

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

Bankruptcy Case No. 01-11808

**IN RE: Lori KROENING
Debtor**

**UNITED STATES TRUSTEE,
Movant,**

v.

**Lori KROENING,
Respondant/ Debtor.**

MEMORANDUM OF DECISION

INTRODUCTION

The United States Trustee (“UST”) moved to dismiss this Chapter 7 case under 11 U.S.C. § 707(b)¹ because the Debtor’s schedules show primarily consumer debts and a significant surplus of income over expenses, indicating substantial abuse of the provisions of Chapter 7. Both parties agree that the applicable standard for determining substantial abuse is the so-called “totality of circumstances” test. *First USA v. Lamanna (In re Lamanna)*, 153 F.3d 1, 4 (1st Cir. 1998); *In re Mastromarino*, 197 B.R. 171, 176 (Bankr. D. Me. 1996). Their disagreement is over the Debtor’s ability to repay her obligations. The UST points to the Debtor’s Schedules² I and J, which show a surplus monthly income. However, the Debtor asserts that her ability to repay must be examined in light of the overall amount of her obligations and the circumstances under which certain obligations were incurred. According to her, the concept of a fresh start contemplates the discharge of certain debts, such as those arising from a domestic relationship gone sour or a deficiency on a leased vehicle, so that other debts may be repaid, such as obligations to a family member or nondischargeable tax claims. The totality of circumstances test does not encompass such a review. A Chapter 7 case will be dismissed, without regard to how or why otherwise lawful consumer debts were incurred, if after consideration of the relevant circumstances, a debtor has an ability to repay. On that basis, the motion of the UST is granted and this case shall be dismissed.

¹ Absent contrary indication, all chapter and section references are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. § 101 *et seq.*, and all “Rule” references are to the Federal Rules of Bankruptcy Procedure.

² By agreement, the Debtor’s petition and schedules are included in the record. Stipulation at 1.

STIPULATED FACTS AND PROCEDURAL HISTORY

The Debtor, Lori Kroening, previously filed for relief under Chapter 7 in Texas, and received a discharge in 1995. This case was commenced with the filing of a Chapter 7 petition in Maine on September 24, 2001 (“petition date”). The UST filed a timely motion to dismiss under § 707(b) on December 21, 2001. The case has been submitted on an agreed record. The parties stipulated that the Debtor would testify as follows:

A. On July 23, 1992 the debtor transferred her interest in her house in Rowlett, Texas, which is the property listed in Schedule A (the “Texas property”), to herself jointly with her then domestic partner, Billy Winona Wines (“Wines”). At that time, the Texas property was subject to the mortgage described in Schedule D, which now has an outstanding balance of approximately \$64,000. The debtor was then and still is the only person obligated on the mortgage on the Texas property.

B. The debtor remained in that relationship and shared the Texas property with Wines and Wines’ two sons until approximately August, 1999.

C. The debtor became the primary source of support for Wines and two boys and in doing so she incurred debts, including obligations to pay bills incurred by Wines for such frivolous items as purchases through home shopping channels, which led her to file a Chapter 7 bankruptcy petition with a Texas Bankruptcy Court, and received a discharge in that proceeding in June, 1995.

D. The debtor continued to support Wines and the two boys in the Texas property but continued to incur debts, including obligations unwisely incurred by Wines. Although the domestic relationship deteriorated, the debtor was reluctant to leave the two boys in the care of Wines, who was unemployed and so unable to support them.

E. In 1998, she asked her mother, Eileen Kroenig, to lend her \$20,000 in order to pay creditors. On or about September 4, 1998, Eileen Kroenig obtained a mortgage loan from Peoples State Bank of Wausau, Wisconsin, signing a promissory note agreeing to pay that lender \$20,107 (an unsigned copy of which is attached Ex. 2). Proceeds of that loan were applied, as shown in the Settlement Statement attached here as Ex. 3, to repay a prior amount owed to that same lender of \$3684.40, which had either been borrowed directly by the debtor or indirectly through her mother and re-advanced to her for her own use. The balance of the loan proceeds after expenses, \$16,308.60, was paid to Eileen Kroenig who in turn advanced that amount to the debtor, who used it to pay bills. At about the same time, the debtor signed an agreement with her

mother, a copy of which is attached here as Ex. 4, agreeing to repay the amount of \$20,107.00 at the rate of \$420 a month.

