UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: BRYAN CHRISTOPHER MCDANIEL, Debtor.	CASE NO. 06-62786-CRM CHAPTER 7 JUDGE MULLINS
FELICIA S. TURNER, UNITED STATES TRUSTEE, Movant, v. BRYAN CHRISTOPHER MCDANIEL, Respondent.	CONTESTED MATTER

ORDER

THIS MATTER is before the Court on the Motion to Dismiss Pursuant to Sections 707(b)(2) and (b)(3) of the Bankruptcy Code Based Upon Presumption of Abuse and the Totality of the Circumstances (the "Motion to Dismiss", Doc. No. 29) filed by the United States Trustee (the "U.S. Trustee"). The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(a) & (b), 28 U.S.C. § 157(a) & (b), and 28 U.S.C. § 151. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) & (B).

Bryan Christopher McDaniel (the "Debtor") filed a voluntary Chapter 7 petition on March 10, 2006. The filing included his Statement of Current Monthly Income and Means Test Calculation ("Form B22A"). At the time of filing, Debtor owned his residence and a rental property. Debtor's residence was subject to a first mortgage with ABN AMRO for $204,000.00 and a second mortgage with SunTrust Bank for $48,200.00. The combined monthly mortgage

payment on the residence was $1,926.56. Debtor's rental property was subject to a mortgage with Chase Home Mortgage for $213,828.00, with monthly debt service of $1,614.00. Debtor did not have a tenant in the rental property at the time of filing. Debtor filed an amended Form B22A ("First Amended Form B22A", Doc. No. 18) on April 25, 2006, and a second amended Form B22A ("Second Amended Form B22A", Doc. No. 30) on June 16, 2006. At line 42 of Debtor's First Amended Form B22A, he deducted $1,927.00, the total monthly debt service for the residential property. Debtor's Second Amended Form B22A changed this deduction to $3,541.00, which included the debt service on the rental property. These additional deductions resulted in a negative disposable monthly income for the Debtor. Since the filing, all three of the secured lenders have obtained orders lifting the automatic stay to proceed to foreclosure with no opposition from the Debtor (Doc. Nos. 16, 24, and 27).

On April 18, 2006, the Chapter 7 trustee conducted and concluded the meeting of creditors pursuant to section 341(a) of the Bankruptcy Code. On May 26, 2006, the U.S. Trustee filed the Motion to Dismiss. The Court conducted a hearing, and thereafter instructed the parties to file written memoranda. Debtor filed Debtor's Memorandum of Points and Authorities in Response to United States Trustee's Motion to Dismiss Pursuant to §§ 707(b)(2) and (b)(3) of the Bankruptcy Code (the "Response"). The U.S. Trustee filed its Supplemental Memorandum of Points and Authorities of United States Trustee in Support of Motion to Dismiss Pursuant to Sections 707(b)(2) and (b)(3) of the Bankruptcy Code Based Upon Presumption of Abuse and the Totality of the Circumstances ("Supplemental Motion"). The U.S. Trustee argues that the Debtor improperly deducted monthly amounts due to secured creditors with respect to the residence and rental property, even though the Debtor intended to surrender both properties. The U.S. Trustee further objects to the Debtor's claim of a $471 vehicle monthly ownership cost. The U.S. Trustee contends that the Internal Revenue Service's ("IRS's") Local Transportation

Expense Standards do not allow a deduction for a fully-owned vehicle. Based on the U.S. Trustee's own calculations of allowable expenses and deductions, the U.S. Trustee prepared a corrected Form B22A spreadsheet ("Corrected Form B22A"). The U.S. Trustee's spreadsheet shows that Debtor's monthly disposable income triggers the presumption of abuse. Consequently, the U.S. Trustee filed a statement of presumed abuse pursuant to section 704(b)(1)(A) of the Bankruptcy Code (Doc. No. 22). The U.S. Trustee also argues that the totality of the circumstances warrants the dismissal of Debtor's case. The U.S. Trustee has prepared a hypothetical 60-month Chapter 13 plan yielding a 90% return to unsecured creditors based upon monthly plan payments of $408.75.

