

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

In re:

Case No. 6:04-bk-01564-ABB  
Chapter 7

DONALD J. DONOVAN,

Debtor.

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**ORDER**

This matter came before the Court on the Motion to Dismiss Case for Substantial Abuse Pursuant to 11 U.S.C. Section 707(b) (“Motion”)<sup>1</sup> filed by the unsecured creditor Cindy M. Barben (“Creditor”), against Donald J. Donovan, the Debtor herein (the “Debtor”), for substantial abuse of the bankruptcy system. An evidentiary hearing on the Motion was held on September 25, 2006 at which the Debtor, the Creditor, and their respective counsel appeared.

The parties were granted fourteen days to submit closing briefs, which period was extended pursuant to the Order entered on (Doc. No. 102). The parties filed closing briefs (Doc. Nos. 99, 104). The Debtor filed a Motion for Sanctions (Doc. No. 105) against Creditor pursuant to Federal Rule of Bankruptcy Procedure 9011. The Court makes the following Findings of Fact and Conclusions of Law after reviewing the pleadings and evidence, hearing live testimony and argument, and being otherwise fully advised in the premises.

**FINDINGS OF FACT**

The Debtor instituted this case on February 17, 2004 (“Petition Date”) by filing a Chapter 13 individual petition. The Debtor is an airline pilot who performs services as an independent contractor for Geneva Aviation, Inc., a charter airline company. His income fluctuates monthly due to Federal Aviation Administration restrictions governing his employer. Creditor, the Debtor’s former spouse, holds a general unsecured claim in the amount of \$54,531.66, Claim No. 8, arising from a divorce decree entered in their divorce proceedings in the

State of New York.<sup>2</sup> The Debtor’s debts are primarily consumer debts.<sup>3</sup>

The Debtor’s plan was confirmed on June 27, 2005, but he was unable to make his plan payments as they came due. The Order Dismissing Case was entered on June 14, 2006, but the effective date of the Order was delayed fourteen days to permit the Debtor an opportunity to convert the case to another chapter.<sup>4</sup> He had not previously sought conversion of his case. The Debtor exercised his right to voluntarily convert his case to Chapter 7 by filing a Notice of Conversion to Chapter 7 pursuant to 11 U.S.C. § 1307(a).<sup>5</sup> An Order was entered on June 30, 2006 converting this case to a Chapter 7 proceeding.<sup>6</sup>

Creditor seeks dismissal contending granting the Debtor Chapter 7 relief would constitute substantial abuse of the bankruptcy process. Creditor bases her Motion upon § 707(b) of the Bankruptcy Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). BAPCPA substantially amended § 707(b) to, among other things: grant any party in interest standing to seek dismissal of a case, include a means testing component for determining abuse, and lower the abuse standard. Creditor prepared a Statement of Current Monthly Income and Means Test Calculation regarding the Debtor’s financial standing (Doc. No. 92, Creditor’s Exh. No. 1).

This case was commenced prior to the BAPCPA effective date and The BAPCPA amendments do not govern. The pre-BAPCPA Code governs this case. Section 707(b), in its pre-BAPCPA form, provides only the Court *sua sponte* or the United States Trustee by motion may dismiss a case filed by an individual debtor whose debts are primarily consumer debts. Creditor does not have standing to seek dismissal of this case pursuant to § 707(b) and the means test is inapplicable.<sup>7</sup> Creditor raises serious issues in her Motion relating to the Debtor’s income disclosures. Creditor’s Motion shall be treated as an objection to conversion in order to

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<sup>2</sup> Doc. No. 41 (Order Sustaining Debtor’s Objection to Claim Number 8).

<sup>3</sup> Doc. No. 7.

<sup>4</sup> Doc. No. 70.

<sup>5</sup> Doc. No. 73.

<sup>6</sup> Doc. No. 74.

<sup>7</sup> Creditor references “substantial abuse” as the abuse standard, which is the proper standard pursuant to the pre-BAPCPA § 707(b). The BAPCPA § 707(b) lowers the standard from “substantial abuse” to “an abuse.”

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<sup>1</sup> Doc. No. 78.

give the parties a full and fair opportunity to address Creditor's contentions.