F. Eileen Kroenig's income was at all relevant times and still is limited to her Social Security pension. The Mortgage loan referred to in the above sub-paragraph (E) encumbered the residence of Eileen Kroenig.

G. As the debtor puts it (Ex. 1), "Unfortunately, ever after a bankruptcy and a loan from my mother, my former partner continued to spend beyond our means. The last straw for me was when I realized that she had drawn the last of the money out of my savings account and frivolously squandered it."

H. In October of 1999, the debtor left Texas, moved to Maine and found work. She tried to pay off bills which had been accumulated during the relationship with Wines while in Texas and to keep the 2000 Nissan Pathfinder she had bought or leased before leaving Texas. However, she was unable to maintain the \$800 monthly payment on the vehicle and surrendered it to the lessor or lienholder which financed it, resulting in a deficiency of \$10,510.13.

I. After moving to Maine, the debtor learned that Wines had run up an American Express bill of \$2300 for a bedroom set, for which the lender had filed suit, and that she owed the IRS \$2200.

J. On Sept. 24, 2001, the debtor filed her petition in this case.

K. Since then, she has been driving a 1989 vehicle which is now "on its last legs" and will have to be replaced.

L. In addition, the debtor wants to have elective dental implant surgery, estimated to cost \$2960, as summarized in a communication from her dentist's office dated March 8, 2002, a copy of which is attached hereto as Ex. 5.

M. Although the debtor is the only person obligated on the mortgage income encumbering the Texas property, she has not made payments on that obligation since October, 1999. She tried unsuccessfully to negotiate with Wines to refinance that property after moving to Maine. The latest information the debtor has regarding this obligation is that Wines has not paid the last four monthly payments and the lender was about to refer the loan to counsel for possible foreclosure.

The Debtor's Schedule I reflects a net monthly income of \$2,119.00, after deductions including a \$58.00 pension contribution. Her Schedule J shows \$1,962.65 in monthly expenses, including a \$420.00 monthly payment to her mother, and a \$184.00 monthly payment to the IRS.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1334(a) and (b). Pursuant to 28 U.S.C. § 157(b)(2)(A), this is a core matter in which this Court will enter final judgment.

STANDARD

Section 707(b)³ expressly requires the party moving for dismissal to establish that (1) the debtor is an individual with primarily consumer debts, and (2) the granting of a discharge would be a substantial abuse of Chapter 7. 11 U.S.C. § 707(b); *Mastromarino*, 197 B.R. at 174. A debt is a consumer debt if, under § 101(8), it was “incurred by an individual for a personal, family or household purpose,” and was not incurred “with an eye toward profit.” 11 U.S.C. § 101(8); *Mastromarino*, 197 B.R. at 174 (internal citations omitted). Substantial abuse must be evaluated by examining the “totality of circumstances” to ascertain “whether [a debtor] is merely seeking an advantage over his creditors, or is ‘honest’ in the sense that his relationship with his creditors has been marked by essentially honorable and undeceptive dealings, and whether he is ‘needy’ in the sense that his financial predicament warrants the discharge of his debts in exchange for liquidation of his assets.” *Lamanna*, 153 F.3d 1, 4 (1998) (citing *In re Krohn*, 886 F.2d 123, 126-27 (6th Cir. 1989)). To be needy, a debtor must lack an ability to repay debts from future

³ Section 707(b) states, in pertinent part:

After notice and hearing, the court, on its own motion or a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. . . .

11 U.S.C. § 707(b).

disposable income. *Id.* Ability to repay, should be regarded “as the primary, but not necessarily conclusive, factor of ‘substantial abuse.’” *Lamanna*, 153 F.3d 1, 5. With *Lamanna*, the First Circuit joined the Fourth, Sixth, Eighth and Ninth Circuits in holding that “a consumer debtor’s ability to repay his debts out of future disposable income is not *per se* ‘substantial abuse’ mandating dismissal,” but can be dispositive. *Id.* at 2, 3 and 5 (citing *In re Green*, 934 F.2d 568, 570 (4th Cir. 1991); *In re Krohn*, 886 F.2d 123, 125-26 (6th Cir. 1989); *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989); *In re Kelly*, 841 F.2d 908, 914 (9th Cir. 1988)).⁴

