

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
at _____ O'clock & _____ min. _____
OCT 22 2002
BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (11)

IN RE:

Terry A. Trexler,

ENTERED

OCT 23 2002
Debtor.

K. E. P.

C/A No. 02-04126-W

JUDGMENT

Chapter 13

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Creditors' Motion is granted and Debtor's bankruptcy case is reconverted to Chapter 7.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
October 22, 2002.

02-133

88
0
1

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:

✓ OCT 23 2002 ✓

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

KIRK E. PORTH

Deputy Clerk

-ust

-Simpson

-Freeman

-McDullough

-P. Freeman

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
11:00 clock & 11:12 min
OCT 22 2002
BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (11)

IN RE:

OCT 23 2002

C/A No. 02-04126-W

Terry A. Trexler,

KEEP

ORDER

Debtor.

Chapter 13

THIS MATTER comes before the Court upon the Objection to Plan and Motion to Reconvert Case to Chapter 7 (the "Motion") filed by the South Carolina Supreme Court, the Lawyers' Fund for Client Protection, and Richard Ralphs (collectively, the "Creditors"). In the Motion, the Creditors move to reconvert Terry A. Trexler's ("Debtor") case to Chapter 7, and they base their motion on essentially two arguments. First, Creditors argue that Debtor's Plan is not feasible because he fails to list Ralphs's claim appropriately, which is alleged to exceed \$400,000.00, and therefore causes the Plan not to protect a secured creditor adequately. Second, Creditors emphasize that Debtor's case is filed in bad faith as evidenced by his failure to schedule all of his assets, namely his interest in a family-owned entity, I.P., LLC. To support this position, Creditors rely on Debtor's testimony to the South Carolina Supreme Court on April 3, 2002 when he admitted that he initially owned 100% of I.P., LLC but claimed he was completely divested of his interest after he informally transferred his interest. In this same testimony, however, Debtor admitted that the written records reflect that he is still the 100% owner of I.P., LLC. Finally, Creditors also aver that the land transfer between I.P., LLC and Debtor's family that occurred within the voidable preference time period suggests bad faith. In response, Debtor argues that he scheduled all creditors who filed proofs of claim and that Ralphs is not scheduled because he had not filed a proof of claim. Debtor also asserts that Creditors

failed to establish fault under 11 U.S.C. §1307 warranting the conversion of his bankruptcy case to Chapter 7.¹ Indeed, at the hearing held to consider this Motion, Debtor produced a copy of minutes of I.P., LLC that indicate that he was completely divested of his interest in the entity when he filed his Voluntary Petition.² After considering the pleadings in the matter, the parties' arguments, and the evidence, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52, applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7052.³

FINDINGS OF FACT

1. In August 1998, Debtor purchased a farm located in Sumter County, South Carolina, and its street address is 920 East Brewington Road. The farm includes a dwelling of approximately 3,000 square feet as well as eleven other buildings.
2. On September 28, 1998, Debtor formed I.P., LLC. According to the Articles of Organization, Debtor is the sole manager and the only member of the entity liable for its debts and obligations.
3. In October 1998, Debtor was suspended from practicing law.
4. On October 22, 1998, Debtor sold two parcels located at 920 Brewington Road, a forty-

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

² At the hearing, Debtor also produced a copy of his mortgage with Heritage Federal Bank, the mortgage's Adjustable Rider Supplement, and copies of checks negotiated by Mrs. James A. Trexler to Terry A. Trexler and to Heritage Federal Bank. Debtor sought to introduce all of these documents into evidence, and the Court took the matter under advisement. After reviewing these documents, the Court admits them into evidence.

³ The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and, to the extent any of the following Conclusions of Law constitute Findings of Fact, they are so adopted.

five acre tract and a nineteen acre tract, to I.P., LLC for \$100.00.

5. On January 28, 1999, I.P., LLC sold the forty-five acre tract to Debtor for \$5.00.

6. Also on January 28, 1999, Debtor executed a mortgage encumbering the forty-five acre tract for \$378,000.00 to Heritage Federal Bank.

7. Also on January 28, 1999, Debtor sold the forty-five acre tract to I.P., LLC for \$5.00.

8. On February 6, 1999, a copy of minutes from an I.P., LLC meeting reflect a change of ownership interest in the entity with Debtor now having a 17% ownership interest. The minutes also reflect Debtor receiving a loan from I.P., LLC totaling \$91,800.00, \$60,000.00 of which Debtor had already received from his parents, and, if Debtor did not repay this loan by January 1, 2000, then Debtor would lose his interest in I.P., LLC. These minutes were prepared by James W. Trexler, Debtor's brother.