Creditor contests the accuracy of the Debtor's income information. The Debtor states in his original Schedule I his net monthly income on the Petition Date was \$4,800.00, which would total \$57,600.00 annually if he received such income every month.<sup>8</sup> His Statement of Financial Affairs reflects a steady decrease in income from 2001 through 2004.<sup>9</sup> His Exhibit 1 reflects total income of \$14,738.04 for the period January 12, 2006 through June 29, 2006.<sup>10</sup> The Debtor, post-hearing, filed an Amended Schedule I reflecting his gross estimated average monthly income is \$6,066.67 and his net income is \$4,045.17.<sup>11</sup> He included the statement: "Reduction in income after filing Chapter 13 case due to client's loss of charter certificate resulting in over 50 percent reduction in need for pilot services."<sup>12</sup>

Creditor contends the Debtor's annual income during the six months preceding the Petition Date exceeded the Florida median income of \$37,099.00. She presented the Means Test Calculation in support of her contention and argues the Debtor has the ability to make a significant contribution against his total indebtedness and should not be allowed Chapter 7 relief.

The original and Amended Schedule I reflect the Debtor's "estimate of average monthly income." The Debtor's monthly income has been difficult to estimate because it fluctuates dramatically month by month, as evidenced by his 2006 pay history. The Debtor made his best estimate in his original Schedule I, but his actual income in 2004 was less than he anticipated when he filed this case. He made earnest and substantial attempts for a year to fulfill his Chapter 13 plan obligations. The Trustee received and disbursed payments of \$48,300.00 from the Debtor (Doc. No. 96).

The Debtor exercised his statutory right to convert the case to Chapter 7 when it became apparent he could not meet his plan obligations. Estimating his monthly income became more difficult post-petition when his employer's need for pilot services was reduced. The Debtor presented his best income estimates in his original Schedule I

and Amended Schedule I. He may have been optimistic with his income estimates, but he has not presented false information regarding his income. He has acted in good faith throughout this case. He made earnest attempts to fulfill his plan obligations, but he was unable to make the payments. His financial situation has deteriorated. The Debtor does not have the ability to make a significant contribution to his total indebtedness.

The Debtor filed his Chapter 13 case in good faith and is authorized to convert to Chapter 7 when it became apparent he could not make his plan payments. The conversion was made in good faith. Granting the Debtor Chapter 7 relief is not a substantial abuse, or any abuse, of the provisions of the Bankruptcy Code. The Debtor is entitled to Chapter 7 relief.

The Debtor seeks an award of sanctions against the Creditor contending Creditor violated Federal Rule of Bankruptcy Procedure 9011 in filing the Motion. Creditor's filing of the Motion originated in her misunderstanding of BAPCPA and was not filed for an improper purpose. Sanctions are not appropriate and the Motion for Sanctions is due to be denied.

## **CONCLUSIONS OF LAW**

### ***Controlling Bankruptcy Code Provisions***

The BAPCPA was enacted on April 20, 2005<sup>13</sup> and was effective on October 17, 2005, with certain provisions effective upon enactment.<sup>14</sup> The amendments, with certain exceptions, "shall not apply with respect to cases commenced under title 11, United States Code, before the effective date of this Act."<sup>15</sup>

BAPCPA amended many provisions of the Bankruptcy Code, including § 707(b).<sup>16</sup> Section 707(b) allows a bankruptcy court, after notice and a hearing, to dismiss a Chapter 7 case if granting relief to the debtor would be contradictory to the goals of the bankruptcy process. BAPCPA substantially amended § 707(b): expanding authority to seek dismissal of a case to include "any party in interest," incorporating a means testing component for determining whether granting relief would constitute

<sup>8</sup> Doc. No. 9.

<sup>9</sup> Doc. No. 9 (SFA No. 1).

<sup>10</sup> Doc. No. 91.

<sup>11</sup> Doc. No. 98.

<sup>12</sup> Id.

<sup>13</sup> Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005).

<sup>14</sup> Pub. L. No. 109-8 at § 1501(a) (uncodified); In re Wayrynen, 332 B.R. 479, 482-83 (Bankr. S.D. Fla. 2005).

<sup>15</sup> Id. at § 1501(b)(1) (uncodified).

<sup>16</sup> Id. at § 102.

an abuse of Chapter 7, changing the abuse standard from “substantial abuse” to “an abuse,” and removing the presumption in favor of granting relief to the debtor. 11 U.S.C. § 707(b) (2005). The revised § 707(b) became effective on October 17, 2005.<sup>17</sup>

Section 707(b), in its pre-BAPCPA form, provides:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

11 U.S.C. § 707(b) (2004). The statute strictly limits who may seek dismissal to the court and the United States Trustee, and specifically excludes parties in interest. The statute, compared to the new BAPCPA statute, sets a high standard for dismissal requiring a showing of “substantial abuse” and includes a presumption in favor of the debtor.

