

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

In re:

Case No. 3:13-bk-533-PMG

Jason Summers Orduna  
and Marites C. Orduna,

Debtors.

Chapter 7

**ORDER ON MOTION TO DISMISS PURSUANT TO 11 U.S.C. SECTION 707(b)(1)  
BASED ON ABUSE ARISING UNDER 11 U.S.C. SECTION 707(b)(3)**

**THIS CASE** came before the Court for a final evidentiary hearing to consider the United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. Section 707(b)(1) Based on Abuse Arising under 11 U.S.C. Section 707(b)(3). (Doc. 23).

The Motion is based solely on §707(b)(3)(B) of the Bankruptcy Code. Under that section, a Chapter 7 case may be dismissed if the totality of the debtor's financial situation demonstrates that the granting of relief would be an abuse of the provisions of Chapter 7. A debtor's ability to pay his creditors is a primary, but not conclusive, factor in determining whether a case is abusive.

In this case, a mathematical calculation of the Debtors' current disposable income indicates that they have the ability to pay a percentage of their debts through a Chapter 13 plan. Based on the totality of the Debtors' financial circumstances, however, the Court cannot find that the granting of relief would

be an abuse of the provisions of Chapter 7. Accordingly, the Motion to dismiss the case should be denied.

### **Background**

The Debtors, Jason Summers Orduna and Marites C. Orduna, filed a petition under Chapter 7 of the Bankruptcy Code on January 30, 2013.

Mr. Orduna was not employed as of the petition date, but obtained employment as a computer drafter after the petition was filed. Mrs. Orduna is employed as a lead analyst at CitiBank, and has been employed by CitiBank for twenty-two years. The Debtors have two dependent children. (Doc. 35, ¶¶ 8, 11, 12).

On their schedule of assets filed with the bankruptcy petition, the Debtors listed their homestead real property with a scheduled value of \$150,607.00, and scheduled mortgages in an unknown amount. The Debtors did not claim the homestead as exempt. On their Chapter 7 Individual Debtor's Statement of Intention, the Debtors stated that the property will be surrendered.

On their schedule of assets filed with the petition, the Debtors also listed personal property with a total scheduled value of \$22,835.00. The personal property primarily consists of miscellaneous household goods and personal effects, and three vehicles:

1. A 2005 Ford Expedition with a scheduled value of \$4,800.00, and a scheduled lien of \$10,721.00. The Debtors are retaining the Expedition, and have signed a Reaffirmation Agreement with the secured creditor. (Doc. 11).

2. A 2006 Ford F150 with a scheduled value of \$7,475.00, and a scheduled lien of \$9,902.00. The Debtors are retaining the F150, and have signed a Reaffirmation Agreement with the secured creditor. (Doc. 12).

3. A 2005 Nissan Sentra with a scheduled value of \$4,450.00, and no scheduled liens. The Debtors claimed the Nissan as exempt to the extent of the scheduled value of \$4,450.00.

On their schedule of liabilities filed with the petition, the Debtors listed general unsecured claims in the total amount of \$62,855.85. The Debtors stipulate that the unsecured debt “consists entirely of charge card and/or credit card debt.” (Doc. 35, ¶ 17).

### **Discussion**

The United States Trustee (UST) filed a Motion to Dismiss the Debtors’ Chapter 7 case pursuant to §707(b)(3) of the Bankruptcy Code. (Doc. 23). Section 707(b)(3) applies only in Chapter 7 cases, and provides:

#### **11 USC §707. Dismissal of a case or conversion to a case under Chapter 11 or 13**

...

(b)(3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph (2)(A)(i) does not arise or is rebutted, the court shall 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)(Emphasis supplied). In this case, the UST does not allege that the Debtor’s petition was filed in bad faith within the meaning of §707(b)(3)(A). Instead, the UST asserts that the totality of the Debtors’ financial situation demonstrates that the case is an abuse within the meaning of §707(b)(3)(B). (Doc. 23; Transcript, pp. 9, 39).