I. Background

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") became effective, in relevant part, on October 17, 2005. Debtor's bankruptcy petition was filed on March 10, 2006, and is governed by BAPCPA. Section 707 of the Bankruptcy Code describes the "means test", which is incorporated in table form as Form B22A, to determine, among other things, whether debtors have the means to pay creditors. For purposes of the means test, a debtor's current monthly income ("CMI") is "the average monthly income from all sources that the [debtor receives] without regard to whether such income is taxable income, derived during the 6-month period ending on . . . the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii)." 11 U.S.C. § 101(10A). A debtor's CMI is reduced by expenses allowed in section 707(b)(2)(A)(ii) - (iv) to determine how much of the debtor's monthly income is available to pay creditors. For an above-median debtor, the applicable expenses are established by the IRS National Standards and Local Standards for the area in which the debtor resides. Pursuant to section 707(b)(1), the court, after notice and a hearing,

may dismiss a Chapter 7 case or convert it to Chapter 13, if the court finds that granting relief under Chapter 7 would constitute an abuse. As described in section 707(b)(2)(A), a debtor "passes" the means test if the debtor has less than $100 per month in monthly net income. If Form B22A shows that the debtor has enough disposable income to pay creditors pursuant to the formula of section 707(b)(2)(A), the debtor "flunks" the means test, and the "presumption of abuse" arises. Pursuant to section 707(b)(2)(B), this presumption can be rebutted by a demonstration of "special circumstances," such as a serious medical condition or active duty military service, which justify additional expenses or adjustments to current monthly income.

II. Although Debtor has Surrendered His Residence and the Rental Property, Debtor May Still Deduct the Amounts Payable to Secured Creditors

The first issue is whether a debtor in a Chapter 7 bankruptcy may claim an expense for payments on secured debts if the debtor intends to surrender the property securing the debts. Case authority from this district supports the position that a debtor can deduct future payments on secured debts, despite surrender of the collateral. In evaluating section 707(b)(2)(A)(iii) in connection with a motion to dismiss in a Chapter 7 case, Judge Drake concluded that a debtor could deduct payments due on secured debts despite the surrender of the collateral, a residence and a vehicle. In re Walker, 2006 Bankr. LEXIS 845, *26 (Bankr. N.D. Ga. 2006). The Walker court applied a "plain meaning" rule in interpreting the statute, and determined the date of the petition as the applicable time frame to apply the means test because the statute requires a determination of "how many payments are owed under the contract for each secured debt at the time of filing." Id. at *11. Further, the Walker court considered the means test to be a "snapshot", stating that "Congress chose to base the means test on historic income and expense figures that are in effect on the petition date, as opposed to figures that may change with the passage of time or with a change in the debtor's lifestyle." Id. at *16. Because of its "snapshot" interpretation of the means test, the court in Walker opines that surrender of collateral does not

change the fact that payments are 'contractually due' and, therefore, "[w]hen a debtor files the bankruptcy petition, the debtor is contractually due for payments on the outstanding secured debts for the length of the contract" and "[t]he debtor's contractual liability for the debt is not eliminated upon the surrender of the collateral." Id. at *12. Other courts have followed Walker's holding. E.g., In re Hartwick, 359 B.R. 16, 21 (Bankr. D.N.H. 2007)(finding that "consideration of postpetition developments in the application of the means test would be contrary to Congressional intent as expressed in the amendments to § 707(b) by BAPCPA"); In re Longo, 364 B.R. 161, 165 (Bankr. D. Conn. 2007)(agreeing "with those courts that hold that the Section 707(b)(2)(A)(iii) calculation is (in all relevant senses) intended to be a 'snapshot' of the state of matters as of the petition date"); In re Palm, 2007 Bankr. LEXIS 2046, *7 (Bankr. D. Kan. 2007)(stating that "[e]xploration into whether post-petition events may impact the debtors' ability to pay some of their unsecured debt is better addressed under the totality of the circumstances test"); In re Mundy, 363 B.R. 407, 414 (Bankr. M.D. Pa. 2007)(stating that "a debtor's decision to surrender collateral securing a debt, while it may be a factor when analyzing abuse under the totality of the circumstances test under § 707(b)(3), may not be considered under the plain language of § 707(b)(2)(A)(iii)(I)"), In re Haar, 360 B.R. 759, 768 (Bankr. N.D. Ohio 2007)(holding that "the Court cannot find that a debtor, who surrenders secured property, is prohibited from expensing payments on that property against their CMI").

