

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA**

IN RE:

Marshall Edward Blackmon,

Debtor(s).

C/A No. 19-04009-HB

Chapter 13

**ORDER GRANTING MOTION TO  
CONVERT TO CHAPTER 7**

**THIS MATTER** is before the Court on the Motion to Convert filed by Trustee William K. Stephenson (“Chapter 13 Trustee”).<sup>1</sup> Debtor Marshall Edward Blackmon filed a Response<sup>2</sup> and a hearing was held on April 15, 2021. Present at the hearing were counsels for Blackmon, the Chapter 13 Trustee, and Kubota Credit Corporation. The Court heard testimony from Robert F. Anderson and Blackmon, and photographs taken by Anderson were submitted as exhibits.

**FACTS**

On March 12, 2018, Blackmon entered a Retail Installment Contract with Kubota for the purchase of a Kubota SVL95-2SHFC, Serial No. 38938 (“Skid Steer”) and a Land Pride AP-SGC2072 Claw Grapple, Serial No. 1028310K, and granted it a purchase money security interest in the amount of \$77,161.65.

With the assistance of counsel, Blackmon filed a petition for Chapter 13 relief and schedules on July 31, 2019. Schedule A/B asks “[d]o you own, lease, or have *legal or equitable interest* in any vehicles, whether they are registered or not?” and instructs the debtor to “[i]nclude *any vehicles you own that someone else drives.*” (emphasis added). In response, Blackmon listed a 1984 Ford LN 750 Dump Truck, 1978 Chevrolet Corvette Coupe, 1964 Dodge 440, and 2017 Kubota 95S Skid Steer. Kubota filed a timely Proof of Claim on September 3, 2019 (Claim 6-1)

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<sup>1</sup> ECF No. 37, filed Feb. 8, 2021.

<sup>2</sup> ECF No. 39, filed Feb. 16, 2021.

in the amount of \$74,451.25, listing the Skid Steer as collateral. There are thirteen other claims that total \$325,726.66.

Blackmon's plan was confirmed on February 7, 2020. It requires 60 monthly payments with less than 100% distribution for unsecured claims. With regard to secured claims, the plan provides Blackmon will surrender the Skid Steer to Kubota and will maintain contractual payments directly to Jessie Knight on Knight's mortgage claim on Blackmon's primary residence while curing the prepetition arrears through the plan. The plan also provides for the valuation and avoidance of other liens. Blackmon wishes to remain in Chapter 13 and is current on his plan payments.

Almost five months after the plan was confirmed, Blackmon's mother, Shirley Blackmon, filed a voluntary petition for Chapter 7 relief with the assistance of counsel.<sup>3</sup> Anderson was appointed Chapter 7 Trustee. Ms. Blackmon listed on her Schedule A/B commercial property located at 1483 Old Camden Highway, Lancaster, SC 29720 (the "warehouse"). At the meeting of creditors, Ms. Blackmon testified there was no property in the warehouse.

Professionals employed by Anderson to assist with liquidating Ms. Blackmon's estate listed the warehouse for sale. On February 5, 2021, Anderson and his relator met with a potential buyer to tour the warehouse. When they arrived, Anderson's keys to the fence surrounding the warehouse did not work, requiring a locksmith to cut the lock. The keys to the warehouse also did not work, requiring the locksmith to change the lock on the warehouse.

Upon entry, Anderson discovered the warehouse was filled with many items of value including classic cars; tools; various miscellaneous items; and several pieces of equipment and machinery, including a Kubota skid steer. Anderson took note of the skid steer because Kubota's

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<sup>3</sup> C/A No. 20-02771-HB.

counsel previously contacted him seeking information regarding its collateral. Anderson notified the Chapter 13 Trustee of the property discovered and discussed the matter with counsel for Blackmon and his mother.<sup>4</sup>

On February 17, 2021, Blackmon filed an amended Schedule A/B to add several vehicles located in the warehouse (1969 Buick Electra, 2005 Chevrolet 3500, 1979 Chevrolet Corvette, 1980 Chevrolet Corvette, 2012 Ford F-250) and hand tools. Blackmon claims no ownership beyond bare legal title in any of the vehicles added and valued each at \$0.00. His schedules describe the hand tools as “no tool worth more than \$500” and listed their value at \$0.00. On the Statement Indicating Changes attached to the amended schedules, Blackmon asserts that “[o]ther than hand tools and vehicles originally listed in his schedules, [he] claims no interest in any item in the [warehouse].”