“Few if any tests are as open-ended as the totality of the circumstances” standard, which involves an “inherent flexibility and wide breath.” In re Kulakowski, 735 F.3d 1296 (11<sup>th</sup> Cir. 2013). Section

707(b)(3)(B) provides that the analysis must relate to the Debtor's financial circumstances, but provides little other guidance regarding the factors that should be considered. "Determination of abuse under section 707(b)(3)(B) solely considers circumstances relating to a debtor's financial situation." 11 U.S.C. §707(b)(3)(B); In re Parada, 391 B.R. 492, 499 (Bankr. D.D. Fla. 2008). The §707(b)(3) analysis is a broad, flexible review that encompasses any factors that are relevant to the debtor's financial condition. In re Riley, 2010 WL 3718017, at 6 (Bankr. D. Mass.); In re Jensen, 407 B.R. 378, 384 (Bankr. C.D. Cal. 2009).

The UST bears the burden of proving abuse under §707(b)(3) by a preponderance of the evidence. In re Wise, 453 B.R. 220, 226 (Bankr. D. Vt. 2011); In re Rudmose, 2010 WL 4882059, at 3 (Bankr. N.D. Ga.).

The UST's Motion should be denied. Under §707(b)(3)(B), a debtor's ability to pay his creditors is a primary, but not conclusive, factor in determining whether a case is abusive. In this case, a mathematical calculation of the Debtors' current disposable income indicates that they have the ability to pay a percentage of their debts through a Chapter 13 plan. Based on the totality of their financial circumstances, however, the Court cannot find that the granting of relief would be an abuse of the provisions of Chapter 7.

### **I. Ability to pay**

It is generally accepted that a debtor's ability to pay his creditors is a primary factor to consider under the totality of the circumstances analysis of §707(b)(3)(B). In re Norwood-Hill, 403 B.R. 905, 912 (Bankr. M.D. Fla. 2009). The Eleventh Circuit Court of Appeals recently "clarified that bankruptcy courts may consider the debtor's 'ability to pay his or her debts' when determining whether

the totality of the circumstances implicates abuse.” In re Kulakowski, 735 F.3d 1296 (11<sup>th</sup> Cir. 2013)(quoting In re Witcher, 702 F.3d 619, 623 (11<sup>th</sup> Cir. 2012)).

In this case, a mathematical calculation of the Debtors’ current disposable income shows that they have the ability to pay a percentage of their debts through a Chapter 13 plan.

The Debtors’ current combined net income equals the approximate sum of \$9,000.00 per month. (Doc. 35, ¶ 22; Exhibit 8; Transcript, p. 43). The combined net income includes Mrs. Orduna’s net income of approximately \$6,300.00 per month, which consists of her salary, plus an annualized amount of the performance bonus that she receives each year. The current joint income also includes Mr. Orduna’s net earnings of \$2,688.42 per month from the new employment that he obtained after the filing of the bankruptcy petition.

The Debtors’ current expenses equal the approximate sum of \$6,318.00 per month, based on the amounts that they listed on their original bankruptcy schedules. If the Debtors’ scheduled expenses are subtracted from their current net income, therefore, the Debtors have disposable income in the amount of \$2,682.00 per month that should be available for payment to creditors. (\$9,000.00 minus \$6,318.00 = \$2,682.00).

After the filing of their original schedules, the Debtors submitted an amended list of expenses to the UST, and the amended list reflects average expenses in the increased amount of \$7,783.00 per month. It appears, however, that the amended expenses may include a typographical error for the “housekeeping/household” entry. The Debtors had initially listed their housekeeping expenses as \$75.00 per month, but the amendment lists the expenses as \$755.00 per month, a difference of \$680.00. The difference was not explained at trial.

If the correct amount of the housekeeping expense is \$75.00 per month, the Debtors' average expenses equal the sum of \$7,103.00 per month (\$7,783.00 minus \$680.00 = \$7,103.00). Based on the amended expenses, therefore, the Debtors' disposable income equals the sum of \$1,897.00 per month (\$9,000.00 minus \$7,103.00 = \$1,897.00).

Consequently, the range of the Debtors' disposable income is between \$1,897.00 and \$2,682.00 per month, and funds within this range should be available for payment to creditors. Based on the mathematical calculation of the Debtors' current disposable income, therefore, it appears that they have the ability to pay a percentage of their debt through a Chapter 13 plan.

