

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION**

IN RE:)	
)	
)	Case No. 10-50713
Timothy Dale Southern)	
)	
Debtor.)	

ORDER DENYING MOTION BY DEBTOR TO CONVERT CASE TO CHAPTER 13

THIS MATTER came on for hearing before the undersigned bankruptcy judge in Winston-Salem, North Carolina upon the Motion by Debtor to Convert Case to Chapter 13 and the Objection to said Motion filed by Ms. Southern, the former spouse of the Debtor. Robert Lefkowitz appeared on behalf of the Debtor and Thomas Anderson appeared on behalf of the objecting creditor. After consideration of the Motion and the Objection and after hearing the testimony and reviewing the evidence presented, the court finds as follows:

Procedural History

The Debtor filed a voluntary petition under Chapter 7 on April 20, 2010. The bankruptcy filing was in response to a state court action to enforce the Separation Agreement between the Debtor and Ms. Southern. Pursuant to the Separation Agreement, the Debtor was to make payments on a vehicle driven by Ms. Southern. That vehicle was her sole means of transportation to her employment and the sole means of transportation for their minor daughter. The Debtor stopped making payments on the vehicle, and the vehicle was repossessed in December 2009. The Debtor's answer to the Complaint in the state court action to enforce the Separation Agreement was due by April 20, 2010.

On July 9, 2010, Ms. Southern filed an Adversary Proceeding against the Debtor alleging that the debts of the Debtor to Ms. Southern are nondischargeable under § 523(a)(5) and § 523(a)(15). On September 20, 2010 the U.S. Bankruptcy Administrator filed a complaint against the Debtor requesting that the court deny the Debtor his discharge, pursuant to 11 U.S.C. § 727(a)(4) and if applicable § 727(a)(2). On January 20, 2011, the Debtor filed a motion to convert the case to Chapter 13.

Ms. Southern has filed a Motion for Judgment on the Pleadings in the Adversary Proceeding. All parties agree that if the Debtor's Motion to Convert is allowed, Ms. Southern's cause of action under § 523 (a)(5) will survive, but that there will be no nondischargeability action under § 523(a)(15). *See* 11 U.S.C. § 1328(a)(2). Similarly, if the Debtor is allowed to convert, it will moot the Adversary Proceeding filed by the Bankruptcy Administrator. The Court will rule on the Motion to Convert prior to the ruling on the Motion for Judgment on the Pleadings.

Facts

The Debtor met with his initial counsel several times pre-petition to complete the bankruptcy schedules and statement of financial affairs. The Debtor had filed for bankruptcy before, having received a Chapter 7 discharge in 1995. The schedules and statement of financial affairs in the present case were signed under penalty of perjury on April 20, 2010. Schedule I reflects that the Debtor was a self-employed garage door installer with gross monthly wages of \$2,434.00 and Schedule J reflects expenditures of \$2,958.43, resulting in a **negative** monthly income of \$524.43. The Debtor's initial counsel did not believe that the Debtor had the ability to fund a Chapter 13 plan, and therefore, a Chapter 7 petition was filed.

The evidence reflects that the Debtor failed to disclose all of his assets in his petition,

schedules, and statements. The primary asset that the Debtor failed to disclose was a custom built motorcycle. While the Debtor testified that he told his initial attorney of the existence of the motorcycle, the court does not find his testimony to be credible on this issue. The Debtor also failed to disclose an interest in a multi-level marketing business and did not accurately report his year to date income or the correct prior employer. The Debtor failed to disclose all of his transfers in his petition, schedules, and statements. The Debtor failed to disclose a deed in lieu of foreclosure on a time share interest, he failed to disclose that he had transferred an interest in the custom built motorcycle worth \$10,000.00 in payment of an unsecured debt in the amount of \$6,500.00, and he failed to disclose the sale of numerous firearms and model cars. The Debtor was not truthful under oath at his § 341 meeting of creditors. The Debtor failed to cooperate with the Trustee, who was required to obtain a court order to take possession on non-exempt property.

Debtor argues that his income has increased, and he is now in a position to fund a Chapter 13 plan. While the Debtor's income may have increased, the Debtor has not been paying his ongoing child support obligation. The Debtor is obligated to pay the sum of \$600.00 per month and has only paid the sum of \$680.00 in 2010 and \$600.00 through February 2011. Since the Bankruptcy petition was filed, the Debtor has only paid \$1,000.00 in child support and, as of February 2011, is behind \$6,000.00 in post-petition child support payments.

Analysis

The starting point in this analysis is § 706 of the Bankruptcy Code. Section 706 provides in relevant part that,

(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.

...

(d) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such Chapter.

For a number of years, circuits were split as to whether a debtor had a “one-time absolute right” to convert from a case under Chapter 7 to Chapter 13 to support the concept that a debtor “should always be given the opportunity to repay his debts,” *In re Kuntz*, 233 B.R. 580, 585 (1st Cir. BAP 1999) (citations omitted), versus those courts which held that the right to convert would be denied in instances of bad faith. *In re Copper*, 426 F.3d 810, 814 (6th Cir. 2005); *In re Finney*, 992 F.2d 43, 45 (4th Cir. 1993). The issue was decided by the Supreme Court in *In re Marrama*, in which the Court held that a Chapter 7 debtor loses the absolute right to convert to Chapter 13 if he or she has engaged in pre-petition bad faith conduct. *In re Marrama*, 549 U.S. 365 (2007). Although *Marrama* did not discuss which party has the burden of proof on the issue of bad faith conduct, this court adopts the reasoning of Judge Waldrep in *In re Goines* and finds that the party objecting to the conversion has the burden of proof and that the standard is by a preponderance of the evidence. *In re Goines* 397 B.R. 26, 33 (Bankr. M.D.N.C. 2007)

The Debtor asserts that his initial counsel did not properly counsel him, that the petition was not fully explained to him, and that he advised his initial counsel of the transfer of the motorcycle. The court finds that he was properly counseled by his initial attorney and believes the testimony of his initial counsel when she stated she knew nothing about the ownership or transfer of the motorcycle or the sale of firearms or the sale of model cars. While the Debtor claims he transferred his interest in the custom built motorcycle in payment of a pre-petition debt in February 2010, the records of the North Carolina Department of Motor Vehicles show that

the title was still in the Debtor's name at the time of his § 341 meeting of creditors. The court finds that it was the Debtor's intention to try to hide the ownership of the motorcycle from the Court and Trustee in an effort to defraud his creditors. The Debtor has not been able to provide evidence of the \$6,500.00 pre-petition debt, and the court finds that his schedules are materially false.

Marrama holds that a dishonest debtor loses the absolute right to convert from a Chapter 7 case to Chapter 13 case. Here, the party objecting to the conversion of the case has carried the burden of proof by the greater weight of the evidence and the court, after reviewing the testimony and the evidence, finds that the debtor made material false statements, material omissions, and misrepresentations in his schedules and statement of affairs and gave false testimony at the § 341 meeting. Due to the Debtor's bad faith, the Debtor's Motion to Convert to Chapter 13 is denied.

SO ORDERED.

SERVICE LIST

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Debtor

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