U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
LYNDA LONGSTREET	§	**Case No. 03-34569 HDH-7**
	§	
Debtor	§	

MEMORANDUM OPINION ON DEBTOR'S
FIRST AMENDED MOTION TO CONVERT

This case presents two questions: whether a debtor in a liquidation proceeding has the absolute right to convert her case to a Chapter 13 case and whether this debtor, who derives her income from independent contractor services, is eligible for Chapter 13 relief.

Overview

Lynda Longstreet ("Debtor") filed a voluntary Chapter 7 case on or about May 2, 2003. Before and during the course of the bankruptcy case, she has been engaged in extensive and unpleasant litigation brought by The Cadle Company ("Cadle"). Before the case was filed, Cadle brought certain judgment claims against the Debtor and began extensive post-judgment collection. During the case, Cadle has continued to pursue the Debtor in the form of motions and a discharge action.

After being involved in the morass of discovery and repeated motions, as well as the adversary proceeding brought by the creditor, the Chapter 7 Debtor determined that her life would become some what easier by converting these proceedings to a Chapter 13 case and proposing a plan.

Not so. Cadle, sensing that the Debtor would avoid the discharge action brought by it after

conversion to Chapter 13, objected to the conversion, claiming that the proposed conversion was in bad faith and also questioning whether the Debtor is eligible for Chapter 13 relief.

The Court held an evidentiary hearing on the Debtor's motion to convert.

Discussion

Under Section 706(a) of the Code, a debtor may convert a Chapter 7 case to a case under Chapter 13 at any time. And the Code implies that the right to convert is unfettered because the same provision precludes waiver of such right. *See*, 11 U.S.C. § 706(a). The applicable rule implementing Section 706(a) requires the filing of a motion, but such motion is not a contested matter under Rule 9014. Fed.R.Bankr.P. 1017(d). Reading the statute and the rule together, some courts in Texas have determined that the debtor enjoys the "absolute right" to convert his or her case to Chapter 11 or to Chapter 13. *See, In re Porras*, 188 B.R. 375 (Bankr. W.D. Tex. 1995).

In *In re Porras, supra*, the court was faced with facts analogous to the present one. The debtor had been accused of failing to disclose an interest in property and was on the verge of an extensive Rule 2004 examination by the Chapter 7 Trustee. In fact, the Chapter 7 debtor had been accused of bankruptcy fraud. When the Chapter 7 Trustee sought to examine the debtor under oath pursuant to Rule 2004, the debtor filed a motion to convert his case to Chapter 11. Although the court saw through the debtor's motives and called them "unsavory," nevertheless, the court determined to apply the plain meaning of Section 706(a) to allow for the conversion.

More recently, in a well-reasoned opinion, a Texas United States District Court has determined that the right to convert from a Chapter 7 case to a proceeding under Chapter 13 is absolute. *See, Pequeno v. Schmidt*, 307 B.R. 568 (S.D. Tex. 2004). In that case, the debtor was accused of omitting a very valuable lawsuit from his filings. When the lawsuit came to light, and

after it was administered and settled by the Chapter 7 Trustee, the debtor determined to convert his case to Chapter 13.

After reviewing the law in the 5th Circuit regarding conversion, the District Court determined that the right to convert was absolute, even in a case where bad faith during the Chapter 7 seemed likely. According to that court, "A statutory right that is absolute cannot have court-made exceptions. If that were the case, it would not be an absolute right."

Application

Before the instant case was filed, Cadle bought a claim against the Debtor and began extensive collection activities against her, including massive discovery, and, on one occasion, getting the Debtor placed in jail.

The Debtor filed her bankruptcy case, seeking, in part, the fresh start of the Bankruptcy Code and also the protection of the automatic stay. Undaunted by the filing, Cadle began a new dose of discovery in the form of 2004 examinations and extreme document requests. Cadle has filed a number of motions with this Court against the Debtor and has sued her to block her discharge.

The timing of Debtor's motion to convert, during the midst of this protracted litigation and not long before docket call in the adversary proceeding, suggests that the Debtor seeks to convert, at least in part, to avoid the discharge litigation with Cadle.

The exercise of her statutory right to convert is not, contrary to the assertions of Cadle, an exercise in bad faith. It is far from clear that Cadle has a valid discharge complaint. Cadle has been denied a motion for summary judgment and also a motion for rehearing on such motion. Unlike the cases mentioned above, it is not clear that the Debtor was acting in bad faith during her Chapter 7. Therefore, even if bad faith might preclude conversion, it would not in this case.

However, the language of Section 707(a) does not have an exception for a bad faith debtor. Applying the letter of the law to the instant case leads to but one conclusion, the Debtor has the right to convert her case to Chapter 7.

Eligibility

A question remains as to whether this Debtor is eligible for Chapter 13 relief as a debtor with "regular income." *See*, Bankruptcy Code § 109.

As pointed out by Cadle, the Bankruptcy Code defines an "individual with regular income" as an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title,. . . ." Bankruptcy Code § 101(31).

The case law and commentary suggest flexibility for a debtor in determining whether its income is "regular."

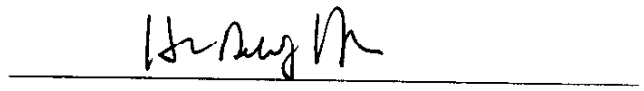
The Debtor had about $14,000 in 2003 income earned from contracts by the time she filed her case in May 2003. Since that time she has worked under services contracts, making from $350 to $450 per engagement. Her testimony indicated that she has earned over this calendar year about $2,000 per month. Finally, she is willing to substitute teach at $85 per day to help fund a plan in the event that her contract income diminishes.

The test is whether her income is "sufficiently" stable and regular to enable her to fund a plan. After reviewing her filings with the Court and hearing her testify, the Court believes that she meets this standard.

Accordingly, Debtor is eligible for Chapter 13 relief.

For these reasons, Debtor's motion to convert will be **GRANTED**.

SIGNED: 9/23/04



Harlin D. Hale
United States Bankruptcy Judge