On March 5, 2021, the Court entered a Consent Order in Ms. Blackmon’s case allowing Kubota to enter the warehouse in coordination with Anderson to verify the property discovered includes the Skid Steer securing its interest and authorizing Anderson to release it if so verified.<sup>5</sup> The Consent Order was signed by Anderson, Ms. Blackmon’s then-counsel, and counsel for Kubota. Anderson and his realtor visited the warehouse a second time on March 11, 2021 to tour it with another potential buyer. The locks had been changed again, preventing them from entering the warehouse. On April 9, 2021, Anderson visited the warehouse a third time to tour it with another potential buyer. Prior to the visit, the Chapter 13 Trustee gave Anderson keys previously obtained from Blackmon. Only one key worked, allowing entry through a back gate, but not the warehouse. Anderson noted that some vehicles outside the warehouse were no longer there.

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<sup>4</sup> Blackmon and his mother were represented by the same attorney at that time. The Court entered orders granting motions to withdraw as counsel in Blackmon’s case on March 10, 2021 and in Ms. Blackmon’s case on March 18, 2021.

<sup>5</sup> ECF No. 30, C/A No. 20-02771-HB.

Blackmon testified he turned over his keys to the warehouse and surrounding property to the Chapter 13 Trustee, never changed the locks, and does not currently have any keys to the warehouse. Blackmon testified that he and Ms. Blackmon were advised they could continue to use the warehouse and it would not be sold to satisfy debts. While Blackmon testified that he has not been to the warehouse recently and his mother never went there, several relatives have access to and use the warehouse and surrounding property. He testified that the property was usually unlocked during the day, and the warehouse was accessible to anyone through a broken window.

When asked at the hearing about the property in the warehouse, Blackmon identified certain property owned by other family members and otherwise stated he did not know who owned the property in question given the number of individuals with access to the property. He admitted ownership of only the vehicles and tools listed in his amended schedules, some small items, and the Skid Steer. Blackmon testified that his former counsel advised him not to include these vehicles in his schedules because he only held bare legal title.

Blackmon testified that one of his sons owns the 1969 Buick Electra, but the title is still in Blackmon's name. With respect to the 2005 Chevrolet 3500, Blackmon testified it was claimed as a total loss and his son paid off the lien, but there have been issues clearing the title and transferring it from his name. Blackmon testified that at some point he discussed with Kubota the possibility of selling the Skid Steer to a third party. Blackmon gave possession of the Skid Steer to a potential buyer and then had difficulties with its return. The collateral was returned two to three months ago and Blackmon stored it in the warehouse "to keep it secure until Kubota could come and get it."

### APPLICABLE LAW

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and this Court may enter a final order.

Section 1307(c) states that, upon the request of a party in interest and after notice and a hearing, a Chapter 13 case may be converted to Chapter 7 or dismissed—whichever is in the best interests of creditors and the estate—“for cause,” and provides a nonexclusive list of eleven grounds justifying conversion or dismissal. 11 U.S.C. § 1307(c). Accordingly, there is a two-step analysis under § 1307(c):

First, it must be determined that there is “cause” to act. Second, once a determination of “cause” has been made, a choice must be made between conversion and dismissal based on the “best interests of the creditors and the estate.”

*In re Nelson*, 343 B.R. 671, 675 (9th Cir. BAP 2006) (citations omitted). “‘The moving party under § 1307(c) bears the burden of proof.’” *In re Gravlin*, No. 17-41714, 2020 WL 3635579, at \*2 (Bankr. D. Mass. Mar. 6, 2020) (quoting *Stevenson v. TND Homes I, LP (In re Stevenson)*, 583 B.R. 573, 579 (B.A.P. 1st Cir. 2018)).

