

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 07-13568
JAMES M. HALL, JR. and)
LISA M. HALL,) Chapter 7
Debtors.) Judge Pat E. Morgenstern-Clarren
) **MEMORANDUM OF OPINION**
) (NOT FOR COMMERCIAL PUBLICATION)

The United States trustee moves to dismiss this chapter 7 case for abuse under 11 U.S.C. § 707(b)(3)(B).¹ The debtors James Hall and Lisa Hall oppose the motion.² For the reasons stated below, the motion to dismiss is granted.³

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).

ISSUE

Did the United States trustee meet his burden of proving that the totality of the debtors' financial circumstances shows that their filing is an abuse of the chapter 7 provisions?

THE EVIDENTIARY HEARING

The court held an evidentiary hearing on October 30, 2007. The United States trustee (UST) presented his case through the testimony of the debtors and Catherine Lowman, an analyst in the UST's office, as well as documents. The debtors presented their case through their

¹ Docket 19.

² Docket 26.

³ In the court's view, the value of this opinion is solely to decide the dispute between the parties and not as an addition to the general jurisprudence. For that reason, the opinion is not intended for commercial publication.

own testimony and cross-examination of Ms. Lowman. The parties stipulated that exhibits used at trial were admitted into evidence, although the stipulation was not on the record.

These 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 witnesses' 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 and applicable in contested matters under FED. R. BANKR. P. 9014). 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] say[s] with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.

United States v. Trogon (In re Trogon), 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990) (internal citations and quotation marks omitted).

FACTS

The debtors filed their chapter 7 case on May 16, 2007. They testified that they had to file this case because they had unanticipated health insurance premiums, as discussed below. They have one 17 year old daughter who lives at home and two adult children (a daughter and a son) who live elsewhere.

A. The Debtors' Prepetition Money Management

1. The Debtors' Employment and Income

Mr. Hall was employed in construction for 30 years at Albert Higley Co. In 2003, when he reached age 50, he retired with a monthly pension of \$4,124.32, which was more than he had been receiving when he was employed, due to gaps in work days. He does not anticipate any change in his pension payments.

During Mr. Hall's tenure at Higley, he paid for his health insurance through the union. He contributed to a fund (apparently through payroll deductions) and the union used that money to pay his premiums. Mr. Hall knew when he retired in 2003 that he had enough money "banked" in that fund to pay his premiums for four years, after which he would have to pay the premiums out of pocket. He did not take any steps to determine how much the premium would be or how he would pay it until 2006, at which time he learned that the premium was \$900.00 a month. He then took a course to qualify as a trucker in the hope that he could get a job with paid health insurance. He worked as a trucker for four months before being laid off in October 2006, after which he had to begin paying for the insurance himself.

Mrs. Hall has been steadily employed as a server in a restaurant for 10 years. Her monthly net income is \$1,685.04,⁴ although she testified that it can fluctuate from month to month. She does not anticipate any change in her employment in the foreseeable future.

The debtors had \$89,602.00 in gross income in 2006 and \$72,005.00 in gross income in 2005.⁵ They received a tax refund of \$5,039.00 for tax year 2006 and are likely to receive a refund in the same amount for 2007. When that refund is spread out over 12 months, it adds \$419.92 a month to the debtors' income. The result is a total monthly income of \$6,229.28, or \$74,751.36 a year.

2. The Debtors' Unsecured Debt

The debtors scheduled \$118,015.57 in unsecured debt, of which \$96,554.57 is credit card debt.⁶ The only testimony about the credit card debt was that it was incurred to pay for vacations, gifts, and other non-necessities. The debtors took these vacations in the two years before they filed their chapter 7 case:

⁴ Schedule I.

⁵ Statement of Financial Affairs ¶ 1.

⁶ Schedule F.

