UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Northern Division

In re:	) Bankr. No. 02-10226
	) Chapter 7
TAMMIE L. BLUDORN	)
f/k/a Tammie L. Earl	)
Soc. Sec. No. 503-06-6537	) DECISION RE: MOTION FOR
	) SUMMARY JUDGMENT REGARDING
Debtor.	) DISMISSAL UNDER § 707(b)
	)

The matter before the Court is the Motion for Summary Judgment filed by the United States Trustee on November 13, 2002, and Debtor's response filed December 3, 2002. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052 and 9014. As set forth below, the Court concludes that the present record establishes substantial abuse under 11 U.S.C. § 707(b) and that this case shall be converted to Chapter 13 in lieu of dismissal, as requested by Debtor.

I.

Tammie L. Bludorn ("Debtor") filed a Chapter 7 petition in bankruptcy on July 31, 2002. In her schedule, Debtor stated she had unsecured claims against her totaling $36,586.77. Debtor, who is married with four minor children, also stated in her original schedules that she and her present husband have a combined monthly net income of $2,776.60 and monthly household expenses of $1,571, thus leaving monthly income in excess of expenses of $1,205.60.

The United States Trustee moved to dismiss the case under 11

U.S.C. § 707(b) for substantial abuse on the grounds that Debtor could use her income in excess of expenses to fund a Chapter 13 plan. The United States Trustee calculated that Debtor contributed 64% of the household's income and that she should thus be responsible for 64% of the household's expenses. Accordingly, the United States Trustee computed that Debtor's income of $1,786.20 less her share of the expenses, $938.24, would leave her $848 to fund a Chapter 13 plan.

Debtor responded by filing amended schedules of income and expenses and by filing an objection to the United States Trustee's dismissal motion. In her objection, Debtor stated, after amending her schedules, that she actually has only $337.88 in excess income and that this amount is not enough to fund a plan. She also said that the secured mobile home debt listed on her schedule of secured creditors relates to property that was "granted" to her former husband and that it should be included as an unsecured debt in the substantial abuse calculation.

The United States Trustee filed a motion for summary judgment regarding its earlier motion to dismiss for substantial abuse. The United States Trustee argued that Debtor admits she has disposable income of $337.88 and that this is enough to fund a "viable" Chapter 13 plan. The United States Trustee also noted that Debtor included in her monthly expenses $179 for a student loan. This sum, he argued, should be added to Debtor's available income to

fund a Chapter 13 plan since the student loan creditor would be included as a creditor under the plan. Finally, the United States Trustee argued that Debtor had not shown that she has more than a contingent liability for the debt on the property that her former husband received in their divorce and, even if she was liable for it, she could still fund a Chapter 13 plan.

Debtor responded to the motion for summary judgment arguing that there was a genuine issue of material fact regarding Debtor's liability on the debt for the property her former husband received in their divorce. Further, based on her amended schedules, Debtor conceded that she has about $350 per month to fund a plan, but she argues there is a factual dispute about whether that is enough to fund a meaningful Chapter 13 plan.

At the Court's request, Debtor's counsel filed a letter detailing Debtor's budgeted monthly expense to the Internal Revenue Service and to a veterinarian. Counsel stated that the $90 to the I.R.S. is for the payment on a joint debt of about $2,000 (remaining) based on an informal agreement with the I.R.S. The $10 listed on Debtor's amended Schedule J was for an annual vaccination bill that Debtor acknowledges should be removed from the Schedule.

Debtor's counsel, as the Court had also requested, furnished a copy of Debtor and her former husband's divorce decree and property settlement agreement. Debtor's counsel advised the Court that Debtor received some real property and a mobile home in the

divorce and she assumed the debt on it. She lived there until February 2001. Around that time, Debtor became delinquent on payments to the mortgage holder, so she deeded the mobile home and real property to her former husband in consideration for his bringing the mortgage payments current. Debtor's attorney indicated that Debtor is still a co-obligor to the mortgage company.

II.

