NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE:	:	CHAPTER
Mac and Maryse Mac Truong,	:	CASE NO.: 03-40283 (NLW)
Debtor.	:	

Before: HON. NOVALYN L. WINFIELD

A P P E A R A N C E S :

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The debtors have moved pursuant to 11 U.S.C. § 706, to convert their Chapter 7 case to a Chapter 13 case and to stay the Chapter 7 Trustee from taking any further action in their case until this conversion motion is decided. For the reasons set forth in greater detail below, the Court denies the debtors' motion to convert from Chapter 7 to Chapter 13.

This Court has jurisdiction to review and determine this matter pursuant to 28 U.S.C. §§ 1334 and 157(a), and the Standing Order of Reference issued by the United States District Court for the District of New Jersey on July 23, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A). The following constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure § 7052.

STATEMENT OF FACTS

On September 15, 2003 the debtors, Mac Truong and Maryse Mac-Truong ("the Truongs") filed a joint Chapter 7 petition. Thereafter, on September 16, 2003 Steven P. Kartzman ("Trustee") was appointed as the trustee to administer the bankruptcy case. From the petition date to the present, the Truongs' case has remained as a Chapter 7 case and Steven Kartzman has continued as the Chapter 7 Trustee.

The basis for the Truongs' motion to convert is somewhat unclear because they do not present detailed facts. They state that they have an annual income of $25,000, IRA savings of approximately $130,000, and an expectation of recovering the sum of $4,500,000.00. The Court infers that the Truongs offer this information to demonstrate that they can fund a Chapter 13 Plan. Additionally, the Truongs note that during their bankruptcy they settled with judgment creditor Broadwhite Associates, ("Broadwhite") reducing a claim of approximately $360,000 to $15,000.

Further, they claim that their residence has a present value of $630,000.00. Consequently, the Truongs state that "we are presently not at all insolvent and are quite capable of paying our undisputed debts and that we absolutely need our residence to survive," and that "it is in our best interest and right pursuant to 11 U.S.C. § 706(a) to convert this Chapter 7 case into one under Chapter 13." (Truong cert., ¶ 8.). The Court infers that these assertions are intended to illustrate the need for and viability of a Chapter 13 case.

The Trustee challenges the Truongs' calculation of their allowable liquidated and noncontingent debt. He points out that even after reducing the Broadwhite claim to $15,000, a review of the filed proofs of claim reveals that the Truong's noncontingent, liquidated unsecured claims amount to $398,369.97. He observes that this sum exceeds the $290,525 eligibility cap under 11 U.S.C. § 109(e) for Chapter 13 relief that was in effect when the Truongs filed their petition. Additionally, the Trustee points out that the Truongs have not presented the full extent of their obligations. Largely as a result of the protracted and extensive litigation to recover the fraudulent conveyance of the Truongs' residence, the total legal fees of the Trustee in the Chapter 7 case amount to approximately $215,000. These fees will constitute administrative expenses if the case is converted to a Chapter 13 case.

The Court also notes that the Truongs' assessment of their unsecured prepetition debts is at variance with amounts scheduled in their bankruptcy petition. The Truongs scheduled unsecured priority claims of $95,550.00 and unsecured nonpriority claims of $5,204,680. These schedules were certified by the Truongs under penalty of perjury and have not been amended to date. These facts substantially undercut the Truongs' present analysis of their liabilities.

Additionally, the Court questions the veracity of their income and assets as stated in their

motion to convert. In May 2006 the Truongs filed an application to proceed In Forma Pauperis in connection with an appeal. In that application, under penalty of perjury, they claimed that they had negligible present income and that their IRA account had a value of only $8,000. The remarkable change in the amount of the Truongs' IRA account (from $8,000 to $130,000) and income (from negligible to $25,000) in less than one year is extraordinary. Thus, none of their statements regarding their financial condition are consistent, and the Court concludes that the Truongs' statements regarding income are unreliable. Furthermore, the Truongs have no prospect of recovering $4,500,000. That claim is based on their belief that they are entitled to the proceeds of certain funds held in Charles Schwab investment accounts. The right to those funds have been thoroughly litigated in the courts of the State of New York, and determined adversely to the Truongs. By an opinion dated May 3, 2006 in Adversary Proceeding 09-2494, this Court held that the Truongs are estopped from using the bankruptcy court as a forum to relitigate the ownership of the Charles Schwab accounts. Accordingly, there is no $4,500,000 recovery that can be used to fund a Chapter 13 Plan.

