

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re

Case No. 6:99-BK-08433-KSJ
Chapter 7

JOSE LUIS WACZEWSKI,
SUSAN WACZEWSKI,

Debtors.

MEMORANDUM OPINION GRANTING
SUSAN WACZEWSKI'S MOTION
TO CONVERT TO CHAPTER 13

The Eleventh Circuit Court of Appeals, in its Judgment entered on March 29, 2005 (Doc. No. 173), has directed this Court to consider the factual question of whether the request of Mrs. Waczewski to convert her Chapter 7 case to a Chapter 13 case was made in bad faith. Understanding the issue on remand requires an overview of the history of this case, which was filed in 1999.

Approximately three years ago, this Court approved a compromise of controversy entered into by Leigh Meininger, the trustee in the debtors' Chapter 7 case,¹ settling a civil lawsuit² in which Mrs. Waczewski had alleged personal injury and wrongful termination claims against a former employer and other related defendants. The debtors, who were extremely dissatisfied with this ruling, have been trying to regain control of this lawsuit ever since, employing multiple strategies to that end.³

¹ Mrs. Waczewski and her husband, Jose Waczewski, filed a joint petition for relief under Chapter 7 of the Bankruptcy Code on October 12, 1999. A discharge was entered on January 26, 2000 (Doc. No. 15).

² The claims asserted by Mr. and Mrs. Waczewski in this lawsuit have been described in detail in numerous prior orders of this Court. (*See, e.g.*, Doc. No. 54).

³ For example, they filed a motion requesting that Mr. Meininger abandon the lawsuit, or, in the alternative, that this Court dismiss Mrs. Waczewski from the bankruptcy case and permit her to resume control of the lawsuit (Doc. No. 37). They also jointly asked the Court to dismiss both debtors from their jointly filed case (Doc. No. 43). They objected to Mr. Meininger's proposed settlement (Doc. No. 36), and sought a determination that the lawsuit was exempt and/or non-assignable such that it could not be

In connection with their goal of regaining control of the lawsuit, the debtors filed two motions: Mrs. Waczewski filed a Motion to Convert to a Chapter 13 case (Doc. No. 42),⁴ and the debtors jointly filed a Motion For Separate Administration of their Chapter 7 estates (Doc. No. 43), asking the Chapter 7 trustee to administer Mrs. Waczewski's bankruptcy case separately from her husband's case. A hearing was held on both of these motions on January 14, 2003.⁵

Although the hearing on the Motion to Convert was properly noticed for hearing on January 14, 2003 (Doc. Nos. 46 and 51), and although the Court announced at the beginning of the scheduled hearing that the Motion to Convert would be heard, neither debtor pursued or even mentioned Mrs. Waczewski's request to convert. Rather, the debtors vociferously argued for separate administration of their two bankruptcy estates and raised issues regarding the allowance and disallowance of claims filed against Mrs. Waczewski.

In summary, the entire argument of both of the debtors at the January 14 hearing revolved around their request for a separate administration of their Chapter 7 estates and their position that approval of the underlying compromise was premature until the claims filed in Mrs. Waczewski's estate were resolved. The Chapter 7 trustee fully supported the separate administration of the two estates insofar as the claims against Mrs. Waczewski were substantially smaller than those against her husband.⁶ However, the trustee effectively argued that he still needed the monies obtained from the compromise to pay even the undisputed claims asserted against only Mrs. Waczewski (when considered in combination with outstanding expenses incurred in the

settled by Mr. Meininger (Doc. No. 44). The details of these efforts are irrelevant, except to illustrate that virtually every action taken by the debtors, who represented themselves *pro se* through the majority of the case, was directed to undoing the compromise approved by the Court.

⁴ The Motion to Convert was filed at 3:59 p.m. on the afternoon *after* the Court already had orally approved the trustee's settlement of the lawsuit at a hearing held earlier in the morning of November 5, 2002.

⁵ The Court also considered the debtors' motion seeking a reconsideration of the order approving the compromise (Doc. No. 50A).

