

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 07-11332
)
PAUL V. SCHOONOVER, JR. and) Chapter 7
LISA D. SCHOONOVER,)
Debtors.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**
) (Not for commercial publication)

The United States trustee moves to dismiss this case under 11 U.S.C. § 707(b)(1) and (b)(3) on the ground that it is an abuse of chapter 7.¹ The debtors Paul and Lisa Schoonover oppose the motion.² For the reasons stated below, the motion is denied.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).³

ISSUE

Did the United States trustee meet his burden of proving that the debtors' chapter 7 filing is an abuse of chapter 7?

¹ Docket 10.

² Docket 30.

³ In the court's view, the value of this opinion is solely to decide the dispute between the parties, rather than to add anything to the general bankruptcy jurisprudence. For that reason, the opinion is not intended for commercial publication.

FACTS

I.

The court held an evidentiary hearing on June 22, 2007. The United States trustee presented his case through the testimony of Steven Davis, the chapter 7 trustee, cross-examination of the debtors, and documents. The debtors presented their case through their own testimony and documents.

The following findings of fact are based on that evidence and reflect the court's weighing of the evidence presented, including determining the credibility of the witnesses. "In doing so, the Court considered the witness's demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression." *In re The V Companies*, 274 B.R. 721, 726 (Bankr. N.D. Ohio 2002). *See* FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P. 52). When the court finds that a witness's explanation was satisfactory or unsatisfactory, it is using this definition:

The word satisfactory 'may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation—he believes what the [witness] says with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.'

United States v. Trogdon (In re Trogdon), 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990)

(discussing the issue in context of bankruptcy code § 727) (quoting *First Texas Savings Assoc., Inc. v. Reed*, 700 F.2d 986, 993 (5th Cir. 1983)).

II.

The debtors Paul Schoonover and Lisa Schoonover are both 41. Mr. Schoonover, who earned a GED, has been an over-the-road truck driver for 18 years. Mrs. Schoonover, a high school graduate, is a bookkeeper. The debtors have two daughters, R. (age 22) and K. (age 28).

R. has had health problems since the second grade; she was eventually diagnosed at age 13 with Crohn's disease and she is also bipolar. The debtors filed a chapter 7 case in 1996 to address the overwhelming debt resulting from R.'s medical bills. R. has always lived with the debtors. She was employed, but was laid off in December 2006 and is still looking for work. The debtors support her, including paying for her medicine, which costs \$108.00 a month.

K. and her husband have three children, ages 3, 7, and 9. They moved to West Virginia to pursue a job opportunity for the husband and in May 2005, the debtors co-signed a note secured by a mortgage so that K. and her family could buy a house. The husband stopped making payments on the note after two months and the debtors started to make the payments required by them as co-signers. The debtors also had to send food via UPS to their daughter and her children to save them from starving, as the husband stopped supporting them and left them without transportation in a house that was miles away from any stores.

Despite all this, the debtors' financial situation was relatively stable until September 2005 when, at age 39, Mr. Schoonover had a heart attack. At the time, he had been working at Ward Trucking for 13 years. He returned to work after about three weeks. About one year later, he was fired. He found a new job within a month. He then found a different job at Milan, where he stayed for two weeks. His next job, at Estes Express Line, lasted six months. He then found a job at All-Pro Trucking, which ended after one month. At the time of the hearing, Mr. Schoonover had been employed at New England Motor Freight for about five months.

By the fall of 2006, the debtors had fallen behind in their payments on their house in Garfield Heights, the house in West Virginia, the medical bills, and other similar obligations. To try to meet their financial obligations and avoid a bankruptcy filing, the debtors liquidated their 401k plans and received about \$35,000.00. They used the funds to bring the two house notes current and divided the balance of the money among their unsecured creditors. While this was not enough to pay all unsecured creditors in full, every creditor got something.

The debtors, however, again fell behind in their financial obligations. In about December 2006, they consulted an attorney and discussed the possibility of filing a chapter 13 so that they could keep their Garfield Heights home. Their counsel drafted a chapter 13 petition. The circumstances, though, continued to evolve for the worse, with the debtors concluding that they had to bring K. and her children back to Cleveland because of their financial distress and also to protect them from physical abuse.

The debtors and counsel eventually decided that a chapter 7 case was the only alternative given their inability to propose a viable chapter 13 plan. The debtors filed their chapter 7 case on March 2, 2007. The debtors' petition and schedules filed at that time show that they have \$22,764.24 in unsecured, nonpriority debt and that they are surrendering both houses. Schedule I shows that Mr. Schoonover has \$2,780.23 in net monthly income, while Mrs. Schoonover's net monthly income is \$1,558.44, for a total of \$4,338.67. With average monthly expenses of \$4,147.49, schedule J shows a net monthly income of \$191.18.

