

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED

at _____ O'clock & _____ min _____ M

MAR 19 2008

IN RE:

C/A No. 07-05770-JW

Ophelia Denise Holmes,

Chapter 7

United States Bankruptcy Court
Columbia, South Carolina (4)

Debtor(s).

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law made in the attached Order of the Court, Debtor's Motion to Convert to Chapter 13 is granted.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
March 19, 2008

ENTERED
MAR 19 2008
K.E.P.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Ophelia Denise Holmes,

Debtor(s).

ENTERED

MAR 19 2008

K. E. P.

FILED

C/A No. 07-05770-0100ck & min

Chapter 7

MAR 19 2008

ORDER

United States Bankruptcy Court
Columbia, South Carolina (4)

This matter comes before the Court on Ophelia Denise Holmes's ("Debtor") Motion to Convert to Chapter 13 ("Motion"). This Court has jurisdiction pursuant to 28 U.S.C. § 1334, and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Pursuant to Fed. R. Civ. P. 52, made applicable to this proceeding pursuant to Fed. R. Bankr. P. 7052, the Court makes the following Findings of Fact and Conclusions of Law.¹

FINDINGS OF FACT

1. Debtor filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code on October 24, 2007.
2. With her petition, Debtor filed her schedules of assets and liabilities. Debtor's Schedule B failed to indicate that Debtor was entitled to a tax refund for the 2007 tax year.
3. Debtor provided Michelle L. Vieira ("Trustee"), her chapter 7 trustee, with a copy of her tax returns for the 2006 tax year. Those returns indicated that Debtor received a refund totaling approximately \$5,900.00 for the 2006 tax year.
4. Debtor appeared for her meeting of creditors on November 26, 2007. Debtor testified that she expected to receive a tax refund for the 2007 tax year in approximately the same amount as the refund she received for the 2006 tax year.
5. Debtor filed the Motion on January 30, 2008.

¹ To the extent any Findings of Fact constitute Conclusions of Law, they are adopted as such. To the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

6. With the Motion, Debtor filed an amended Schedule B disclosing an anticipated tax refund in the amount of \$5,100.00 for the 2007 tax year. Debtor also filed amended Schedules I and J. Amended Schedule I indicates that Debtor's income has not changed since the petition date. Amended Schedule J indicates that Debtor's expenses have not changed since the petition date; however, Debtor has removed payment to two secured creditors in her amended Schedule J since she proposes to pay these creditors through a chapter 13 plan.

7. Debtor's schedules indicate that she has \$4,718.00 in unsecured debt. Unsecured claims filed in the case total \$650.77.²

8. Debtor's schedules indicate that she is eligible to be a debtor under chapter 13 pursuant to 11 U.S.C. § 109(e).

9. Debtor has received her tax refunds for the 2007 tax year and is holding the same pending the resolution of the Motion.

10. Trustee objects to the Motion on grounds that Debtor has acted in bad faith by failing to timely disclose the tax refunds on Schedule B and by seeking to convert this case at the time such refunds were disclosed in her amended schedules. Trustee anticipates that all unsecured creditors with an allowed claim could be paid in full with the estate's portion of Debtor's tax refund.

11. Debtor testified that the failure to disclose the potential for a tax refund in her original schedules was an error and that she readily disclosed the existence of the potential refund at her meeting of creditors. She also testified that her circumstances have changed since the petition date and that she now requires relief under chapter 13 since the creditor with a lien against her vehicle is unwilling to enter into a reaffirmation agreement with her unless she is current on her payments to the creditor. Debtor testified that the tax refund would be necessary

² The claims bar date was March 18, 2008. Two creditors have filed secured claims with one being for Debtor's vehicle and another for certain household goods.

to allow her to become current and make necessary repairs to her vehicle, which is her only means of transportation for her and her three dependents.³

12. Debtor's chapter 13 plan allows Debtor to cure the arrearage owed on the vehicle and proposes to pay unsecured creditors a minimum distribution of ten (10%) percent. The distribution to unsecured creditors under the plan would exceed the distribution available if the Trustee disbursed the refund; however, unsecured creditors may not receive a distribution for two years because of proposed distributions to secured creditors.

CONCLUSIONS OF LAW

The right to convert Debtor's chapter 7 case to one under chapter 13 is governed by 11 U.S.C. § 706. 11 U.S.C. § 706(a) broadly provides that a debtor may convert a case to a case under chapter 13 so long as the case was not previously converted to a case under chapter 7. This right of conversion is tempered by 11 U.S.C. § 706(d), which prohibits conversion if the debtor is not eligible for relief under the chapter to which debtor wishes to convert.