⁶ The trustee estimated that the claims filed against Mrs. Waczewski totaled between \$7,682 and \$21,631, depending on the resolutions of objections the debtors could file as to some of the filed claims. With the inclusion of the trustee's administrative fees, the amounts he already had gathered would not pay all of the claims filed in Mrs. Waczewski's case, under any scenario.

administration of this estate). As such, the trustee demonstrated that approval of the compromise was merited, regardless of separate administration of the estates.

Because neither debtor raised Mrs. Waczewski's request to convert her case to Chapter 13, and because they argued strenuously to stay in the existing Chapter 7 case, albeit as separately administered estates, the Court assumed, perhaps mistakenly, that Mrs. Waczewski no longer wanted to proceed on her request to convert. The Court also notes that it was difficult at times to determine exactly what the debtors, who were acting *pro se*, desired at any point.

Certainly, Mrs. Waczewski's request for separate administration in her Chapter 7 case is directly contrary to any request to convert to a Chapter 13 case. A debtor cannot be in both a Chapter 7 liquidation case and a Chapter 13 wage earner reorganization case at the same time in the same case. As such, after the hearing, the Court granted what the debtors requested—the separate administration of their Chapter 7 cases. The Court also denied Mrs. Waczewski's Motion to Convert (Doc. No. 54), equating the debtor's failure to prosecute the motion with a lack of desire to convert. No finding of bad faith was made at that time.

On February 20, 2003, the debtors appealed, among other orders, the order denying their request to vacate the order approving the compromise and denying Mrs. Waczewski's request to convert to a Chapter 13 case (Doc. No. 50A). After some initial maneuvering relating to the debtors' request for leave to appeal and their request to stay the effectiveness of the order approving the compromise, the District Court reached the merits of the debtors' appeal.

On March 2, 2004, the District Court entered a lengthy order affirming both the approval of the compromise as well as the denial of Mrs. Waczewski's motion to convert (Doc. No. 145). In making this ruling, the District Court found that Mrs. Waczewski's request to convert to a Chapter 13 case was justified due to "special circumstances" noting that Mrs. Waczewski had no income, no means to repay creditors, no monies to fund the lawsuit against her former employer, and that "it is apparent that the Appellant's motive in pursuing this motion for conversion is misplaced. Her goal is not to obtain a fresh start in exchange for repaying creditors, but rather to regain control of litigation in a way to punish the defendants for what she perceives as a serious wrong done to her."

The debtors then timely filed an appeal with the Eleventh Circuit. In turn, the Eleventh Circuit affirmed the approval of the compromise but remanded the instant issue—whether Mrs. Waczewski was denied the right to convert to a Chapter 13 case due to bad faith, citing the requirement that "a Chapter 13 plan must meet certain criteria, including that it be proposed in good faith." In re Kitchens, 702 F.2d 885, 887 (11th Cir. 1983). Because a debtor's good or bad faith is a factual finding and because this Court did not "determine whether Mrs. Waczewski acted in bad faith," the Eleventh Circuit then vacated and remanded the case for this Court "to consider the factual question of whether or not this request was made in bad faith." (Doc. No. 173, p. 18).

Typically, the factors listed in the Kitchens decision are applied by courts to determine whether good or bad faith exists in connection with deciding whether to dismiss an *existing* Chapter 13 case. Kitchens, 702 F.2d at 888-889. The Kitchens case lists the proper factors for consideration under Section 1325(a)(3),⁷ not Section 706(a),⁸ which is the relevant provision in determining whether a debtor can convert from a Chapter 7 case to a Chapter 13 case. Specifically, in deciding whether to dismiss a Chapter 13 case for bad faith, the Court must examine the totality of circumstances, including an analysis of the debtor's income and expenses, the duration of the Chapter 13 plan, the debtor's motivations and sincerity in seeking relief under the provisions of Chapter 13, the debtor's degree of effort, the debtor's ability to earn and the likelihood of fluctuation in those earnings, the circumstances under which the debtor has contracted debts, and the debtor's past dealings with creditors. Id. The basic inquiry is whether, under the circumstances, the debtor has abused the provisions, purpose, or spirit of the Bankruptcy Code. Id.