The debtors testified that their financial situation has deteriorated since the filing, and even since filing their amended schedules. The day before the hearing, the debtors advised counsel that Mr. Schoonover's income had dropped significantly after the filing because his employer transferred him from a pay per hour position to a pay per mile position. This has

resulted in a loss of income per month of about \$100.00. Mrs. Schoonover's hours have dropped from a steady 38 hours per week to a variable number of hours ranging from 32 to 36 due to a decrease in business. Additionally, the current budget fails to include (1) all of Mr. Schoonover's long-distance driving expenses, which he inadvertently understated by \$214.00 (\$416.00-\$202.00); (2) R.'s medicine; or (3) the expenses related to K. and her children. Also, Mr. Schoonover's employer is not withholding city taxes and those will have to be paid.

Additional facts are discussed below.

DISCUSSION

Bankruptcy code § 707(b)(1) provides that a court may dismiss a case filed by a debtor whose debts are primarily consumer debts if it finds that granting relief would be an abuse of chapter 7. 11 U.S.C. § 707(b)(1). In cases such as this where there is no presumption of abuse, courts must consider whether the debtor filed in bad faith or whether the totality of circumstances of the debtor's financial situation shows abuse. 11 U.S.C. § 707(b)(3). The United States trustee has the burden of proving his case by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279 (1991).

The United States trustee does not claim that the debtors filed in bad faith. Rather, he argues that the totality of circumstances shows that the debtors are abusing the bankruptcy system. Specifically, he contends that the debtors are eligible to file a chapter 13 in which they would be able to repay at least 50% of their unsecured debt based on their schedules, information provided in their reaffirmation agreements, and a repayment plan recently reached with the State of Ohio regarding back taxes. The debtors argue that their finances are so bad that they cannot repay the debt (although they would if they could), their income is no longer stable, there are no

state remedies available to assist them, they cannot obtain relief through private negotiations, and they are living on a no-frills budget.

The parties agree that the applicable law is found in two Sixth Circuit cases: *Behlke v. Eisen* (*In re Behlke*), 358 F.3d 429 (6th Cir. 2004) and *In re Krohn*, 886 F.2d 123 (6th Cir. 1989).⁴ Together, those cases identify several factors to be considered in deciding whether the totality of circumstances shows abuse. Those factors include: the debtors' ability to repay debts out of future earnings; whether the debtors have a stable source of future income; whether they are eligible for chapter 13; whether there are state remedies available to them; whether they can obtain relief through private negotiations; and whether they can reduce their expenses significantly without being deprived of necessities such as food, clothing, and shelter.

Are the debtors eligible to file a chapter 13?

The parties agree that the debtors' income and debt make them eligible for a chapter 13. *See* 11 U.S.C. § 109(e).

Do the debtors have a stable source of income?

Prior to September 2005, the debtors both had stable income. Mrs. Schoonover still has stable employment, although the number of hours she works has been reduced from a steady 38 hours to between 32 and 36 hours. She anticipates that her hours will go back up at some point. Mr. Schoonover had stable income until he was fired in March 2006. Since then, he has had four different jobs. When he started his current job in February 2007, he was paid by the hour and was able to work 70 hours a week. Since the bankruptcy filing, his employer transferred him to

⁴ Those cases, decided before Congress adopted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, are still good law on the factors to be considered in abuse cases. *In re Zayas*, No. 06-13070, 2007 WL 987240, at *2 (Bankr. N.D. Ohio April 2, 2007); *In re Mestemaker*, 359 B.R. 849, 856 (Bankr. N.D. Ohio 2007).

a different job where he is paid by the mile. The change means that he earns a net income of about \$2,700.00 a month, which is less than when the case was filed. The court concludes that his income is not stable either in terms of staying employed at the same place or maintaining a predictable level of income.⁵

Are there state remedies available to the debtors?

The United States trustee did not identify any state remedies that are currently available to the debtors. Mrs. Schoonover testified that in the future her daughter K. may be eligible for some assistance, but details were not provided. K.'s husband owes child support, but she is unlikely to collect it, with or without a lawsuit, because her husband is in jail on assault charges.

Can the debtors obtain relief through private negotiations?

The debtors testified that they could not obtain relief through private negotiations. They did negotiate a payment plan with the State of Ohio, but that was in the context of the chapter 7 case.

Can the debtors reduce their expenses significantly without being deprived of necessities such as food, clothing, and shelter?

The debtors testified that there is no fat in their budget. They acknowledge that they could live without their cable service, but the United States trustee did not argue that this is a luxury that should be eliminated. He did not, in fact, argue that there is any way for the debtors to tighten their belts.

⁵ K. had been employed at McDonald's, which might have permitted her to contribute to the household income. She lost that job, however, when her husband assaulted her and "trashed" her car, preventing her from getting to work. Because she does not have a car, she cannot find other employment.

Are the debtors able to repay debts out of future earnings?

The United States trustee contends that the debtors have two additional pots of money that they could devote to their unsecured creditors: money going now to the State of Ohio and money that they are not using to pay the note that secures the mortgage on their house.

