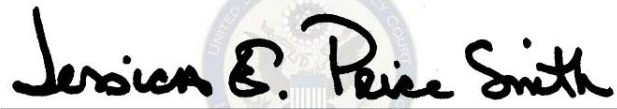


IT IS SO ORDERED.

Dated: 29 June, 2017 01:26 PM

A handwritten signature in black ink that reads "Jessica E. Price Smith". The signature is written in a cursive, flowing style. Behind the signature is a faint, circular seal of the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division.

JESSICA E. PRICE SMITH
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:

In Proceedings Under Chapter 7

KENNETH KIRK
JESSICA KIRK

Case No.: 16-14606

Debtors.

JUDGE JESSICA PRICE SMITH

MEMORANDUM OF OPINION AND ORDER

This matter is before the Court on the Motion to Dismiss Case Pursuant to 11 U.S.C. § 707(b)(2) and (b)(3) (the “Motion”) filed by the United States Trustee for Region 9 (the “Trustee”). The Debtors object to dismissal. After conducting a duly noticed evidentiary hearing on May 31, 2017 and considering the parties’ post-hearing briefs, the following findings of fact and conclusions of law are rendered:

The Debtors filed a voluntary Chapter 7 petition on August 23, 2016. Mr. Kirk is employed as a police officer for the City of Cleveland and has been in this position for 18 years. Mrs. Kirk is a legal secretary and has been employed with Keith D. Weiner and Associates for two years.

The Debtors' Schedule I reflects monthly income of \$8,516.00. The Debtors have three dependents.

With their petition, the Debtors filed the required Statement of Current Monthly Income and Means Test Calculation, Form 122A (hereinafter, the "Means Test"). That Means Test showed an annual income of \$118,202 and negative monthly income of -\$180.41. The median annual income for a family of five in Ohio is \$87,383.00. After reviewing the Debtors' petition, the Trustee determined that the Debtors' case is an abuse and moved for dismissal. The Debtors objected to the Motion and included an Amended Means Test with their objection, which addressed some of the issues raised by the Trustee. The Amended Means Test reflects an annual income of \$118,202.00 and negative monthly income of -\$57.95.

The Trustee asserts that the Debtors' case should be dismissed because a presumption of abuse arises pursuant to 11 U.S.C. § 707(b)(2) and, under the totality of the circumstances, granting the Debtors a Chapter 7 discharge would be an abuse under 11 U.S.C. § 707(b)(3)(B). The Trustee further contends that the case was not filed in good faith and should be dismissed pursuant to 11 U.S.C. § 707(b)(3)(A). The Trustee bears the burden of proving the Debtors' case is an abuse by a preponderance of the evidence. *In re Baker*, 400 B.R. 594, 597 (Bankr.N.D. Ohio 2009).

The Trustee first moves for dismissal under 11 U.S.C. § 707(b)(2), alleging that the Debtors have taken deductions on the Amended Means Test which exceed the allowable amounts and that when appropriate deductions are entered, the presumption of abuse arises. The Trustee further alleges that the Debtors did not rebut this presumption by introducing evidence to demonstrate special circumstances as provided under 11 U.S.C. § 707(b)(2)(B). The Debtors argue that the presumption of abuse does not arise. The Trustee points to the following lines on the Amended Means Test he believes are incorrect:

Means Test Review	Trustee's Test	Debtors' Test	Difference
Line 22- Additional Healthcare Costs	\$0	\$130.00	\$130.00
Line 30- Additional Food and Clothing Expense	\$0	\$64.00	\$64.00
Line 34 -Secured Debts Necessary for Support	\$0	\$185.00	\$185.00
Line 36 - Chapter 13 Administrative Expense	\$134.00	\$208.00	\$74.00
Total Disputed Amount			\$453.00

With the Trustee's adjustments, the Debtors have \$394.00 in monthly disposable income, which is sufficient to fund a Chapter 13 Plan. *See* 11 U.S.C. § 707(b)(2)(A)(i). The Trustee's bankruptcy analyst, Catherine Lowman, credibly testified regarding adjustments to the Amended Means Test. She testified that the medical documentation provided by the Debtors established that their monthly expenses were actually below the IRS standard allowance. Both Debtors testified about healthcare expenses, but the testimony was vague and failed to establish that their expenses exceed the allowable IRS expense of \$270.00 per month. The Debtors introduced their Exhibit D, which is a claims summary showing amounts their insurance provider was billed and the patient responsibility. They pointed to an unpaid bill from Anesthesia Associates in the amount of \$5,791.50 as proof that their additional expense on Line 22 is appropriate. The date of service, however, is post-petition and therefore not properly included in the Means Test analysis. Further, the Debtors failed to establish that the bill remained unpaid by the insurance provider. Accordingly, the Trustee's reduction of Line 22 from \$130.00 to \$0.00 is appropriate.

