

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In Re:

MARCIN ZEGUNIA,

Debtor.



Order Filed on September 11,
2015 by Clerk U.S. Bankruptcy
Court District of New Jersey

Case No.: 14-36070 (JKS)

Hearing Date: July 21, 2015

Judge: John K. Sherwood

Chapter: 7

**MEMORANDUM DECISION AND ORDER
WITH RESPECT TO MOTION TO DISMISS**

The relief set forth on the following pages is hereby **ORDERED**.

**DATED: September 11,
2015**

A handwritten signature in cursive script, appearing to read "JK Sherwood".

Honorable John K. Sherwood
United States Bankruptcy Court

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WHEREAS:

1. Marcin Zegunia (the “Debtor”) filed a voluntary petition (the “Petition”) for relief under Chapter 7 of the Bankruptcy Code on December 31, 2014. (ECF No. 1).
2. United Nations Federal Credit Union (“UNFCU”) filed a timely motion to dismiss the case for abuse of chapter 7 pursuant to 11 U.S.C. § 707(b)(2)(A) or § 707(b)(3)(B) (the “Motion”) on May 28, 2015. (ECF No. 23).
3. The Debtor filed opposition on June 29, 2015 (ECF No. 26), and a hearing on the Motion was conducted on July 21, 2015.
4. Having reviewed the Motion and opposition and having heard the arguments of counsel, and for the reasons set forth below (and discussed on the record at the hearing), the Court has concluded that: (I) the presumption of abuse does not arise and dismissal is not warranted under 11 U.S.C. § 707(b)(2)(A); and (II) dismissal or conversion of the case to chapter 13 is appropriate based on the totality of the circumstances of the Debtor’s financial situation under § 707(b)(3)(B).

THE FOLLOWING ARE THE COURT’S FINDINGS OF FACT AND CONCLUSIONS OF LAW:

11 U.S.C. § 707(b)(2)(A)

5. The Court may “dismiss a case filed by an individual debtor under [chapter 7] whose debts are primarily consumer debts, or, with the debtor’s consent, convert such a case to a

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case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter.” 11 U.S.C. § 707(b)(1).

6. 11 U.S.C. § 707(b)(2)(A)(i) provides: “[i]n considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or \$7,475, whichever is greater; or (II) \$12,475.”
7. In other words, “[s]ection 707(b)(2)(A)(i) requires a court to presume that abuse exists if the debtor’s current monthly income, reduced by allowed deductions and multiplied by 60, is greater than or equal to the greater of 25% of the debtor’s nonpriority, unsecured claims or [\$7,475], whichever is greater, or [\$12,475].” *In re Tauter*, 402 B.R. 903, 905 (Bankr. M.D. Fla. 2009).
8. On Official Form 22-A of the Petition, the Debtor lists his current monthly income (“CMI”)¹ for the six-month pre-petition period as \$7,214.67 and monthly expenses of \$8,379.79. (Petition at 17). Although UNCFU asserts that the Debtor understates his CMI, the Debtor provided paystubs and other evidence indicating that his gross income from June to November 2014 was \$43,288.00. (*See* Debtor’s Br. in Opp’n to Mot. to Dismiss, ECF No. 26, Ex. B). Thus, the Debtor’s average monthly income over the six-month pre-petition period was \$7,214.67 and CMI was correctly listed on the Petition.

¹ *See* 11 U.S.C. § 101(10A) (defining “current monthly income” as “the average monthly income from all sources that the debtor receives . . . derived during the 6-month period ending on—(i) the last day of the calendar month immediately preceding the date of the commencement of the case.”).

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9. Because the Debtor's monthly expenses exceed his CMI, his net disposable income as of the Petition date was negative and the presumption of abuse does not arise under 11 U.S.C. § 707(b)(2)(A). (*See* Petition at 17).
10. Thus, UNCFU's Motion to dismiss the case for abuse under § 707(b)(2)(A) is denied.