Finally, the conduct of the Truongs in the course of their case strongly suggests to this Court that the motion to convert is but one more obstacle raised by the Truongs to thwart the Trustee's sale of their residence. The dockets of this case and the adversary proceedings amply reveal repeated motions for reconsideration by the Truongs that were found to be factually and legally unsupported. The Truongs' fraudulent transfer of their residence has been the subject of a heavily litigated adversary proceeding which ultimately resulted in a series of summary judgments in favor of the Trustee. Indeed, as a consequence of the unwarranted motion practice, this Court imposed a Filing Injunction against the Truongs which required the Truongs to receive permission from the Court

prior to filing any further motions. Significantly, the present motion was brought only after the Trustee's motion to remove the Truongs from the residence on account of their failure to cooperate in the sale of their residence. The instant motion appears to be nothing more than another effort to preclude the Trustee from selling the residence.

DISCUSSION

This motion to convert presents two questions, (i) whether 11 U.S.C. § 706 prevents the Truongs from converting to Chapter 13 because they are not eligible to be Chapter 13 debtors under 11 U.S.C. § 109(e), and (ii) even if the Truongs are eligible Chapter 13 debtors under 11 U.S.C. § 109(e), whether the court should deny the motion based upon a finding of bad faith.

A. Debtors are ineligible under 11 U.S.C. § 109(e)

While the provisions of 11 U.S.C. § 706(a) provide that a debtor "may" convert a bankruptcy case from one Chapter to another, this right to convert is not absolute and is limited by the text of 11 U.S.C. § 706(d) which prohibits conversion to a Chapter for which a debtor is ineligible. Marrama v. Citizens Bank of Mass., 125 S.Ct. 1105 (2007) ; Matter of Pearson, 773 F.2d 751, 754 (6th Cir. 1985); Colliers on Bankruptcy, ¶ 706.01, 706-2 (15th Ed. 1984). 11 U.S.C. §§ 706 (a) and (d) provide in relevant parts:

> (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.
>
> (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."

11 U.S.C. §§ 706(a) and (d).

Under 11 U.S.C § 109(e), " [o]nly an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $[290,525.00],[1] ...may be a debtor under chapter 13 of this title." When the Truongs filed their Chapter 7 petition on September 15, 2003, they listed a total of $5,204,680 in unsecured nonpriority claims. The Truongs have never amended this amount in the three and one-half years that this case has been pending. Clearly, $5,204,680 exceeds the Congressionally-mandated limit of $290,525.00. Moreover, even if the Court considers the filed proofs of claim as reflecting the true prepetition unsecured debt, those claims amount to $398,369.97, which still exceeds the allowable debts limits for unsecured debt. Therefore, on the bare facts of this case and on face of the statute, the Truongs are ineligible to be Chapter 13 debtors and the conversion motion must be denied. In re Slominicki, 250 B.R. 531, 532 (Bankr. W.D.Pa. 2000).

Furthermore, the legislative history for 11 U.S.C. § 706 makes it clear that conversion to Chapter 13 may only occur if the debtor meets the monetary criteria set forth in 11 U.S.C § 109(e). The Senate Report discussing § 706(d) specifically states that "[S]ubsection d... reinforces [11 U.S.C. §] 109 by prohibiting conversion to a Chapter unless the debtor is eligible to be a debtor under that Chapter." S. Rep. No. 989, 95th Cong., 2d Sess. 94, reprinted in 1978 U.S. Cong. Code & Admin. News 5787, 5880.

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[1]The Truong's eligibility for Chapter 13 relief is measured as of the date that they initially filed for bankruptcy, September 15, 2003. The debt ceiling for eligibility is adjusted periodically pursuant to 11 U.S.C. § 104(b). For the 3 year period beginning April 1, 2001 (that applicable to this matter), the ceiling for unsecured debt in a Chapter 13 case is $290,525.00, as established by notice dated February 20, 2001 by the Judicial Conference of the United States [66 F.R. 10910]. In re Arcella-Coffman, 318 B.R. 463, 467, n.1 (Bankr. N.D. Ind. 2004).

