


ORDERED.

Dated: March 22, 2019

  
Cynthia C. Jackson  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION  
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In re:

Ryan Christopher Melady and  
Christina Rebecca Melady,

Chapter 7

Case No. 6:16-bk-07252-CCJ

Debtor.

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ORDER DENYING AMENDED MOTION TO DISMISS CASE

This case came before the Court for trial on the United States Trustee's ("UST") Amended Motion to Dismiss under Section 707(b)(1) and 707(b)(3) of the Bankruptcy Code (Doc. No. 36; the "Motion to Dismiss"). By the Motion to Dismiss, the UST argues that the Debtors have the ability to pay their creditors in a hypothetical Chapter 13 case, and that the facts surrounding this case -- the totality of circumstances -- demonstrate abuse requiring dismissal. The Court having considered the evidence and argument of counsel, denies the Motion to Dismiss for the reasons stated below.

Background

On November 4, 2016 (the “Petition Date”), the Debtors filed a Voluntary Petition for relief under Chapter 7 of the Bankruptcy Code. This is the Debtors’ second bankruptcy case. The Debtors filed their first bankruptcy case because they could not pay the business debts they personally guaranteed after their business closed.<sup>1</sup> The Debtors are in their forties and support two sons, who are 14 and 16 years old. Mr. Melady has a medical condition which does not allow him to have consistent employment. Mrs. Melady is employed at a credit union as a national account executive.

Mrs. Melady started working at the credit union in May 2014.<sup>2</sup> The credit union pays Mrs. Melady a salary and a commission based on her performance. The credit union also provides Mrs. Melady with benefits -- a 401(k) retirement account and health insurance. Mrs. Melady and her family must meet a \$6,000 deductible each year before the insurance company will pay for medical expenses. The credit union contributes \$1,400 towards the deductible each year, and Mrs. Melady contributes \$100.00 a pay period. Mrs. Melady’s position requires frequent travel and interaction with potential clients. Because of Mrs. Melady’s frequent travel, the Debtors and their family often purchase their meals from fast-food restaurants.

According to their 2015 and 2016 tax returns, the Debtors earned a gross income of about \$108,000 per year. Mrs. Melady contributed on average approximately \$6,000 to her 401(k) retirement account. The Debtors received income tax refunds for 2015 and 2016 of approximately \$8,000 each year. Mrs. Melady uses a portion of her tax refund each year to pay for medical expenses until the family meets the health insurance deductible. Almost all the income disclosed on the tax returns are attributable to Mrs. Melady’s earnings.

On their Amended Schedule I, the Debtors represent that Mr. Melady is unemployed and Mrs. Melady’s gross monthly income is \$9,357.44, with payroll deductions of \$1,824.18, resulting

in a net income of \$7,533.26.<sup>3</sup> Mrs. Melady's payroll deductions include a \$281.15 monthly deduction for the repayment of 401(k) loans. On their Second Amended Schedule J, the Debtors represent that their total monthly expenses are \$8,391.81. The Debtors list monthly expenses which include a modified mortgage payment of \$2,776.45 (includes escrow for real estate taxes and insurance),<sup>4</sup> a food and housekeeping supply expense of \$1,429.77, and medical expenses of \$856.35. After deducting the Debtors' expenses from their listed income, the Debtors are left with a *negative* disposable income of \$858.55 per month.

By the bankruptcy schedules, the Debtors disclose an interest in the following property:

- a. a 2,032 square foot home situated on 1.8 acres of land in Mount Dora, Florida valued at approximately \$156,000 (the "House"). Wells Fargo Home Mortgage holds a mortgage on the House for approximately \$280,000;
- b. a 2012 Chevy Suburban valued at approximately \$20,000 (the "Suburban"). Mrs. Melady's parents own the Suburban. The Debtors and Mrs. Melady's parents have an agreement that allows the Debtors to use the Suburban;<sup>5</sup>
- c. a 2012 Volkswagen Passat valued at approximately \$6,200 (the "VW"). Volkswagen Credit, Inc holds a lien on the VW for approximately \$1,800;
- d. a 2014 Hustler X-One 54" Zero Turn Mower valued at \$3,500. Sheffield Financial holds a lien of approximately \$5,000 on the mower;
- e. furniture, electronics, jewelry, and clothing totaling approximately \$1,700;
- f. Mrs. Melady's 401(k) retirement account valued at approximately \$17,000; and,
- g. Cash and bank accounts totaling less than \$700.