The Debtor’s honesty is not at issue in this case, so the focus of the totality of circumstances test will be upon factors which may limit her ability to repay. The list of relevant factors is nonexclusive. *Lamanna*, 153 F.3d 1, 5. Those that have been considered in this District, which are relevant in this instance, include “financial need (*e.g.*, income and expenses, budget, job/income stability); alternatives to liquidation bankruptcy (*e.g.*, Chapter 13 eligibility, state law remedies, prospects for negotiation); mitigating circumstances (*e.g.*, recent job loss, illness, disability or other ‘calamity’); aggravating circumstances (*e.g.*, lavish lifestyle, incurring credit and taking cash advances beyond ability to pay); and general ‘honesty’ (*e.g.*, accuracy of schedules, forthright disclosure).” *Mastromarino*, 197 B.R. at 177.

BURDEN

As expressly stated in the statute, “there shall be a presumption in favor of granting the relief requested by the Debtor.” 11 U.S.C. § 707(b). The moving party, therefore, has the burden

⁴ Prior to the *Lamanna* decision, this approach was employed by bankruptcy courts in this Circuit. *In re Haffner*, 198 B.R. 646, 648 (Bankr. D.R.I. 1996); *Mastromarino*, 197 B.R. 171; *In re Snow*, 185 B.R. 397, 401-03 (Bankr. D. Mass. 1995).

of going forward and the ultimate burden of proof in establishing that the debts are consumer debts and that the Debtor has an ability to repay them. Upon such a showing, the presumption in favor of the debtor “vanishes.” *Mastromarino*, 197 B.R. at 177 (internal citations omitted). If applicable, the moving party may also show aggravating circumstances, such as that the debtor had previously filed for bankruptcy. The debtor, on the other hand, has the opportunity to overcome this evidence by establishing mitigating circumstances that diminish her ability to pay. The moving party will prevail by showing substantial abuse by a preponderance of the evidence. *In re Mitman*, 2001 Bankr. LEXIS 865, *2 (S.D. Ohio 2001) (quantum of evidence is by preponderance in § 707(b) motions); *In re Hall*, 258 B.R. 45, 53 (Bankr. M.D. Fla. 2001) (same); *In re Watkins*, 216 B.R. 394, 397 (Bankr. W.D. Tex. 1997) (same).

DISCUSSION

The Debtor is an individual whose debts are primarily consumer debts. Her honesty in dealing with her creditors has not been challenged, but her schedules show a monthly surplus of income over expenses, which suggests an ability to repay her debts out of future disposable income. Although not conclusive on the question of substantial abuse, that surplus must be regarded as the primary factor. Other factors to be considered include which must be considered in light of all relevant circumstances. These include (1) her financial need, (2) if her financial situation allows for viable alternatives to Chapter 7, (3) mitigating circumstances, (4) aggravating circumstances, and (5) the significance of her prior Chapter 7 case.

1. Financial Need of Discharge
 - a. Income and Expenses

The Debtor is an educated, single woman without any legal dependents. She is a respiratory therapist employed in a regional hospital. At the time of filing, the Debtor listed on her Schedule I a gross monthly income from her position as a respiratory therapist of \$2,650.00, with a net income of \$2,119.00. She listed her expenses (amended February 19, 2002) as \$1,962.25.⁵ This leaves a surplus of \$156.75 which could be used to repay debt. Further, Schedule J shows that the Debtor has earmarked \$420.00 a month to repay her mother. There is nothing in the record showing a legal basis for preferring the mother over other creditors. “This is not a moral judgment, but a legal one. . . . To grant such voluntary expenditures priority over [other undistinguishable] legal obligations would be to permit [a debtor] unilaterally to subordinate his creditors to his personal lifestyle choices.” *Mastromarino*, 197 B.R. at 17. Adding \$420.00 to \$156.75 would leave \$576.00 a month for the repayment of consumer debts. The Debtor’s Schedule J also shows that the IRS is to receive a monthly payment of \$184.00 and that \$58.00 is being withheld each month as a contribution to the Debtor’s pension. Even if, for the reasons discussed below, these amounts were not added to her monthly surplus of income over expenses, it is clear that this Debtor has income which could be used to repay debts.

