

**UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION  
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In re:

JOSE CARPINTERO and  
LAUREN N. CARPINTERO

Case No. 09-28366-BKC-AJC

Chapter 7

\_\_\_\_\_ Debtors /

**ORDER GRANTING UNITED STATES TRUSTEE'S MOTION TO DISMISS  
CHAPTER 7 CASE**

THIS MATTER came before the Court on January 6, 2010, upon the U.S. Trustee's Motion to Dismiss Chapter 7 Case Pursuant to 11 U.S.C. § 707(b)(1) and (b)(3) (the "Motion") (DE 32). In the Motion, the U.S. Trustee contends the Debtors' financial situation, as a measure of ability to pay, demonstrates abuse. Specifically, the U.S. Trustee argues that in calculating the Debtors' ability to pay under Section 11 U.S.C. § 707(b)(3), the Debtors may not take into account the payments associated with the property that they intend to surrender. The U.S.

Trustee also contends that the Debtors may not deduct voluntary 401(k) contributions on Schedule I or student loan payments on Schedule J. When these adjustments are made, the U.S. Trustee argues that there is disposable income to repay creditors in a Chapter 13 case.

## **I. Undisputed Facts**

Jose Carpintero and Lauren N. Carpintero (the "Debtors") filed a joint, voluntary petition for Chapter 7 bankruptcy relief on August 31, 2009. The Debtors are married, have two minor children and are both employed in the legal field. The Debtors' Schedules show that as of the petition date, the Debtors owned real property valued at \$136,000; in their Statement of Intention, they indicate they are surrendering that property. The Schedules also show that the Debtors' obligations are primarily consumer debts and consist of \$351,304 in secured debt, of which \$314,974 is debt associated with the real property, no unsecured priority debt, and \$117,519 of unsecured nonpriority debt.

At the Section 341 Meeting of Creditors, the Debtors testified that:

- They are still living in the property;
- The total mortgage payments are approximately \$1,840;
- They have not made mortgage payments for one year;
- They have not paid the real estate taxes for year 2008;
- They have not paid insurance on the property;
- That the property is in foreclosure; and
- They have not entered into a lease to rent a home, but that they have searched and expect to pay \$1,800-\$1,900 rent for a four-bedroom home once the foreclosure process is concluded.

Even though the Debtors testified that they have not made any payments associated with the property for a year, they nevertheless included those payments on Amended Schedule J. The Debtors included as an expense their monthly home mortgage payments of \$1,840, as well as a monthly expense of \$150 for homeowners' insurance, and \$435 for real estate taxes. On Amended Schedule I, the Debtors deduct \$175 of voluntary 401(k) contributions.

## II. Analysis

The U.S. Trustee has not alleged bad faith, therefore the Court considers only the totality of circumstances regarding Debtors' financial situation in determining whether this case demonstrates abuse. "In determining whether a debtor's financial situation demonstrates abuse . . . courts have applied a test that analyzes 'whether the debtor has sufficient projected disposable income to fund a hypothetical chapter 13 case.' In re Parada, 391 B.R. 492, 501 (Bankr. S.D.Fla. 2008) (citing In re Henebury, 361 B.R. 595, 611 (Bankr. S.D.Fla. 2007)).

The Court agrees with the U.S. Trustee's argument that the \$50 student loan expense should be excluded from the means test calculation and the Debtors' 401(k) contributions should be included in income. A debtor is entitled to a deduction from CMI equal to his "average monthly payments on account of *secured* debts." 11 U.S.C. § 707(b)(2)(A)(iii). See In re Smith, 2007 Bankr. LEXIS 2173, \*12 (Bankr. N.D. Ohio June 22, 2007). Because the student loan payments are unsecured debt, they do not enter the means test calculation. Student loan debt payments do not fit into one of the allowed categories of expenses which constitute disposable income; such categories of expenses are limited to payments for the support of the debtor and his dependents, charitable contributions, and expenses to keep an existing business above water. 11 U.S.C. § 1325(b)(2)(A) and (B).