The Debtors scheduled approximately \$126,000.00 in general unsecured debt on Schedule F, including Mrs. Melady's student loans totaling \$80,000.

After the Petition Date, the Debtors' financial condition began to change. The Debtors' gross income decreased by approximately \$6,000.<sup>6</sup> Based on the calculations provided by the

UST, Mrs. Melady's gross monthly income is currently \$8,410.57, with payroll deductions of \$1,985.95, resulting in a net income of \$6,424.62.<sup>7</sup> The payroll deductions do not allow Mrs. Melady to contribute any income to the 401(k) or repay the 401(k) loans. Mrs. Melady does not anticipate receiving future commissions from her employer due to a change in the credit union's commission structure and her performance at work.

The Debtors also acquired assets after the Petition Date. Mrs. Melady financed the purchase of a used 2017 Mazda 3 four door sedan (the "Mazda 3"). Mrs. Melady's mother paid the down payment, and the monthly payment is \$318.56 for 66 months. Mrs. Melady purchased the Mazda 3 because she needed a newer vehicle to transport business clients. Mrs. Melady previously used the VW for work purposes. Because the VW has been driven for over 150,000 miles and the air conditioner no longer works, the Debtors gave the vehicle to their 16-year-old son. The Debtors' 16-year-old son has a part-time job that helps offset the insurance costs for keeping the VW. The Debtors also purchased a washer and dryer for approximately \$1,500 and a stove for approximately \$450.00. The Debtors purchased the appliances because their other appliances no longer worked. Mrs. Melady also believes that the value of their Home has increased after the Petition Date.

During the pendency of this case, the Chapter 7 Trustee has administered assets of the bankruptcy estate. The Trustee sold the estate's interest in the Suburban and VW to the Debtors for a total of \$5,377,<sup>8</sup> and recovered an additional \$6,719 consisting of the estate's interest the Debtors' 2016 tax refund.<sup>9</sup> The Chapter 7 Trustee has collected a total of \$13,376 in this case, and after payment of Chapter 7 administrative expenses, the Chapter 7 Trustee anticipates a 8.2 % dividend to unsecured creditors that filed timely claims.<sup>10</sup>

### Discussion

Under Section 707(b)(1) of the Bankruptcy Code, a bankruptcy court “may dismiss a case filed by an individual debtor... if it finds that the granting of relief would be an abuse.”<sup>11</sup> In making this determination, the bankruptcy court should consider whether “the totality of the circumstances... of the debtor's financial situation demonstrates abuse” under Section 707(b)(3)(B).<sup>12</sup> The core inquiry of a Section 707(b)(3)(B) analysis is whether the debtor's financial situation indicates an ability to pay a substantial portion of the unsecured nonpriority debts.<sup>13</sup> Courts utilize Section 1325's definition of “disposable income” in conducting the ability to pay analysis.<sup>14</sup> Section 1325(b)(2), in pertinent part, defines “disposable income” as:

(2) Current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonable necessary to be expended for such child) less amounts *reasonably necessary* to be expended—

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed.<sup>15</sup>

Though a debtor's ability to repay creditors is a primary factor in determining whether abuse exists under Section 707(b)(3)(B), it is not conclusive.<sup>16</sup> “Post-petition pre-discharge events are relevant to a Section 707(b)(3)(B) analysis.”<sup>17</sup> Other relevant factors include, but are not limited to:

- (1) whether unforeseen or catastrophic events such as sudden illness, disability, or unemployment propelled the debtor into bankruptcy;
- (2) whether the debtor's standard of living has substantially improved as a result of the bankruptcy filing or essentially remained the same;
- (3) the debtor's age, health, dependents, and other family responsibilities;
- (4) the debtor's eligibility for Chapter 13 relief and whether creditors would receive a meaningful distribution in a Chapter 13 case;
- (5) the age of the debts for which the debtor seeks a discharge and the period over which they were incurred;

- (6) whether the debtor incurred cash advances and made consumer purchases far in excess of the ability to repay;
- (7) whether the debtor made any payments toward the debts or attempted to negotiate with [his] creditors;
- (8) the accuracy of the debtor's schedules and statement of current income and expenses;
- (9) whether the debtor filed the petition in good faith;
- (10) employment stability;
- (11) retirement plan contributions and the debtor's age;
- (12) whether living expenses can be reduced without depriving the debtor or his dependents of adequate food, clothing, shelter, and other necessities; and
- (13) the availability of non-bankruptcy remedies including state law relief, private negotiations, and “good, old-fashioned belt tightening.”<sup>18</sup>

Here, the Debtors’ financial situation does not indicate that they could pay a substantial portion of their unsecured nonpriority debts. The Debtors’ current net monthly income (with no deductions for 401(k) contributions or repayment of 401(k) loans) is \$6,424.62.<sup>19</sup> Using the IRS Collection Financial Standards for a family of the four,<sup>20</sup> and adding the Debtors’ other allowed expenses,<sup>21</sup> the Debtors’ allowed monthly expenses total \$5,628.98, leaving approximately \$795 a month available to pay unsecured creditors. Because the Debtors use a portion of their tax refunds each year to pay medical expenses (due to their high insurance deductible) and Mrs. Melady’s employment income is decreasing, the Court finds that very little, if any, of the Debtors’ future tax refunds would be available to pay unsecured creditors. After deducting the Chapter 13 Trustee’s administrative expenses,<sup>22</sup> the Debtors’ unsecured creditors would receive approximately \$43,000 over a period of five years,<sup>23</sup> or a 34% distribution in a hypothetical Chapter 13 case. As such, the Court finds that the Debtors cannot pay a *substantial* portion of their unsecured nonpriority debts.

But even if the Court was to find that the Debtors *could* pay a substantial portion of their unsecured nonpriority debts, other relevant factors demonstrate that this case is not an abuse. The Debtors’ do not own luxury homes or vehicles. The Debtors’ post-petition purchase of a used

vehicle and appliances does not demonstrate a substantial improvement in the Debtors' standard of living. Mrs. Melady needed a fully functioning vehicle to maintain her employment. The Debtors purchased the appliances to replace old appliances that no longer worked. Mrs. Melady's income has decreased since the bankruptcy filing, and she does not anticipate receiving commissions in the future. Mr. Melady does not have consistent employment due to medical reasons. The Debtors filed their first bankruptcy case due to their business closing. And the Chapter 7 Trustee has already collected assets in this case which will allow unsecured creditors to receive an 8.2 % distribution for their claims now, instead of having to wait for periodic distributions over a five-year period.

Finally, the Debtors cannot meet the IRS Collection Financial Standards with just "good, old-fashioned belt tightening." The Debtors' actual housing expense exceeds the IRS Collection Financial Standards by over \$1,600. The Debtors' actual housing expense consists mostly of their \$2,776.45 monthly home mortgage payment. To meet the IRS standard, the Debtors and their family would need to surrender the House, and not just reduce expenses. The Debtors and their children have resided in the home for over ten years.<sup>24</sup> The House is not extravagant. Mrs. Melady testified that the House value is increasing. The Debtors obtained a loan modification from the lender prior to filing this case in order to keep their home. And, Mrs. Melady's testimony was credible throughout the trial. Based on these circumstances, the Court does not find it appropriate to require the Debtors to surrender the House in order to pay unsecured creditors.

Having considered the totality of the circumstances of the Debtors' financial situation, the Court finds that this case does not demonstrate an abuse under Section 707(b)(3)(B) of the Bankruptcy Code.