b. Assets and Liabilities

The Debtor lists one secured debt in the amount of \$64,000.00 on her Schedule D, which is the mortgage held by Chase Manhattan Bank on the Texas property. She no longer resides in

⁵ A “debtor’s schedules, executed under the pains and penalties of perjury, have significant evidentiary weight.” *Mastromarino*, 197 B.R. at 177 (quoting *In re Snow*, 185 B.R. at 403).

the home and can therefore allow the mortgagee to foreclose or a Chapter 13 trustee to sell it.⁶

The Debtor concedes that “no foreseen circumstances render it likely that she would return to beneficial occupancy of that residence.”⁷ In bankruptcy the Debtor cannot maintain a home that she cannot afford, particularly because Ms. Wines, notwithstanding the ownership in joint tenancy, is no longer paying the mortgage that the Debtor is alone obligated on.

On her Schedule E the Debtor lists one unsecured debt with priority status under § 507(8)(A)(i) in the amount of \$2,193.00.⁸

The Debtor lists general unsecured debts in the aggregate amount of \$18,887.80 on her amended Schedule G, filed October 22, 2001.

The Debtor, notwithstanding how or by whom debts were incurred for which she is legally liable, is able to repay her creditors 100% over time without resorting, again, to bankruptcy and a discharge of her debts.

⁶ The Debtor asserts that sale of the house would result in a deficiency, but this is questionable. Although the Debtor’s Schedule D states that her half interest is worth \$35,000.00, it is undisputed that she holds the property in joint tenancy with Ms. Wines, therefore she owns a half interest in the whole, valued at \$70,000.00. Based on this figure, whether the bank forecloses or a trustee sells the property for the estate, it can be assumed that there will be no deficiency after the \$64,000.00 mortgage is paid in full.

⁷ The Debtor argues that the costs, penalties, and fees associated with foreclosure of the Texas property, together with the \$64,000.00 balance owed, would exceed any sale price received and result in a deficiency, but this is speculation outside the stipulated record. In addition, as noted, under Chapter 13 there is leeway to modify the plan to accommodate any increased debt resulting from a deficiency.

⁸ The claim filed by the IRS on February 14, 2002 indicates that this debt is actually in the amount of \$2,224.58, and would be deemed allowed in that amount because the Debtor never challenged it. 11 U.S.C. § 502(a) and Fed. R. Bankr. P. 3001(f). Because the schedules and not the proofs of claim have been admitted by agreement as part of the record, I will refer to the scheduled amounts only.

2. Viable Alternatives to Liquidation

The UST offers a detailed analysis of how the Debtor could repay 100% of her debts within a Chapter 13 plan. This is an appropriate approach. *Lamanna*, 153 F.3d at 4.

“[A]lthough Chapter 13 eligibility is not essential to the § 707(b) calculus, the analysis proceeds by considering what payout to unsecured creditors would flow from a hypothetical Chapter 13 plan.” *Mastromarino*, 197 B.R. at 177. Using the correct figures and allowing that the \$184 payment to the IRS is an approximation of the proper monthly figure under the Code and Rules, the Debtor could propose a viable plan using the \$576.75 in excess income previously calculated for payment into a plan.⁹ Over twelve months,¹⁰ this would amount to \$6,921.00 in payments, which would pay off the \$2,200.00 priority debt to the IRS and the Chapter 13 trustee’s priority commission in the approximate amount of \$2,539.48. This would leave \$2,181.52 to contribute to paying down the \$23,194.80 in unsecured nonpriority debt, leaving a total remaining obligation of \$21,013.28 at end of the twelve months. Upon completion of her payments to the IRS, the Debtor would be able to increase her monthly plan payments by \$184 (the monthly amount paid to the IRS during the first year) for a total of \$760.75. With these increased payments, the Debtor would be able to pay 86.89 % of her nonpriority unsecured debts

⁹ Under 11 U.S.C. § 507(a)(1), administrative expenses, including the trustee’s commission, must be paid prior to general unsecured claims, and under § 507(a)(8), taxes are also a priority. *Id.* Other than the scheduled debt to the IRS, the Debtor only lists nonpriority Schedule F obligations, into which category the loan from her mother would also fall.