With respect to Line 30, Additional Food and Clothing Expenses, Ms. Lowman testified that she analyzed the Debtors' expenses on Schedule J and found them to be below the IRS standard expense and that the Debtors did not provide documentation to substantiate the additional expense. The Debtors' testimony also did not establish that their food and clothing expenses exceed the IRS allowable standard. The Trustee's reduction of Line 30 from \$64 to \$0 is appropriate.

In Line 34, the Debtors included an expense for curing the arrears on a rental property that they intend to surrender and have not lived in since 2013. The mortgage lender for that property obtained relief from stay on December 16, 2016. Line 34 permits an expense to cure an arrearage on a primary residence or "other property necessary for your support or the support of any of your dependents." Because the rental property is not a primary residence or necessary for the support of the Debtors or their dependents, the Trustee's reduction of the expense on Line 34 from \$184 to \$0 is correct. Finally, on Line 36, the Debtors overstated what their administrative expense would be in a Chapter 13 because they included the mortgage on the rental property in their projected monthly plan payment. Therefore, the Trustee's reduction of Line 36 from \$208 to \$134 is appropriate.

With these adjustments to the Debtors' Amended Means Test, the Debtors could pay unsecured creditors \$23,460 over the life of a five-year plan and the presumption of abuse arises. The Trustee has met his burden with respect to the presumption of abuse. The Debtors did not rebut the presumption with any special circumstances.

The Trustee further contends that even if the presumption of abuse did not arise, the totality of the circumstances warrants dismissal pursuant to 11 U.S.C. § 707(b)(3)(B). The

inquiry focuses on whether the Debtors have the ability to repay their unsecured creditors. *In re Burton*, 379 B.R. 732, 736 (Bankr.N.D. Ohio 2007). The Debtors earn significantly above the median income for a family of five in Ohio. Both have stable income and Mr. Kirk has been employed with the City of Cleveland for 18 years. Further, it is undisputed that the Debtors receive a significant tax refund each year. In 2015, the tax refund was \$7,081 and in 2016, the tax refund is expected to be \$6,300. Mr. Kirk testified that they had not yet received the 2016 tax refund. This overpayment of taxes could be used to pay unsecured creditors. The Debtors' Schedule J, as filed, shows monthly net income of \$368.37. The Debtors claim a childcare expense of \$430.00 per month but the Debtors' tax return only reflects \$1,568 paid in 2016. The Debtors testified that they pay Mr. Kirk's mother \$35.00 per day to watch the children during the summer months and other non-school days, but they did not offer specific figures to substantiate \$430.00 per month. The Debtors also include a \$400.00 per month medical and dental expense, which, as stated above, was unsubstantiated. Finally, the Debtors took a home maintenance and repair expense on line 20(d) of \$450.00 per month. They indicated on Schedule J that this expense would be eliminated when the rental property foreclosure was complete. Based on a review of Debtors' Schedules I and J, and considering the substantial yearly tax refund, it does appear they have the ability to repay creditors. Accordingly, under the totality of the circumstances, a Chapter 7 discharge would be an abuse.

Finally, the Trustee argues that the Debtors filed their case in bad faith and that it should be dismissed pursuant to 11 U.S.C. § 707(b)(3)(A). Specifically, Ms. Lowman analyzed the Debtors' credit card usage. Of particular note is the credit card debt the Debtors incurred from December 2015, when they first consulted with bankruptcy counsel, to the filing date in August

2016. In December 2015, the balance on eight credit card accounts was \$51,032. At the time of filing, the Debtors had increased their credit card debt to \$72,535.00, a 42% increase in eight months. Two weeks prior to meeting with bankruptcy counsel, the Debtors charged seven airline tickets in the amount of \$2,132.00 for a family vacation they took two months prior to filing for Chapter 7 relief. Although Mrs. Kirk testified that Mr. Kirk's parents reimbursed them for two of the airline tickets, there does not appear to be a corresponding payment to the credit card. Both Debtors testified that they believed they would be able to find a way out of their financial troubles, but the evidence of their spending leading up to the petition filing demonstrates otherwise. Under these circumstances, the Trustee has demonstrated that the Debtors did not file this Chapter 7 petition in good faith.

The Trustee has met his burden to show that the presumption of abuse arises, that dismissal is appropriate under the totality of the circumstances and for bad faith. The Trustee's Motion is granted and the Debtors' objection is overruled. The Debtors' case will be dismissed unless they seek conversion to Chapter 13 within 14 days from the entry of this order.

IT IS SO ORDERED.