UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 00-05354-W
Bluette E. Fisher,	**JUDGMENT**
Debtor.	Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Court recognizes Bluette E. Fisher's ("Debtor") election to convert the case, and, by separate order, the case shall be converted to Chapter 13. In addition, the Court orders that the Chapter 7 discharge issued on November 21, 2000 is conditionally vacated subject to Debtor's confirmation and completion of a Chapter 13 plan.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
January 30, 2002.

19

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy Court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

JAN 30 2002

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

SHEILA R. PHIPPS
Deputy Clerk

✓ sent to all cred/ parties on matrix

✓ WST
✓ KC
✓ JG

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 00-05354-W
Bluette E. Fisher,	**ORDER**
Debtor.	Chapter 7

THIS MATTER comes before the Court upon the Motion to Rescind Chapter 7 Discharge and to Convert Case to Chapter 13 (the "Motion") by Bluette E. Fisher ("Debtor"). Debtor argues that she filed a Chapter 7 case based upon the mistaken belief that she owned a life estate in her residence and that, because she held a limited property interest, she could retain her residence. The Chapter 7 Trustee, however, sought to liquidate the residence after discovering that Debtor owns only half the property in a life estate and that she owns the other half in fee simple. Because of the misunderstanding of her property ownership, Debtor requests that the Court vacate her Chapter 7 discharge entered November 21, 2000 and permit her to convert her bankruptcy case to Chapter 13 pursuant to 11 U.S.C. §706.[1]

No party in interest objected to the Motion or challenged Debtor's assertion of mistake, inadvertence, surprise, or excusable neglect. In fact, the Trustee appeared at the hearing through his attorney and expressed no objection to the conversion or the grounds asserted by Debtor as a basis for vacating the Chapter 7 discharge. In essence, no party challenged Debtor's good faith at this point in the case.

The Bankruptcy Code provides debtors a right to convert a case from Chapter 7 to

---

[1] Further references to the Bankruptcy Code shall be by section number only.

18

Chapter 13 at any time, provided the case has not been previously converted. See §706(a).[2] In addition, the debtor must be eligible to be a debtor in the chapter to which she is converting. See §706(d); see also In re Stern, 266 B.R. 322, 325 (Bankr. D. Md. 2001) (ruling that the debtor was not able to convert from Chapter 7 to Chapter 13 because the debtor's total unsecured debt exceeded the statutory limits permitted for a Chapter 13 debtor). Indeed, as one court noted, "[t]he statutory language is straightforward and seemingly confers an absolute right to convert 'at any time'. . ." In re Mosby, 244 B.R. 79, 83 (Bankr. E.D. Va. 2000); see also Finney v. Smith (In re Finney), 992 F.2d 43, 45 (4th Cir. 1993) (affirming the district court's decision that subjective bad faith, standing alone, is insufficient to abrogate the debtor's unqualified §706(a) right of conversion). In this District, the Court has generally treated a debtor's right to convert as absolute, subject to considering reconversion in appropriate circumstances.

At first blush, it appears that Debtor can convert her case to Chapter 13. Her case has not been previously converted, and she apparently meets the eligibility requirements to have a Chapter 13 case. Indeed, Debtor asserts that she has sufficient income to fund a Chapter 13 plan,

---

[2] Courts have debated whether a debtor's right to convert a bankruptcy case from Chapter 7 to Chapter 13 is absolute. Some courts have concluded that this right is absolute, provided the debtor is eligible to participate in the new Chapter to which she converted. See In re Widdicombe, 269 B.R. 803, 807 (Bankr. W D. Ark. 2001); see also Mason v. Young (In re Young), 237 F.3d 1168, 1174 (10th Cir. 2001) (ruling that the right to convert is absolute in part because bankruptcy courts will scrutinize the converted case). Another line of cases hold that the right to convert is absolute except in extreme circumstances. See Martin v. Martin (In re Martin), 880 F.2d 857, 859 (5th Cir. 1989). A slight variation of this line is that the right to convert is presumed but not absolute and is subject to the Court's determination that the conversion is appropriate; however, the power to deny conversion should be used sparingly and only in extreme circumstances. See In re Krishnaya, 263 B.R. 63, 69 (Bankr. S.D. N.Y. 2001); see also In re Pakuris, 262 B.R. 330, 335 (Bankr. E.D. Pa. 2001) (ruling that, in contested conversion proceedings, the Court will examine the facts of the case to determine whether conversion is appropriate).

and, according to Debtor's Schedules, it appears that Debtor's secured and unsecured debt does not exceed the limits prescribed in §109(e).

One potential problem to conversion, however, is the fact that Debtor has already received a Chapter 7 discharge. Courts have treated the issue of conversion in this context differently. For example, some courts have noted that, regardless of a debtor's prior discharge in Chapter 7, nothing in the Bankruptcy Code expressly prohibits the conversion of the case to Chapter 13. See Martin, 880 F.2d at 859 (concluding in dicta that post-discharge motions to convert should be treated the same as motions to convert where no discharge has been granted); Mosby, 244 B.R. at 86 (eschewing an absolute rule that bars debtors from converting a case to Chapter 13 after receiving a Chapter 7 discharge and instead reviewing these issues on a case by case basis). Although not a central holding in the case, this Court has previously stated that conversion from Chapter 7 to Chapter 13 may occur after the debtor receives his or her Chapter 7 discharge. See In re Butler, C/A No. 92-76511, slip op. 5 (Bankr. D. S.C. Feb. 2, 1993). Other courts have disagreed, concluding that a court must first examine the totality of the circumstances and consider the debtors' good faith, their ability to propose a confirmable Chapter 13 plan, the prejudice to creditors if the conversion is permitted, the efficient administration of the bankruptcy estate, and whether the conversion would be an abuse of the bankruptcy process before converting the case. See Pakuris, 262 B.R. at 335-36 (applying these factors and concluding that conversion was not warranted); see also In re Marcakis, 254 B.R. 77, 82-83 (Bankr. E.D. N.Y. 2000) (finding conversion unwarranted where the debtor no longer had any meaningful debts to repay in a Chapter 13 plan and could not propose a credible Chapter 13 plan).

