

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT

BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560

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June 10, 2004

Bruce J. Gering
Assistant U.S. Trustee
230 South Phillips Avenue, Suite 502
Sioux Falls, South Dakota 57102

Stan H. Anker, Esq.
Dakota Professional Building
2902 West Main Street, Suite 1
Rapid City, South Dakota 57702-8174

Subject: ***In re Donald A. Hausle***
Chapter 7; Bankr. No. 04-50015

Dear Mr. Gering and Mr. Anker:

The matter before the Court is the United States Trustee's Motion for Summary Judgment with respect to his Motion to Dismiss for Substantial Abuse. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court will grant the United States Trustee's motion.

Summary. On January 16, 2004, Donald Albert Hausle ("Debtor") filed for relief under chapter 7 of the bankruptcy code. Debtor is single and has no dependents. According to his schedules, Debtor has unsecured debts totaling \$95,534.73, monthly net income of \$3,916.00, and monthly expenses totaling \$3,527.00. On April 15, 2004, Debtor filed an amended Schedule J, which reflected monthly expenses totaling \$3,777.00.

On April 16, 2004, the United States Trustee filed a Motion to Dismiss for Substantial Abuse. In his motion, the United States Trustee questioned Debtor's calculation of his monthly net income and certain monthly expenses. According to the United States Trustee, Debtor has monthly disposable income of \$1,136.50. This sum, the United States Trustee argued, would permit Debtor to pay his unsecured creditors \$40,914.00 over a three-year period or \$68,190.00 over a five-year period.

On May 6, 2004, Debtor filed a response to the United States Trustee's motion to dismiss. In his response, Debtor admitted filing a chapter 7 petition, denied understating his income,

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stated that his monthly expenses were reasonably necessary for his maintenance and support, and stated that he did not have the ability to pay a substantial portion of his debts.

On May 11, 2004, the United States Trustee filed a Motion for Summary Judgment. In his motion, the United States Trustee referred the Court to Fed.Rs.Civ.P. 8(b) and (d), made applicable to this proceeding by LBR 9014-2(a), and argued that Debtor's general denials in his response to the United States Trustee's motion to dismiss did not refute the United States Trustee's allegations regarding Debtor's income and expenses.

On May 21, 2004, Debtor filed a brief and affidavit in opposition to the United States Trustee's motion for summary judgment. Debtor did not address the United States Trustee's argument regarding Fed.Rs.Civ.P. 8(b) and (d), choosing instead to offer revised income and expense figures. Debtor claimed that his average monthly income for the first five months of 2004 was more representative of his actual monthly income than that reflected on his Schedule I, which was based upon Debtor's 2002 tax return, or in the United States Trustee's motion to dismiss, which was based upon Debtor's 2003 tax return. Debtor also claimed that his monthly expenses needed to be adjusted to account for food and medical expenses he did not have prior to undergoing heart surgery in December 2003. Debtor did not explain why those additional food and medical expenses were not included in his original Schedule J, which was filed more than a month after his surgery, or in his amended Schedule J, which was filed more than four months after his surgery. Debtor also increased expenses other than his food and medical expenses.

On June 1, 2004, after the matter was taken under advisement, Debtor filed a supplemental response, in which he asked the Court to take into account a \$34.00 per month increase in his health insurance premium.

Summary Judgment. Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Bankr.P. 7056 and Fed.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein).

The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Circ. 1992) (quoting therein *Matsushita Elec.*

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Industrial Co. v. Zenith Radio, 475 U.S. 574, 587-88 (1986), and citations therein). Where motive and intent are at issue, disposition of the matter by summary judgment may be more difficult. *Cf. Amerinet*, 972 F.2d at 1490 (citation omitted).

The movant meets his burden if he shows the record does not contain a genuine issue of material fact and he points out that part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997) (quoting therein *City of Mt. Pleasant v. Associated Electric Coop*, 838 F.2d 268, 273, (8th Cir. 1988)). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970) (citation therein); *Handeen*, 112 F.3d at 1346.

