

**United States Bankruptcy Court
District of New Mexico**

Document Verification

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
GERALD TRUJILLO and
CYNTHIA DOMINGUEZ-TRUJILLO,
Debtors.

NO. 7-03-10875 SA

**MEMORANDUM OPINION ON UST'S
MOTION TO DISMISS UNDER § 707(b)**

This matter came before the Court for trial on the merits of the United States Trustee's Motion to Dismiss under § 707(b). The UST appeared through its attorney Leonard Martinez-Metzgar. Debtors appeared through their attorney Steve Mazer. This is a core proceeding. 28 U.S.C. § 157(b).

FACTS

Debtors filed their Chapter 7 proceeding on February 5, 2003. The parties stipulated at the beginning of trial that the debts in this case are primarily consumer debts.

Unsecured debts were approximately \$187,000, of which \$166,000 was debt on 14 credit cards. The remaining unsecured debt consisted of loans from credit unions. Debtor Wife testified that in 2002 and 2003 they were falling behind in paying bills, creating debt to pay debt, and taking cash advances to meet their obligations.

Secured debts were approximately \$307,000 on a home mortgage, two car loans that totaled \$32,000, and a Thrift Savings Plan retirement account loan of \$18,000.

Debtor Husband is an engineer that has worked at Intel Corporation for about 6 years. His income was \$70,577 in 2002 and \$68,859 in 2001. At the time of filing, he earned \$6,100 per month gross. Deductions from gross included \$1,323 taxes, \$100 insurance, \$605 retirement, and \$958 of retirement loans¹, leaving a net of \$3,114. Debtor wife is a Personnel Specialist that has worked at the US Fish & Wildlife Service for 15 years². Her income was \$44,097 in 2002 and \$57,405 in 2001. At the time of filing she earned \$5,087 per month gross. Deductions from gross included \$1,081 taxes³, \$160 insurance, and \$253 retirement⁴, leaving a net of \$3,593. Total net household income was therefore \$6,707 per month.

¹Schedule D lists a loan to the Thrift Savings Program, which is the United States government retirement system. Yet Schedule I lists the TSP loan as a deduction from the Husband's Intel wages.

²She testified that she did not work for most of 2002 because she was pregnant, but returned to work about the time of the filing of the bankruptcy petition.

³Therefore, joint tax withholdings are \$2,404 per month, or \$28,848 per year. Income tax liability for 2002 was \$12,059 after tax credits, and for 2001 was \$15,231 after tax credits. Debtors sold their rental house June 29, 2002, so will no longer have an approximate \$4,000 rental loss, but they will still likely have a sizeable refund that could be used to pay creditors.

⁴Debtor Wife testified that she had stopped the TSP deduction after filing bankruptcy. Therefore, an additional \$253 per month is available to pay creditors.

Debtors have two sons; one lives with his father and Debtors pay \$120 per week to him for child support. The older son, age 6, attends the private Manzano Day School which has a tuition of \$9,600 per year, or \$800 per month. UST Exhibit 12 also showed that Debtors paid Manzano Day School for "extended care" for an additional \$50-90 per month from January 2002 to May 2002. This son also goes to a summer camp that charges \$200 per week, or \$2,400 for 3 months. Debtor wife testified that the older son has speech problems, is shy, and is withdrawn; for these reasons she prefers Manzano Day School due to its low student-teacher ratio and because the school has specialists on staff⁵.

Debtors purchased their \$320,000 home in April, 1998. The first mortgage payment is \$2,357 and the second mortgage payment is \$654, for a monthly total of \$3,011. According to the Debtors' Schedule A, they believed they had about \$12,600 equity in their home. Based on the Court's review of and familiarity with hundreds of budgets of other debtors, the Court finds that \$3,011 is at the very high end of housing expense.

⁵She also testified that Manzano did not have a speech therapist on staff. Therefore, her son attends private speech lessons at \$50 per month.

Debtors have 4 cars, 1 of which is inoperable. Two had purchase money security interests on them and the monthly payments for the two cars was \$961⁶. Semi-annual insurance on the cars is: \$466 for the 1994 Jeep, \$474 for the 1999 Chrysler 300M, and \$469 for the 2001 Chrysler PT Cruiser. This works out to \$2,818 per year, or about \$235 per month. There was no showing why Debtors needed 3 cars.

Debtors list \$350 for recreation in their monthly expenses. Debtor Wife testified, however, that they go out twice per year and gave no other explanation for the \$350. Therefore, the Court finds that this \$350 is overstated.

Debtors pay \$208 per month for life insurance in addition to the insurance that is deducted from Debtors' salaries. The additional life insurance is for four policies, two universal life policies with cash value, and two term policies. Exhibit 10 shows that each Debtor has \$400,000 face value life insurance from these additional policies. Debtor Wife also testified that she has 5 times her annual salary in life insurance coverage that is deducted directly from her paycheck.