On September 26, 2005, the Court held an evidentiary hearing on this remanded issue regarding Mrs. Waczewski's request to convert to Chapter 13. Both of the debtors and their son presented evidence

⁷ Bankruptcy Code Section 1325(a)(3) provides as follows:
(a) Except as provided in subsection (b), the court shall confirm a plan if—
(3) the plan has been proposed in good faith and not by any means forbidden by law[.]

⁸ Bankruptcy Code Section 706(a) provides as follows:
(a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under Section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

at that hearing. Mrs. Waczewski stated that she wants to present a plan more beneficial to her creditors but can only accomplish that goal by regaining control of the lawsuit against her employer. However, she was unable to articulate any way that could possibly occur. The Eleventh Circuit has entered a final judgment approving the trustee's compromise of the lawsuit.⁹ As such, further prosecution of the lawsuit will not occur and cannot result in any benefit to Mrs. Waczewski's creditors. Moreover, even if the lawsuit were returned to her, she has no money to fund the litigation. Sadly, Mrs. Waczewski wants to pursue the lawsuit based more on her desire for retribution than on any desire to pay her creditors.

Mrs. Waczewski did not file a Chapter 13 plan listing the payments she would make or how she would fund any such plan. However, the debtor's testimony was clear that she has insufficient income to fund any plan. She was unemployed at the time she initially requested the conversion to Chapter 13, although she did receive a worker's compensation settlement in 2003 or 2004. She is now only marginally employed. She currently works from her home to answer forwarded telephone calls made to her son's legal practice. She cannot work outside the home due to alleged panic attacks. She earns approximately \$300 per month. In order to fund any Chapter 13 plan, she would have to rely almost exclusively upon her husband's earnings, not hers.

As such, based on the evidence presented, the Court agrees with the ruling articulated first by the District Court—that Mrs. Waczewski seeks to convert this case in bad faith in a misguided attempt to regain control of the underlying lawsuit settled by the trustee. Accordingly, after considering the evidence and the totality of the circumstances, the Court finds that the debtor earns insufficient monies to fund any legitimate Chapter 13 plan, that the debtor is not motivated by any desire to pay her creditors but rather wants to punish her former employer by continuing the litigation against it, and that, given the debtor's current mental and physical condition including her self-professed panic attacks and inability to leave her home, she is not likely to enjoy any increased income in the future. She cannot in good faith propose a Chapter 13 plan.

The Court does query whether bad faith, however, is a basis to deny conversion from a Chapter 7 case to a Chapter 13 proceeding. The Court initially denied the debtor's request to convert,

not because she was not entitled to the conversion, but because she was strenuously arguing for an inconsistent position—the separate administration of her and her husband's Chapter 7 estates.

The Court would opine that Section 706 (a) of the Bankruptcy Code grants debtors a “one time absolute right” to convert to Chapter 13. As the Eleventh Circuit stated in In re J.B. Lovell Corp., 876 F.2d 96, 97 (11th Cir. 1989), debtors have a “one-time absolute right to voluntarily convert a Chapter 7 proceeding against them into...a Chapter 13 individual repayment plan.” However, the issue as to whether a debtor has an absolute right to convert or whether a request for conversion can be conditioned on other factors, such as the absence of good faith, is currently pending for consideration before the United States Supreme Court. In re Maramma, 430 F.3d 474 (1st Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3475 (U.S. Jan. 30, 2006) (No. 05-996). Indeed, divergent opinions on the issue have emerged.¹⁰ Perhaps, if the Supreme Court