If the movant meets his burden, however, the non movant, to defeat the motion, "must advance specific facts to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (quoting *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). The non movant must do more than show there is some metaphysical doubt; he must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106 F.3d 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996), and *JRT, Inc. v. TCBY System, Inc.*, 52 F.3d 734, 737 (8th Cir. 1995)).

Substantial Abuse. Pursuant to 11 U.S.C. § 707(b), the Court may dismiss a chapter 7 case "if it finds that the granting of relief would be a substantial abuse" of chapter 7. Section 707(b) is intended to promote fairness to creditors and prevent the use of chapter 7 by unneedy debtors. *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1288 (8th Cir. 1997).

The bankruptcy code does not define "substantial abuse." However, in interpreting § 707(b), the Eighth Circuit Court of Appeals has held that the primary inquiry is whether the debtor has the ability to pay her creditors. *Id.* (citing *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989)); *Nelson v. Siouxland Federal Credit Union (In re Nelson)*, 223 B.R. 349, 353 (B.A.P. 8th Cir. 1998). A debtor's ability to pay her creditors is measured by evaluating the debtor's financial condition in a hypothetical chapter 13 case. *Id.* The analysis includes the expectation that the debtor would put forth her best efforts in a chapter 13 plan. *In re Shelley*, 231 B.R. 317, 319 (Bankr. D. Neb. 1999); *In re Pamela E. Beauchamp*, Bankr. No. 97-50487, slip op. at 6 (Bankr. D.S.D. May 28, 1998) (citing *Hagel v. Drummond (In re Hagel)*, 184 B.R. 793, 798 (B.A.P. 9th Cir. 1995)). If the debtor has the substantial ability to pay her creditors, her chapter 7 case should be dismissed. *Koch*, 109 F.3d at 1288.

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Discussion. The United States Trustee is correct in his reading of LBR 9014-2(a) and Fed.Rs.Civ.P. 8(a) and (d). Debtor was required to admit or deny each of the United States Trustee's allegations. Debtor did not do so, choosing instead to offer only broad statements that he had not understated his income and that his expenses were reasonably necessary for his maintenance and support. In particular, Debtor did not admit or deny the United States Trustee's allegations regarding his average net monthly income, his payments to Wells Fargo Bank Nevada and US Bank, his monthly medical expense, his payment to the Internal Revenue Service, or his cattle. As a result, each of those allegations is deemed admitted. LBR 9014-2(a); Fed.R.Civ.P. 8(d). While those admissions would support a finding of substantial abuse in this case, the Court does not need to decide the United States Trustee's motion for summary judgment on the basis of Debtor's noncompliance with LBR 9014-2(a).

According to Debtor's most recent income and expense figures,¹ Debtor has monthly net income of \$3,466.50 and monthly expenses of \$3,525.60. This would not permit Debtor to pay anything to his creditors. However, Debtor has included among his monthly expenses a \$300.00 payment for a "Cattle Loan" and a \$104.00 payment for "Property Settlement Debts." With respect to the cattle loan, Debtor has not disclosed any income that he might receive from the cattle and has not refuted the United States Trustee's allegation that in 2003 he reported a loss of income of \$6,379.00 on the cattle. Under the circumstances, it cannot be argued in good faith that this expense is reasonably necessary for Debtor's maintenance and support. With respect to the property settlement debts, those debts may or may not be nondischargeable. In either event, they are not entitled to be treated more favorably than Debtor's other unsecured debts. Were Debtor to surrender the cattle securing the cattle loan and treat the property settlement debts the same as his other unsecured debts, he could commit \$404.00 to paying his creditors.

