FILED

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JAN 0 3 2007

**IN THE UNITED STATES BANKRUPTCY COURT**

**FOR THE DISTRICT OF SOUTH CAROLINA**

United States Bankruptcy Court
Columbia, South Carolina (1)

ENTERED

JAN 0 3 2007

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| IN RE: | C/A No. 06-04387-JW |
| Clyde B. Livingston, | Chapter 13 |
| Debtor. | **JUDGMENT** |

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Clyde B. Livingston's ("Debtor") motion to dismiss the case is granted, American First Federal, Inc.'s motion for conversion of the case to chapter 7 is denied, and Community Resource Bank's motion to dismiss this case is moot. Pursuant to 11 U.S.C. § 109(g), the dismissal of this case is with prejudice for a period of 180 days to bar re-filing by Debtor under any chapter of the United States Bankruptcy Code.

John E. Waites

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
January 3, 2007

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

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| IN RE: | C/A No. 06-04387-JW |
| Clyde B. Livingston, | Chapter 13 |
| Debtor. | **ORDER** |

This matter comes before the Court on Clyde B. Livingston's ("Debtor") motion to dismiss the case, the chapter 13 trustee's (the "Trustee") petition to dismiss the case, Community Resource Bank's ("CRB") motion to dismiss this case, and American First Federal, Inc.'s ("AFF") motion for conversion of the case to chapter 7. CRB filed an objection to AFF's motion. AFF filed an objection to the Trustee's petition to dismiss. Debtor filed responses to the Trustee's petition and CRB's motion. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Pursuant to Fed. R. Bankr. P. 7052, made applicable to this proceeding by Fed. R. Civ. P. 52, 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 13 of the Bankruptcy Code on October 2, 2006. Debtor initially filed this case pro se, but has been represented by counsel since November 20, 2006.

2. On October 2, 2006, William K. Stephenson, Jr. was appointed as the chapter 13 trustee (the "Trustee").

3. CRB holds a second mortgage secured by Debtor's primary residence at 260 N. Brookside Dr. NW, Orangeburg, SC, and a mortgage on Debtor's rental property at 116 Gold Dr., Orangeburg, S.C.

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

4. AFF holds a judgment against Debtor in the amount of $136,847.51, plus interest in the amount of $76.33 per day, accruing from April 12, 2005.

5. When Debtor filed his petition, he did not include all of the required lists, schedules, and statements. Debtor requested and received an extension of time to file schedules, statements, and plan. On October 31, 2006, Debtor filed his remaining schedules, a Statement of Financial Affairs, and a plan. Debtor did not file a declaration as to the truth of these remaining schedules.

6. On November 15, 2006, the Trustee filed a petition to dismiss the case for failure to file an adequate plan.

7. On November 17, 2006, AFF filed an objection to the Trustee's petition to dismiss the case and a separate motion to convert the case to a chapter 7.

8. On November 30, 2006, CRB filed a motion to dismiss the case.

9. On December 1, 2006, CRB filed a motion for relief from stay.[2]

10. On December 6, 2006, CRB filed an objection to AFF's motion to convert the case to a chapter 7.

11. On December 7, 2006, the Trustee filed a second petition to dismiss the case for failure to make payments under the plan.

12. On December 8, 2006, Debtor filed a response to Trustee's petition to dismiss wherein he stated that he intended to file an amended plan prior to the hearing and that he wanted to preserve his right to remain in chapter 13 if feasible.

13. On December 11, 2006, Debtor filed a response to CRB's motion to dismiss wherein he stated again that he intended to file an amended plan prior to the hearing and that he wanted to preserve his right to remain in chapter 13 if feasible.

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[2] CRB's motion for relief from stay was granted by separate order on December 19, 2006.

14. On December 18, 2006, Debtor filed a voluntary motion to dismiss the case pursuant to 11 U.S.C. § 1307(b).

## CONCLUSIONS OF LAW

The issue before the Court is whether Debtor's case should be dismissed or converted to chapter 7. Section 1307(b) of the Bankruptcy Code provides that "[o]n 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." This section appears to allow Debtor to voluntarily dismiss his chapter 13 case as a matter of right. However, section 1307(c) provides that upon request of a party in interest, "a court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause…." In situations where a debtor's motion to dismiss and a party-in-interest's motion to convert are simultaneously presented to the Court, an issue arises regarding which subsection controls.

