

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:) Bankr. No. 01-50504
) Chapter 7
SUEANN TURNER,)
Soc. Sec. No. 507-84-8787) DECISION RE: UNITED STATES
) TRUSTEE'S MOTION FOR
Debtor.) JUDGMENT ON THE PLEADINGS

The matter before the Court is the Motion for Judgment on the Pleadings filed by the United States Trustee. 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.Rs.Bankr.P. 7052 and 9014. As set forth below, the Motion will be granted.

I.

Sueann Turner ("Debtor") filed a Chapter 7 petition and schedules. According to her schedules, Debtor had one secured creditor with a secured claim on her 1998 vehicle. She had one priority unsecured creditor, her local county for unpaid real estate and mobile home taxes of \$80. She listed numerous unsecured creditors whose claims totaled \$45,097.84. She stated her former husband is a co-debtor on three claims, including the county's tax claim.

According to her schedules of income and expense, Debtor is divorced with two minor children. She is employed as a registered nurse/supervisor and she takes home monthly income of \$2,811.08.

She did not list the receipt of any child support payments. Her monthly expenses are \$2,526.00, which includes a \$310.00 per month payment on the secured claim against her vehicle.

The United States Trustee moved to dismiss Debtor's case under 11 U.S.C. § 707(b) because Debtor's schedules showed she had available income of \$285.08 per month to fund a Chapter 13 plan. The United States Trustee argued this would allow her to pay over \$10,000 to her unsecured creditors through a three-year plan or over \$17,000 through a five-year plan. The United States Trustee also questioned some expenses that, if corrected, would increase the income Debtor had available to fund a Chapter 13 plan.

In her response, Debtor conceded that she had \$285.08 in excess income. She also said her home maintenance expense should be \$30 per month rather than \$100, as was originally stated in her schedules. However, Debtor said the debt for taxes owed to the county by her and her former husband is actually \$800, not the \$80 stated in her schedules. Based on this information, Debtor asked the Court to deny the United States Trustee's motion to dismiss under § 707(b).

On December 26, 2001, the United States Trustee moved for judgment on the pleadings. The motion was based on Debtor's admission that she had excess income of \$355.08 a month (\$285.08 as set forth in her schedules and an additional \$70 based on the overstated home maintenance expense).

II.

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 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), and *In re Schnabel*, 153 B.R. 809, 818 (Bankr. N.D. Ill. 1993)).

III.

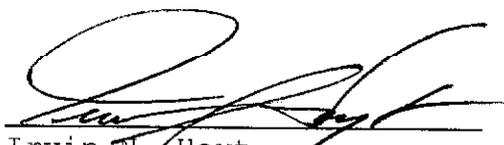
The present record shows that Debtor has at least \$355 per

month in excess income. With this money, she can fund a meaningful Chapter 13 plan. Over a three-year plan term, she could repay her unsecured creditors about 25% of their claims, including the applicable commission to the Chapter 13 trustee. Through a five-year plan, she could repay unsecured creditors just over 42% of their claims. While doing so, she could still maintain the payment on her newer car and meet the other necessary expenses for her and her dependents. Accordingly, it would be a substantial abuse of the bankruptcy process to allow her to continue her case under Chapter 7.

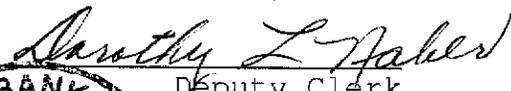
The United States Trustee's Motion for Judgment on the Pleadings will be granted. Debtor will be given an opportunity to voluntarily convert her Chapter 7 case to a Chapter 13 case. Should she decide not to convert her Chapter 7 case, it will be dismissed under § 707(b).

Dated this 2nd day of January, 2002.

BY THE COURT:


Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: 
Dorothy L. Baker
Deputy Clerk



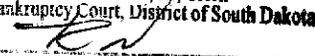
NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

JAN 02 2002

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

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

JAN 02 2002

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

Case: 01-50504 Form id: 122 Ntc Date: 01/02/2002 Off: 3 Page : 1
Total notices mailed: 4

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