UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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In re:

JO-ELLYN L. PILARSKI,

Debtor.

ORDER DENYING MOTION OF UNITED STATES TRUSTEE FOR DISMISSAL UNDER 11 U.S.C. § 707(b)

BKY 07-30026

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At Minneapolis, Minnesota, this 14th day of November, 2007.

This Chapter 7 case came on before the Court for hearing on the motion of the United States Trustee for dismissal pursuant to 11 U.S.C. § 707(b). The movant appeared by his attorney, Michael R. Fadlovich. The Debtor appeared by her attorney, Kelly J. McCormack. The Court ordered post-hearing briefing, which counsel submitted. The following order memorializes the decision on the motion, made on the moving and responsive documents, the arguments of counsel, and the post-hearing briefing.

The Debtor filed a voluntary petition under Chapter 7 on January 4, 2007, which commenced this case. The United States Trustee ("the UST") now moves for dismissal of the case, on the ground that allowing it to proceed to an unqualified grant of discharge would constitute an abuse of the provisions of Chapter 7. The UST's statutory authority is 11 U.S.C. §§ 707(b)(2) - (3).[1] These provisions were enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 ("BAPCPA"). The UST's motion raises two issues.

[1]The custom of judicial opinion writing would dictate that the text of these statutes be quoted here, for the convenience of the reader. However, the text of these provisions is so sprawling, densely-worded, and cumbersome that reprising it verbatim would overwhelm two other values for judicial composition, brevity and economy. Suffice it to say that § 707(b)(2) imposes a presumption of abuse on a debtor whose "current monthly income," reduced by specified expense items, as cumulated over a 60-month period, would exceed certain thresholds. Section 707(b)(3) applies to cases where a motion for dismissal is made but the presumption of § 707(b)(2) would not apply. It requires the court to consider whether the debtor filed for Chapter 7 "in bad faith," and "whether the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse" of the provisions of Chapter 7.

NOTICE OF ELECTRONIC ENTRY AND
FILING ORDER OR JUDGMENT
Filed and Docket Entry made on 11/14/07
Lori Vosejpka, Clerk, By jrb, Deputy Clerk

I. Applicability of Presumption of Abuse: 11 U.S.C. § 707(b)(2)(A)(i).

When she filed for bankruptcy, the Debtor was the owner in fee of real estate in St. Paul, Minnesota, that she used as her homestead. She scheduled the claims of three creditors that were secured by mortgages against this property. The stated total of her debts to these creditors exceeded the value that she attributed to the property. In her Statement of Intention, she checked the box for "Property will be Surrendered" as to all three of these secured debts.

As currently required, the Debtor submitted a Form B 22A, the so-called "Statement of Current Monthly Income and Means-Test Calculation." This form contains a detailed set of income and expense disclosures and calculations that relate to the substantive concerns underlying 11 U.S.C. § 707(b)(2). In it, the Debtor included line-items in entry 42, in Subpart C, "Deductions for Debt Payment," that reflected monthly payment obligations for debt service on two of the three claims secured by mortgages against her homestead. The total of these two items was $1,543.00. This total and its stated components correctly reflected the amortization of these debts that had been in effect on the date the Debtor filed for bankruptcy.

With the inclusion of these two line-entries, the Debtor's "Total Deductions for Debt Payment" were $1,924.15. Combined with her stated "Total Expenses Allowed under IRS Standards" for various expenditures for personal subsistence, transportation, taxes, and health care, this made for "Total Deductions Allowed under § 707(b)(2)" of $4,938.96.

This sum exceeded the Debtor's stated monthly income, as defined under 11 U.S.C. § 707(b)(2), by the sum of $474.24. Thus, as the Debtor presented it in her initial filing, her case would not trigger a presumption of abuse under 11 U.S.C. § 707(b)(2)(A)(i). The consequence would be that any motion for dismissal under 11 U.S.C. § 707(b)(1) would not be driven forward with the burden of production of evidence shifted to her.

However, the UST took the position that debt service in the form of "house payments [the Debtor] clearly will never make" could not be deducted from her current monthly income for the

means test that goes to the statutory presumption. In that, he was prompted by the Debtor's Statement of Intention on the disposition of her homestead.[2]

As the UST would have it, the cost of housing to be attributed to the Debtor for the means test is that derived from the IRS Housing and Utilities Standards for Ramsey County, Minnesota. For a household of the size of the Debtor's (one person), this figure would be $817.00. Adjusted for this suggestion, per the UST, the Debtor's means-test profile would show a monthly disposable income of $259.39.[3] This sum, multiplied by sixty pursuant to § 707(b)(2)(A)(i), is $15,563.40; and because this figure is greater than $10,000.00, the presumption under § 707(b)(2)(A)(i) would arise. Thus, the UST maintains, he has made out a prima facie case for dismissal under § 707(b)(1).

In response, the Debtor relied on *In re Hartwick*, 352 B.R. 867 (Bankr. D. Minn. 2006), a decision by Judge Dennis D. O'Brien of this Court. In *Hartwick*, Judge O'Brien concluded that the "means test" under § 707(b)(2) permitted the debtor there "to deduct the monthly mortgage debt under 11 U.S.C. § 707(b)(2)(A)(ii) and (iii) as the actual amount owing when the petition was filed," on a debt secured by a homestead mortgage for which foreclosure proceedings had not yet been finalized--even though the debtor had "executed a statement of intention to abandon the property and the property [was then] in foreclosure." 352 B.R. at 868. In their post-hearing submissions, both sides hotly debated the merits of Judge O'Brien's rationale. Since *Hartwick* was a ruling by another judge of a trial court, it of course was not binding precedent; thus, the field of argument in this case, before another judge, was wide open.

