

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

In re:

Susan L. Kulakowski, Case No.  
10-bk-07286-CED  
Chapter 7  
Debtor.

**ORDER GRANTING UNITED STATES  
TRUSTEE'S MOTION FOR SUMMARY  
JUDGMENT, DENYING DEBTOR'S MOTION  
FOR SUMMARY JUDGMENT, AND  
DISMISSING DEBTOR'S CHAPTER 7  
BANKRUPTCY CASE  
(EFFECTIVE DATE DELAYED 14 DAYS)**

THIS CASE came on for hearing before the Court on May 18, 2011, on the cross-motions for summary judgment filed by the United States Trustee and the Debtor in connection with the United States Trustee's previously filed motion to dismiss pursuant to 11 U.S.C. § 707(b)(1) and (b)(3)<sup>1</sup> (Doc. No. 19) (the "Motion to Dismiss"). At the commencement of the hearing, the Court confirmed with counsel that the record upon which they relied in support of their motions was limited to the Debtor's Petition and Schedules and the Debtor's Responses to the Requests for Admissions. (Transcript, Doc. No. 53, pp. 3-4.) At the conclusion of the hearing, having considered the motions, the record and the arguments of counsel, the Court orally announced its ruling. The Court granted the United States Trustee's Motion for Summary Judgment (Doc. No. 36), denied the Debtor's Motion for Summary Judgment (Doc. No. 40), and dismissed the Debtor's Chapter 7 bankruptcy case, effective 14 days from the entry of the Court's order, in order to permit the Debtor to convert the case to a Chapter 13 case. The Court then requested that counsel for the United States Trustee submit a proposed written order consistent with the Court's oral ruling. The Court has adopted portions of the proposed order and hereby supplements its oral ruling as follows.

The issue presented in the parties' motions for summary judgment is whether the Court should consider the Debtor's non-filing spouse's income in determining whether the granting of relief under the Bankruptcy Code to the Debtor would be an abuse of the provisions of Chapter 7 within the meaning of

section 707(b)(3). The Court concludes that it will include all of the non-filing spouse's income and separate expenses for two reasons. First, all of the non-filing spouse's income and separate expenses are included in "current monthly income" under section 707(b)(2). Second, as a married couple, the Debtor and her non-filing spouse acted as an economic unit. It is therefore appropriate to pool the Debtor and her husband's income and expenses for purposes of evaluating whether the Debtor has the ability to repay her debts and whether the totality of the circumstances demonstrates abuse.

Having concluded that the income and expenses of the Debtor and her husband should be pooled, the Court finds that this case is abusive under the totality of the circumstances under section 707(b)(3), and that the case should be dismissed pursuant to section 707(b)(1).

**1. Factual Background**

The Debtor filed her voluntary petition under Chapter 7 on March 30, 2010. On September 29, 2010, the United States Trustee filed the Motion to Dismiss. After conducting discovery, the United States Trustee and Debtor filed motions for summary judgment. The parties have agreed that the Motion to Dismiss may be adjudicated on the undisputed facts as a matter of law. Those undisputed facts are as follows.

The Debtor has been married to Edmund Kulakowski for 21 years. They file joint tax returns and together have an adult child. They pool their income and expenses. They share a joint checking account into which Mr. Kulakowski deposits his net monthly take home pay. Their household expenses are primarily paid out of the joint checking account. The Debtor and her husband jointly own their homestead and are joint obligors on the home mortgage. The Debtor does not individually own any non-exempt personal property.

Mr. Kulakowski earns \$101,972.28 annually, or \$8,497.69 per month. According to the Debtor's Schedule I (after payroll deductions of \$3,006.49 which include \$975.00 per month for a 401(k) retirement plan), Mr. Kulakowski has net average monthly income of \$5,491.20. On Schedule J, the Debtor listed total monthly expenses of \$4,338.33, leaving a surplus of \$1,152.87 per month. Schedule J does not include Mr. Kulakowski's \$364.00 per month automobile payment. Otherwise, Schedule J sets forth all of the expenses of the Debtor's entire household, including deductions totaling \$406.49 for the

<sup>1</sup> Unless otherwise stated, all statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.*

discretionary items of recreation, clubs and entertainment, newspapers, magazines, etc., storage fees for boat, and clubhouse dues, and \$1,021.58 in regular expenses from operation of business, profession, or farm for the Debtor's business. However, the Debtor's business produces no income.