9. On January 8, 2000, a copy of minutes from an I.P., LLC meeting reflect that Debtor's loan is past due and that Debtor forfeits his interest in I.P., LLC but that Debtor continues as President of the LLC. These minutes were also prepared by James W. Trexler.

10. On January 25, 2001, Debtor filed annual reports for 1999, 2000, and 2001 with the Secretary of State's office for I.P., LLC. The reports indicate that the information on file is correct and reflect no change in the ownership structure of the LLC.

11. On January 29, 2001, the South Carolina Supreme Court disbarred Debtor from practicing law.

12. On May 22, 2001, Debtor agreed to pay restitution to the Lawyers Fund for Client Protection in the amount of \$29,431.05 by September 30, 2001.

13. On October 18, 2001, I.P., LLC transferred the forty-five acre tract of the farm to James

W. Trexler, Hazelene Trexler, and James A. Trexler for \$5.00. As president of I.P., LLC, Debtor executed the transfer.

14. On February 27, 2002, the South Carolina Supreme Court ordered Debtor to appear before it on April 3, 2002 to show cause why he should not be held in civil or criminal contempt for failing to pay the restitution as required by the Supreme Court.

15. On April 2, 2002, Debtor filed his Voluntary Petition seeking bankruptcy relief under Chapter 7.

16. On April 3, 2002, Debtor testified before the South Carolina Supreme Court that there was an informal, oral transfer of his interest in I.P., LLC but that there was no formal, written transfer of this interest. In addition, Debtor admitted that, according to written records of the LLC, he remained the sole owner of the LLC.

17. On April 17, 2002, Debtor filed his Schedules and Statement of Financial Affairs. The Schedules indicate that Debtor owns no real property, little personal property other than a 1999 Dodge Truck, and that he earns no income and has monthly expenses totaling \$795.00.

18. On May 16, 2002, the §341 meeting was held. At this meeting, Debtor testified to several points, including the following:

(a) No formal documents were executed to indicate a formal transfer of Debtor's interest in I.P., LLC. Debtor testified an informal transfer occurred at a meeting thirty to sixty days after the LLC was formed and that minutes of that meeting might exist.

(b) Debtor has earned no income since August 2001. From 1998-2001, he received income from an insurance policy, but the only income he received at the time of the §341 meeting was "a few dollars here and there" from his family. Exh. F., page 18, lines 5-7.

(c) Debtor has not received a salary or any income from I.P., LLC.

(d) I.P., LLC is not a profitable business entity as, according to Debtor, "It hasn't made a dime." Exh. F, page 25, lines 6-9.

19. At the conclusion of the §341 meeting held on May 16, 2002, the Chapter 7 Trustee held the meeting open for thirty days to investigate Debtor's assets further and to explore other issues.

20. On June 17, 2002, the Court entered orders authorizing the Chapter 7 Trustee to conduct Rule 2004 examinations of James W. Trexler, Debtor's brother, Julie C. Trexler, Debtor's sister-in-law, and Hazelene Trexler, Debtor's mother. On June 19, 2002, the Court entered an order authorizing the Chapter 7 Trustee to conduct a Rule 2004 examination of James A. Trexler, Debtor's father.

21. On July 12, 2002, Debtor filed a Motion to dismiss his bankruptcy case.

22. On August 13, 2002, the Court held a hearing to consider Debtor's Motion to dismiss his bankruptcy case. The Court denied the relief sought and instructed counsel for the Chapter 7 Trustee to prepare an order reflecting this ruling.

23. On August 14, 2002, Debtor filed a Motion to convert his bankruptcy case from Chapter 7 to Chapter 13. Debtor also filed amended Schedules and a Notice, Chapter 13 Plan, and Related Motions.

24. Debtor's Amended Schedule I indicates that Debtor is employed by I.P., LLC and that Debtor earns \$833.33 monthly from I.P., LLC. The Amended Schedule I also indicates that Debtor's monthly expenses are \$450.00.

25. On August 22, 2002, the Court entered an Order converting Debtor's case to Chapter 13.

26. On September 9, 2002, the Court entered an Order denying Debtor's Motion to dismiss

his bankruptcy case.

