UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

DAVID W. BAYES — Case No. 04-10846

Debtor(s)

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

Currently before the court is the motion of David W. Bayes ("Debtor") to convert his chapter 7 case to one under chapter 13. Opposition has been filed by Kim F. LeFebvre. Esq., Assistant United States Trustee ("UST"), Philip J. Danaher, Esq., Chapter 7 Trustee ("Trustee"), and Debora L. Bayes ("Debora"). The court has jurisdiction pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(A), and 1334(b).

FACTS

Based upon the pleadings submitted, the court finds the following:

1) The Debtor filed a voluntary petition pursuant to chapter 7 of the United States Code on February 13, 2004.

2) The section 341 meeting of creditors was held on March 17, 2004.

3) The court's docket reflects that the Trustee closed the § 341 meeting.

4) Notwithstanding the closure of the § 341 meeting, the Trustee requested additional information from the Debtor regarding assets and finances at the meeting.

5) It is undisputed that there was at least one non-disclosed asset by the Debtor involving real property on State Highway 30 in Amsterdam, New York (the "Real Property").

6) Disputed issues of fact exist about the extent of non-disclosure and the basis for non-disclosure with regards to the Real Property.

7) On March 30, 2004, the Debtor filed a motion to convert his chapter 7 case to chapter 13.

8) Oral argument was held in connection with the motion on April 29, 2004.

ARGUMENTS

The UST states that due to the inaccuracies and omissions in the schedules filed by the Debtor, the conversion should be denied. The UST provides an exhaustive list of the problems raised by the faulty information and argues that the Debtor's failure to provide accurate data shows a sufficient lack of good faith such that the conversion should be denied. The UST

acknowledges the split of authority regarding 11 U.S.C. § 706(a) on whether the right to convert is absolute. The UST cites two cases in the Second Circuit, *In re Marcakis,* 254 B.R. 77 (Bankr. E.D.N.Y. 2000), and *In re Krishnaya*, 263 B.R. 63 (Bankr. S.D.N.Y. 2001), for the proposition that the court has discretion to deny the conversion based on reasoning outside the strict parameters of § 706(a). The UST concludes by stating, "[w]hether the omissions were intentional or inadvertent, they reflect a level of reckless indifference to the debtor's duty to fully and accurately disclose his assets that should be considered by the court when determining whether the debtor has the requisite good faith to proceed with a chapter 13." (Resp. to the Debtor's Resp. to the UST's Objections to Debtor's Req. to Convert to Ch. 13 ¶ 6.)

The Debtor responds that any mistakes or omissions were inadvertent and not intentional; much of the disputed information was based on analysis by Debtor's counsel. In effect, the Debtor argues all of the problems are correctable by supplements and amendments to his petition. The objection of the Trustee is based on the Debtor's failure to provide the additional information he requested. Specifically, the Trustee requests that the "[m]otion converting this proceeding to a Chapter 13 proceeding brought by the debtor be denied until such time as the Chapter 7 Trustee receives all requested documentation and has time to review the same and make a determination of the assets involved in this proceeding ." (Aff. in Opp'n. at 2.)

The objection of Debora, the Debtor's ex-spouse, is based on her adversary complaint objecting to discharge and dischargeability. She requests that the conversion be denied and "the debtor's Chapter 7 case be stayed until the issues addressed in the complaint ... are fully and finally resolved ." (Answering Aff. at 2.) The Debtor did not specifically respond to the objections of the Trustee and Debora.

DISCUSSION

The primary issue in this case is whether there is an absolute right to convert a case from chapter 7 to chapter 13 pursuant to § 706(a). The court has recently addressed this issue in *In re Carrow,* Case No. 02-17838 (September 8, 2004).[1] Looking to the express language of § 706, this court held that a debtor has the right to convert from chapter 7 to chapter 13 as long as (1) the debtor's case was not previously converted, and (2) the debtor is eligible for chapter 13. *Id.*; *See* 11 U.S.C. § 706(a),(d). As such, the court respectfully declined to follow *Marcakis,* and *Krishnaya.*

No argument is put forth by the objectant that either (1) the Debtor's case was previously converted, or (2) the Debtor is not eligible for chapter 13 pursuant to § 109. Thus, the court finds no impediment to the conversion of the Debtor's chapter 7 case to chapter 13.

This court, however, shares the concerns of the Trustee and the UST regarding the Debtor's omissions and non-disclosure. The bankruptcy process is largely self-policing; trustees have to be able to rely on a debtor's frankness and veracity and the penalties for perjury. A debtor has a paramount duty to consider all questions posed on a statement or schedule carefully and see that the questions are answered completely in all respects. *In re Sofra*, 110 B.R. 989, 991 (Bankr. S.D. Fla. 1990) (citations omitted). As the court indicated in the case of *In re Raymonda,* Ad. Pro. No. 99-91199 (Feb. 9, 2001):[2]

> This court is intimately familiar with the concerns and responsibilities of trustees and the fundamental premise that this system cannot function without the full,

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[1] The court assumes familiarity with the *Carrow* decision.

[2] *Raymonda* dealt with an objection to discharge pursuant to § 727(a)(4). However, the basic concerns voiced by the court in *Raymonda* apply with equal force here.

> complete, and absolutely frank disclosure from debtors. The alternative would be chaos; trustees would have to approach each debtor and assume the worst, i.e. that the debtors have provided faulty or incomplete information. Debtors must never lose sight of the fact that, ordinarily, they come into this court voluntarily and request relief, ultimately leading to a discharge. The price for that discharge is timely, accurate and complete disclosure of all the information required by the Code.

Id. at 10.

As discussed in *Carrow,* the court has a number of avenues to guard against abuses in the system. The problems annunciated by the UST may or may not have involved fraudulent intent. At the very least, they display a cavalier disregard by the Debtor and his attorney of the responsibilities of a debtor seeking discharge: a careful review of all questions answered and information provided to ensure its accuracy. The court is sufficiently troubled to sua sponte require a hearing to discern the Debtor's intent and whether he harbors the requisite good faith to support his request for chapter 13 relief.

Pursuant to the reasoning set forth in *Carrow,* and based upon the foregoing, it is hereby

ORDERED, that the Debtor's chapter 7 case is converted to chapter 13; and it is further

ORDERED, that a chapter 13 Trustee shall be appointed; and it is further

ORDERED, that the Debtor appear and show cause on September 30, 2004 at 1:00 P.M. at the James T. Foley U.S. Courthouse, Room 306, Albany, New York as to why his chapter 13 case should not be reconverted to chapter 7 because of his preconversion conduct.[3]

Dated: September 9, 2004

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge

[3] The court assumes that the Debtor will strictly comply with the requirements of Fed. R. Bankr. P. 3015. If not, the court will consider that as independent grounds for the reconversion.