The debtors' agreement with the State of Ohio requires them to pay \$264.43 a month for 14 months, after which time they will owe penalties and interest payments for a few more months. The United States trustee argues that when those payments are finished, the debtors could devote that money to their unsecured creditors and he suggests a chapter 13 plan with that provision. He argues further that the debtors have not been paying their monthly obligation on their house note and that the payment scheduled for that debt could also be assigned to unsecured debtors. With these two changes, he contends that the debtors could pay somewhere between 50 to 95% of their unsecured debt over 48 months.

The evidence showed that the debtors' financial circumstances were bad when they filed their chapter 7 and that they have changed for the worse since then. When the debtors first considered their bankruptcy options, they had three adults living in their home. They now are financially responsible for four adults and three young children. While they have not paid the amounts due on their house note in about six months, a state court judgment has been entered against the debtors for the balance due under the note and to foreclose the mortgage. Consequently, they will have to move in the foreseeable future.⁶ Mrs. Schoonover testified that she will have to find a house to rent that will hold seven people and will have to pay up front the

⁶ The court notes that chapter 7 debtors generally are in long-standing default on their house notes and they still list the monthly amount due on the note in schedule J because they are in a transitional period between home ownership and making other housing arrangements.

first month's, last month's, and one additional month's rent as a security deposit. She believes the rent will be in the same range as the \$938.00 payment that is scheduled, but which recently went up to \$1,100.00. This explanation satisfactorily accounts for the money listed as due on the house note.

With respect to the possibility of using the money now going to the State of Ohio to pay unsecured creditors, the court finds that the chance of there being additional disposable income in about 16 months is too remote to prove this point. Mrs. Schoonover testified—and the court believes—that there simply is no extra money in their budget; everything is swallowed up by the day to day necessities. Even with the chapter 7 relief, they still cannot pay their utility bills on time; they pay something to whoever is going to turn off the service. When the money runs out, they reduce the amount spent on food. The family's monthly food budget is now \$650.00, or \$142.00 a week for seven people. This is less than the IRS allowance of \$685.00 to feed four people. As the children grow, they will eat more and they will need clothes, shoes, and medical care that are not presently in the budget at all. The court also notes that one of the debtors' cars is a 2002 Infiniti with 88,000 miles, creating the possibility that in 16 months or so it will need repairs beyond routine maintenance. All in all, the evidence does not show that the debtors will, in 16 months, be able to devote the Ohio payments to their unsecured debts.

The United States trustee points out that the debtors filed reaffirmation agreements in which they state that they can afford to reaffirm the debt on their cars and still have \$191.18 of disposable income. He asks that this additional money be devoted to unsecured creditors. Mrs. Schoonover testified that they never had an extra \$191.18. Instead, they signed what they needed to sign to win court approval of the reaffirmation agreements because they will lose their jobs without cars. She again said that they will cut back other expenses to make these payments.

The court notes that many budgets offered in support of reaffirmation agreements are shaky. In this city, a debtor generally cannot get to work without a car and without a job a debtor cannot get a fresh start. This is an economic reality not squarely addressed by the code, and so—absent third party objection—the court generally accepts at face value most budgets offered in support of reaffirmation agreements if they show that the debtor’s income exceeds expenses. There is, however, a critical difference between a budget that is optimistic and one that is false. The budget offered in support of the debtors’ reaffirmation agreements falls into the former category, but not by much. The court will enter a separate order addressing that issue. The debtors are further cautioned not to file any document in the future that does not have an objectively sound basis in fact.

The court concludes that, based on the totality of circumstances, the United States trustee did not meet his burden of proving that this bankruptcy filing is an abuse of chapter 7. Overall, the evidence showed that the debtors tried very hard to avoid filing a bankruptcy case by liquidating their retirement accounts and using the proceeds to pay both their secured and unsecured creditors; they have constantly tried to stay employed, but their income has nevertheless dropped; they have attended to unexpected family obligations that were not of their own making; they preferred to file a chapter 13 case and seriously considered doing so; they have no credit cards and try to live within their means; and nothing in their budget could be considered a luxury. They have no alternative state court remedies or private negotiation possibilities. In short, they are entitled to the fresh start contemplated by Congress in enacting the bankruptcy code.

CONCLUSION

For the reasons stated, the United States trustee's motion to dismiss is denied. A separate order will be entered reflecting this decision.

A handwritten signature in black ink, reading "Pat E. Morgenstern-Clarren". The signature is written in a cursive, flowing style. The "P" is large and loops around the "at". The "E" is simple. "Morgenstern-Clarren" is written in a more formal but still cursive script.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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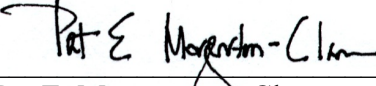
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PAUL V. SCHOONOVER, JR. and) Chapter 7
LISA D. SCHOONOVER,)
) Judge Pat E. Morgenstern-Clarren
Debtors.)
) **ORDER**
) (Not for commercial publication)

For the reasons stated in the memorandum of opinion issued this same date, the United States trustee's motion to dismiss this case under 11 U.S.C. § 707(b)(3) is denied. (Docket 10).

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge