

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: March 31 2011

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No. 10-34288
)	
Juan H. Trejo and)	Chapter 7
Heather T. Trejo,)	
)	
Debtors.)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION AND ORDER
REGARDING MOTION TO DISMISS

This case is before the court on the United States Trustee’s (“the UST”) motion to dismiss Debtors’ Chapter 7 case for abuse under 11 U.S.C. § 707(b)(1) and (3) [Doc. # 16] and Debtors’ response [Doc. # 24]. The court held a hearing on the motion that Debtors, their counsel and counsel for the UST attended in person and at which the parties presented testimony and other evidence in support of their respective positions.

The district court has jurisdiction over this Chapter 7 case pursuant to 28 U.S.C. § 1334(a) as a case under Title 11. It has been referred to this court by the district court under its general order of reference. 28 U.S.C. § 157(a); General Order 84-1 of the United States District Court for the Northern District of Ohio. Proceedings to determine a motion to dismiss a case under § 707(b) are core proceedings that this court may hear and decide. 28 U.S.C. § 157(b)(1), (b)(2)(J) and (O).

Having considered the briefs and arguments of counsel and having reviewed the record in this case, for the reasons that follow, the court will grant the UST’s motion and will dismiss Debtors’ Chapter 7 case

unless they timely convert it to a case under Chapter 13.

BACKGROUND

Debtors are married and have three dependent children, ages eighteen, fifteen and nine years. Juan Trejo works in maintenance at the Reuben Company, where he has been employed for eighteen years. He testified that some positions at the Reuben Company have been eliminated and that he has been told that there is a possibility of additional jobs being cut. Heather Trejo is employed as a registered nurse at Toledo Hospital, where she has worked for thirteen years.

On June 22, 2010, Debtors filed a petition for relief under Chapter 7 of the Bankruptcy Code, stating that their debts are primarily consumer debts. Debtors testified that they sought bankruptcy relief due to continuing wage garnishments of over \$1,000 per month, [*see* UST Ex. 3, p. 1], that resulted in their inability to continue making the required payments on their debt obligations.

Debtors' Schedule D shows total secured debt in the amount of \$323,904. Their secured debts include a \$200,000 land contract for their home, which Debtors value at \$200,000, and \$110,000 secured by a first mortgage on property located at 2625 Midwood Avenue, Toledo, Ohio ("Midwood property"), which Debtors value at \$94,000. Their secured debts also include \$11,704 secured by their 2004 Pontiac Grand Prix and \$2,200 secured by their 2001 GMC Yukon. Although Debtors' schedules show unsecured nonpriority debt in the amount of \$21,752, Heather Trejo testified that she also owes a student loan debt of approximately \$30,000, which amount is not included in Debtors' bankruptcy schedules. Debtors' schedules show no unsecured priority debt.

The Midwood property is Debtors' former residence, where they lived from 1997-2008. Since they moved to their new home, the Midwood property has never been rented. Both Mr. and Ms. Trejo testified that Debtors last made a mortgage payment with respect to the Midwood property approximately a year ago, and Debtors have stated an intention to surrender this property, [UST Ex. 2, p. 36]. They have also surrendered the Pontiac Grand Prix.

Debtors' Schedule I shows gross monthly wages in the combined total amount of \$7,669.74 and net monthly wages after payroll deductions in the combined total amount of \$5,775.85. [*Id.* at 23]. Annualized, their gross income for 2010 is \$92,036. In 2009, Debtors earned a combined total of \$88,562 and, in 2008, they earned \$87,478. [*Id.* at 27].

Debtors' Schedule J shows total monthly living expenses of approximately \$6,035. Those expenses include a land contract expense of \$900 for their home, car payments of \$325 for the Pontiac Grand Prix and \$440 for the GMC Yukon, a telephone and cell phone expense of \$210, and expenses of \$200 for

personal grooming and haircuts, and \$100 for recreation. In addition, Debtors' Schedule J expenses include a mortgage expense of \$1,100 for the Midwood property, which, as stated above, they intend to surrender.

Heather Trejo testified to additional expenses that have arisen since filing. Although the Pontiac Grand Prix has been surrendered, Debtors require two vehicles and anticipate the cost of a second vehicle exceeding by approximately \$100 their monthly payment for the Grand Prix. They have also incurred dental expenses for braces for two of their children at a cost of \$200 per month. In addition, their payment on their land contract has increased from \$900 to \$1,000 per month. With these additional expenses, and adjusting Debtors' expenses downward to reflect elimination of the \$1,100 Midwood property mortgage expense, Debtors' income after current expenses totals \$440.

Heather Trejo also testified that she anticipated an increase in their car insurance expense averaging \$90 a month because they would have two children driving. The court does not, however, find this extra predicted expense necessary for the maintenance and support of Debtors or their dependents on the record before it, as the court's expectation is that the children would contribute to payment of the added cost of insurance if they will be driving family vehicles.

Debtors' Form B22A calculating the means test shows that their annualized current monthly income at the time of filing this case was above the median income for a household the size of Debtors in Ohio. According to Debtors' means test calculation, no presumption of abuse arose under 11 U.S.C. § 707(b)(2). The UST filed a motion to dismiss for abuse and is now proceeding only under § 707(b)(3).

LAW AND ANALYSIS

Where debts are primarily consumer debts, as in this case, the court may, after notice and a hearing, dismiss a Chapter 7 petition "if it finds that the granting of relief would be an abuse of the provisions of [Chapter 7]." 11 U.S.C. § 707(b)(1). Under § 707(b)(3), in determining whether granting relief would be an abuse, the court is required to 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." 11 U.S.C. § 707(b)(3)(A) and (B). This provision was added by Congress in 2005 as a part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

Before BAPCPA, courts considered whether to dismiss a case for "substantial abuse" under § 707(b) based on the "totality of the circumstances." *See, e.g., In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989); *In re Price*, 353 F.3d 1135, 1139 (9th Cir. 2004). The Sixth Circuit explained that "substantial abuse" could be predicated upon either a lack of honesty or want of need, to be determined by the totality of the circumstances. *Krohn*, 886 F.2d at 126. Congress incorporated this judicially created construct in

§ 707(b)(3). Although pre-BAPCPA case law applying these concepts is still helpful in determining abuse under § 707(b)(3), under BAPCPA Congress has lowered the standard for dismissal in changing the test from “substantial abuse” to “abuse.” *In re Mestemaker*, 359 B.R. 849, 856 (Bankr. N.D. Ohio 2007).

In this case, the UST does not argue that Debtors filed their petition in bad faith but instead contends that the totality of their financial circumstances demonstrates that they are not needy and that granting them a discharge would be an abuse of the provisions of Chapter 7. The totality of the circumstances test allows the court to consider both prepetition and postpetition circumstances. *See U.S. Trustee v. Cortez (In re Cortez)*, 457 F.3d 448, 455 (5th Cir. 2006) (“Section 707(b) does not condition dismissal on the *filing* of bankruptcy being [an abuse] but rather on the *granting of relief*, which suggests that in determining whether to dismiss under § 707(b), a court may act on the basis of any development occurring *before* the discharge is granted.”); *In re Mestemaker*, 359 B.R. 849, 855-56 (Bankr. N.D. Ohio 2007).

Debtors are “needy” when “[their] financial predicament warrants the discharge of [their] debts” in a Chapter 7 case. *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 434 (6th Cir. 2004). Factors relevant to determining whether a debtor is “needy” include the ability to repay debts out of future earnings, which alone may be sufficient to warrant dismissal under some circumstances. *Krohn*, 886 F.2d at 126. Other factors include “whether the debtor enjoys a stable source of future income, whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code, whether there are state remedies with the potential to ease his financial predicament, the degree of relief obtainable through private negotiations, and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities.” *In re Bender*, 373 B.R. 25, 30 (Bankr. E.D. Mich. 2007); *In re Burge*, 377 B.R. 573, 577 (Bankr. N.D. Ohio 2007); *see Krohn*, 886 F.2d at 126. As the movant, the UST carries the overall burden of demonstrating, by at least a preponderance of the evidence, that the Debtors’ case should be dismissed. *In re Tucker*, 389 B.R. 535, 538 (Bankr. N.D. Ohio 2008).