CONCLUSIONS OF LAW

Section 1307(c) provides that a court can dismiss a Chapter 13 case or convert it to Chapter 7 for cause. Cause includes the number of factors listed in §1307(c) as well as filing a bankruptcy petition in bad faith. See Molitor v. Eidson (In re Molitor), 76 F.3d 218, 220 (8th Cir. 1996); In re Johnson, 228 B.R. 663, 668 (Bankr. N.D. Ill. 1999); In re Brunner, C/A No. 92-71010, slip op. at 3 (Bankr. D. S.C. Jun. 10, 1992). In determining whether a debtor has filed a petition in bad faith, most courts examine the totality of the circumstances and specifically consider (1) whether the debtor stated debts and expenses accurately, (2) whether the debtor made any fraudulent representation to mislead the court, and (3) whether the debtor unfairly manipulated the Bankruptcy Code. See Molitor, 76 F.3d at 220; Johnson, 228 B.R. at 668; see also Sladek v. Zeman (In re Sladek), 269 B.R. 229, 231 (D. Colo. 2001). Specifically, in Brunner, this Court outlined factors it considers important in gauging whether a debtor filed a case in bad faith, including the debtor's employment history and prospects, the debtor's honesty in representing facts, any unusual problems facing the debtor, and evidence of prepetition conduct or other actions that might render a debt nondischargeable. See Brunner at 3-4.

Applying the law to the facts of the case, the Court concludes that it should grant Creditors' Motion because there is cause to reconvert Debtor's case to Chapter 7 based upon Debtor's bad faith. The Court agrees with Creditors that the bad faith aspect of Debtor's case centers around his involvement with I.P., LLC. As the Findings of Fact indicate, Debtor has acted evasively and inconsistently regarding his interest in I.P., LLC. Indeed, to the Supreme Court in April 2002, Debtor testified that he was completely divested of his interest in I.P., LLC

by virtue of an informal transfer within his family but that no written record reflects this transfer. To the Chapter 7 Trustee in May 2002, Debtor's testified largely to the same point but hinted that minutes might exist reflecting the transfer. Then, at this Court's hearing on September 24, 2002 to consider the reconversion of Debtor's bankruptcy case to Chapter 7 based in part on Debtor's failure to include his interest in I.P., LLC in his bankruptcy Schedules, Debtor produced minutes of I.P., LLC meetings that indicate that Debtor forfeits his interest in that entity on January 8, 2000. This pattern of evasiveness indicates Debtor may not be disclosing his financial affairs completely or accurately and causes the Court to question Debtor's veracity and good faith. Similarly, Debtor has inconsistently described the income he receives from I.P., LLC, and this inconsistency also raises questions about Debtor's truthfulness. Specifically, Debtor began this bankruptcy case by indicating in his Schedules that he earns no income. To the Chapter 7 Trustee at the §341 meeting, he testified four times that he received no income or salary from I.P., LLC.⁴ In addition, Debtor testified that I.P., LLC was not a profitable entity. Yet, when Debtor converted his case to Chapter 13 on August 14, 2002 and needed regular income to be eligible for Chapter 13 relief pursuant to §109(e), Debtor amended his Schedule I to suddenly indicate that he earns a monthly income of \$833.33 from I.P., LLC.⁵ These two positions are

⁴ The following passages are excerpts of Debtor's testimony at the §341 meeting: in summarizing his role as the president of I.P., LLC, Debtor testified, "No salary. No income." (see Exh. F., page 19, lines 23-24); "Nobody gets a salary [from I.P., LLC]" (see *id.*, page 25, line 8); "I have not made an income on [the farm owned by I.P., LLC]" (see *id.*, page 36, lines 4-5); "There's never been a salary, period [from I.P., LLC]" (see *id.*, page 62, line 7).

⁵ The Court questions whether Debtor would be eligible for Chapter 13 relief pursuant to §109(e). At the §341 meeting, Debtor testified that I.P., LLC was not profitable and that it, to paraphrase Debtor, never made a dime. See Exh. F., page 25, lines 6-9. Yet, from this unprofitable entity, Debtor claims he earns regular income in his Amended Schedule I. The Court doubts whether an entity that Debtor previously portrayed as woefully under-capitalized

wholly inconsistent. See, e.g., Harford v. Moore Bros. Co. (In re Harford), No. 86-1178, 1986 WL 17681, at **1 (4th Cir. Oct. 2, 1986) (affirming a bankruptcy court's decision to dismiss a Chapter 13 case based upon the numerous inconsistencies between a debtor's testimony at a §341 meeting and the debtor's schedules and statement).

In addition, the numerous property transfers between Debtor, his family, and I.P., LLC are unexplained, and the latest transfer from I.P., LLC to Debtor's family on October 18, 2001 falls within the period during which a trustee can seek to avoid a transfer as fraudulent pursuant to §548(a). Based upon the Court's uncertainty as to Debtor's interest in I.P., LLC as well as the presumption that a conveyance from a transferor to a member of the transferor's family may be indicia that the conveyance was for the benefit of someone of close relationship to the transferor to the detriment of creditors, the Court concludes that the property transfer between I.P., LLC and Debtor's family is an additional ground for reconverting Debtor's bankruptcy to Chapter 7. See Anderson v. Blair (In re Blair), C/A No. 99-08835-W, Adv. Pro. No. 99-80410-W, slip op. at 6, fn. 5 (Bankr. D. S.C. Jun. 28, 2000); Brunner, at 4 (noting that evidence of any questionable prepetition conduct should be considered in determining whether a plan is proposed in good faith).