Additionally, 401(k) contributions should also be included as income as they are "not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor." See In re Leung, 311 B.R. 626, 631 (Bankr. S.D. Fla. 2004); In re Dorwarth, 258 B.R. 293, 295 (Bankr. S.D. Fla. 2001); In re Parada, 391 B.R. at 503. It is unfair to allow the Debtors to save money without first repaying unsecured creditors. However, because 11 U.S.C. § 541(b)(7)(A) excludes 401(k) contributions from disposable income as defined in § 1325(b)(2),

should the Debtors choose to convert their case to Chapter 13, they can continue to make retirement plan contributions during the course of the plan.

With regard to Debtors' housing expense, the law is not as clear. Courts have split on the issue of whether projected disposable income should include forward-looking figures or should be based on a snapshot of the debtor's financial situation at the time of the filing of the bankruptcy petition. In 2008, U.S. Bankruptcy Judge Isicoff held that it is appropriate to consider post-petition events in viewing the totality of the circumstances of the debtor's financial situation. Parada, 391 B.R. at 501. However, Judge Isicoff fixed the cut-off date for determination of relevancy at the date of the hearing on the motion to dismiss. Id.

The U.S. Supreme Court recently held that when a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation. Hamilton v. Lanning, 2010 U.S. LEXIS 4568 (U.S. June 7, 2010). Thus, using a "strict CMI" or mechanical approach is no longer warranted where there are special circumstances present.

In this case, the Court will consider the totality of Debtors' circumstances. In their Amended Schedule J, the Debtors include an expense of \$1,840 in line 1 for their mortgage payment; an expense of \$150 in line 11(a) for homeowner's insurance; and an expense of \$435 in line 12 for real estate taxes. While these expenses are indeed associated with their property, Parada, 391 B.R. at 502, these may not be allowed expenses as the Debtors have stated their intention to surrender their property. Notwithstanding surrender of the property, the Debtors testified that their home expenses going forward would likely be about \$1,800 to \$1,900. That testimony was not refuted, and the Court believes that amount is a reasonable expense for a family of four.

However, without reaching the determination of whether Debtors may include in their means test the payments for property intended to be surrendered, the Debtors still do not “pass” (or “fail,” as the case may be) the means test qualifying them to remain in Chapter 7. Even if the Debtors were allowed to deduct the expenses related to the soon-to-be surrendered house in full, inclusive of taxes and insurance (which they will not be paying in the future), they still have enough disposable income to fund a Chapter 13 plan and thus fail the means test. Increasing the Debtors’ income by the 401(k) contributions results in an average monthly income of \$6,692.00. Decreasing the Debtors’ expenses by \$50 for the disallowed student loan payment deductions results in average monthly expenses of \$6,502.72. This leaves a surplus of \$189.28. Because they are above the \$182.50 threshold for presumed abuse under the means test, the case should be dismissed.

While it seems unfair that Debtors be denied Chapter 7 relief for being over the threshold by only \$7.00, in actuality, once the property is surrendered, Debtors will have an extra \$450 in disposable income (representing taxes which no longer need be paid), even if the Court allowed a \$1900 housing expense. This would allow the Debtors to repay \$38,356.80 in a hypothetical Chapter 13 plan. Unfortunately, this hypothetical repayment plan would only repay unsecured creditors up to 12% of their debts, demonstrating the harsh results the means test produces. Debtors who are barely above the threshold will continue to struggle for years to generate a meager payout to creditors that falls far short of the 25% dividend that the means test is aimed at producing. Accordingly, it is

ORDERED and ADJUDGED that

1. The U.S. Trustee’s Motion to Dismiss Chapter 7 Case Pursuant to 11 U.S.C. § 707(b)(1) and (b)(3) is GRANTED, provided the Debtors do not, within ten (10) days from the

entry of this order, file a motion to convert this case to a case under Chapter 13 of the Bankruptcy Code.

2. The clerk is directed to dismiss this case unless, within ten days of entry of this Order, the Debtors convert their case to a case under Chapter 13 of the Bankruptcy Code.

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