B. Bad Faith Prohibits Conversion

Even if the Truongs met the eligibility limits of 11 U.S.C. § 109(e), conversion to Chapter 13 would not be appropriate. The Supreme Court recently ruled that there is no absolute right to convert a Chapter 7 case to a Chapter 13 case, and that bad faith may form the basis for denial of such a conversion motion. Marrama v. Citizens Bank of Mass., 127 S.Ct. 1105 (2007). In Marrama, the debtor alleged that his principal asset, a house in Maine, had no value, and he denied that he had transferred any property other than in the course of ordinary business during the year preceding the filing of his petition. Id. at 1108. In fact, the house had "substantial value" and the debtor had transferred the house to a newly created trust for no consideration seven months prior to filing for bankruptcy. Id. Marrama later admitted that he transferred the house to protect it from his creditors. When the trustee declared that he intended to recover the house in Maine as an asset of the estate, Marrama filed a Notice to convert to Chapter 13 status. Id. At the hearing on conversion, Marrama that his "misstatements about the Maine property were attributable to "scrivener's error," that he had originally filed under Chapter 7 rather than Chapter 13 because he was then unemployed, and that he had recently become employed and was therefore eligible to proceed under Chapter 13. Id. at 1108-1109. The bankruptcy court rejected these arguments. It ruled "that there is no 'Oops' defense to the concealment of assets and that the facts established a 'bad faith' case." Id. at 1109. On appeal, the debtor argued that he had an absolute right to convert his Chapter 7 case to a Chapter 13 case. Neither the Bankruptcy Appellate Panel not the First Circuit Court of Appeals were persuaded by the debtor's argument.

The Supreme Court in Marrama affirmed the decision of the First Circuit. It agreed with the First Circuit that the right to convert from Chapter 7 to Chapter 13 is "absolute only in the absence

of extreme circumstances." Id. at 1109 (quoting In re Marrama, 313 B.R. 525, 531 (1st. Cir. BAP 2004)). The Supreme Court's majority decision was based in part on the construction of the word "cause" in 11 U.S.C. § 1307(c). Id. at 1110. The Court noted that bankruptcy courts have found that dismissal of a Chapter 13 case for prepetition bad faith conduct is implicitly authorized by the words 'for cause' in § 1307(c). Id. The Court further reasoned that

> in practical effect, a ruling that an individual's Chapter 13 case should be dismissed or converted to Chapter 7 because of prepetition bad-faith conduct, including fraudulent acts committed in an earlier Chapter 7 proceeding, is tantamount to a ruling under Chapter 13. That individual, in other words, is not a member of the class of "'honest but unfortunate debtor[s]'" that the bankruptcy laws were enacted to protect. See Grogan v. Garner, 498 U.S. at 287. The text of § 706(d) therefore provides adequate authority for the denial of his motion to convert.

Id. at 1110-1111. Further, the Supreme Court noted that the bankruptcy courts have broad equitable authority to present abuse of process. Id. In short, Manama found that bad faith may be a basis to deny conversion from Chapter 7 to Chapter 13.

The facts in Marrama are not dissimilar to the facts in the case at bar. Here, the Truongs transferred their property to family members and corporate entities to put it beyond the reach of the Trustee and their creditors. They have made inconsistent and unconvincing explanations of their assets and liabilities. Moreover, they filed this motion to convert only after the Chapter 7 Trustee moved to remove them from their residence for failure to cooperate with him. This type of bad faith conduct makes the Truongs unworthy of, and therefore ineligible for the benefits of Chapter 13. A bankruptcy court will not permit the abuse of the bankruptcy process. See In re Jeffrey, 176 B.R. 4 (Bankr. D. Mass. 1994)(conversion denied because of debtors' concealment of an asset and to convert would be a "gross abuse" of Chapter 7).

CONCLUSION

The motion to convert to Chapter 13 must be denied. First, under 11 U.S.C. § 109(e), the Truongs simply are not eligible to be Chapter 13 debtors. Second, their conduct throughout the Chapter 7 case readily demonstrates that the motion to convert is a bad faith attempt to thwart the Chapter 7 Trustee's effort to sell the residence.