Notwithstanding the Debtor's having disclosed her husband's income and total household expenses on Schedules I and J (and the resulting \$1,152.87 monthly net income), the Debtor took an entirely different position on her Amended Official Form 22A "Chapter 7 Statement of Current Monthly Income and Means-Test Calculation." (Doc. No. 37.) On her Amended Form 22A, the Debtor, as required, disclosed her husband's income on Line 11. On Line 17, she then subtracted a "marital adjustment" of \$6,329.52 which was described as:

Husband's taxes, insurance, debt servicing, retirement savings, living expenses. This amount represents non-filing spouse's income NOT used for debtor's household expenses. Total household expenses per Schedule J, \$4,338.33. Debtor's share of total household expenses, at 50% split, is \$2,169.16.

The Debtor apparently contends that the payroll deductions of \$3,006.49, together with Mr. Kulakowski's claimed one-half of the household expenses (\$2,169.16) and his car payment (\$364.00) and some other expenses not itemized on Schedule J, equal the \$6,328.52 "marital adjustment" taken on Line 17. It appears that the Debtor "backed into" the amount of the marital adjustment by deducting one-half of the household expenses itemized on Schedule J from Mr. Kulakowski's gross monthly salary: \$8,497.58 (gross income) minus \$2,169.16 (one-half the household expenses) equals \$6,328.52 (exactly the amount of the claimed marital adjustment).

After deducting the \$6,328.52 from the \$8,497.68 on Line 11, the Debtor was left with current monthly income on Line 18 of \$2,169.16 – or her half of the couple's total household expenses (as itemized on Schedule J) – which she asserts is her net monthly income contributed to her by her husband. From the \$2,169.16, the Debtor then subtracted her own allowed living expenses, using the appropriate National and Local Standards, of \$2,457.00. This leaves the Debtor, on Line 50, with monthly disposable income of -

\$287.84 and the conclusion, on Line 52, that the presumption of abuse does not arise.

The Debtor scheduled secured debts of \$144,257.73, \$0 of priority debt, and \$136,470.75 of unsecured nonpriority debt. (Doc. No. 1.) Including the secured debt, approximately 61% of the Debtor's debt is consumer debt. The Debtor's unsecured debts are substantially in the form of credit card debt. A substantial portion of the charges on the credit cards are attributable to the purchase of goods and services for the benefit of the household, including the Debtor's adult daughter. Approximately 20% of the charges on the credit cards were uniquely for Mr. Kulakowski's benefit. (Doc. No. 35.)

## **2. Summary of the parties' positions**

The United States Trustee contends that Mr. Kulakowski's income and expenses should be pooled with the Debtor's because, first, they are married; second, they have historically pooled their income and expenses; and third, Mr. Kulakowski's income is substantial enough to significantly raise the Debtor's standard of living and generate total household income in excess of reasonable costs of food, clothing shelter, and other necessities, and the Kulakowskis in general hold themselves out as an economic unit.

The Debtor responds by arguing that the Court should not pool the Kulakowskis' income and expenses under section 707(b)(3) because, first, they would not be pooled under section 707(b)(2); second, it is unfair to include all of Mr. Kulakowski's income to pay the separate obligations of the Debtor; and third, Mr. Kulakowski makes all of the household income and the Bankruptcy Code does not penalize debtors for having high earning spouses."

## **3. Conclusions of law**

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 322 (1986). Once the moving party has properly supported its motion for summary judgment, the burden then shifts to the non-moving party to come forward with specific facts showing that there is a genuine issue for trial. *Int'l Stamp Art, Inc. v. U.S.*

*Postal Serv.*, 456 F.3d 1270, 1273-74 (11<sup>th</sup> Cir. 2006) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). In this case, the facts are undisputed and summary judgment is appropriate.

For the Court to dismiss this case under section 707(b)(1), the United States Trustee must demonstrate that the Debtor's obligations are primarily consumer debts, and that the granting of relief would be an abuse of the provisions of Chapter 7. The Debtor concedes that her obligations are primarily consumer debts. The sole issue is then whether the Debtor's filing represents an abuse of the provisions of Chapter 7.