As discussed above, Debtors’ monthly income after payroll deductions and adjusted monthly expenses totals \$440, which amount could be devoted to paying their prepetition unsecured debt. Although further belt tightening may be possible, if at least \$400 per month were applied to repay unsecured creditors over the sixty-month maximum plan duration for above-median income debtors, *see* 11 U.S.C. § 1322(d)(1), Debtors would have \$22,200 available after payment of the Chapter 13 Trustee’s administrative expenses

to pay their unsecured debt.¹ Assuming Debtors' unsecured debt includes the \$16,000 anticipated estimated deficiency judgment on the Midwood property mortgage and the \$30,000 student loan debt, as well as the \$21,752 in unsecured debt set forth in their Schedule F, their unsecured debt totals \$67,752. As Debtors' schedules show no unsecured priority debt, unsecured creditors may potentially receive a dividend of approximately thirty-three percent, or more if claims are not filed by all creditors as frequently occurs. *See In re Behlke*, 338 F.3d at 437 (finding *substantial* abuse where debtors had the ability to pay at least a 14% dividend to their unsecured creditors).

Debtors are eligible for Chapter 13 should they choose to seek such relief. Notwithstanding Juan Trejo's testimony regarding the potential for additional layoffs at his work, Debtors currently are individuals with regular and sufficiently stable income and their debts are less than the statutory eligibility limits. *See* 11 U.S.C. §§ 109(e), 101(30). Both Debtors have worked for their current employer for a long time. To the extent that Debtors seek relief under Chapter 13 and their financial circumstances substantially change for the worse at some time in the future, they would have additional options at that time, such as modification of their Chapter 13 plan under § 1329, a hardship discharge under § 1328, or reconversion to Chapter 7.

The record shows that Debtors' financial predicament stemmed from their move to the land contract property from their long time residence on Midwood, carrying payments for a time for both, which they could not afford, then falling behind on other obligations that resulted in garnishment of Mr. Trejo's wages and the compounding of their downward financial spiral. With the protection of the automatic stay to stop their financial situation from worsening, the court finds that Debtors have income that could be devoted to make a meaningful pro rata distribution to all of their unsecured creditors through Chapter 13. Their gross joint income has actually increased over each of the last three years.

The availability of debtors' remedies under state law and the relief that might be afforded through private negotiations are other factors the Sixth Circuit has identified as relevant in deciding whether it would be an abuse to grant a Chapter 7 discharge in a particular case. Neither party has addressed these factors in this case. As the United States Trustee bears the burden of proof on the motion, *In re Wright*, 364 B.R. 640, 643 (Bankr. N. D. Ohio 2007), the court will assume that there are no such state law remedies or private negotiations that will assist in resolving Debtors' financial problems.

¹ The court notes that Debtors schedule a \$440 car payment on their second vehicle, the GMC Yukon, on which they owed only \$2,200 at the time of filing in June 2010. [*See* UST Ex. 2, pp. 16 & 24]. It thus appears that this debt, if it is not already, will soon be paid in full resulting in additional funds being available to repay unsecured creditors.

In sum, the court finds that Debtors have reasonably stable income and are able to pay a meaningful portion of their unsecured debts out of their future income without Debtors or their dependents being deprived of adequate housing, food, clothing, or other necessities and that granting Debtors relief under Chapter 7 of the Bankruptcy Code would, therefore, be an abuse of the provisions of that chapter given the totality of their financial circumstances.

THEREFORE, for all of the foregoing reasons, good cause appearing,

IT IS ORDERED that Debtors are allowed thirty (30) days from the date of this order to file a motion to convert to a Chapter 13 case, absent which the United States Trustee's motion to dismiss [Doc. #16] will be granted, and this case will be dismissed, by separate order of the court.