## **II. Other circumstances**

A debtor's ability to pay his creditors, however, is not the conclusive factor in determining whether a case should be dismissed under the "totality of the circumstances" analysis of §707(b)(3). Instead, the debtor's surrounding circumstances may also be considered to the extent that they are helpful in determining whether the case is an abuse of the provisions of Chapter 7. In re Rivers, 466 B.R. 558, 570 (Bankr. M.D. Fla. 2012).

Congress could have required dismissal based solely on a debtor's "ability to pay." Instead, Section 707(b)(3)(B) requires evaluation of the "totality of the circumstances." Thus, the UST must show something more than just the debtor's mathematical ability to pay. (Citations omitted).

...

If the "totality of the circumstances" test is to mean anything, it is that the debtor's mathematical ability to pay be weighed against all the other factors.

In re Lavin, 424 B.R. 558, 563-65 (Bankr. M.D. Fla. 2010). In In re Hardigan, 490 B.R. 437 (Bankr. S.D. Ga. 2013), the Court recently reaffirmed the conclusion that the “totality of the circumstances” analysis involves more than a debtor’s ability to pay:

Ability to repay debt is not the Court’s sole consideration, and based on my prior decisions, Movants must show more. (Citations omitted). In *Cribbs* this Court noted that, though ability to pay is the primary factor to be considered in a totality of the circumstances analysis, “if it is the only indicia of abuse, the case should not be dismissed under that test.” (Citations omitted).

...

In some respects BAPCPA, in adopting the means test in 2005, introduced such an objective standard [of referring to overall expenses in similar households]. . . . But because Congress did not adopt in §707(b)(3)(B) a purely mathematical “future income” payment approach similar to the means test, I remain convinced that legislative intent was for courts not to be limited solely to a mathematical calculation of ability to pay, but rather to include behavioral elements as well.

In re Hardigan, 490 B.R. at 450-51. See also In re Rudmose, 2010 WL 4882059, at 3 (Bankr. N.D. Ga.) (“In short, the totality of the circumstances means *totality* and not just ability to pay.”)(Emphasis in original).

In this case, the totality of the Debtors’ financial situation does not indicate that the granting of relief would be an abuse of the provisions of Chapter 7, despite their ability to pay a percentage of their debt. On the contrary, the evidence shows (1) that Mr. Orduna was not employed on the petition date, and his current employment is unstable, (2) that the Debtors will likely incur atypical medical and family expenses in the future, and (3) that the Debtors’ lifestyle is relatively modest, and will not improve as a result of the bankruptcy filing.

#### **A. Mr. Orduna’s employment**

First, the parties stipulated that Mr. Orduna was unemployed on the date that the petition was filed. (Doc. 35, ¶ 11).

Under §707(b)(3)(B), the Court may consider whether a debtor's financial distress was the result of his prior unemployment and his inability to find new employment upon comparable terms. In re Schumacher, 495 B.R. 735, 745 (Bankr. W.D. Tex. 2013).

In this case, Mr. Orduna testified that he lost his prior employment in August of 2012, and remained unemployed until March of 2013, a period of seven months. (Transcript, pp. 12-13, 21). While Mr. Orduna was unemployed, the Debtors were unable to pay their home mortgage payments and other household expenses, and American Express commenced a collection action against them in the Circuit Court for Duval County, Florida. (Doc. 1; Transcript, pp. 11, 24).

Mr. Orduna obtained new employment in March of 2013, approximately two months after the bankruptcy case was filed. His current income is less than the income that he received from his prior employment, however, and his current employment is not stable. (Transcript, pp. 13-15). His employer is a contractor, and Mr. Orduna's employment therefore depends on the particular job's staffing requirements and the contract's renewal at the expiration of the contract term. According to Mr. Orduna, a number of his co-workers have been released. (Transcript, pp. 21-22).

### **B. Medical and family expenses**

Second, the Debtors will likely incur atypical medical and family expenses in the future.

Under §707(b)(3)(B), the Court may consider a debtor's health, dependents, and family responsibilities in determining whether a case is an abuse of the provisions of Chapter 7. In re Lavin, 424 B.R. at 563.