Section 707(b)(3) dictates that the Court, in considering whether the granting of relief would be an abuse under section 707(b)(1), shall consider whether the debtor filed the petition in bad faith or whether the totality of the circumstances of the debtor's financial situation demonstrates abuse. The primary factor used by bankruptcy courts in applying section 707(b)(3) is the debtor's ability to pay his or her debts from future income. See *In re Keller*, 2010 WL 4386850, \*2 (Bankr. S.D. Ga. Sep. 2, 2010); see also *In re Ricci*, 2009 WL 3381517, \*15 (Bankr. M.D. Fla. Sep. 30, 2009); cf. *In re Behlke*, 358 F.3d 429, 434-5 (6th Cir. 2004). In this case, the Debtor concedes that if Mr. Kulakowski's income is included in the analysis of the Debtor's budget, then the Debtor has substantial disposable income and the requisite abuse has been demonstrated.

**A. All of Mr. Kulakowski's income should be included in the Debtor's budget.**

The Court finds that the Debtor's budget should include all of Mr. Kulakowski's income and expenses. Courts have generally concluded that a non-filing spouse's income is relevant to the determination of a debtor spouse's ability to pay. See *In re Engskow*, 247 B.R. 314, 317 (Bankr. M.D. Fla. 2000); *In re Adams*, 2007 WL 3091583, \*3 (Bankr. Md. Oct. 18, 2007) ("In determining ability to repay, every reported case agrees that if the debtor herself has no income, the Court must take into account the income of the debtor's non-filing spouse when the spouse receives significant income."). Mr. Kulakowski's income has been fully contributed to the household in the past. Consequently, it is fair and reasonable in an analysis under section 707(b)(3) to continue to fully include his income in the future.

**B. The definition of "current monthly income" is relevant to determining abuse under the totality of the circumstances standard.**

Although the Motion to Dismiss does not seek dismissal under section 707(b)(2), the provisions of that sub-section are relevant to the Court's analysis herein. Pursuant to section 707(b)(2)(A)(i), the court shall presume abuse exists if the debtor's "current monthly income," reduced by certain allowable expenses and multiplied by 60, is not less than the lesser of (I) 25% of the debtor's unsecured nonpriority claims, or \$6,575.00, whichever is greater, or (II) \$10,950.00. "Current monthly income" is defined in section 101(10A)(B) as including any amount paid by any entity other than the debtor on a regular basis for the household expenses of the debtor or the debtor's dependents.

If Mr. Kulakowski's income is included for purposes of section 707(b)(2), it stands to reason that his income should be reasonably included for purposes of section 707(b)(3). See *In re Boatright*, 414 B.R. 526, 534 (Bankr. W.D. Mo. 2009) ("[this] mirrors the approach Congress approved for use in the § 707(b)(2) context, and the Court finds no statutory, precedential, or practical basis for abandoning it."). Similarly, if the Debtor had filed this case as a Chapter 13, Mr. Kulakowski's income would be entirely included as "disposable income" under section 1325(b)(2) for the purpose of determining whether the Debtor's plan provided that all of the Debtor's projected disposable income be applied to payments to unsecured creditors under the plan.

Under Section 101(10A), the Debtor's "current monthly income" includes Mr. Kulakowski's income to the extent it was contributed to the Debtor's household expenses in the past. Official Form 22A calculates the "amount paid . . . on a regular basis for the household expenses of the debtor" by requiring the debtor to list the gross wages of the non-filing spouse on Line 3, Column B, and then subtracting a "marital adjustment" on Line 17. Because the Debtor and her husband pool their income and expenses, all of Mr. Kulakowski's income, less his separate deductions and personal expenses, must be included in the Debtor's "current monthly income" on Official Form 22A.

If the Debtor had correctly prepared her Official Form 22A, she would have calculated the marital adjustment on Line 17 in amount equal to the sum of

Mr. Kulakowski's payroll deductions of \$3,006.49 (taxes, insurance, 401(k), and United Way deductions)<sup>2</sup> and his car payment of \$364.00. The marital adjustment of \$3,370.49 would then be deducted from the current monthly income of \$8,497.68 on Line 11, leaving the Debtor with current monthly income of \$5,127.19 on Line 18. Thus it follows that Mr. Kulakowski regularly contributes \$5,127.19 to the Debtor's household expenses.

Case law supports this Court's conclusion that Mr. Kulakowski's regular contributions to the household expenses should be included in "current monthly income." For example, in *In re Quarterman*, 342 B.R. 647, 651 (Bankr. M.D. Fla. 2006), the court stated:

In calculating a debtor's disposable income, it is necessary to start with the debtor's current monthly income, which is the debtor's average (gross) monthly income for the previous six months, *plus amounts others, i.e. the debtor's non-filing spouse in a single case, regularly contributed to household expenses of the debtor or the debtor's dependants*, less other (non-applicable) exclusions, and reduce from it the following amounts: (1) income that is included in current monthly income that was not "received" by the debtor; (2) "amounts reasonably necessary to be expended" by the debtor, whether under § 1325(b)(2)(A) and (B) or section 707(b); (3) "child support payments, foster care payments, or disability payments for a dependant child ... to the extent reasonably necessary to be expended for such child"; (4) amounts required to repay a loan described in section 362(b)(19) (loans from qualified plans); and (5) amounts withheld from wages or received by employers as contributions to employee retirement plans. [Footnotes omitted, emphasis supplied.]

The Court's interpretation of section 101(10A) is supported further by the instructions on Official Form 22A. The instruction on Official Form 22A, Line 17 states:

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<sup>2</sup>The Court does not here address whether the 401(k) deduction is appropriate, but includes the amount for the sake of the instant discussion.

Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose.

In other words, the Debtor may not merely think up a theory for a marital adjustment, but must connect the adjustment to specific deductions and expenses. Not only must the debtor itemize, the burden is on the debtor to substantiate. As the court in *In re Hickman*, 2008 WL 2595182, \*3 (Bankr. W.D. Wash. Jun. 27, 2008) explained:

Thus, if a debtor's non-filing spouse has income, that portion of the spouse's income not dedicated to paying household expenses normally is deducted from the CMI, under the "marital adjustment." The "determination of the amount paid by a non-filing spouse on a regular basis for household expenses of the debtor or the debtor's dependents is necessarily fact specific and subject to interpretation." [Citations omitted.]

In this case, prior to the hearing, the Debtor did not claim a marital adjustment on the Means Test Form. Moreover, the Debtor failed to present any evidence regarding funds from [the non-filing spouse's] income that were *not* regularly contributed to the household expenses of the Debtor or their children. Lastly, the Debtor made no argument in this respect in his post-evidentiary hearing brief. The Debtor has failed to establish the grounds for a marital adjustment in any amount.

In the Debtor's Amended Official Form 22A, the Debtor characterizes her husband's regular contribution to household expenses as being limited to one-half of their combined household expenses. The Debtor calculates this to be \$2,169.16. Although the Debtor does not claim that her husband only contributes \$2,169.16 per month to their household, she contends that she should not be forced to recognize a contribution from her husband that exceeds one-half of the household expense. This argument runs counter to the reality – which is that all of Mr. Kulakowski's income has historically been available to support the

Debtor and their household.

Alternatively, the Debtor contends that her husband's contribution to the household is capped at one-half of the Debtor's household expenses. But the logic of this second alternative interpretation is entirely circular – under this reasoning, Mr. Kulakowski's income could be unlimited, yet the Debtor would never, and could never, fail the means test. The Debtor has cited no authority for either of her interpretations.

The appropriate method is clear. The marital adjustment must reflect the reality of what has not been contributed to the household in the past, be itemized, and be factually supported. The marital adjustment should not merely reflect one-half of the household expenses or be capped by the Debtor's household expenses, but must reflect actual contributions.

**C. The Debtor and her non-filing spouse are fairly treated as an economic unit.**

Under a section 707(b)(3) analysis, it is appropriate to include Mr. Kulakowski's income and separate expenses with those of the Debtor because the Kulakowskis act as an economic unit. They have been married 21 years. They share a joint checking account. He deposits all of his take home pay into the joint checking account. They file joint tax returns. They own their homestead jointly. She owns no non-exempt personal property individually. They are joint obligors to Bank America on two debts totaling \$144,257.73, which are secured by their jointly owned homestead and vehicle. The Debtor has also incurred \$136,470.75 in unsecured debt, substantially in the form of credit card debt. A substantial portion of the charges on the credit cards are attributable to the purchase of goods and services for the benefit of the household, including an adult daughter. Up to 20% of the charges on the credit cards are uniquely attributable to the specific benefit of Mr. Kulakowski. Fairness dictates that Mr. Kulakowski's income and separate expenses be fully included in the analysis of the Debtor's income.