Of the four different versions of Debtor's Form B22A in the record, the most accurate "snapshot" of Debtor's deductions is found in Debtor's Second Amended Form B22A. As of the filing date, the Debtor was contractually obligated to make payments on the debts that he owed to ABN AMRO, Sun Trust Bank, and Chase Home Mortgage. If Debtor had not filed bankruptcy, those debts would have been contractually due for the next 60 months. The Debtor's decision to surrender the collateral does not change the fact that the debts were contractually due

on March 10, 2006 and remained contractually due for the next 60 months. The scheduled mortgage payments reflected on the Second Amended Form B22A total $3,540.56. These deductions result in a monthly disposable income of negative $2,185.25. As a result, no presumption of abuse arises.

III. Debtor May Not Deduct Ownership Costs Associated with the Fully Owned Vehicle

The second issue is whether the Debtor is entitled to deduct ownership costs for his fully owned vehicle. Lines 22 through 24 of Form B22A incorporate the IRS's Local Transportation Expense Standards, which divides transportation expenses into two components, one related to the costs associated with operating a vehicle ("Operating Expenses") and the other associated with the cost of purchasing or leasing a vehicle ("Ownership/Lease Expenses"). All debtors receive the line 22 Operating Expenses allowance based either on public transportation costs or the costs of operating one or two vehicles. The U.S. Trustee does not object to Debtor's deduction of $238 at line 22. With regard to the Ownership/Lease Expense, a debtor may claim this deduction only if the vehicle in question is either (1) leased, or (2) owned but subject to an obligation to a secured creditor. In In re Hardacre, 338 B.R. 718 (Bankr. D. Tex. 2006), a debtor attempted to claim a deduction for a vehicle which was not subject to a note and lien or lease agreement. The court disallowed the deduction holding that the deduction claimed by the debtor was prohibited "because the Local Standards only provide for a deduction for automobiles that are subject to lease or purchase, they do not permit a debtor to claim an ownership deduction for a vehicle owned free and clear by the debtor." Id. at 728. Numerous courts have held that a debtor cannot deduct an ownership expense for a fully owned vehicle. See In re McGuire, 342 B.R. 608 (Bankr. W.D. Mo. 2006); In re Barraza, 346 B.R. 724 (Bankr. N.D. Tex. 2006); In re Lara, 347 B.R. 198 (Bankr. N.D. Tex. 2006); In re Carlin, 348 B.R. 795 (Bankr. D. Or. 2006); In re Oliver, 350 B.R. 294 (Bankr. W.D. Tex. 2006); In re Harris, 353 B.R. 304 (Bankr. E.D.

Okla. 2006); In re Wiggs, 2006 Bankr. LEXIS 1547 (Bankr. N.D. Ill. 2006); In re Devilliers, 358 B.R. 849 (Bankr. E.D. La. 2007); In re Slusher, 359 B.R. 290 (Bankr. D. Nev. 2007); In re Ceasar, 364 B.R. 257 (Bankr. W.D. La. 2007); United States v. Ross-Tousey (In re Ross-Tousey), 2007 U.S. Dist. LEXIS 36836 (E.D. Wis. 2007); In re Howell, 2007 Bankr. LEXIS 1405 (Bankr. D. Kan. 2007); In re Skaggs, 349 B.R. 594 (Bankr. E.D. Mo. 2006); Stapleton v. Talmadge (In re Talmadge), 2007 Bankr. LEXIS 2237 (Bankr. D. Pa. 2007).

In this case, the Debtor in his First Amended Form B22A claimed a $471 Ownership/Lease Expense for his vehicle. The Debtor's Second Amended Form B22A eliminated this deduction. However, instead of eliminating the deduction at line 23a of the Second Amended Form B22A, Debtor entered $471 in line 23b (the line for average monthly payments of debts secured by the vehicle). When the line 23b figure is subtracted from the Ownership/Lease Expense, the line 23 expense amounts to $0.00. However, in line 42 of the Second Amended Form B22A, the Debtor did not list any corresponding debt secured by the vehicle. Since the Debtor makes no argument in his Response for the allowance of this deduction, it appears that the Debtor concedes the $471 Ownership/Lease Expense deduction. To the extent there is a dispute, since the Debtor fully owns the vehicle, he cannot take the Ownership/Lease Expense deduction.