2006: A family trip (five people) to Florida

2006: Mrs. Hall and one of her daughters traveled to Canada

2006: A family trip (five people) to North Carolina

2005: A family trip (five people) to Hawaii

2005: Mr. and Mrs. Hall took a trip to Italy

Mrs. Hall testified that they took these trips to spend quality time with their family.

3. The Debtors' Secured Debt

The debtors scheduled \$263,112.33 in secured debt, with \$42,000.00 of that being unsecured.⁷ This debt relates to the debtors' residence, their mobile home, and two cars.

The debtors bought their residence in 1992 for \$76,000.00. They refinanced it in January 2005 for \$150,000.00 to pay some of their credit card debt. They owe \$142,684.00 on the note secured by a mortgage on the house. They intend to remain in the home and are current on the note payments.⁸

In July 2003,⁹ at about the time that Mr. Hall retired, the debtors traded in their Gulfstream Conquest motor home for an All Seasons RV motor home, paying about \$102,000.00 for the All Seasons. They had negative equity in the Gulfstream, which they added to the amount they borrowed to purchase the new motor home. They paid \$760.00 a month on the note secured by the motor home. They bought the motor home to use for family vacations.

The debtors drive a 2004 Chevy and a 2006 Chevy. They are current on these payments, and intend to retain the cars and continue to make regular payments.¹⁰

⁷ Schedule D.

⁸ Statement of Financial Affairs ¶ 3.

⁹ Statement of Financial Affairs ¶ 10.

¹⁰ Schedule D; Chapter 7 Individual Debtor's Statement of Intention.

4. The Debtors' Tax Debt

The debtors are current with their federal, state, and local taxes.¹¹

5. Mrs. Hall's Car Accident and Insurance Settlement

Mrs. Hall was in a car accident in 2003. In 2005, she received a settlement in the range of \$8,000.00–9,000.00. She used some of the money to pay some of the bills from the Hawaii trip and some to pay for Mr. Hall's truck driver training.

B. The Debtors' Claimed Expenses in Schedule J

1. The Motor Home

In calculating their current expenses, the debtors included the \$760.00 a month payment for the motor home. They now agree that this expense should be deleted from Schedule J because the vehicle will be surrendered.

2. The Whole Life Insurance Portion of Mr. Hall's Life Insurance Premium

Mr. Hall has both term insurance and whole life insurance. Because whole life insurance is a form of investment, the debtors now agree that the premium attributable to that insurance (\$263.84) should not be included as an expense, leaving an expense of \$116.16.

3. The Debtors' Health Insurance Premium

The debtors listed \$950.00 a month for this payment. They now agree that the correct number is \$883.00 a month.

4. Vehicle Insurance

The debtors insure the two cars that they drive, as well as four other vehicles,¹² at a monthly cost of \$350.00. Three of the additional vehicles are cars driven by the debtors' adult son and daughter who live elsewhere and their 17 year old daughter who lives at home. The debtors' daughters cannot afford to pay their own premiums. The debtors insure all of the vehicles because they own them and they believe that state law requires owners to carry

¹¹ Schedule E.

¹² UST Exh. 12.

insurance. The amount of the monthly premium attributable just to the two cars used by the debtors is \$80.00.

5. Voluntary Monthly Payment to Adult Daughter

The debtors' adult daughter is in the fourth year of a six-year pharmacy program. They give her \$150.00 a month which she uses for food and books. The debtors claim her as a dependent for income tax purposes.

THE POSITIONS OF THE PARTIES

The UST moves to dismiss under § 707(b)(3)(B) arguing that based on the totality of the debtors' financial circumstances, including Mrs. Hall's stable job, Mr. Hall's regular pension payments, their high income, unrestrained spending on vacations and other luxuries, and ability to repay their unsecured debts, granting them relief would be an abuse of chapter 7.