This case is factually distinguishable from the case of *In re Boatwright*, 414 B.R. 526 (Bankr. W.D. Mo. 2009). In *Boatwright*, the non-debtor spouse owned a business that generated significant income. When the debtor filed bankruptcy, the United States Trustee filed a motion to dismiss the case under section 707(b)(3). The evidence demonstrated that the non-debtor spouse paid the debtor only a small salary, and refused to pay

any of her living expenses in excess of that salary. The court denied the United States Trustee's motion to dismiss and allowed the debtor's case to proceed, finding that under the totality of the circumstances, pooling the debtor's and non-debtor spouse's income was not appropriate. The *Boatwright* facts are very different from those presented in this case. Here, the majority of the Debtor's obligations were incurred during a 21-year marriage during which time both the income and expenses of the Kulakowskis were pooled, and the Debtor incurred debts for the benefit of the household and her husband. Separating out the Debtor's income and expenses does not reflect the reality of the Debtor's financial circumstances.

The fact that Mr. Kulakowski earns all of the income of the household does not undermine the United States Trustee's position. First, the source of income is irrelevant under the definition of "current monthly income." Second, the fact that the Debtor enjoys income without earning it personally should not be a reason to exclude the income. There is no public policy favoring debtors with passive income over debtors with earned income. Third, the case cited as support by the Debtor, *In re Athens*, 2007 WL 6376132 (Bankr. M.D. Pa. Aug. 1, 2007), is distinguishable from the instant case: the debtor in *Athens* claimed a monthly shortfall of \$29.00 on his amended schedules, whereas Ms. Kulakowski concedes substantial monthly net income in her Schedule J; in *Athens*, the household income was below the state median for a household of the same size, whereas Ms. Kulakowski's total current monthly income is more than 195 percent of the state median for her household size; the court in *Athens* believed it inappropriate to require a non-debtor to surrender her home in order for the debtor to make payments, whereas Ms. Kulakowski can make a substantial repayment without surrendering a residence.

Contrary to the Debtor's argument, the Court does not suggest that Mr. Kulakowski is liable for his wife's debts. Dismissal of the Debtor's case does not achieve this result for the Debtor's creditors. Rather, the Court finds that the Debtor should not be discharged from her liabilities because she is able to make a substantial repayment to her creditors utilizing the income her husband has historically contributed the support of the Debtor and their household. Any other approach would be fundamentally unfair to her creditors.

In conclusion, Mr. Kulakowski's income and

expenses should be pooled with those of the Debtor. The Kulakowskis have been married 21 years, they have pooled their income and expenses and have generally acted as an economic unit in the past. Allowing them to act otherwise for the purposes of the Debtor's filing of her voluntary petition would permit an abuse of Chapter 7.

As reflected on Schedule J, the Debtor and her husband have combined net monthly income, after deducting their household expenses, a \$975 per month 401(k) contribution, and the payment of \$1,021.58 in business expenses for the Debtor's non-income producing business, in the amount of \$1,152.87. This amount is sufficient to allow the Debtor to repay a significant portion of her unsecured debts. The Court finds that the totality of the circumstances of the Debtor's financial situation demonstrates abuse. Accordingly, for the reasons set forth above, it is

**ORDERED**

1. The United States Trustee's Motion For Summary Judgment with respect to the United States Trustee's Motion to Dismiss (Doc. No. 36) is GRANTED;

2. The Debtor's Motion for Summary Judgment on United States Trustee's Motion to Dismiss (Doc. No. 40) is DENIED;

3. The United States Trustee's Motion to Dismiss Case Pursuant to 11 U.S.C. § 707(b)(1) and (b)(3) (Doc. No. 19) is GRANTED;

4. The effectiveness of this order is stayed for 14 days to allow the Debtor to convert this case to a Chapter 13 if she so chooses.

DONE and ORDERED on September 2, 2011.

/s/ Caryl E. Delano

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Caryl E. Delano  
United States Bankruptcy Judge