“A Bankruptcy Court has considerable discretion in determining whether ‘cause’ exists.” *In re Demeza*, 567 B.R. 473, 477 (Bankr. M.D. Pa. 2017) (quotations and citations omitted). Among the causes for conversion or dismissal listed in the statute are “unreasonable delay by the debtor that is prejudicial to creditors” and a “material default by the debtor with respect to a term of a confirmed plan[.]” 11 U.S.C. § 1307(c)(1), (6). “Although bad faith, or a lack of good faith, is not included in this list, bad faith can constitute cause for dismissal under Section 1307(c).” *In re Buis*, 337 B.R. 243, 250 (Bankr. N.D. Fla. 2006) (citations omitted).

When examining good faith for confirmation purposes, courts in the Fourth Circuit use a totality of the circumstances test. *In re Johnson*, 438 B.R. 854, 857 (Bankr. D.S.C. 2010) (citing *Deans v. O'Donnell*, 692 F.2d 968, 972 (4th Cir. 1982)).<sup>6</sup>

When engaging in this analysis, courts often consider a number of factors, including: (1) the percentage of repayment creditors will receive; (2) the financial situation of the debtor; (3) the period of time over which creditors will receive payment; (4) the employment history and current and future employment prospects of the debtor; (5) the nature and amount of unsecured claims; (6) any previous bankruptcy filings of the debtor; (7) the honesty of the debtor in disclosing the facts of his case; (8) the nature of the debtor's pre-petition conduct giving rise to the case; (9) the dischargeability of the debtor in a chapter 7; and (10) any other extraordinary or unusual problems of the debtor.

*Id.* (citations omitted). “The court’s task in a good faith analysis is to determine whether the plan represents an abuse of the provisions, purpose, or spirit of Chapter 13.” *Id.* (quotations and citations omitted). Importantly, a finding of bad faith does not require malice or actual fraud by the debtor. *In re Gravlin*, No. 17-41714, 2020 WL 3635579, at \*2 (Bankr. D. Mass. Mar. 6, 2020) (quoting *Sullivan v. Solimini (In re Sullivan)*, 326 B.R. 204, 212 (B.A.P. 1st Cir. 2005)).

With respect to the debtor’s good faith in fully and accurately listing his assets and liabilities:

[t]he critical time for disclosure is at the time of the filing of a petition and the Debtor has the responsibility to do so. Bankruptcy law requires debtors to be honest and to take seriously the obligation to disclose all matters. The bankruptcy schedules and statements of affairs are carefully designed to elicit certain information necessary to the proper administration and adjudication of the case. To allow the Debtor to use his discretion in determining the relevant information to disclose would create an end-run around this strictly crafted system.

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<sup>6</sup> While this and associated cases discuss good faith in filing the plan and petition for confirmation purposes under § 1325(a)(3) and (7), the same analysis applies with respect to a motion to convert or dismiss under § 1307(c). *See In re Loper*, C/A No. 08-03646, 2009 WL 9084933, at \*3-4 (Bankr. D.S.C. 2009) (using the *Deans* factors and discussing good faith on the trustee’s pre-confirmation motion to convert or dismiss under § 1307(c)); *In re Whitaker*, C/A No. 05-09998, slip op. at 4-5 (Bankr. D.S.C. 2005) (granting motion to dismiss under § 1307(c) and reasoning “[n]ormally, the question of bad faith is associated with plan confirmation and the good faith requirements prescribed by 11 U.S.C. § 1325(a)(3)...[t]he factors considered in determining whether a plan is proposed in good faith are worthy of consideration in the context of determining whether Debtors filed this second case in bad faith.” (citations omitted)).