¹⁰ Compare, e.g., In re Copper, 426 F.3d 810 (6th Cir. 2005) (holding that a debtor's request to convert a Chapter 7 case to a case under Chapter 13 could be denied in the absence of good faith); Matter of Martin, 880 F.2d 857 (5th Cir. 1989) (court does not have discretion to block conversion in a case not previously converted and debtor is otherwise eligible for conversion to chapter chosen); In re Marrama, 313 B.R. 525, 533 (1st Cir. Bankr. App. Panel app. I 2004) (endorsing the “totality of circumstances” approach in determining whether a motion to convert from a chapter 7 to a chapter 13 should be granted, and concluding that “the right to convert is presumptive and should be granted unless there are extreme circumstances showing that the debtor is abusing the jurisdiction of the bankruptcy court.”); In re Miller, 303 B.R. 471, 477 (10th Cir. B.A.P. 2003) (bankruptcy courts are without discretion to evaluate other circumstances or impose requirements on conversion beyond whether the debtor meets the statutory requirements for conversion delineated in Section 706; courts going beyond those requirements “appear to have been erroneously engrafting the good faith requirements of §§ 1307 and 1325 onto a conversion process initiated by the debtor.”); Pequeno v. Schmidt, 307 B.R. 568, 579-81 (S.D. Tex. 2004) (providing detailed analysis of the various approaches employed by courts and concluding that a debtor's statutory right to convert is absolute, and that absolute rights cannot have court-made exceptions); In re Gallagher, 283 B.R. 604, 606 (Bankr. M.D. Fla. 2002) (considering the basic policy aim of a Chapter 13 case, the debtor's motivation for conversion, and the reason why the debtor did not initially seek relief under Chapter 13); In re Porter, 276 B.R. 32, 39 (Bankr. D. Mass. 2002) (reasoning that bankruptcy courts must “determine whether conversion ... is appropriate pursuant to the overall purpose and policy of the Bankruptcy Code, and although the Debtor's right to convert is nearly absolute, the matter remains within the discretion of the Court” and denying debtor's motion to convert because debtor did not disclose pre-petition transfers and showed little hope of being able to propose a

⁹ See also this Court's Memorandum Opinion and Order Denying Susan Waczewski's Motion to Set Aside Second Compromise, entered simultaneously with this order.

grants certiorari, a final resolution of the conflict will issue.

Given this uncertainty in the law across the nation, the Court is guided by the Eleventh Circuit's opinion in J.B. Lovell Corp.—debtors get one chance to convert to a Chapter 13 case, no questions asked. As such, Mrs. Waczewski should be allowed to convert her case to Chapter 13. The conversion, however, seems an exercise of futility. Mrs. Waczewski cannot regain control of the lawsuit. She cannot propose a Chapter 13 plan in good faith. The Court cannot articulate a single reason how the debtor or her creditors would benefit from her conversion at this point. Moreover, the Court cannot envision any longevity in the Chapter 13 case because she appears unable to propose a viable Chapter 13 plan.

For all of these reasons, the Court, irrespective of finding that the debtor cannot propose a Chapter 13 plan in good faith, will convert Mrs. Waczewski's Chapter 7 case to a Chapter 13 proceeding, even if her stay in the Chapter 13 case may be short lived. A separate order consistent with this ruling shall be entered.

DONE AND ORDERED in Orlando, Florida, this 30th day of March, 2006.

/s/ Karen S. Jennemann
KAREN S. JENNEMANN
United States Bankruptcy Judge

Copies furnished to:

Debtors: 4824 Pebble Beach Drive, Orlando, FL 32811

Counsel for Debtors: Frederic E. Waczewski, 4824 Pebble Beach Drive, Orlando, FL 32811

Trustee: Leigh R. Meininger, P.O. Box 1946, Orlando, FL 32802-1946

United States Trustee, 135 W. Central Blvd., Suite 620, Orlando, FL 32801

confirmable plan); In re Sully, 223 B.R. 582, 584 (Bankr. M.D. Fla. 1998) (reasoning that the absolute right to convert pursuant to Section 706(a) is tempered by a bankruptcy court's "equitable powers to protect the process when the debtor attempts to convert to a reorganization chapter for an improper purpose."); (KEITH M. LUNDIN, 4 CHAPTER 13 BANKRUPTCY § 325.1 at 325-14 (3d ed. 2002) ("The debtor's good faith in first filing a Chapter 7 case and then converting to Chapter 13 is most appropriately tested at confirmation under § 1325(a)(3) using the usual good-faith rules applicable in the circuit. No obvious good purpose is served by overlaying a whole new jurisprudence of good faith as a judge-imposed condition on conversion from Chapter 7 to Chapter 13."))