The date a debtor files a bankruptcy case determines whether the BAPCPA amendments govern. BAPCPA’s plain language is clear the amendments, with a few exceptions, none of which are applicable to this case, do not apply to cases commenced prior to October 17, 2005.<sup>18</sup> Congress unequivocally intended for the BAPCPA amendments to apply prospectively and not retroactively.<sup>19</sup> “Absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment.” Gozlon-Peretz v. U.S., 498 U.S. 395, 404, 111 S. Ct. 840 (1991); *see also* In re Waczewski, 2006 WL 1594141, Case No. 6:06-BK-00620-KSJ at \*5 (Bankr. M.D. Fla. 2006).

The Debtor commenced his Chapter 13 case on February 17, 2004, before the BAPCPA enactment and effective dates. The BAPCPA

amendments do not govern this case; it is governed by the pre-BAPCPA Code provisions. Pub. L. No. 109-8 at § 1501(a); In re McKinney, 457 F.3d 623, 624-25 (7th Cir. 2006); In re Wayrynen, 332 B.R. at 482-83; *see also* Christo v. Padgett, 223 F.3d 1324, 1332 (11th Cir. 2000) (denying retroactive effect of procedural change in Bankruptcy Code on basis of language similar to § 1501(b)(1) in 1994 Bankruptcy Code amendments).

The Debtor’s case was converted to Chapter 7, but not dismissed because the Order Dismissing Case did not become effective. The Debtor timely exercised his statutory right to convert pursuant to 11 U.S.C. § 1307(a) and his case was converted to a Chapter 7 proceeding on June 30, 2006. The conversion of a case does not change the petition date:

Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of filing of the petition, the commencement of the case, or the order for relief.

11 U.S.C. § 348(a) (2004); *see also* In re State Airlines, Inc., 873 F.2d 264, 268 (11th Cir. 1989) (section 348(a) “makes clear” conversion does not change the petition date, commencement of the case, or order for relief).

Section 707(b), in its pre-BAPCPA form, governs. Creditor does not have standing pursuant to the plain and unambiguous language of § 707(b) to seek dismissal of this case for substantial abuse of the bankruptcy process by the Debtor. 11 U.S.C. § 707(b). The means test is inapplicable to this case. Id. Creditor’s Motion shall be treated as an objection to conversion in order to give the parties a full and fair opportunity to address Creditor’s concerns about the Debtor’s income disclosures.

### ***Debtor’s Good Faith***

Section 1307(a) allows a debtor to convert a Chapter 13 case to Chapter 7 “at any time.” 11 U.S.C. § 1307(a) (2004). The statute does not specifically require a conversion be made in good faith, but an inherent good faith requirement exists. For example, there is an exception to the general rule

<sup>17</sup> Nothing in BAPCPA indicates the effective date of the amendments to § 707(b) (as contained in § 102 of BAPCPA) is any date other than October 17, 2005.

<sup>18</sup> Id. at § 1501(b).

<sup>19</sup> Id.

concerning the property of the estate after a conversion from chapter 13 to chapter 7. 4 COLLIER ON BANKRUPTCY ¶348.07, at 348-24 (15<sup>th</sup> ed. Rev. 2005). The property of the chapter 7 estate is the property of the estate as of the conversion date if conversion is found to be in bad faith. 4 COLLIER ON BANKRUPTCY ¶ 348.07, at 348-25 (15<sup>th</sup> ed. rev. 2005).

The Debtor filed his Chapter 13 in good faith with the intent to pay his creditors' claims through a plan. He filed his original Schedule I estimating the best he could his average monthly income. He attempted earnestly for a year to fulfill his plan obligations paying more than \$48,000 to the Trustee. He converted to Chapter 7 when it became apparent he could not meet his plan obligations. The evidence reflects the Debtor's income continues to fluctuate radically each month and has decreased substantially post-petition due to factors beyond his control.

The Debtor was authorized to convert his case and the conversion was made in good faith. He does not have the ability to fund a feasible plan. He has not abused the bankruptcy process. Granting the Debtor Chapter 7 relief would not be a substantial abuse, or any abuse, of the provisions of the Bankruptcy Code. The Debtor is entitled to Chapter 7 relief. A basis for awarding the Debtor sanctions against Creditor pursuant to Federal Rule of Bankruptcy Procedure 9011 does not exist.

Accordingly, it is

**ORDERED, ADJUDGED and DECREED** that Creditor's Motion to Dismiss is hereby **DENIED**; and it is further

**ORDERED, ADJUDGED and DECREED** that the Debtor's Motion for Sanctions is hereby **DENIED**.

Dated this 8<sup>th</sup> day of November, 2006.

/s/ Arthur B. Briskman  
ARTHUR B. BRISKMAN  
United States Bankruptcy Judge