APPLICABLE LAW - 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 Cir. 1992)(quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986)(cites therein)). The non moving party is entitled to all reasonable inferences that can be drawn from the evidence without resorting to speculation. *P.H. v. School District of Kansas City, Missouri*, 265 F.3d 653, 658 (8th

Cir. 2001)(quoting therein *Sprenger v. Fed. Home Loan Bank of Des Moines,* 253 F.3d 1106, 1110 (8th Cir. 2001)(internal quotation omitted)). Only disputes over facts that might affect the outcome of the suit under the applicable law properly preclude the entry of summary judgment. *P.H. v. School District*, 265 F.3d at 658.

The movant meets his burden if he shows that the record does not contain a genuine issue of material fact and he identifies 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)(cite 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 (emphasis added)(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 at 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)).

APPLICABLE LAW - SUBSTANTIAL ABUSE. Section 707(b) of the

Bankruptcy Code permits the dismissal of a Chapter 7 case upon a showing that granting the debtor relief would be a substantial abuse of the Bankruptcy Code. The section is intended to promote fairness to creditors and prevent the use of Chapter 7 by non needy debtors. *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1288 (8th Cir. 1997).

"Substantial abuse" is not defined within the Bankruptcy Code. In interpreting the section, the Court of Appeals for the Eighth Circuit has held that the primary inquiry is whether the debtor has the ability to pay creditors under a Chapter 13 plan. *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 is measured by evaluating the debtor's financial condition in a hypothetical Chapter 13 case. *Id.* The analysis includes the expectation that the debtor will put forth his best effort 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)).

III.

The record, based on Debtor's amended Schedules I and J and as clarified by her attorney's letter docketed January 28, 2003, is sufficient to allow the Court to apply § 707(b). There are no

disputed material facts. Therefore, resolution of the matter through the United States Trustee's motion for summary judgment is appropriate.

The present record establishes the following:

EXPENSES (for household)	
rent or mortgage	$ 282.00
elec. or heating fuel	140.00
water	40.00
cable television	32.00
telephone	75.00
home maintenance	100.00
food (family of six)	700.00
clothing	150.00
medical and dental	50.00
transportation	300.00
recreation	200.00
insurance	163.00
real estate taxes	15.00
car payment	105.00
computer	52.00
business expense	25.00
cell telephone	60.00
school lunches	25.00
Total expenses	$2,514.00

Debtor's share of expenses: * $1,583.82

* Based on percentage of net income that Debtor contributes (63%) to the household.

INCOME (Debtor's only)	
net income from wages	$1,465.88
income from business	50.00
Child support	455.00
Total income	$1,970.88

Excess income available to fund a Chapter 13 plan $ 387.06

The Court has removed three expenses that Debtor included on her amended Schedule J. Debtor's student loan debt and the joint debt to the I.R.S. are all pre-petition claims that would be paid with other pre-petition claims through a Chapter 13 plan (the I.R.S.'s claim may be a priority claim). The veterinary expense, as noted above, was erroneously included on the Schedule.

The pre-petition, unsecured claims against Debtor, according to her schedules, total $36,586.77. The mobile home debt that Debtor's former husband has now assumed is not a present obligation that Debtor must pay. Accordingly, it is not included within the unsecured debt total. If and when Debtor's former husband defaults on the mortgage payments, and if and when a deficiency debt occurs after foreclosure and a sale of the mortgaged property, then Debtor may have a claim against her. If her Chapter 13 plan payments had not yet been completed, Debtor can move to modify her confirmed plan under 11 U.S.C. § 1329 to provide for any deficiency claim.

With $387 per month, Debtor can fund a Chapter 13 plan that will provide unsecured creditors with a meaningful repayment of a portion of their claim. Over a 36-month plan, Debtor can pay 34.6%

of the unsecured claims.[1] Over a 60-month plan, Debtor can pay 57.69% of the unsecured claims.

In her response to the United States Trustee's summary judgment motion, Debtor advised the Court that she would prefer that her Chapter 7 case be converted to a Chapter 13 case rather than dismissed for substantial abuse. Accordingly, an order will be entered converting this case to Chapter 13.

So ordered this 31st day of January, 2003.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: Deputy Clerk

UNITED STATES BANKRUPTCY COURT SEAL

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JAN 31 2003

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

JAN 31 2003

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court District of South Dakota
By_____

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[1] This calculation includes an estimated 10% fee for the Chapter 13 case trustee: (36 monthly payments x $387) ÷ (unsecured claims of $36,586.77 + 10% for trustees fees) or $13,932 ÷ $40,245.45 = 34.61%.

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