The Supreme Court has recently analyzed 11 U.S.C. § 706 in the context of a chapter 7 debtor wishing to convert his case to one under chapter 13. See Marrama v. Citizens Bank of Massachusetts (In re Marrama), 127 S.Ct. 1105, ___ U.S. ___, 166 L.Ed.2d 956 (2007). The Supreme Court construed 11 U.S.C. § 706(d) as not only a limitation to conversion if a debtor is not eligible for chapter 13 relief under 11 U.S.C. § 109(e) but also if the debtor could be subject to conversion or dismissal of a case under chapter 13 pursuant to 11 U.S.C. § 1307(c). See id., 127 S.Ct. at 1110-1111. This construction changes existing precedent in this Circuit in which the right to convert was viewed as absolute absent extreme circumstances. See In re Finney, 992 F.2d 43, 44-45 (4th Cir. 1993). Notwithstanding this recent interpretation of 11 U.S.C. § 706(a), the Supreme Court observed that the vast majority of debtors who seek a conversion are entitled

³ Debtor's schedules indicate that she has a second vehicle but is surrendering the same to the secured creditor.

to a conversion under 11 U.S.C. § 706(a) except those that do not fall within the class of honest but unfortunate debtors for whom Congress intended to provide a fresh start through reorganization. See Marrama, 127 S.Ct. at 1111.

Bad faith is one of the grounds that would constitute cause for dismissing or converting a chapter 13 case and thus the denial of a motion to convert a chapter 7 case. See id. at 1111. Though the Supreme Court does not articulate what conduct qualifies as “bad faith” sufficient to deny a motion to convert, it notes that such conduct must be atypical and extraordinary. See id. at 1112, n. 11. This high burden is consistent with the general policy of 11 U.S.C. § 706(a) that a debtor should be given the opportunity to repay her debts. See id. at 1110.

At issue in this case is whether Debtor’s initial failure to disclose the existence of a tax refund in her schedules would be “cause” to dismiss or convert her case under 11 U.S.C. § 1307(c).⁴ The Court has identified only one case, aside from the lower court’s decision in Marrama,⁵ in which the failure to disclose a tax refund was found to be grounds for conversion of chapter 13 case to a chapter 7 case. See In re Powers, 48 B.R. 120 (Bankr. M.D. La. 1985). In Powers, the bankruptcy court denied a debtor’s motion to dismiss under 11 U.S.C. § 1307(b) and granted the creditor’s motion to convert the case to chapter 7 based upon the debtor’s failure to disclose a tax refund of \$8,000.00. See id. at 121 (finding no absolute right to dismiss a chapter 13). In that case, the refund was not discovered until after confirmation of the chapter 13 plan and not until after the debtor liquidated other undisclosed assets to take a vacation. See id. at 120. In both the lower court’s decision in Marrama and the bankruptcy court’s decision in Powers, the courts concluded that a debtor’s failure to disclose a tax refund, when coupled with

⁴ There appears to be no dispute that Debtor is otherwise eligible to convert this case to one under chapter 13.

⁵ See Marrama v. Citizens Bank of Massachusetts (In re Marrama), 313 B.R. 525, 534 (B.A.P. 1st Cir. 2004). The debtor’s failure to disclose the tax refund in Marrama was one of the grounds considered by the lower courts to deny debtor’s motion to convert; however, this ground was not discussed in the subsequent opinion by the Supreme Court as that decision focused on more significant efforts by the debtor to defraud his creditors.

other significant fraudulent conduct, indicated a lack of good faith. See id.; Marrama, 313 B.R. at 534. This Court has also denied a debtor's right to claim an exemption in a tax refund when a debtor has acted in bad faith by failing to disclose the refund. See In re Gartman, C/A No. 06-05307-W, slip op. (Bankr. D.S.C. Mar. 30, 2007). In Gartman, the court found that debtor provided dishonest answers at his meeting of creditors about the refund and did not amend his schedules until after the chapter 7 trustee filed a motion to turnover the refund.

In this case, however, openly disclosed the refund at the 341 meeting and amended her Schedule B once her tax returns were completed and the precise refund amount became known.⁶ Debtor has not spent the refund but has retained it for the benefit of her creditors. This case is distinguishable from Gartman, Powers and the Bankruptcy Appellate Panel's decision in Marrama in that Debtor's initial failure to disclose the potential refund appears to be an isolated error, which is mitigated by Debtor's honest testimony at her meeting of creditors and Debtor's good faith effort to repay her creditors.

It also appears that Debtor has experienced a change in circumstances that would warrant the need for chapter 13 relief. Since the petition date, Debtor has discovered that she must become current with her automobile finance company in order to reaffirm and retain the vehicle. Chapter 13 appears to be Debtor's only viable method for retaining the vehicle she requires for her employment and her dependents. Debtor's conduct does not appear to be an effort to conceal an asset or to avoid her obligations to creditors. Although a chapter 13 case would delay unsecured creditors, it appears that all unsecured creditors may be paid in full and with interest if Debtor completes her proposed chapter 13 plan.

⁶ Counsel for Debtor indicated that it was his decision to delay amending Schedule B until the amount of the refund became known.

Based upon the foregoing, the Court finds that Debtor has met her burden of proof⁷ and grants the Motion.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
March 19, 2008

⁷ Debtor bears the initial burden making a *prima facie* case for conversion and the burden then shifts to the objecting party to demonstrate that Debtor is not eligible for relief. See In re Broad Creek Edgewater, L.P., 371 B.R. 752, 757 (Bankr. D.S.C. 2007).