11 U.S.C. § 707(b)(3)(B)

11. 11 U.S.C. § 707(b)(3) provides, in relevant part: “[i]n considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter . . . the court shall consider—(A) whether the debtor filed the petition in bad faith; or (B) the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse.”
12. A Debtor's ability to repay debts from future earnings is a primary consideration in the totality of the circumstances analysis under § 707(b)(3)(B). *In re Jordan*, 428 B.R. 430, 433 (Bankr. N.D. Ohio 2010); *In re Norwood-Hill*, 403 B.R. 905, 912 (Bankr. M.D. Fla. 2009); *In re Lamug*, 403 B.R. 47, 55 (Bankr. N.D. Cal. 2009).
13. In evaluating whether a case should be dismissed under the totality of the circumstances, the debtor's financial condition should be considered at the time of the hearing on the motion to dismiss. *In re Pennington*, 348 B.R. 348, 651 (Bankr. D. Del. 2006); *see also In re Pittman*, 506 B.R. 496, 499 (Bankr. S.D. Ohio 2014) (“The totality of the circumstances includes reviewing debtors' pre- and post-petition financial circumstances.”).

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14. It appears that the Debtor's CMI during the six-month pre-petition period was unusually low due to missed work days and rehabilitation from illness. The Petition states that the Debtor earned \$121,322.00 in 2013. (*See* Petition at 42, Statement of Financial Affairs). And, even though the Debtor earned only \$43,288.00 during the six-month pre-petition period, his income for all of 2014 was \$101,563.47. (*See* Motion, ECF No. 23, Ex. B at 2). The Debtor's paystubs from January 2015 to March 2015 indicate an average monthly income of \$10,410.10. (*See Id.*, Ex. B). If the Debtor's earnings remain stable, his income in 2015 could exceed \$124,000, which is more than double the median income of \$60,625 for a one-person household in New Jersey in 2014.² Thus, although there are never any guarantees where future income is concerned, it appears that so long as the Debtor manages his illness, there is a reasonable chance his monthly income will return to normal levels.
15. The Debtor's income history and anticipated income and expenses suggest that granting a chapter 7 discharge would constitute abuse because he has the ability to fund a chapter 13 plan to pay off some creditors.³ *See In re Wadsworth*, 383 B.R. 330, 333 (Bankr. N.D.

² *See Census Bureau Median Family Income By Family Size*, available at: http://www.justice.gov/ust/eo/bapcpa/20141101/bci_data/median_income_table.htm.

³ In evaluating whether dismissal is warranted under § 707(b)(3)(B), courts often "consider how the income and expenses of the Debtor would be treated in chapter 13," which, unlike the § 707(b)(2)(A) analysis, looks to the debtor's "future, rather than historical, income and expenses." *In re Pennington*, 348 B.R. at 651 ("When judges are required to make determinations of abuse under § 707(b)(3), they should accordingly use the means-test threshold: If a debtor's actual disposable income, determined by the court, is below that threshold, there should be no finding of abuse based on debt-paying ability; if disposable income meets or exceeds the threshold, abuse should be found.") (citing Hon. Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under § 707(b)(3)*, Am. Bankr. Inst. Journal, April 2006, at 52). Conducting the § 707(b)(2)(A) analysis using Debtor's average monthly income from January to March 2015, (which appears to be more indicative of the Debtor's past and future income), the Debtor would have monthly disposable income of \$2,030.31 (the result of deducting the allowable expenses on the Petition [\$8,379.79] from the Debtor's average monthly income [\$10,410.10]). Over a period of 60 months, the Debtor's potential disposable income totals \$121,818.60. The Petition indicates that the Debtor has \$274,579.75 in unsecured debt.

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Ohio 2007) (“Under any measure, a debtor having a stable annual salary of almost \$100,000 will be hard pressed to establish that they do not have the ability to pay some of their unsecured debt, such as through funding a Chapter 13 plan.”); *In re Pennington*, 348 B.R. 647, 651 (Bankr. D. Del. 2006) (dismissing case for abuse where below-median income debtors could have repaid 25% of unsecured debt); *In re Pittman*, 506 B.R. 496, 499 (Bankr. S.D. Ohio 2014) (finding abuse where debtor had sufficient income to make 24% distribution to unsecured creditors in Chapter 13 plan); *In re Stimmel*, 440 B.R. 782, 785 (Bankr. N.D. Ohio 2010) (dismissing case for abuse where debtor could have paid 22% dividend to creditors).

16. Additional considerations demonstrate the Debtor should not be entitled to a chapter 7 discharge. The Debtor is currently single, with no children or dependents,⁴ and his claimed expenses reveal that there is significant room for him to tighten his belt. For instance, included in the Debtor’s allowable expenses are a monthly rent payment of \$2,735.00 and a monthly payment of \$719.00 on a 2015 Mercedes GLA, which the Debtor seeks to reaffirm. (*See* Petition, Schedule J). The Debtor purchased this vehicle in October 2014, when he was receiving medical treatment and when his financial

(Petition at 19). Accordingly, the Debtor could make a meaningful distribution to unsecured creditors over the life of a 60-month plan.

⁴ In response to the Motion to Dismiss, the Debtor submitted “mock” Schedules I and J showing that he has negative monthly disposable income even with his increased income of \$10,410.40 because he has taken on his fiancée as a dependent since the Petition date and is responsible for many of her expenses. However, it is not clear that the Debtor’s fiancée qualifies as a dependent under § 707(b)(2)(A), and the Debtor would need to submit amended schedules in order for the Court to consider any such expenses. Furthermore, the “mock schedules” present no evidence as to extent of the Debtor’s expenditures on behalf of his fiancée and presume that the fiancée contributes no income to satisfy expenses. *See In re O’Connor*, No. 08-60641, 2008 WL 4516374 at *10-11 (Bankr. D. Mont. Sept. 30, 2008) (holding that 18 year-old nephew was not a dependent where no evidence was presented as to the debtors’ expenditures on his behalf and there was no explanation for why such expenses were necessary and reasonable).

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circumstances were at a difficult point. And, at the time, he was already making payments of \$374.45 per month on a 2013 Volkswagen Passat.⁵ (*Id.*). The Debtor gives no reasonable explanation of his need for two vehicles and it is clear that he could make greater payments to unsecured creditors by arranging for more modest living and transportation accommodations. The Debtor's desire to maintain a high standard of living to the detriment of unsecured creditors weighs against granting of chapter 7 relief. *See In re Honkomp*, 416 B.R. 647, 650 (Bankr. N.D. Iowa 2009) ("Debtors who wish to retain luxury goods rather than pay their legitimate creditors are not the type of honest but unfortunate debtor who should benefit from chapter 7 relief."); *In re Oot*, 368 B.R. 662 (Bankr. N.D. Ohio 2007) (reaffirmation of Debtor's luxury vehicles warranted denial of chapter 7 relief); *In re Castellaw*, 401 B.R. 223, 228-29 (Bankr. N.D. Tex. 2009).

17. For the reasons discussed above, as well as those set forth on the record at the July 21, 2015 hearing, dismissal or conversion of the case to chapter 13 under 11 U.S.C. § 707(b)(3)(B) is warranted under the totality of the circumstances. The Court cannot ignore the Debtor's past and potential future income and granting a discharge under these circumstances would be an abuse of chapter 7. If the Debtor's health takes a turn for the worse or he otherwise struggles to make chapter 13 plan payments, the Debtor can propose a modified chapter 13 plan or move to convert his case to chapter 7.

⁵ The Petition indicates that the Debtor also seeks to reaffirm the debt on the Passat. While Debtor's counsel indicated that this was a mistake and that the Debtor intends to surrender the Passat, the monthly payments of \$374.45 are included in the Debtor's secured debt deductions and factor into his claimed expenses. (Petition at 16). Also, if the Debtor had opted to keep the Passat in lieu of the Mercedes, the result would be savings of more than \$300 per month.

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Now, therefore, it is hereby **ORDERED**:

1. The Motion to dismiss or convert the case to chapter 13 pursuant to 11 U.S.C. § 707(b)(3)(B) is granted.
2. The Debtor has 10 days from the date of this Order to convert the case to a chapter 13 proceeding.
3. If the Debtor fails to act within 10 days, the Court will dismiss the case without further notice or a hearing.