The debtors reply that the totality of the circumstances does not show abuse because they did not know how high the health insurance premium would be, took vacations to be with their children and each other, and knew they had money coming in from Mrs. Hall's car accident settlement to help pay the costs of their trips and their other debts. They also defend the challenged expenses as reasonable and appropriate, stating that they wish to provide transportation for their daughters and that they also want to help support their adult daughter during her college years. The debtors conclude that when all of the expenses are allowed, they have only a few dollars to apply to a chapter 13 plan.

DISCUSSION

A. 11 U.S.C. § 707(b)(3)(B)

Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), the court may dismiss a chapter 7 case filed by a debtor whose debts are primarily consumer debts if the court finds that granting relief to the debtor would be an abuse of the provisions of chapter 7. 11 U.S.C. § 707(b)(1). When no presumption of abuse arises, as in this case, courts analyzing whether the filing is nevertheless an abuse of chapter 7 must consider

whether (1) the debtors filed in bad faith; or (2) whether the totality of the circumstances of the debtor's financial situation demonstrates abuse. 11 U.S.C. § 707(b)(3). The UST relies here on the totality of the circumstances prong found in § 707(b)(3)(B). He has the burden of proof by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991).

Pre-BAPCPA, a chapter 7 case could be dismissed as a substantial abuse of the system if the court found that a debtor was not needy. *In re Krohn*, 886 F.2d 123, 126–27 (6th Cir. 1989). The factors used to determine whether a debtor was needy before BAPCPA are also relevant to determining whether the totality of a debtor's financial circumstances demonstrates abuse under BAPCPA. *In re Mestemaker*, 359 B.R. 849, 856 (Bankr. N.D. Ohio 2007). Those factors include: the debtor's ability to repay debts out of future earnings; whether the debtor has a stable source of future income; whether the debtor is eligible for chapter 13; whether there are state remedies available to the debtor; whether the debtor can obtain relief through private negotiations; and whether the debtor can reduce his expenses significantly without being deprived of necessities such as food, clothing, and shelter. *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 434 (6th Cir. 2004); *In re Krohn*, 886 F.2d at 126–27. "Courts generally evaluate as a component of a debtor's ability to pay whether there would be sufficient income in excess of reasonably necessary expenses to fund a Chapter 13 plan." *In re Mestemaker*, 359 B.R. at 856. In doing that analysis, courts must consider whether the debtor is able to reduce expenses going forward. *See In re Krohn*, 886 F.2d at 126–27. Courts may consider the debtor's circumstances both before and after the bankruptcy filing. *In re Toney*, No. 07-30637, 2007 WL 2417335, at *3 (Bankr. N.D. Ohio Aug. 20, 2007).

B. Application of the Factors to the Facts of this Case

Eligibility for chapter 13 relief

The debtors are eligible for chapter 13 relief. *See* 11 U.S.C. § 109(e).

State remedies and private negotiations

The UST did not identify any state remedies that are available to the debtors and he did not show that the debtors can obtain relief through private negotiations.

The debtors' income

Mrs. Hall has steady employment with stable income that is not likely to change in the near future. Similarly, Mr. Hall will continue to receive his pension in the stated monthly amount. The debtors are also likely to receive a sizeable federal income tax refund for tax year 2007.

The debtors' expenses

The debtors agree that their schedules overstated their expenses for the motor home, the health insurance premium, and the life insurance. These changes decrease these expenses by \$1,090.84 a month.

The debtors can also reduce their expenses by limiting their vehicle insurance to just the two cars that they drive. The debtors' desire to provide transportation for their daughters is understandable, but it is not a reasonably necessary expense for a family in financial *extremis*. So long as the debtors take steps to make sure that the extra vehicles are not driven, the debtors are not obligated to maintain insurance on them. The debtors contend that they are entitled to provide their daughters with transportation because they claim them as dependents for federal income tax purposes. They did not cite any law that links the federal tax status with the question of whether paying to insure cars driven by non-income producing, non-debtors is a reasonable expense under the chapter 7 analysis. Dropping the extra insurance decreases the debtors' monthly insurance expense by \$270.00.