This Court recently addressed the issue of the debtors' right to dismiss their case against a creditor's pending motion to convert in In re Davis, No. 06-02808-DD, slip op. at 10 (Bankr. D. S.C. Oct. 2, 2006). In that case, Judge Duncan recognized a debtor's right to dismiss his case under 1307(b); however, he also acknowledged that there may be instances of egregious conduct or abuse of the bankruptcy system that could warrant a denial of a debtor's motion to dismiss, such as the abusive timing of the debtor's filing of the motion to dismiss.

In this case, Debtor waited to file his motion to dismiss until the eve of the hearing on the Trustee and CRB's motions to dismiss and AFF's motion to convert the case to chapter 7.[3]

[3] Debtor filed responses to the Trustee and CRB's motions to dismiss indicating that he intended to file an amended plan prior to the hearing and that he wanted to preserve his right to remain in chapter 13 if feasible.

Because the timing of Debtor's motion may raise a question of abuse of the judicial process under the reasoning of Davis, the Court will examine the merits of AFF's motion to convert.

When a motion to convert is filed, the Court must make a determination of whether cause exists for conversion and whether conversion is in the best interests of the creditors and the estate. 11 U.S.C. § 1307(c). AFF asserts that cause for conversion exists because (1) Debtor has engaged in unreasonable delay that is prejudicial to creditors and (2) Debtor has failed to file a plan timely under § 1321.

AFF first argues that Debtor's failure to timely file accurate schedules, statements, and a feasible plan amounts to unreasonable delay that is prejudicial to the positions of American First and other creditors. Debtor obtained an extension to file his schedules, statements, and plan until November 1, 2006. Debtor filed these documents on October 31, 2006. AFF asserts that Debtor has caused unreasonable delay by failing to file *accurate* materials and a *feasible* plan. As a result, AFF claims it has been prejudiced because it has been unable to review the materials and adequately prepare for the § 341 meeting in this case. Based on the evidence presented, the Court finds that AFF has not demonstrated sufficient unreasonable delay or prejudice to warrant relief under § 1307(c)(1). Further, the Court notes that § 1307(c)(9) specifies that only the Trustee may make a request for dismissal or conversion on the ground that the Debtor failed to file the materials required by § 521(1).

AFF further argues that Debtor's failure to file a feasible plan is grounds for conversion under § 1307(c)(3). Section 1307(c)(3) provides that failure to file a plan timely under section 1321 of this title amounts to "cause" for dismissal or conversion. Debtor filed his plan timely, but AFF argues that Debtor's failure to file a feasible plan amounts to filing no plan at all. This argument is not persuasive. If the plan is not feasible, then AFF could seek relief under

§1307(c)(5) following the Court's denial of confirmation of the plan and denial of a request for additional time for filing another plan or a modification of the plan.[4]

The Court is not convinced that AFF has demonstrated cause for conversion under either § 1307(c)(1) or § 1307(c)(3). Even if these facts amounted to sufficient "cause" under either of these sections, AFF has failed to present sufficient evidence showing that conversion would be in the best interests of creditors and the estate. AFF's only argument was that the debtor's unreasonable delay caused downstream creditors, such as AFF, to become progressively less secured as interest and fees continue to accrue on the debts owed to senior secured lienholders. No other creditors joined in AFF's motion.[5] The Court notes that AFF would suffer little prejudice if the case is dismissed rather than converted because, as a judgment creditor, it has significant collection and discovery rights in state court. A dismissal of the case would enable AFF to execute upon its judgment.

Based on the evidence presented, the Court finds that AFF's motion to convert the case to a case under chapter 7 should be denied and that the motion of Debtor to dismiss the case should be recognized and granted.[6] The Court notes that the voluntary dismissal by the debtor following a motion for relief from stay triggers § 109(g), which provides for automatic dismissal with prejudice for a period of 180 days.

Accordingly, it is hereby ORDERED

1) That Debtor's motion to dismiss the case is granted;

2) That American First Federal, Inc.'s motion for conversion of the case to chapter 7 is denied;

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[4] §1307(c)(5) provides that "denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or modification of a plan" amounts to cause for conversion or dismissal.
[5] CRB, a secured creditor, objected to AFF's motion to convert.
[6] The Trustee withdrew his petition to dismiss the case at the hearing on the motions.

3) That Community Resource Bank's motion to dismiss this case is moot; and

4) The dismissal of this case is with prejudice for a period of 180 days to bar re-filing by Debtor under any chapter of the United States Bankruptcy Code.

**AND IT IS SO ORDERED.**

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
January 3, 2007