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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:	CASE NO. 06-72831-CRM
MICHAEL FITZGERALD WATSON,	CHAPTER 7
Debtor.	JUDGE MULLINS
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FELICIA S. TURNER, UNITED STATES TRUSTEE,	CONTESTED MATTER
Movant,	
v.	
MICHAEL FITZGERALD WATSON,	
Respondent.	

ORDER

THIS MATTER is before the Court on the Motion to Dismiss Pursuant to Section 707(b) (the "Motion to Dismiss", Doc. No. 25) 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).

Michael Fitzgerald Watson (the "Debtor") filed a voluntary Chapter 7 petition on October 10, 2006. The filing included his Statement of Current Monthly Income and Means Test Calculation ("Form B22A"). The Debtor claimed a household size of two. At the time of filing, Debtor owned his residence and listed two debts secured by an interest in the property. Debtor's residence was subject to a first mortgage with Merrill Lynch Mortgage for \$334,000.00 and a second mortgage with Countrywide Home Loans for \$81,931.00. Since the filing, both lenders

have obtained orders lifting the automatic stay to proceed to foreclosure.(Doc. Nos. 16 & 17). On November 28, 2006, the meeting of creditors was commenced and concluded pursuant to section 341(a) of the Bankruptcy Code. On January 8, 2007, the U.S. Trustee filed the Motion to Dismiss. The U.S. Trustee filed its Supplemental Memorandum of Points in Support of Motion to Dismiss Pursuant to Section 707(b) (the "Supplement") on March 5, 2007. The Debtor filed an amended Form B22A ("Amended Form B22A", Doc. No. 30) and amended schedules on March 7, 2007. The Court conducted a hearing and took the matter under advisement.

This case is governed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("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 stated in section 707(b)(2)(A)(ii) - (iv) to determine how much a debtor has available to pay creditors. 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.

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. The

U.S. Trustee argues that the Debtor improperly deducted monthly amounts due to secured creditors with respect to the residential property, even though the Debtor disclosed that he would surrender his residence. 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) of the Bankruptcy Code 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 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 opined 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. This Court recently followed Walker’s holding that section 707(b)(2)(A)(iii) allows a debtor to claim deductions for payments on debts secured by the to-be-surrendered residence. See In re McDaniel, No. 06-62786 (Bankr. N.D. Ga. Aug. 24, 2007). In McDaniel, the debtor was contractually obligated to make mortgage payments to three secured creditors at the time of filing. If debtor had not filed for bankruptcy, those debts would have been contractually due for the next 60 months. In denying a motion to dismiss for presumption of abuse, this Court held that “[t]he Debtor’s decision to surrender the collateral does not change the fact that the debts were contractually due on [the petition date] and remained contractually due for the next 60 months.” Id. With respect to the case at bar, Debtor’s

scheduled mortgage payments total \$3,475.00. These deductions result in a *negative* monthly disposable income of \$918.95 on the original Form B22A and \$1,574.28 on the Amended Form B22A. The U.S. Trustee's Motion to Dismiss also argues for additional adjustments to the Debtor's Form B22A, reflected on the U.S. Trustee's adjusted Form B22A ("Adjusted Form B22A"). When Debtor's scheduled mortgage payments are added back to the deductions taken by the U.S. Trustee on its Adjusted Form B22A, Debtor's monthly disposable income calculates to a *negative* monthly disposable income of \$2,433.77. As a result, no presumption of abuse arises.

The U.S. Trustee further requests the Court dismiss this case under section 707(b)(3) of the Bankruptcy Code. 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). 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). 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). In McDaniel, the U.S. Trustee also argued for dismissal based on the totality of the circumstances. The Court found that dismissal was not appropriate after actual, post-petition events were incorporated into the calculation of debtor's disposable income. Specifically, the debtor's post-petition increases in rent, utilities and household expenses for the expected birth of his child resulted in negative disposable income.


In this case, the Debtor has amended Schedules I and J, contending that Schedule J, as modified, more accurately represents his actual, post-petition monthly rent expenses. Debtor argues that he lacks the disposable income to fund a plan as his monthly net income calculates to \$0.00. The U.S. Trustee contends that the Debtor underestimates his disposable income and could fund a Chapter 13 plan. The U.S. Trustee argues that the Debtor's deduction of \$1,800.00 for rent payments should be reduced to \$1,130 based on IRS National and Local Standards. This reduction does not reflect Debtor's *actual* monthly expenses for rent. Since case law permits courts to consider actual, post-petition income and expenses changes, the totality of the circumstances does not support a dismissal as Debtor does not have the disposable 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 3 day of ~~September~~^{October}, 2007.


C. RAY MULLINS
UNITED STATES BANKRUPTCY JUDGE