⁶After the Chapter 7 was filed Debtor Wife's father loaned Debtors about \$30,000 to redeem the 1999 Chrysler 300M and the 2001 Chrysler PT Cruiser. The monthly payment to the father is now \$670, or \$291 less per month.

Chris Newbill testified on behalf of the UST. She works at Albuquerque Public Schools as a District Disabilities Liason, and is therefore familiar with services provided to students with disabilities in the public school system. Specifically, students have access to speech and language therapy programs if they attend Albuquerque Public Schools. These services are not provided to children that attend private school or who are home-schooled.

Gabriel Sanchez also testified on behalf of the UST. He works at the Bernalillo County Parks & Recreation Department. He has two children that attend a Catholic school at which the tuition is \$284 per month. While he keeps his children home with him in the summer, he has looked into city run summer programs. The cost for a 7 week program ranges from \$250 to \$285 for the 7 weeks.

CONCLUSIONS OF LAW

The Tenth Circuit Court of Appeals adopted the "totality of the circumstances" standard for determining "substantial abuse" in Stewart v. United States Trustee (In re Stewart), 175 F.3d 796, 809 (10th Cir. 1999).⁷ The Court held that

⁷ But cf. Associates Comm'l Corp. v. Rash, 520 U.S. 953, 963 n. 5 (1997) (rejecting "ruleless approach allowing use of different valuation standards based on the facts and circumstances of individual cases.").

ability to pay was a primary factor in determining whether "substantial abuse" occurred. Id. The Court reasoned that, if a debtor has the ability to pay his or her ongoing expenses and repay debt within a reasonable time, seeking discharge under those circumstances would be substantial abuse. Id. Other factors the Tenth Circuit examined in addition to ability to repay were 1) whether debtor suffered any unique hardships such as sudden illness, calamity, disability, or unemployment, 2) whether cash advances and consumer purchases far exceeded ability to pay at the time and whether the debtor was living an extravagant lifestyle, 3) whether the debtor has a stable source of future income, 4) whether the debtor's expenses can be significantly reduced without depriving him or her of adequate food, clothing, shelter, and necessities, 5) whether the debtor qualifies for chapter 13 relief, and 6) whether the filing was in good faith. Id. at 809-10.

Applying In re Stewart to the facts of this case compels a finding of substantial abuse. First, while the Debtors' Schedules I and J indicate no ability to repay debts, the Court finds that the budget has luxury expenses that could easily be used to pay creditors. For example, \$10,000 for private school and \$2,400 for summer camp seems excessive for chapter 7 debtors. Similarly, \$3,000 per month for housing

seems high for the Albuquerque area for a family of 3. Recreation is overstated. Tax withholding seems excessive. The installment payments on cars has dropped \$291 since the bankruptcy filing. Getting rid of 1 of the 3 cars would save over \$900 per year in car insurance. Some life insurance may be prudent, but it appears the Debtors are excessively insured. Finally, the Debtors are either contributing to or repaying retirement funds while they propose nothing to their creditors. So, while the Court is not rewriting the Debtors' budget, it does appear that significant savings can be realized through some combination of cutbacks. These savings could be used to repay some debts.

Turning to the other In re Stewart factors, the Court finds that there were no undue hardships. It is true that Debtor Wife did not work for a large part of 2002 due to a pregnancy, but she had returned to work by the time of the bankruptcy filing. It was also not clear to the Court whether part of the time off could have been covered by sick leave, and it is not clear whether Debtor Wife was forced to take off this time or whether it was her choice to take off the time.

The Court finds that cash advances and consumer purchases far exceeded ability to pay at the time and that the Debtors were living an extravagant lifestyle. Evidence of this

lifestyle includes the expensive house, 4 vehicles, private school, expensive summer camp, large credit card debt, and excessive life insurance obligations.

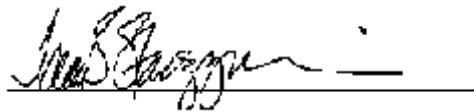
The Debtors' income seems stable. He has had his position for 6 years; she has had hers for 15 years.

The debtors' expenses can be significantly reduced without depriving them of adequate food, clothing, shelter, and necessities. See discussion above regarding ability to pay.

The Debtors qualify for Chapter 13 relief.

The parties stipulated that the Debtors filed their petition in good faith.

In conclusion, the Court finds that under the "totality of the circumstances" granting a chapter 7 discharge in this case would be a substantial abuse, justifying dismissal. An appropriate order will be entered allowing Debtors to convert to a chapter 13 within 14 days but, if they do not convert, the case will be dismissed.

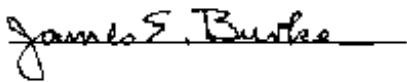
A handwritten signature in black ink, appearing to read "James S. Starzynski", is written over a horizontal line.

Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on March 11, 2004, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

Steve H Mazer
122 10th St NW
Albuquerque, NM 87102-2901

United States Trustee
c/o Atty Leonard K. Martinez-Metzgar
PO Box 608
Albuquerque, NM 87103-0608

A handwritten signature in cursive script, reading "James S. Bustee", is written over a solid horizontal line.