The Court believes the best approach is to examine the appropriateness of a conversion to Chapter 13 after the issuance of a discharge in the case as a Chapter 7 case on a case by case basis. Although allowing a debtor to convert a Chapter 7 case after receiving the Chapter 7 discharge seemingly smacks of bad faith in an attempt to reap the benefits of both bankruptcy chapters, this Court believes sufficient safeguards may be put in place to recognize conversion in these situations while also preventing an abuse of the bankruptcy process. First, once a debtor has converted to Chapter 13, she must show that her Chapter 13 plan is proposed in good faith in order to confirm it. See §1325(a)(3). If there is an issue of a debtor's bad faith, the Chapter 13 Trustee, interested parties, or the Court sua sponte can address this issue at confirmation. Second, in a Chapter 13 case, a debtor must satisfy the Chapter 7 liquidation test under §1325(a)(4) and pay creditors the same value that the Chapter 7 Trustee would have collected and distributed in a Chapter 7 case. A plan that does not provide creditors at least what they would have received in the Chapter 7 case will not be confirmed. Finally, in situations of bad faith or abuse or upon the failure to achieve confirmation and completion of the debtor's Chapter 13 plan, the Court may consider reconverting the case to Chapter 7. See §1307(c).

In this case, the Court concludes that conversion should not be prohibited. As noted previously, no party, including the Trustee, raised allegations of Debtor's bad faith or that Debtor will be unable to fund a Chapter 13 plan. Moreover, Debtor asserts that she is an eligible Chapter 13 debtor and that she has not previously converted a case.

The remaining issue for the Court to decide is how to deal with Debtor's Chapter 7 discharge. In this Court's view, the maintenance of the Chapter 7 discharge in a case subject to a Chapter 13 discharge is inconsistent. See In re Hauswirth, 242 B.R. 95, 97 (Bankr. N.D. Ga.

1999) (conditioning conversion from Chapter 7 to Chapter 13 upon vacating the Chapter 7 discharge pursuant to Federal Rule 60 of Civil Procedure or, alternatively, §105 after concluding that debtors should not receive two discharges in the same case).[3] Furthermore, courts are divided as to a court's ability to set aside a discharge at the debtor's request. Cf. Markovich v. Samson (In re Markovich), 207 B.R. 909, 913 (BAP 9th Cir. 1997) (holding that a bankruptcy court did not have the equitable power to revoke a discharge outside the framework of §727); Mosby, 244 B.R. at 90 (potentially permitting a debtor to vacate a discharge by motion under Rule 60(b)).[4]

Under the circumstances of this case, the Court finds it appropriate to conditionally revoke Debtor's Chapter 7 discharge. It is therefore,

ORDERED, that the Court recognizes Debtor's election to convert the case, and, by separate order, the case shall be converted to Chapter 13.

---

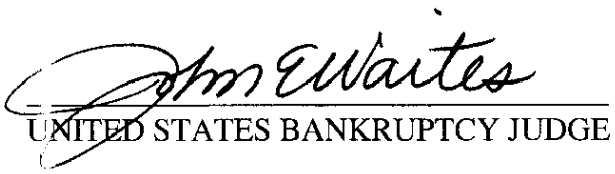
[3] Some treatises disagree with this approach. See 6 Lawrence P. King, Collier on Bankruptcy ¶706.02[3] (15th ed. 2001) ("Indeed, a debtor may request conversion even after a chapter 7 discharge has been entered. Since the Code makes no provision for revocation of the discharge in that event, the discharge remains operative and the converted case may proceed on that basis."); 4 Keith M. Lundin, Chapter 13 Bankruptcy §325-6 (3d ed. 2000) ("The Code does not require debtors to forfeit discharge as an entry fee for conversion to Chapter 13.").

[4] The authorities that permit debtors to rely on Rule 60(b) as a means to revoke their discharge allow the revocations only in limited circumstances. For example, one court conditioned the revocation of discharge under Rule 60 by requiring (1) no creditor affected by the outcome to object and all who appeared to concur in the entry of the order vacating or revoking the order granting discharge and (2) a lack of prejudice to interested parties and a lack of culpability on behalf of the debtor. See In re Jones, 111 B.R. 674, 680 (Bankr. E.D. Tenn. 1990). Another court cautioned that Rule 60 "functions as a safety valve to prevent miscarriages of justice, and would seldom, if ever, be appropriate simply because a litigant changes his or her mind." Mosby, 244 B.R. at 90 (refusing to set aside debtors' discharges where debtors belatedly changed their minds and decided they would receive better treatment in Chapter 13 than in Chapter 7).

IT IS FURTHER ORDERED that the Chapter 7 discharge issued on November 21, 2000 is conditionally vacated subject to Debtor's confirmation and completion of a Chapter 13 plan.

IT IS FURTHER ORDERED that this Order shall be served upon all creditors and parties in interest in this case, United States Trustee, Chapter 7 Trustee, and the Chapter 13 Trustee for the Charleston Division.

AND IT IS SO ORDERED.



UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
January 30, 2002.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy Court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

JAN 30 2002

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

SHEREE R. PHIPPS
Deputy Clerk

✓ Sent to all cred. / parties on Matrix

✓ UST
✓ KC
✓ JG