Formatted For Electronic Distribution

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

Not For Publication

IN RE:	)	
	)	
JAN ROSSEN,	)	Case No. 99-10383
	)	Chapter 7
Debtor.	)	

APPEARANCES:

John Glynn, Esq.
Attorney for Debtor
P.O. Box 423
Lebanon, NY 03766

Raymond Obuchowski, Esq.
Trustee
Obuchowski Law Office
P.O. Box 60
Bethel, VT 05032

MEMORANDUM OF DECISION ON DEBTOR'S MOTION TO CONVERT CHAPTER 7 CASE TO ONE UNDER CHAPTER 13

I. ISSUE

The issue before the Court is whether § 706(a) of the Bankruptcy Code grants a debtor an absolute right to convert his or her case from one under chapter 7 to one under chapter 11, 12, or 13. The Court holds that as a matter of law § 706(a) of the Bankruptcy Code does indeed provide the debtor an absolute conversion right, subject only to the limitations expressed in that statutory provision concerning prior conversions.

II. BACKGROUND

On March 22, 1999, Jan Rossen (the "Debtor") filed with the Court a voluntary chapter 7 petition dated February 23, 1999. Thereafter, Raymond Obuchowski (the "Trustee") was appointed chapter 7 trustee for the case. On May 20, 1999, the initial meeting of creditors under §341 of the Bankruptcy Code was conducted and the Debtor was examined by the Trustee. On June 9, 1999, the Debtor filed a "Notice of Conversion to Case under Chapter 13", which was docketed as a motion and set for hearing on July 28, 1999. On June 10, 1999, the Trustee moved

the Court for an extension of time to (i) object to exemptions and (ii) file a complaint objecting to the Debtor's discharge. The Court (Conrad, J.) granted this relief. Thereafter, on June 14, 1999, the Trustee filed an objection to the Debtor's conversion to chapter 13.

At the July 28, 1999 hearing, the Court (Conrad, J.) heard initial argument on the conversion dispute, but continued the hearing to a later date to permit the parties to engage in discovery. In his pleadings and at the July 28 hearing, the Trustee argued that the Debtor was seeking conversion to chapter 13 in order to avoid the consequences of the Trustee's allegations of hidden assets and other filing abuses. The Debtor responded that the Trustee's allegations were unfounded and that the appearances giving rise to the Trustee's allegations were the result of a delay in the filing of her case, for which her former attorney bore responsibility. More importantly, the Debtor argued that her conversion right was absolute because her case had not been previously converted under Section 1112, 1208, or 1307 of title 11.

Two status conferences were held by the Court (Krechevsky, J.; sitting by special designation) over the ensuing months. Then, on April 13, 2000, the Court (Brown, J.) advised the parties that it would postpone any evidentiary hearing until the Court could review the legal issue of whether the Debtor's conversion right was absolute; and that if the Court concluded that the right was absolute, no evidentiary hearing would be required.

III. LEGAL DISCUSSION

Section 706(a) of the Bankruptcy Code provides:

> 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.

The legislative history of this section indicates that where, as in the case before the Court, a case has not been converted to chapter 7 from another chapter, subsection (a) grants the debtor "[the]

one-[time] absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case." H.R.Rep. No. 595, 95th Cong., 1st Sess. 380 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 94 (1978). It further reveals that "[t]he policy of the provision is that the debtor should always be given the opportunity to repay his debts." Id.

Bankruptcy Rule 1017(f), which provides for the practical application of § 706(a), provides in relevant part:

> (2) Conversion or dismissal under §§ 706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013.

Fed. R. Bankr. P. 1017(f)(2). The 1987 Advisory Committee Note to Bankruptcy Rule 1017(d), which was redesignated as Bankruptcy Rule 1017(f) by the 1999 amendments, explains that the subdivision was amended to clarify that dismissal or conversion pursuant to the cited sections is not a contested matter under Bankruptcy Rule 9014 and that "[n]o hearing is required on these motions unless the court directs." 1987 Adv. Comm. Note. Indeed, according to the leading bankruptcy treatise, "if conversion is sought pursuant to section 706(a), the motion to convert is not considered a contested matter, since the only possible issues are whether the case has been previously converted and whether the debtor is eligible [pursuant to § 109] for relief under the chapter to which the debtor seeks to convert." 6 Collier on Bankruptcy, ¶ 706.07 (15th ed. 1999).

Despite the language of the statutory provision and related rule, as well as the legislative history thereto, the case law authority on whether the right to convert is absolute is mixed. The greater weight of authority indicates that the right is absolute or "nearly absolute". See, e.g., Finney v. Smith (In re Finney), 992 F.2d 43, 45 (4th Cir. 1993) (§ 706(a) provides a "one-time absolute right" to convert; however, that does not preclude the "court's sua sponte consideration of whether reconversion . . . is appropriate"); Martin v. Martin (In re Martin), 880 F.2d 857 (5th Cir. 1989) ("[A] debtor's right to convert under § 706(a) is, as indicated by the

statute and its legislative history, an absolute one. The courts refuse to interfere with that right in the absence of extreme circumstances."); Kuntz v. Shambam (In re Kuntz), 233 B.R. 580 (1st Cir. BAP 1999) ("a debtor's one time right to conversion [(§ 706(a))] may only be denied in 'extreme circumstances' constituting bad faith "); In re Mosby, 2000 WL 133439 (Bankr. E.D.Va. 2000) (only the most egregious circumstances "could justify denial of what is otherwise a clear statutory right"; court indicates remedy is reconversion (§ 1307(c)); In re Verdi, 241 B.R. 851 (Bankr. E.D.Pa. 1999) (stating that the language of § 706(a) "allowed of no exceptions in permitting conversion" and advising that the appropriate remedy for objectors is motion to reconvert); In re Dixon, 241 B.R. 234 (Bankr. M.D. Fla. 1999) (debtor has one time absolute right to convert under § 706(a); bad faith is a plan issue, not a conversion issue); In re Cavaliere, 238 B.R. 247 (Bankr. W.D.N.Y. 1999) (debtor's motion to convert shortly after creditor filed a nondischargeability complaint for fraud not grounds for denial of confirmation given that § 706(a) provides a "nearly absolute" right to debtor to convert).