In addition, Debtor has included among his monthly expenses

¹ Like many debtors before him, Debtor has presented a moving target to the United States Trustee, offering two different sets of monthly income figures and four different sets of monthly expense figures. Had this matter proceeded to trial, Debtor would have been expected to justify his failure to accurately set forth his income and expenses on his original Schedules I and J.

a \$356.00 payment for an automobile loan that should, according to Debtor's figures, be paid off within two years of Debtor's filing. The earliest Debtor would be likely to have a plan confirmed is September 2004. His first plan payment would then be due October 2004. At that point, he should have 16 payments remaining on his automobile loan. Thus, he could commit an additional \$356.00 to paying his creditors for the remaining 20 months of a three-year plan or the remaining 44 months of a five-year plan.

Debtor has also included among his monthly expenses a \$91.00 payment for dental work that should, again according to Debtor's figures, be paid off within a year of the date it is actually incurred. Since the Court cannot tell when this obligation was, or will be, incurred, the most that can be said is that Debtor could commit an additional \$91.00 to paying his creditors for 24 months of a three-year plan or 48 months of a five-year plan.

Were Debtor to commit those additional sums to paying his creditors once the underlying obligations have been fully satisfied, he would be able to pay his unsecured creditors \$18,798.36 over a three-year period² or \$35,903.40 over a five-

² monthly net income		3,466.50	
monthly expenses	-	3,525.60	
cattle loan payment	+	300.00	
property settlement payment			+ 104.00
monthly disposable income	=	344.90	
times 36 months	=	12,416.40	
auto payment for 20 months	+	7,120.00	
dental payment for 24 months	+	2,184.00	
total plan payments	=	21,720.40	
chapter 13 trustee's commission		-	
2,172.04			
estimated attorney's fees	-	750.00	
available for unsec'd creditors	=		
18,798.36			

year period.³ Either figure represents a substantial portion of Debtor's total unsecured debt of \$105,709.73.⁴ Thus, the Court concludes Debtor has the substantial ability to pay his creditors.

The Court's analysis does not take into account the very real possibility that Debtor may be understating his income. Debtor based his calculations on his 2004 year-to-date sales. Debtor does not appear to have considered the likelihood that those sales were lower than they will be when he is fully recovered from surgery. The Court's analysis also does not take into account the possibility that Debtor could postpone his dental work. Were Debtor to do so, he could make an additional \$1,094.00 available to his creditors. Finally, the Court's analysis does not take into account the possibility that Debtor could, in putting forth his best effort in a chapter 13 plan, voluntarily reduce his spending for such items as food, clothing, transportation, recreation, and charitable contributions. Any reduction in Debtor's spending for these items would further enhance his ability to pay his creditors.

The Court will enter an order granting the United States

³ monthly net income		3,466.50	
monthly expenses	-	3,525.60	
cattle loan payment	+	300.00	
property settlement payment			+ 104.00
monthly disposable income	=	344.90	
times 60 months	=	20,694.00	
auto payment for 44 months	+	15,664.00	
dental payment for 48 months	+	4,368.00	
total plan payments	=	40,726.00	
chapter 13 trustee's commission		-	
4,072.60			
estimated attorney's fees	-	750.00	
available for unsec'd creditors	=		
35,903.40			

⁴ This figure includes the undersecured portions of both Debtor's cattle loan (\$1,000.00) and a loan secured by "Prints & guns" (\$9,175.00). Debtor's remaining secured debt (Wells Fargo Bank) is fully secured.

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Trustee's motion for summary judgment. The order will provide that if Debtor does not voluntarily convert this case to chapter 13 on or before June 18, 2004, this case will be dismissed on June 21, 2004.

Sincerely,

/s/ Irvin N. Hoyt

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

cc: case file (docket original; copies to parties in interest)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:) Bankr. No. 04-50015
) Chapter 7
DONALD ALBERT HAUSLE,)
Soc. Sec. No. XXX-XX-1380,) ORDER GRANTING
) MOTION FOR SUMMARY JUDGMENT
)
Debtor.)

In recognition of and in compliance with the Letter Decision entered this date,

IT IS HEREBY ORDERED that the United States Trustee's Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED that if Debtor does not voluntarily convert this case to chapter 13 on or before June 18, 2004, this case will be dismissed on June 21, 2004.

So ordered this 9th day of June, 2004.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk

(Seal)