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[2]The Debtor has tacitly conceded the threshold point, i.e., that an actual monthly payment on these debts will not feature in her personal budget going forward. She has never amended her Statement of Intention, or otherwise avowed a new intent to keep the homestead by reaffirming on these mortgage-secured debts or by de facto resuming payment on them.

[3]There is a discrepancy of several dollars between this figure and the one that results from a simple deduction of the difference between the respective amounts of the deemed housing expense. This is due to a difference in the deemed administrative expense for a hypothetical Chapter 13 case involving the Debtor's debt structure, as between the two sides' calculations.

After the record was closed here, a decision was rendered on appeal from Judge O'Brien's decision, in *Fokkena v. Hartwick*, 373 B.R. 645 (D. Minn. 2007) (Davis, J.). In the part of his decision relevant to the case at bar, Judge Davis affirmed Judge O'Brien's ruling as to the amount of an allowable housing-expense deduction for the means test. He held that the calculation of "[t]he debtor's average monthly payments on account of secured debts" under § 707(b)(2)(A)(iii) "applies to payments [on secured debts] that the debtor is under contract to make" at the times relevant to a motion under § 707(b). Thus, Judge Davis ruled, where a debtor is "still under a contractual obligation to pay her mortgage at the time she filed her bankruptcy petition and at the time . . . [of a] motion to dismiss" under § 707(b), that debtor is permitted a deduction from current monthly income for the amount of the contractually-due monthly payment on such debt for the purposes of the means test. 373 B.R. at 656.

Judge Davis's analysis is lengthy and detailed; it divines the legislative intent of BAPCPA from the structure of the relevant statutory text, and it ultimately defers to the congressional intention to "creat[e] a mechanical means test" for application under § 707(b)(2). *See* 373 B.R. at 653-656. It is not settled whether the decision of a district judge in an appeal from a bankruptcy judge's decision is precedent binding on bankruptcy judges within the same districts. *In re Johnson*, 300 B.R. 471, 474-476 (Bankr. D. Minn. 2003), *rev'd on other grounds*, 314 B.R. 779 (D. Minn. 2004). Regardless, Judge Davis's ruling on this issue is fully supported in the text of §§ 707(b)(2)(A)(ii)(I) and 707(b)(2)(A)(iii)(I) and the extant legislative history, not to mention a calm, thoughtful, and sequential logic. As such, it is entitled to full deference, and is to be applied here.[4]

The Debtor accordingly prevails on this prong of the UST's motion. Under the means test, she has no current monthly income that is not to be deemed to be dedicated to "the amounts determined under [11 U.S.C. §§ 707(b)(2)(A)] (ii), (iii), and (iv)" per § 707(b)(2)(A)(i). Thus

[4]For another treatment of the issue using much the same analysis and logic, *see In re Randle*, 358 B.R. 360 (Bankr. N.D. Ill. 2006).

there is no presumption that granting her relief under Chapter 7 would be an abuse of the provisions of that chapter; and without that presumption there is no factual basis for dismissal.

II. Possibility of Abuse Under Considerations of Bad Faith and Totality of Circumstances: 11 U.S.C. § 707(b)(3)(A) - (B).

In the text of his original motion, the UST hedged his bets on pushing for a dismissal of this case:

> 31. In the event the court does not find the Debtor's case to be a presumptive abuse under 11 U.S.C. §707(b)(2), then the U.S. Trustee submits that the case may be an abuse using the Totality of Circumstances test as set forth in 11 U.S.C. §707(b)(3) and the U.S. Trustee hereby reserves his right to bring a motion under that subsection.

In his post-hearing brief, the UST's counsel pressed forward on this theory[5] and expanded on it:

> . . . [I]t appears that the Debtor has attempted to claim as an expense future house payments which she will not have in order to pass the means test. Such an attempt by the Debtor could be construed as bad faith. Irrespective of the Debtor's bad faith, alternate cause for dismissal exists under § 707(b)(1), based on the totality of the circumstances under § 707(b)(3). The Debtor no longer has a monthly house payment in the amount claimed and has not had such a payment for the past three months. As a result, she has the ability to make substantial payments to her creditors.

But under his ensuing argument the UST would have "substantial" projected disposable income deemed to the Debtor by attributing a housing expense of $817.00 per month to her, on the express thought that this amount, the one prescribed by the IRS Local Housing Standard, should apply with equal force under § 707(b)(3). There is no warrant for doing this in § 707(b)(3). Entirely to the contrary, the text of the statute clearly contemplates an examination of a debtor's unique "financial situation." The UST's attribution of "the artificial expenses the means test requires" is inapposite in a motion that invokes the particularized inquiry into the totality of the

[5]The rather coy, conditional phrasing of the motion's original text did not really put a formal request for dismissal under § 707(b)(3) before the Court. *In re Robertson*, 370 B.R. 804, 811 n. 11 (Bankr. D. Minn. 2007). However, the Debtor's counsel did not object to the submission of the issue, so it will be reached on its merits.

circumstances under § 707(b)(3). He did not produce any evidence of the Debtor's actual housing expense, going forward. In the absence of that, and given that the Debtor's other scheduled expenses are reasonable in nature and amount, the "totality of the circumstances does not indicate abuse." *In re Ellringer*, 370 B.R. 905, 914 (Bankr. D. Minn. 2007). And basing a means-test submission on the original *Hartwick* rationale could not be considered as "fil[ing] the petition in bad faith," particularly given the vindication of the theory on appeal in *Hartwick*. *Id.* There is no basis for dismissing this case under § 707(b)(3).

III. Resultant Disposition.

IT IS THEREFORE ORDERED that the United States Trustee's motion for dismissal of this case is denied.

BY THE COURT:

GREGORY F. KISHEL
UNITED STATES BANKRUPTCY JUDGE