Similarly, the debtors can decrease their expenses by eliminating the monthly payment to their adult daughter. Certainly it is admirable for parents to want to help their children get a good education. The debtors could have accomplished this by saving some of the money they spent on vacations or the motor home and using that money to aid their daughter. Having made

a different choice, they cannot now assist their daughter at the expense of their unsecured creditors. Moreover, there was no evidence that the adult daughter is incapable of supporting herself, although she would have to earn more money (either during the school year or the summer) or obtain additional loans or scholarships. The \$150.00 devoted to the daughter is not an appropriate expense under these circumstances.

These changes reduce the debtors' expenses by a total of \$1,510.84 a month, leaving amended monthly expenses of \$5,377.16.

Paying debt out of future earnings

As discussed above, the debtors have \$6,229.28 in monthly income. After reducing the monthly expenses by amounts attributable to the motor home, whole life insurance, and voluntary payment to the adult daughter, and reducing the health insurance and car insurance premiums, the debtors have \$5,377.16 in monthly expenses.¹³ This leaves the debtors with \$852.12 a month, or \$51,127.20 over 60 months, the applicable commitment period for a chapter 13 plan for above median income debtors. *See* 11 U.S.C. § 1325(b)(4). The court is not now deciding what amount the debtors would be required to pay under a chapter 13 plan, just that they clearly have excess income after paying reasonable expenses.

The debtors contend that their filing is not an abuse because their problems arose from an unforeseen circumstance; i.e., the need to start paying a hefty monthly health insurance premium in 2007. This is not by any means an unforeseen circumstance. The debtors knew when Mr. Hall retired in 2003 that he would have to pay this premium four years later. Information about the amount of the premium was readily available to Mr. Hall through his union. A person acting responsibly would have asked how much the premium was, and made plans during the four year window for how to pay it. Instead, the debtors turned a blind eye to this known, upcoming expense; at the same time they chose to incur significant debt to buy a motor home and take family vacations. If the debtors had refrained from buying the motor home, they could have

¹³ *See* UST Exh. 11.

saved a minimum of \$760.00 a month (not including additional costs for gas, maintenance, and insurance) over four years and had ample funds to pay the new expense. Along the same lines, they could have enjoyed time at home or close to home with each other and their children rather than spending money they did not have to travel to Hawaii, North Carolina, Florida, Canada, and Italy. In short, to the extent that the debtors are in a financial bind, it is due to their own actions and inactions rather than any misfortune visited upon them by chance. Allowing the debtors to remain in chapter 7 would undoubtedly be an abuse of chapter 7.

This decision does not necessarily mean that the debtors are without a remedy under the bankruptcy code. Debtors with substantial consumer debt and substantial income may obtain relief under chapter 13 by repaying part of the unsecured debt in exchange for a discharge at the end of the payment plan. These debtors may not, however, discharge all of their unsecured debt in a chapter 7 case.

CONCLUSION

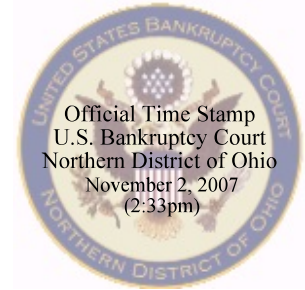
The UST's motion to dismiss under § 707(b)(3)(B) is granted. This decision does not preclude the debtors from filing a motion to reinstate for the sole purpose of converting to a case under chapter 13. A separate order will be entered based on this decision.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

NOT FOR COMMERCIAL PUBLICATION

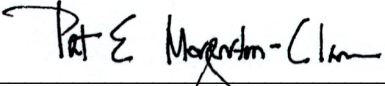
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 07-13568
)
JAMES M. HALL, JR. and) Chapter 7
LISA M. HALL,)
) 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 granted and the case is dismissed. (Docket 19).

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge