

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

In re:

Case No. 3: 11-bk-7120-PMG

Leigh A. Ard,

\_\_\_\_\_ Debtor.

Chapter 7

**ORDER ON MOTION TO DISMISS PURSUANT TO 11 U.S.C. SECTION 707(b)(1) BASED  
ON PRESUMPTION OF ABUSE ARISING UNDER 11 U.S.C. SECTION 707(b)(2) AND  
ABUSE ARISING UNDER 11 U.S.C. SECTION 707(b)(3)**

**THIS CASE** came before the Court for a final evidentiary hearing to consider the Motion of the United States Trustee (UST) to Dismiss Pursuant to 11 U.S.C. Section 707(b)(1) Based on Presumption of Abuse Arising under 11 U.S.C. Section 707(b)(2) and Abuse Arising under 11 U.S.C. Section 707(b)(3). (Doc. 25).

At trial, the UST did not assert that the presumption of abuse arises in this case under §707(b)(2) of the Bankruptcy Code. (Doc. 57, p. 1; Transcript, p. 20). Instead, the UST asserts only that the case should be dismissed under §707(b)(3) of the Bankruptcy Code, because the totality of the Debtor's financial situation shows that the granting of relief would be an abuse of the provisions of Chapter 7.

The Motion should be denied. The burden of showing that the Debtor has the ability to repay her creditors was not satisfied. Additionally, the evidence shows that the Chapter 7 petition was preceded

by a decrease in the Debtor's income, that the Debtor has not pursued an extravagant lifestyle, and that the budget items challenged by the UST were reasonable under the circumstances. For these reasons, the Court cannot find that the granting of relief to the Debtor would be an abuse of the provisions of Chapter 7 of the Bankruptcy Code.

### **Background**

The Debtor is married with two young children. She is employed as an administrative assistant for a company in Jacksonville, Florida, and her non-filing spouse is employed as a security guard. (Docs. 1, 72).

The Debtor filed a petition under Chapter 7 of the Bankruptcy Code on September 28, 2011.

#### **A. Schedules**

On her schedule of real property filed with the petition, the Debtor listed the following properties:

1. A homestead located in Jacksonville, Florida with a scheduled value of \$146,000.00, and scheduled encumbrances totaling \$191,572.00.

2. A rental condominium in Jacksonville with a scheduled value of \$33,000.00, and scheduled encumbrances totaling \$123,071.00. According to the schedules, the condominium is owned by a limited liability company, but the Debtor is obligated on the mortgages.

3. Three separate lots described as "Ocala National Forest Campsites," with scheduled values of \$3,060.00, \$3,060.00, and \$7,480.00, respectively, and with no scheduled encumbrances.

4. Vacant land in Baker County, Florida, with a scheduled value of \$18,225.00, and with no scheduled encumbrances.

On her schedule of personal property filed with the petition, the Debtor listed the following assets:

1. A 401(k) Plan with her employer, with a scheduled value of \$38,528.00, and subject to a loan in the amount of \$19,123.04.

2. A 2010 joint income tax refund in the amount of \$2,000.00.
3. A 1995 Toyota 4-Runner with a scheduled value of \$1,975.00.
4. A 1997 Buick Century with a scheduled value of \$1,575.00.
5. A 2007 Yamaha ATV with a scheduled value of \$3,955.00, and a scheduled lien in the amount of \$9,642.00.

The Debtor subsequently amended her schedule of personal property to add an account with the Florida Prepaid College Plan for her two children. The amount of her interest in the Plan was scheduled as \$14,539.73. (Doc. 23).

On her schedule and amended schedule of property claimed as exempt, the Debtor listed her homestead real property, the interest in her 401(k) plan, a portion of her interest in the Toyota 4-Runner, and her interest in the Florida Prepaid College Plan. (Docs. 1, 23).

