL 194243, *2 (Ohio App. April, 24, 1996). She may also commence proceedings in state court against her ex-husband to collect amounts owed on credit card debt ordered by the state court to be paid by him. Although he may have received a Chapter 7 discharge, a debt to a former spouse that is incurred in connection with a divorce is a nondischargeable debt. *See* 11 U.S.C. § 523(a)(15). While the existence of

state law remedies is a factor weighing in favor of the UST's motion to dismiss, because the record is silent as to the amount of the credit card debt for which her ex-husband is responsible under the divorce decree and the amount of credit card debt for which she believes she was not an obligor, the court cannot determine the magnitude of this factor's potential for easing her financial burden.

Nevertheless, on balance, the court finds that granting Debtor relief under Chapter 7 of the Bankruptcy Code would be an abuse of the provisions of that chapter given the following financial circumstances: (1) Debtor has generally stable, regular, above median income; (2) she is eligible for Chapter 13 relief if she chooses to seek such relief; (3) she has the ability to reduce payroll deductions funding her 401(k) plan, and, to the extent accurate, the expenses stated on her second amended Schedule J, without depriving her or her dependents of any necessity; and (4) she has the ability to repay a meaningful portion of her remaining unsecured debt.

THEREFORE, for all of the foregoing reasons, good cause appearing,

IT IS ORDERED that Debtor is allowed thirty (30) days from the date of this order to file a motion to convert to a Chapter 13 case, absent which the Motion of the United States Trustee to Dismiss Pursuant to 11 U.S.C. § 707(b)(1) and (b)(3) [Doc. #14] will be granted, and this case will be dismissed, by separate order of the court.