Those courts holding that conversion under § 706(a) is not an absolute or "nearly absolute" right of the debtor generally do so under the theory that there is a "good faith" requirement to conversion, much along same lines as courts that hold there is a general good faith filing requirement. See, e.g., In re Thornton, 203 B.R. 648 (Bankr. S.D.Ohio 1996) (court may scrutinize the facts to determine whether the debtor's conversion is in good faith); In re Dews, 243 B.R. 337 (Bankr. S.D.Ohio 1999) (court asserts that debtors must do equity to get equity and, therefore, court can look at motives).

This Court believes that those decisions construing § 706(a) as providing an absolute one-time conversion right are more persuasive in their reasoning than those decisions that impose a good faith requirement that is not set forth in the language. The former decisions recognize both (i) the clarity and importance of congressional intent, as expressed in the statutory

language and legislative history of § 706(a), and (ii) the distinction between grounds for involuntary conversion or involuntary dismissal or denial of confirmation, on the one hand, and voluntary conversion or dismissal, on the other hand.

Although it concerns a debtor's right to dismiss a chapter 13 case, the Second Circuit's statutory construction analysis in Barbieri v. RAJ Acquisition Corp. (In re Barbieri), 199 F.3d 616 (2d Cir. 1999) is instructive. In Barbieri, the debtor moved to dismiss her case under § 1307(b) of the Bankruptcy Code, which provides:

> On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

Barbieri, 199 F.3d at 618 (quoting 11 U.S.C. § 1307(b)). The Bankruptcy Court denied the debtor's motion and stated that "[t]he Court, pursuant to Section 105 of the Code and Section 1307(c) is today sua sponte converting this Chapter 13 case to a case under Chapter 7." Id. The Bankruptcy Court determined that a "conversion to Chapter 7 and an opportunity for the trustee in Chapter 7 to investigate the debtor's assets and obligations is more appropriate than permitting a withdrawal or a debtor in possession status under Chapter 11." Id. at 619. On appeal, the District Court rejected the debtor's claim that § 1307(b) affords a debtor an absolute right to dismiss a chapter 13 petition and affirmed the Bankruptcy Court's conversion of Barbieri's petition into a Chapter 7 proceeding. Id. On further appeal, the Second Circuit Court of Appeals reversed, holding that: (1) the debtor has an absolute right to dismiss a chapter 13 petition, so long as the case has not been converted under chapter 7, 11, or 12, and (2) the purported *sua sponte* conversion of debtor's case to chapter 7 did not preclude voluntary dismissal by the debtor. Id. at 617.

The lower courts and the appellee in Barbieri maintained that construing §

1307(b) as granting an absolute right to the debtor to dismiss her case would "open up the bankruptcy court[s] to a myriad of potential abuses." Id. at 619 (quoting District Court decision). The Trustee makes a similar argument in the instant case. The Second Circuit, however, focused on the language of the statute, rather than the perceived potential abuses that an "absolute right" construction would engender. Id. It determined that the language of § 1307(b) was unambiguous, given its use of the terms "at any time" and "shall", and the express limitations set forth in the statute (concerning prior conversions). Id. Lastly, the Second Circuit contrasted the mandatory language of § 1307(b) ("shall") with the permissive language of § 1307(c) ("may"), noting that Congress is presumed to act "intentionally and purposely when it includes particular language in one section of a statute but omits it in another." Id. (quoting BFP v. Resolution Trust Corp., 511 U.S. 531, 537 (1994)).

Analyzing § 706(a) in the statutory construction framework of Barbieri, this Court finds the language of § 706(a) unambiguous, which finding is reinforced, as in Barbieri, by the fact that there are express limitations to the conversion right contained in subsection (a) and by the fact that other subsections of § 706 use different language. In particular, § 706(a) leaves conversion to the discretion of the debtor (*"the debtor may convert a case . . . at any time"*), without any reference to the court or a hearing. It limits the right to convert to those cases that have not been previously converted. It may be contrasted with the language of § 706(b), which leaves conversion under different circumstances to the discretion of the court (*"the court may convert a case . . . at any time"*). Furthermore, the legislative history of § 706(a), as well as the Advisory Committee Note to Bankruptcy Rule 1017, supports this Court's reading of § 706(a) as containing an absolute conversion right, subject only to the limitations contained therein.

Finally, like Barbieri, this Court recognizes that "the purpose of the Bankruptcy Code is to afford the honest but unfortunate debtor a fresh start, not to shield those who abuse the

bankruptcy process in order to avoid paying their debts . . . [; however, the Court's] concerns about abuse of the bankruptcy system do[es] not license [] [it] to redraft the statute." Id. at 621 (internal quotation/citations omitted). "Moreover, there are several provisions of the Bankruptcy Code that specifically authorize court [or other] action to prevent [or redress] abuse."

IV. CONCLUSION

For the reasons stated above, the Court holds that the Debtor has the absolute right to voluntarily convert her chapter 7 case to one under chapter 13 absent a prior order of conversion. The Trustee's objection to the conversion is therefore overruled.

Dated at Rutland, Vermont this 10th day of July, 2000.

/s/ Colleen A. Brown
Honorable Colleen A. Brown
United States Bankruptcy Judge