On her schedule and amended schedule F, the Debtor listed creditors holding unsecured claims in the amount of \$35,829.00. (Docs. 1, 23).

#### **B. Chapter 7 events**

On November 17, 2011, the Chapter 7 Trustee filed an objection to the exemptions claimed by the Debtor, and a Motion for the Debtor to turn over property of the estate to the Trustee. (Docs. 13, 14).

On January 5, 2012, the Trustee filed a Notice of Intent to Compromise his claims against the Debtor. (Doc. 33). In the Notice, the Trustee indicated that the estate may hold claims related to the Ocala National Forest Campsites, the Florida Prepaid College Plan, the 401(k) plan and loan, certain of the Debtor's household goods and personal effects, the vehicles, and the tax refund. The Trustee agreed to resolve the estate's claims for the total sum of \$15,000.00, payable from the Debtor at the rate of \$1,250.00 per month commencing on February 1, 2012. The Notice further provided that the

settlement amount is “allocated as follows: \$11,900 for the vacant land in Baker County, Florida, \$400 for the non-exempt jewelry (wedding ring, gold necklace, earrings and bracelets), \$1,200 for the estate’s interest in the 1995 Toyota 4-runner and \$1,500 for the estate’s interest in the 1997 Buick Century.” (Doc. 33, ¶12). Finally, the compromise provided that the Ocala National Forest Campsites were property of the estate subject to administration by the Trustee. (Doc. 38, ¶3).

The compromise was approved on February 1, 2012, and the Trustee subsequently filed notices of public auction of the Ocala campsites. (Docs. 38, 41, 66).

On February 12, 2012, the Debtor filed a Reaffirmation Agreement with HSBC Bank Nevada, N.A. regarding the Bank’s lien on the Yamaha ATV. (Doc. 46). Pursuant to the Agreement, the amount of the debt was \$9,847.38, and the Debtor agreed to pay the creditor the sum of \$100.00 per month for a period of forty-eight months for a total reaffirmed sum of \$4,800.00.

No objections to the Debtor’s discharge or complaints to determine the dischargeability of a debt were filed in the case.

### **Discussion**

On December 14, 2011, the UST filed a Motion to Dismiss the Debtor’s bankruptcy case pursuant to §707(b)(1) of the Bankruptcy Code. (Doc. 25). Under §707(b)(1), the Court may dismiss a Chapter 7 case 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).

A Court’s determination of abuse under §707(b)(1) “may be made under either of the standards set forth under §707(b)(2) and (3).” In re Chapman, 447 B.R. 250, 252 (8<sup>th</sup> Cir. BAP 2011).

Section 707(b)(2) provides a method to determine whether a debtor's case is presumptively abusive for purposes of dismissal under §707(b)(1). 11 U.S.C. §707(b)(2).

If the presumption of abuse does not arise under §707(b)(2), or if the presumption is rebutted, §707(b)(3) provides that the Court may nevertheless determine whether the case is abusive based on the debtor's bad faith or the totality of the circumstances. 11 U.S.C. §707(b)(3).

In this case, the UST initially submitted a statement that the presumption of abuse had arisen under §707(b)(2). At trial, however, the UST did not request dismissal of the case as presumptively abusive. Instead, the UST asserts only that the case should be dismissed under §707(b)(3) of the Bankruptcy Code, because the totality of the Debtor's financial situation shows that the granting of relief would be an abuse of the provisions of Chapter 7. (Doc. 57, p. 1; Transcript, p. 20).

"Determination of abuse under section 707(b)(3) solely considers circumstances relating to a debtor's financial situation." 11 U.S.C. §707(b)(3)(B); In re Parada, 391 B.R. 492, 499 (Bankr. S.D. Fla. 2008). The §707(b)(3) analysis is a broad, flexible review that encompasses any factors that are relevant to the debtor's financial condition. In re Riley, 2010 WL 3718017, at 6 (Bankr. D. Mass.); In re Jensen, 407 B.R. 378, 384 (Bankr. C.D. Cal. 2009). The section is not intended to determine whether a debtor's conduct is abusive toward individual creditors, but is instead intended to determine whether the conduct is abusive toward the bankruptcy process as a whole. In re Gonyer, 383 B.R. 316, 321 (Bankr. N.D. Ohio 2007).

The movant bears the burden of proving abuse under §707(b)(3) by a preponderance of the evidence. In re Wise, 453 B.R. 220, 226 (Bankr. D. Vt. 2011); In re Rudmose, 2010 WL 4882059, at 3 (Bankr. N.D. Ga.).

### **A. Ability to pay**

It is generally accepted that a debtor's ability to pay his creditors is a primary factor to consider under the "totality of the circumstances" analysis of §707(b)(3). In re Norwood-Hill, 403 B.R. 905, 912 (Bankr. M.D. Fla. 2009). A debtor's "ability to pay his or her debts may be taken into account under the totality-of-the-circumstances test" of §707(b)(3). In re Witcher, 702 F.3d 619, 623 (11<sup>th</sup> Cir. 2012).

In this case, the UST's "primary argument is that the Debtor has considerable disposable income to fund a Chapter 13 plan." (Doc. 57, p. 1; Transcript, p. 47). To support its position, the UST asserts that certain items contained in the Debtor's schedule of expenses are not reasonably necessary for the support and maintenance of the Debtor and her dependents.

At trial, for example, the UST examined the Debtor regarding the amended schedule of income and expenses that she had filed shortly before the hearing. (Docs. 72, 73). With respect to her expenses, the Debtor testified that she had listed payments on a 401(k) loan in the amount of \$531.00 per month, payments on the reaffirmed ATV loan in the amount of \$100.00 per month, and payments on the Florida College Prepaid Fund in the total amount of \$527.00 per month. The Debtor also testified that she was making payments on the compromise with the Chapter 7 Trustee in the amount of \$1,250.00 per month. (Docs. 72, 73; Transcript, pp. 15-17). The UST did not question the Debtor regarding any other significant expenses or debt repayments. (Transcript, pp. 11-18).

According to the UST, all of the challenged expenses are discretionary items that should not be included when considering the Debtor's ability to pay her creditors. (Transcript, p. 50). If the

challenged expenses are eliminated, the UST contends that the Debtor would have disposable income of more than \$1,000.00 per month. (Transcript, p. 49).

The documentary evidence and Debtor's testimony, however, show that the disposable income calculated by the UST is largely illusory. Although the Debtor included the ATV payment and the College Prepaid Fund payments on her amended schedules (Doc. 73), she testified that she is not current on the ATV payments, and that she has not made a payment on the College Prepaid Fund in approximately six or seven months. (Transcript, pp. 30, 35-36; Exhibit 8). Further, and perhaps most significantly, the Debtor testified that she has not made a mortgage payment on her home in seven or eight months, and that she has received a notice of default from the mortgage lender. (Transcript, pp. 30, 38). According to the Debtor, she is currently able to pay only her necessary expenses, has depleted her small savings account, and has spent nearly all of the funds in her checking account. (pp. 30, 39-40; UST's Exhibits).

Under the totality of the circumstances analysis of §707(b)(3), courts may evaluate post-petition events to obtain a realistic picture of the debtor's actual ability to repay his creditors. In re Sonntag, 2012 WL 1065482, at 4 (Bankr. N.D. W. Va.); In re Vecera, 430 B.R. 840, 845 (Bankr. S.D. Ind. 2010). In other words, the "ability to pay must be a reality for the filing of a Chapter 7 to be found abusive." In re Lavin, 424 B.R. 558, 565 (Bankr. M.D. Fla. 2010). In this case, the reality of the Debtor's financial condition would not permit her to repay her creditors in a Chapter 13 plan.

The Debtor works as an administrative assistant, and is the primary income-earner in her household. (Doc. 72). Her base pay from her employment is \$3,500.00 per month. (Doc. 72;

Transcript, pp. 13-14). Although she receives financial and tuition support for her two children, the Debtor is responsible for the children's daily care and expenses. (Transcript, p. 35).

At the time of trial, the Debtor had nearly completed the payments to the Chapter 7 Trustee pursuant to the compromise or "buyback" agreement. The Debtor testified, however, that the mortgage payments on her home are in substantial default, and that she has not been able to make payments on certain of the other items listed in her schedule of expenses. Accordingly, the record indicates that the funds to pay the Trustee were drawn from other areas of her budget, and do not represent disposable income that would otherwise be available for creditors. Once the payments to the Trustee terminate, the Debtor testified that she intends to use the funds to reinstate the mortgage on her home. (Transcript, p. 38).

The movant bears the burden of proving the Debtor's ability to pay her creditors under §707(b)(3). In re Beckett, 442 B.R. 638, 645 (Bankr. N.D. Ohio 2010). Based on her current income and the defaults that have occurred during the Chapter 7 case, the Court finds that the burden of showing that the Debtor has the actual ability to repay her creditors through a Chapter 13 plan was not satisfied.

#### **B. Other circumstances**

Even if the UST had shown that the Debtor was able to repay her creditors, it is generally recognized that ability to pay is not the only factor to consider for purposes of §707(b)(3) of the Bankruptcy Code. On the contrary, surrounding circumstances should also be considered in determining whether a case is an abuse of the provisions of Chapter 7. In re Rivers, 466 B.R. 558, 570 (Bankr. M.D. Fla. 2012).

Congress could have required dismissal based solely on a debtor's "ability to pay." Instead, Section 707(b)(3)(B) requires evaluation of the "totality of the circumstances."

Thus, the UST must show something more than just the debtor's mathematical ability to pay. (Citations omitted).

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If the "totality of the circumstances" test is to mean anything, it is that the debtor's mathematical ability to pay be weighed against all the other factors.

In re Lavin, 424 B.R. 558, 563-65 (Bankr. M.D. Fla. 2010). See also In re Rudmose, 2010 WL 4882059, at 3 (Bankr. N.D. Ga.)("In short, the totality of the circumstances means *totality* and not just ability to pay.")(Emphasis in original).

In this case, the totality of the Debtor's financial situation does not indicate that the granting of relief would be an abuse of the provisions of Chapter 7. The evidence shows that the Chapter 7 petition was preceded by a decrease in the Debtor's income, that the Debtor has not pursued an extravagant lifestyle, and that the budget items challenged by the UST were reasonable under the circumstances.

First, it appears that the filing of the bankruptcy petition was preceded by a decrease in the Debtor's income. The Debtor testified, for example, that her adjusted gross income in 2009 was \$85,502.00, and that her adjusted gross income in 2010 was \$56,512.00, a decrease of approximately \$30,000.00. Although her income increased somewhat in 2011 to \$62,514.00, it did not reach the level of her 2009 income, and the Debtor does not expect her current annual income to approach her 2011 earnings. (Transcript, pp. 21-25; UST's Exhibits; Debtor's Exhibits).

Second, the Debtor has not pursued an extravagant lifestyle. The assets reflected in the Debtor's schedules are relatively modest, and do not indicate that the Debtor or her family engaged in a number of frivolous activities or went on a "spending spree" before filing the Chapter 7 petition. See In re Lavin, 424 B.R. at 564. Apart from her 401(k) account and the Florida Prepaid College Fund, for

example, the total value of the personal property listed on the Debtor's schedules equals \$12,887.35. (Docs. 1, 23). This amount includes a joint income tax refund in the amount of \$2,000.00 and the vehicles that the Debtor uses for transportation: a 1995 Toyota 4-Runner and a 1997 Buick Century. The UST does not assert that the Debtor failed to disclose any assets or failed to account for any prepetition income or expenditures.

