

In the United States Bankruptcy Court

for the Northern District of Iowa

RICHARD EARL SIRES
Debtor.

Bankruptcy No. 96-60777KW
Chapter 7

ORDER RE MOTION TO REVOKE DISCHARGE AND DISMISS CASE OR CONVERT TO CHAPTER 13

On January 29, 1997, the above-captioned matter came on for hearing on Debtor's Motion to Revoke Discharge and Dismiss Case or Convert to Chapter 13. Attorney Dennis Guernsey was present with Debtor. Also present was Chapter 7 Trustee Habbo Fokkena. After considering arguments of counsel, the Court took the matter under advisement pending briefs. The deadline for filing briefs is now past and this matter is ready for resolution.

STATEMENT OF THE CASE

Debtor filed his Chapter 7 Petition on April 3, 1996. The first Meeting of Creditors was scheduled for May 28, 1996. Trustee appeared at this meeting, however, the Minutes of the First Meeting of Creditors reflect that Debtor did not appear. The Trustee reset the First Meeting of Creditors for June 24, 1996. The Minutes of that meeting reflect that again the Trustee was present and Debtor did not appear. The Trustee again reset this matter for July 22, 1996. Debtor did appear at this Meeting and, upon examination, the Trustee noted that a homestead problem existed because of prior debt. Shortly thereafter, the Trustee filed an Objection to Exemption asserting that Debtor acquired his homestead on September 2, 1994 and Debtor had debts acquired or incurred prior to that time in the approximate amount of \$5,800.

Trustee's Objection to Exemption was filed on August 5, 1996. The discharge of Debtor was entered on August 8, 1996. The short period of time between the filing of the objection and the entry of discharge is due to Debtor's failure to appear at earlier 341 meetings. See FRBP 4004(a). Debtor filed a resistance to the objection to exemption on August 19, 1996. Subsequently, possibly recognizing the unassailable position of the Trustee, Debtor filed the pending Motion to Revoke Discharge and Dismiss Case or Convert to Chapter 13 on December 4, 1996. It is this matter which is before the Court.

In his Motion, Debtor states as a reason to revoke discharge:

That subsequent to filing his petition, the Debtor obtained better employment, so that he now feels that he no longer requires the protection offered by a Chapter 7 bankruptcy and that he can pay his debts in an orderly fashion.

Debtor asks the Court to revoke the discharge previously entered and either dismiss the case in its entirety or order the conversion of this case from Chapter 7 to Chapter 13.

Both the Objection to Exemption and the Motion to Revoke Discharge or Convert were set for hearing. At the commencement of the hearing, Debtor conceded the existence of pre-acquisition debt and conceded that the Objection to Exemption is valid. Also, at the commencement of the hearing, Debtor withdrew the Motion to Dismiss. The only issue for Court determination, therefore, is Debtor's request that the previously entered discharge be revoked and that Debtor be allowed to convert to Chapter 13. This is a core proceeding pursuant to 11 U.S.C. 157(b)(2)(A).

CONCLUSIONS OF LAW

Debtor was granted a discharge pursuant to 11 U.S.C. 727. The Court may revoke a Chapter 7 discharge under 727(d) as follows:

- d. on the request of the trustee, a creditor or the United States trustee, and after notice and a hearing, the Court shall revoke a discharge granted under subsection (a) of this section if -
 - 1. such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;
 - 2. the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or
 - 3. debtor committed an act specified in section (a)(6) of this section.

No allegation is made in this case that Debtor procured his discharge through fraud. The Code makes no specific provision allowing a Debtor to seek revocation of discharge. Based on the language of 727 (d), some courts have held that debtors have no statutory grounds to revoke their own discharge. See In re Wyciskalla, 156 B.R. 579, 580 (Bankr. S.D. Ill. 1993) (holding that debtors have no statutory authority to seek revocation of Chapter 7 discharge to convert to Chapter 13, based on 727(d)); In re Leiter, 109 B.R. 922 (Bankr. N.D. Ind. 1990) (same).

Most courts hold that a discharge may not be revoked on general equitable grounds. In re Daniels, 163 B.R. 893, 897 (Bankr. S.D. Ga. 1994); Wyciskalla, 156 B.R. at 580. One court has allowed a Chapter 7 discharge to be revoked if 1) the discharge is meaningless, 2) no postpetition debts have been incurred and 3) the debtor is entitled to convert under 706. In re Jones, 111 B.R. 674, 677 (Bankr. E.D. Tenn. 1990).

Rule 60(b), made applicable to Bankruptcy Courts through Bankruptcy Rule 9024, gives courts the power to reconsider their orders for mistake, inadvertence, surprise, excusable neglect or "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(1, 6). In re Cisneros, 994 F.2d 1462, 1465 (9th Cir. 1993), invoked this rule in revoking a Chapter 13 discharge to correct its own mistake in overlooking a proof of claim. Daniels acknowledged that a court can revoke a Chapter 13 discharge based on mistake of the court, but not based on mistake by a party. 163 B.R. at 897.