IV. The Totality of the Circumstances Does Not Support a Dismissal as Debtor's Post-Petition Income and Expense Changes Indicate a Negative Disposable Monthly Income

The third issue is whether the totality of the circumstances supports dismissal of the case. Section 707(b)(3) of the Bankruptcy Code requires a court, when considering whether the granting of Chapter 7 relief would constitute an abuse, to consider whether the petition was filed in bad faith or whether abuse is demonstrated under the totality of the circumstances. E.g., Stapleton v. Mundy (In re Mundy), 363 B.R. 407, 414 (Bankr. D. Pa. 2007). The U.S. Trustee contends that the Debtor has the disposable income to yield a 90% return to unsecured creditors

based on a hypothetical 60-month plan. The Debtor argues that the case should not be dismissed based on the totality of the circumstances as he lacks the disposable income to fund a plan because of post-petition changes to income and expenses.

In determining whether to dismiss a case pursuant to section 707(b)(3), a court should "consider both the debtor's ability to repay as indicated by an analysis of the [debtor's] income and expenses and as indicated by other factors surrounding the [debtor's] filing of their bankruptcy petition." In re O'Conner, 334 B.R. 462, 466 (Bankr. D. Fla. 2005). Under BAPCPA, courts look to pre-BAPCPA case law in construing the "totality of the circumstances". In re Rollins, 2007 Bankr. LEXIS 2459, *13-14 (Bankr. M.D. Ga. 2007). As such, it has been held in the 11th Circuit that "the common thread among the circuits is that if the debtor has the ability to repay even a portion of his debts out of future income, he should not be in Chapter 7." In re Cox, 249 B.R. 29, 31 (Bankr. D. Fla. 2000). Further, courts can consider post-petition circumstances when making their determination. In evaluating whether the "totality of the circumstances" of a debtor's financial situation includes consideration of post-petition events, one court recently held that:

> In determining, if the granting of relief would be an abuse of the provisions of Chapter 7, courts are required to determine if the debtor has the ability to pay a substantial portion of their unsecured claims through a Chapter 13 plan based upon the totality of the debtor's financial circumstances. If a Chapter 13 plan is to be feasible it must be based on the debtor's actual or anticipated ability to pay and therefore consideration of post-petition changes in the financial circumstances of the debtor is appropriate.

In re Henebury, 361 B.R. 595, 609-11 (Bankr. S.D. Fla. 2007). See also In re O'Conner, 334 B.R. at 466 (court accepted debtors filing schedules with lower income than they were currently making at time of filing as debtor-spouse expected the availability of overtime hours to cease post-petition).

Since filing, the Debtor has amended Schedules I and J. The amended schedules reflect

a raise and a resulting increase in monthly tax withholdings. The amendments reflect the Debtor's two percent 401K contribution of approximately $156.00 per month, as well as a deduction for health care insurance after the expected birth of his child. The Debtor contends that Schedule J, as modified, more accurately represents his post-petition expenses for rents, utilities and the anticipated expenses associated with the birth of his child. After deducting Debtor's updated expenses, Debtor's disposable income is now a negative $353.00. The U.S. Trustee's hypothetical plan utilizes expenses based primarily on the IRS National and Local Standards for a household size of one. Therefore, these standards do not reflect Debtor's *actual* monthly expenses for a household size of two (presumably three with the birth of Debtor's child). The Debtor's post-petition schedules also provide for higher rent and utility expenses. In addition, Debtor anticipates increased expenses for the expanded household. Since case law permits courts to consider post-petition income and expenses changes in this evaluation, the totality of the circumstances does not support a dismissal as Debtor does not have the income necessary to fund a Chapter 13 plan. Accordingly,

IT IS ORDERED that the U.S. Trustee's Motion to Dismiss is **DENIED**.

The Clerk of Court is directed to serve a copy of this Order upon the Movant, Debtor, Debtors' counsel, the Chapter 7 trustee, and all parties in interest.

IT IS SO ORDERED, this 24 day of August, 2007.

C. RAY MULLINS
UNITED STATES BANKRUPTCY JUDGE