Third, the budget items challenged by the UST are reasonable under the circumstances and do not indicate an abuse of the bankruptcy system. With respect to the 401(k) loan and Florida Prepaid College Fund, for example, the Debtor testified that she incurred the obligations long before the Chapter 7 petition was filed and before she anticipated filing her bankruptcy case. The Debtor further testified that defaults would be declared if she terminated the payments, and that fees or other penalties would be imposed if she does not comply with the terms of the programs. (Transcript, pp. 31, 34-36).

Additionally, of the \$15,000.00 paid to the Chapter 7 Trustee under the compromise and "buyback" agreement, the sum of \$2,700.00 was allocated to the vehicles that she uses for transportation. See In re Ralston, 400 B.R. 854, 868 (Bankr. M.D. Fla. 2009) ("Debtors who own their vehicles free and clear would likely need to devote this 'extra' disposable income to make payments to the trustee under a buyback arrangement in order to keep their vehicle."). Another portion of the Debtor's buyback price, the sum of \$11,900.00, was allocated to a lot in Baker County, Florida that had a scheduled value of \$18,225.00. In accordance with agreement, the Debtor's other non-homestead properties are being administered by the Trustee as property of the estate. Finally, the buyback agreement provides that the failure to make the payments to the Trustee "will be grounds for revocation of discharge." (Doc. 33; Transcript, pp. 29, 31).

In summary, the Debtor has described the expenses challenged by the UST and provided reasons for making the payments. Her explanations show that the items were not incurred or paid with the intent to abuse the bankruptcy process.

The evidence indicates that the Debtor's "motives and purposes in filing for bankruptcy relief are consistent with the purposes of Chapter 7." In re Reese, 402 B.R. 43, 54 (Bankr. M.D. Fla. 2008). The Debtor has two young children and earned the sum of \$62,514.00 from her employment in the year that the petition was filed. The filing was preceded by a significant decrease in the Debtor's income, and neither her prepetition nor her post-petition conduct evidences any improper purpose with respect to the Chapter 7 case. In re Rivers, 466 B.R. at 570.

The Debtor listed substantial debts on her schedule of liabilities, including more than \$35,000.00 on her schedule of unsecured claims, plus a large potential claim arising from the rental condominium owned by a separate entity. There is no evidence that the debts were not honestly incurred. On the contrary, it appears that the case was filed for the proper purpose of resolving unmanageable debts that were unfortunately incurred by the Debtor. In re Reese, 402 B.R. at 54. The totality of the Debtor's financial situation does not show that the granting of relief would be an abuse of the provisions of Chapter 7.

### **Conclusion**

The UST asserts that the Debtor's Chapter 7 case should be dismissed pursuant to §707(b)(3) of the Bankruptcy Code, because the totality of the Debtor's financial situation shows that the granting of relief would be an abuse of the provisions of Chapter 7.

The Motion to Dismiss should be denied. The burden of showing that the Debtor has the ability to repay her creditors was not satisfied. Additionally, the evidence shows that the Chapter 7 petition was preceded by a decrease in the Debtor's income, that the Debtor has not pursued an extravagant lifestyle, and that the budget items challenged by the UST were reasonable under the circumstances. Consequently, the Court cannot find that the granting of relief to the Debtor would be an abuse of the provisions of Chapter 7 of the Bankruptcy Code.

Accordingly:

**IT IS ORDERED** that the Motion of the United States Trustee to Dismiss Pursuant to 11 U.S.C. Section 707(b)(1) Based on Presumption of Abuse Arising under 11 U.S.C. Section 707(b)(2) and Abuse Arising under 11 U.S.C. Section 707(b)(3) is denied.

**DATED** this 19 day of February, 2013.

**BY THE COURT**

Paul M. Glenn

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PAUL M. GLENN

United States Bankruptcy Judge