In this case, the Debtors have two teenage children, and the Debtors expect to incur increased educational and transportation expenses for the children within the next year. (Doc. 35, ¶ 8; Transcript, pp. 16, 25, 35).

Additionally, the Debtors have various medical conditions that the Court may consider in evaluating the totality of the circumstances.

Specifically, the parties stipulated that Mr. Orduna has a heart condition that required surgery in 2009, and that he suffers from high blood pressure, high cholesterol, and diabetes. Mrs. Orduna was diagnosed with eye cancer in 2005, and underwent treatment for the cancer that left her partially blind in her right eye. (Doc. 35, ¶ 31).

The Debtors are required to monitor their health conditions, and incur ongoing out-of-pocket expenses for their medications. (Transcript, pp. 25-26, 28, 32). Their current medical expenses, including expenses for prescription medications, are approximately \$485.00 per month, and the prognosis for Mrs. Orduna's eye condition is unknown. (Transcript, pp. 28-29, 32-22).

### **C. Lifestyle**

Third, the Debtors' lifestyle is relatively modest, and will not improve as a result of the bankruptcy filing.

Under §707(b)(3)(B), the Court may consider whether a debtor had made consumer purchases that greatly exceeded his ability to pay, and whether he is now seeking to discharge his prior debts in order to maintain an extravagant lifestyle. In re Lavin, 424 B.R. at 563; In re Ricci, 456 B.R. 89, 103 (Bankr. M.D. Fla. 2009).

In this case, the Debtors listed their homestead with a scheduled value of \$150,607.00, and listed personal property with a total scheduled value of \$22,835.00, primarily consisting of their vehicles. (Doc. 1). Two unscheduled retirements accounts contain a total of \$35,000.00. (Doc. 35, ¶ 14). The UST does not assert that the Debtors have engaged in a pattern of unreasonable purchases for luxury items that they could not afford.

The Debtors intend to surrender their home. (Doc. 35, ¶ 25). Wells Fargo Bank, N.A. has obtained relief from the automatic stay to pursue an in rem judgment against the property (Doc. 27), and the Debtors are attempting to locate replacement housing. (Transcript, p. 18). According to Mr. Orduna, he expects the rental payment for the replacement housing to cost approximately \$1,750.00 per month. (Transcript, p. 18).

The Debtors are retaining their existing vehicles. (Docs. 11, 12). The vehicles are more than seven years old, and have required significant repair or maintenance expenditures during the Chapter 7 case. (Transcript, pp. 19-20, 26, 29-30).

In summary, the Debtors' assets and expenditures are relatively modest, and they do not enjoy an extravagant lifestyle. Their situation is unlike the case of In re Weixel, 494 B.R. 895 (6<sup>th</sup> Cir. BAP 2013), in which the debtors had purchased an expensive home and did not attempt to adjust their upscale lifestyle before filing the bankruptcy petition. In this case, the debts that the Debtors have incurred are for ordinary expenses, not luxury items (Transcript, p. 34), and the Debtors' financial circumstances do not show that their lifestyle will improve in the future as a result of the bankruptcy filing.

### **Conclusion**

The UST filed a Motion to Dismiss the Debtors' case based on §707(b)(3)(B) of the Bankruptcy Code. Under §707(b)(3)(B), a Chapter 7 case may be dismissed if the totality of the debtor's financial situation demonstrates that the granting of relief would be an abuse of the provisions of Chapter 7. A debtor's ability to pay his creditors is a primary, but not conclusive, factor in determining whether a case is abusive.

In this case, a mathematical calculation of the Debtors' current disposable income shows that they have the ability to pay a percentage of their debts through a Chapter 13 plan. Based on the totality of the Debtors' financial circumstances, however, the Court cannot find that the granting or relief would be an abuse of the provisions of Chapter 7. Accordingly, the Motion to dismiss the case should be denied.

Accordingly:

**IT IS ORDERED** that the United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. Section 707(b)(1) Based on Abuse Arising under 11 U.S.C. Section 707(b)(3) is denied.

**DATED** this 13 day of December, 2013.

**BY THE COURT**

Paul M. Glenn

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PAUL M. GLENN  
United States Bankruptcy Judge