Finally, the Court concludes by emphasizing the importance of full and complete disclosure by debtors in their schedules and statements of financial affairs. A host of cases cite omissions from and errors in schedules as at least a partial basis for converting or dismissing a

and apparently without any real business prospects in the near future could provide him with the regular income he needs to fund a Chapter 13 plan. Moreover, there is the potential that Richard A. Ralphs, who obtained relief from the stay in order to finalize a judgment against Debtor, could have an award of punitive damages that pushes Debtor over the unsecured debt limits of §109(c).

Chapter 13 case pursuant to §1307(c) because of the debtor's bad faith. See Molitor, 76 F.3d at 221 (converting a case to Chapter 7 in part because the debtor misrepresented liabilities in his schedules); Sladek, 269 B.R. at 232, Toles v. Powers, No. 3:99-CV-1517-G, 1999 WL 1261453 (N.D. Tex. Dec. 28, 1999) (converting a case to Chapter 7 in part because the debtor failed to disclose assets); In re Shaheen, 268 B.R. 455, 462 (Bankr. E.D. Va. 2001) (dismissing a Chapter 13 case with prejudice from filing a petition in any bankruptcy court under any chapter for one year in part because the debtor submitted incomplete and inaccurate schedules and a statement of financial affairs); In re McNichols, 254 B.R. 422, 435 (Bankr. N.D. Ill. 2000) (dismissing a Chapter 13 case in part because the debtor failed to schedule her monthly 401(k) payroll deduction, which consequently distorted the debtor's income and expense statement); Johnson, 228 B.R. at 669 (converting a case to Chapter 7 in part because the debtor failed to disclose assets); In re Clark, 86 B.R. 593, 595 (Bankr. E.D. Ark. 1988) (dismissing a Chapter 13 case in part because the debtor filed incomplete schedules; specifically, the debtor failed to include all personal property she owned). The teaching to glean from these cases is that complete and full disclosure by debtors in their schedules and statement of financial affairs is critical, and, if the duty is not performed accordingly, debtors risk either having no case at all or losing their Chapter 13 case and proceeding in Chapter 7. The reason for this unflinching principle is because "accuracy, honesty, and full disclosure are critical to the functioning of bankruptcy," and are "inherent in the bargain for the discharge." Kestell v. Kestell, 99 F.3d 146, 149 (4th Cir. 1996) (citing In re Mascolo, 505 F.2d 274, 278 (1st Cir. 1974)). Accordingly, this Court has repeatedly stressed the principle articulated in Kestell. See, e.g., Anderson v. Hooper (In re Hooper), 274 B.R. 210, 220 (Bankr. D. S.C. 2001) ("Bankruptcy is a give-and-take process, and, in order for

Debtors to receive the benefits and protections of the Bankruptcy Code, they must fulfill their role of complete disclosure to their creditors and the Trustee.”) (citing Tillery v. Hughes (In the Matter of Hughes), 184 B.R. 902, 909 (Bankr. E.D. La. 1995)); In re Justice, C/A No. 02-01524-W, slip op. 8-9 (Bankr. D. S.C. Aug. 29, 2002) (“[B]ankruptcy schedules and statements of affairs are extremely important documents that are carefully designed to elicit certain information necessary to the proper administration and adjudication of cases. Debtors have a duty to complete these documents thoughtfully and thoroughly.”) (citations omitted). Because of this overarching principle and the Court’s reluctance to find Debtor’s elusive and ever-changing representations credible, the Court believes Debtor has failed to perform his duty as a debtor in bankruptcy and clearly, accurately, and truthfully provide his financial information to the Court and his creditors in order for his case to be administered efficiently.

Based upon the findings regarding Debtor’s bad faith, the Court concludes that it does not need to address the argument regarding Debtor’s treatment of Ralphs’s claim in his Amended Schedules.

CONCLUSION

From the arguments stated above, it is, therefore,

ORDERED that Creditors’ Motion is granted and Debtor’s bankruptcy case is reconverted to Chapter 7.

AND IT IS SO ORDERED.

Columbia, South Carolina,
October 22, 2002.


UNITED STATES BANKRUPTCY JUDGE

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:

✓ OCT 28 2011 ✓

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

KIRK E. PORTH

Deputy Clerk

-451

-Simpson.

-Freeman

-McClough

-P. Freeman