*In re Weldon*, 184 B.R. 710, 715 (Bankr. D.S.C. 1995). Regardless of value, what property to include on bankruptcy schedules is not within a debtor’s discretion—the schedules are to be comprehensive and include all property owned by the debtor. *In re Coombs*, 193 B.R. 557, 563 (Bankr. S.D. Cal. 1996) (citations omitted) (“Even if the debtor thinks the assets are worthless he must nonetheless make full disclosure...the debtor has no discretion—the schedules are to be complete, thorough and accurate in order that creditors may judge for themselves the nature of the debtor’s estate.”).

In determining whether conversion or dismissal is appropriate, “the test turns on whether or not the [conversion or] dismissal is in the best interests of the debtor and the creditors of the estate, with particular emphasis on whether the [conversion or] dismissal would be prejudicial to creditors.” *In re Zimmer*, 623 B.R. 151, 162 (Bankr. W.D. Pa. 2020) (quotations and citations omitted). “[D]ismissal of the bankruptcy case is the appropriate remedy when *neither* of the ‘twin pillars’ of bankruptcy are present...(1) a discharge for the honest but unfortunate debtor, and (2) when assets are available for the satisfaction of valid claims against the estate.” *Id.* (emphasis in original) (citations omitted). “[T]he second pillar [is present] even if the [debtor’s] assets are such that claims can only be paid a very small percentage on the dollar. The key is that at least some portion of claims, however small, be paid through liquidation of assets.” *Id.* (quoting *In re Lots by Murphy, Inc.*, 430 B.R. 431, 436 (Bankr. S.D. Tex. 2010)).

Upon conversion to Chapter 7, a disinterested person is appointed as a trustee who is responsible to, *inter alia*, “collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest”; “be accountable for all property received”; “investigate the financial affairs of the debtor”; and “if advisable, oppose the discharge of the debtor[.]” 11 U.S.C. § 704(a). A Chapter

7 debtor's discharge is open to challenge by the trustee, creditors, or the United States on several grounds, including: the debtor's failure to keep or produce adequate books or financial records; failure to explain satisfactorily any loss of assets; commission of perjury; failure to obey a lawful order of the bankruptcy court; and fraudulent transfer, concealment, or destruction of property that would have become property of the estate. 11 U.S.C. § 727.

### **CONCLUSION**

Blackmon blamed his former lawyer for his failure to originally schedule the discovered vehicles. The Court does not find Blackmon's explanation credible and the schedules—which ask detailed questions in plain language—were signed by him under penalty of perjury. *See* Fed. R. Bankr. P. 1008 & 28 U.S.C. § 1746. The evidence indicates bad faith in failing to list all his assets.

More importantly, Blackmon's behavior with respect to the Skid Steer evidences bad faith and constitutes both an unreasonable delay prejudicial to Kubota and a material default of his confirmed plan. *See* 11 U.S.C. § 1307(c)(1), (6). Despite the plan's surrender of the Skid Steer, Kubota still does not have possession of its collateral more than one year after confirmation. The Skid Steer was only discovered after Anderson found them in Ms. Blackmon's property. Even after this discovery, Blackmon made little effort to give Kubota access to the Skid Steer or otherwise coordinate its repossession of its collateral as of the hearing date. The Trustee has demonstrated bad faith, unreasonable and prejudicial delay, and a material default.

As the Chapter 13 Trustee has demonstrated cause, the Court must determine whether conversion or dismissal is in the best interests of creditors and the estate. Neither the Trustee, Blackmon, nor any creditors have requested dismissal of the case. Additionally, at least one of the “twin pillars” of bankruptcy appears to be present—assets are available to satisfy claims against the estate—which negates any benefit of dismissal. Further, a Chapter 7 trustee is better equipped



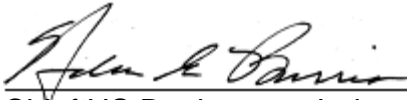
to discover and liquidate assets for the benefit of creditors and take any further action necessary on the facts of this case. Based on the foregoing, converting the case to Chapter 7 is in the best interests of creditors and the estate.

**IT IS, THEREFORE, ORDERED** that the Trustee's Motion to Convert is granted.

**FILED BY THE COURT  
04/28/2021**



Entered: 04/29/2021

  
Chief US Bankruptcy Judge  
District of South Carolina