### Conclusion

For the reasons set forth above, it is ORDERED that:

1. The Motion to Dismiss is denied.
2. The clerk is directed to enter a discharge.

Clerk's office to serve.

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<sup>1</sup> The Debtors filed their first Chapter 7 bankruptcy case on May 10, 2007, Case No. 6:07-bk-01898-ABB (the "First Case"). Prior to the First Case, the Debtors owned and operated a retail wireless store (the "Business"). The Business started having financial difficulties and ultimately failed. Because the Debtors could not pay the Business debts they personally guaranteed and other debts, the Debtors filed the First Case. About five months after the Debtors filed the First Case, the bankruptcy court entered a discharge.

<sup>2</sup> See UST Ex. No. 4 (Doc. No. 62-4). Debtors' Amended Schedule I states that Mrs. Melady has been employed at the credit union for 2.5 years.

<sup>3</sup> UST Ex. No. 4 (Doc. No. 62-4).

<sup>4</sup> The Debtors signed a mortgage modification agreement with the mortgage holder in December 2011.

<sup>5</sup> The Debtors initially owned the Suburban. Because the lien holder was going to repossess the Suburban, Mrs. Melady's parents paid off the \$16,000 lien. The Debtors then transferred the Suburban to Mrs. Melady's parents and have agreed to pay Mrs. Melady's parents \$320 a month for 72 months to use the Suburban.

<sup>6</sup> UST Ex. No. 15 (Doc. No. 62-15). According to their 2017 tax return, the Debtors earned a gross income of about \$102,000.

<sup>7</sup> UST Ex. Nos. 9 and 12. (Doc. Nos. 62-9 and 62-12)

<sup>8</sup> See Doc. No. 39.

<sup>9</sup> See Doc. No. 42.

<sup>10</sup> Doc. No. 43.

<sup>11</sup> 11 U.S.C. § 707(b)(1).

<sup>12</sup> 11 U.S.C. § 707(b)(3)(B).

<sup>13</sup> *In re Dowleyne*, 400 B.R. 840, 846 (Bankr. M.D. Fla. 2008).

<sup>14</sup> *In re Ricci*, 456 B.R. 89, 106 (Bankr. M.D. Fla. 2009).

<sup>15</sup> 11 U.S.C. § 1325(b)(2) (emphasis added).

<sup>16</sup> *In re Norwood-Hill*, 403 B.R. 905, 912 (Bankr. M.D. Fla. 2009).

<sup>17</sup> *In re Dowleyne*, 400 B.R. at 846.

<sup>18</sup> *In re Ricci*, 456 B.R. at 106-07 (citing *In re Krohn*, 886 F.2d 123, 126-28 (6th Cir. 1989); *In re Norwood-Hill*, 403 B.R. at 912-913; *In re Carney*, No. 07-31690, 2007 WL 4287855, at \*3, 7-10 (Bankr. N.D. Ohio Dec. 5, 2007)).

<sup>19</sup> See UST Ex. No. 12 (Doc. No. 62-12)

<sup>20</sup> When the Debtors filed their bankruptcy case, the IRS Financial Standards for a family of four in Lake County, Florida totaled \$4,595.35. This amount consists of the following allowances: \$1,190 for housing, \$600 for utilities, \$1,509 for food and clothing, \$856.35 for actual medical expenses, and \$440.00 for transportation expenses (excluding vehicle loan payments).

<sup>21</sup> The Debtors' other allowed monthly expenses total \$1,033.63, consisting of the \$320 Suburban loan payment, \$318 Mazda 3 loan payment, \$300 for the children's educational expenses, and \$95.63 life insurance premium payments.

<sup>22</sup> The Chapter 13 Trustee's Administrative Fee is 10% of the Chapter 13 plan payment amount.

<sup>23</sup> The Court determines this amount by multiplying the \$795 monthly payment by 60 months less 10% of the Chapter 13 Trustee's administrative fee (\$795 x 60 = \$47,700 less \$4,770 = \$42,930).

<sup>24</sup> The Debtors listed the House on their bankruptcy schedules in the First Case.