¹⁰ Paying \$184.00 a month on her \$2,200.00 debt to the IRS would take approximately 12 months to complete ($\$2,200.00 \div \$184.00 = 11.95$).

and 100% of her priority debt within a plan with a term of 36 months.¹¹ She could pay 100% of her debts by elongating the term of the plan.

The Debtor's unstated problem with Chapter 13 is that even if she filed a 100% plan, she would not be able to repay the debt to her mother at a rate of \$420.00 a month, and therefore her mother in turn might not be able to maintain the terms of her loan obligation with the bank, resulting in foreclosure of her home. Although the Debtor's intention to pay the debt to her mother is honorable, it is not a mitigating circumstance under the law.

3. Mitigating Circumstances

Mitigating circumstances are events that bear negatively upon a debtor's ability to pay, such as "[w]hether the bankruptcy petition was filed because of sudden illness, calamity, disability, or unemployment." *Mastromarino*, 197 B.R. at 176 (quoting *Green v. Staples (In re Green)*, 934 F.2d 568, 572 (4th Cir. 1991)). As evidenced by her schedules, the Debtor does not dispute that she is legally obligated for the debts at issue; she simply wishes to see them discharged under Chapter 7. The fact that the debts were incurred by another party, however, does not mitigate the Debtor's responsibility or legal obligation to her creditors.

The Debtor also contends that the majority of her unsecured debt is comprised of a \$10,510.13 deficiency resulting from the surrender of her Nissan Pathfinder. There is no contention that the Debtor entered into the lease in bad faith. In addition, the Debtor's assertions that she needs elective dental implant surgery and a new car do not amount to mitigating circumstances. Even if her debt were increased by the dental surgery she has stated she wishes to

¹¹ Paying \$760.75 for 24 months would accrue total payments in the amount of \$18,258.00, which is 86.89% of the Debtor's \$21,013.28 in remaining debt after payment of the lower amount for the 12 months prior, resulting in a total 36 month plan.

have performed, and she needed to purchase a new car, the Debtor would be still be able to fund a plan by increasing the length of a plan or by slightly decreasing the dividend realized by her creditors, any amount of which would be greater than that realized in the no-asset liquidation proposed.

As noted by the UST, the Debtor's obligations, including the loan from her mother, are the result of her own personal lifestyle choices. There are, therefore, no mitigating circumstances relevant to this Debtor's ability to repay her creditors.

4. Aggravating Circumstances

Aggravating circumstances are those that would further decrease the likelihood of the Debtor being allowed to proceed under Chapter 7, such as “[w]hether the debtor incurred cash advances and made consumer purchases far in excess of his of his ability to repay.”

Mastromarino, 197 B.R. at 176 (quoting *In re Green*, 934 F.2d at 572). Such allegations would go a debtor's honesty in dealing with her creditors. Nothing of this sort, however, has been suggested by the UST.

5. The Debtor Has Previously Filed for Bankruptcy

Like other aggravating circumstances, recidivism could show that a debtor would prefer pursuing an additional discharge over paying her lawful obligations where two or more filings show an intent to seek advantage over creditors when there is an ability to repay. *In re Blair*, 226 B.R. 502, 506 n.6 (Bankr. D. Me. 1998). Standing alone, this Debtor's previous Chapter 7 case would not be a basis for finding substantial abuse. The UST has not asserted, and there is nothing in the record to suggest, absent other circumstances, that her prior Chapter 7 case would be enough to sustain a dismissal. Nonetheless, her prior experience in bankruptcy and her delay

in filing the current petition in order to overcome the § 727(a)(8) limitation on discharges suggests a familiarity with the process and the concept of discharge. Her attempt to use a Chapter 7 discharge selectively is not indicative of bad faith or dishonesty, and it is not enough to tip the scale in favor of the UST, but it does suggest, in light of her ability to pay, an intent to seek an advantage over her creditors. *Lamanna*, 157 F.3d at 4 (citing *In re Krohn*, 886 F.2d at 126-27).

CONCLUSION

The Debtor has offered no legal basis to refute the UST's argument that allowing her to proceed would be a substantial abuse of Chapter 7. She has an ability to repay her debts and has failed to show mitigating circumstances. The UST has met his burden under the "totality of circumstances" test by a preponderance of the evidence. This case shall be dismissed. A separate order will issue

DATED:

Louis H. Kornreich
United States Bankruptcy Judge