The 8th Circuit has held that Rule 60(b) is not a vehicle for relief because of carelessness. Sutherland v. ITT Continental Baking Co., 710 F.2d 473, 476 (8th Cir. 1983); see also In re Seyfert, No. 87-01375D, slip op. at 3 (Bankr. N.D. Iowa Oct. 8, 1987). Rule 60(b) relief should not be afforded based on ignorance of the law or carelessness of the parties in having failed to timely effect a choice of

remedy. Leiter, 109 B.R. at 925 (refusing to revoke Chapter 7 discharge to allow conversion to Chapter 13).

The court in Wyciskalla refused to apply Rule 60(b) to revoke a Chapter 7 discharge where debtor reconsidered the wisdom of his original decision to file his petition in bankruptcy. 156 B.R. at 582. Another court refused to revoke a Chapter 7 discharge where debtor was disappointed with past legal advice. In re Tardiff, 137 B.R. 83, 87 (Bankr. D. Me.), vacated and remanded on other grounds, 146 B.R. 499 (D. Me.), aff'd on remand, 145 B.R. 357 (Bankr. D. Me. 1992) Wyciskalla noted a concern for allowing the debtor to avoid statutory restrictions on the frequency of filing by gaining revocation of discharge. 156 B.R. at 581 n.5.

This Court has reviewed the entire record presented. It is the Court's conclusion that Debtor's Motion to revoke the discharge previously entered must be denied. No statutory or general equitable authority exists to revoke Debtor's Chapter 7 discharge. Even applying the more relaxed standards set forth in Jones, *supra*, no grounds exist to set aside this discharge.

However, ruling that Debtor is not entitled to a revocation of discharge does not end the analysis. Revocation of discharge under 727(d) and conversion under 706 are separate concepts and Debtor has asked the Court to convert from a Chapter 7 to a Chapter 13. Section 706 provides that:

- a. The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.
- b. On request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time.
- c. The court may not convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests such conversion.
- d. Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

The final issue for determination, therefore, is whether Debtor can convert to a Chapter 13 from a Chapter 7 after entry of discharge. Courts addressing this issue have variously resolved this question. Some have concluded that the conversion language contained in the first sentence of 706 is intended to apply only until such time as a Chapter 7 discharge has been entered. These courts have concluded that after the entry of a Chapter 7 discharge, conversion to another Chapter is precluded. Jones, 111 B.R. at 680.

Other courts acknowledge a conditional right to convert after discharge under 706. These courts conclude that the court has the authority to evaluate the debtor's good faith in proposing Chapter 13 conversion, both prior to authorizing the actual conversion and on an ongoing basis as the Chapter 13 case progresses. In re Spencer, 137 B.R. 506, 516 (Bankr. N.D. Okla. 1992).

A final category of cases gives unconditional applicability to the first sentence of 706. These courts conclude that the language of 706 provides that a debtor may convert a case under Chapter 7 to another Chapter at any time, limited only by the condition that the debtor has not previously converted the case under 1112. In re Jennings, 31 B.R. 378, 380 (Bankr. S.D. Ohio 1983).

The record establishes that this Debtor has not made such a prior conversion. The majority rule appears to be that under such circumstances Debtor has an absolute right to convert and a Court has no authority to block such a conversion. Both circuit courts which have considered this question have recognized the right of the debtor to make such a conversion. In so doing, however, both courts recognize that substantial issues may remain concerning feasibility, good faith and the impact of the previously granted discharge upon the Chapter 13 case. However, these courts conclude that these issues must be determined after the conversion. In re Martin, 880 F.2d 857 (5th Cir. 1989); In re Finney, 992 F.2d 43 (4th Cir. 1993). The Eighth Circuit has not addressed this issue.

It is the conclusion of this Court that the majority rule gives literal meaning to the language of 706 and that Debtor is entitled to convert a case whether or not a discharge has already been granted. While opposing interpretations may provide summary and rapid disposition of this type of case, the literal language of 706 is compelling. Additionally, the integrity of the bankruptcy process is preserved by giving literal meaning to 706, thereby allowing the conversion and reserving all challenges to the Chapter 13 case until after the conversion has occurred. The reservation of these challenges includes, but is not limited to, bad faith and feasibility issues.

It is the conclusion of this Court that no grounds exist under this record to revoke the discharge previously granted to Debtor. Likewise, there is no prohibition under 11 U.S.C. 706 to Debtor converting from a Chapter 7 to a Chapter 13. In so doing, Debtor must evaluate his case and determine whether a Chapter 13 Plan can be presented which is in good faith and feasible. If conversion occurs, all issues and challenges to the Chapter 13 case remain intact.

WHEREFORE, for the reasons set forth herein, Debtor's Motion to Revoke Discharge is DENIED.

FURTHER, Debtor is granted until March 3, 1997 to elect whether to convert to a Chapter 13. Debtor shall file his election in writing with the Court.

SO ORDERED this 19th day of February, 1997.

Paul J. Kilburg
U.S. Bankruptcy Judge