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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
UNPUBLISHED OPINION

In re)	
)	
LARRY D. CHRISTENSON and)	Bankruptcy Case No. 82A-01080
SUSAN M. CHRISTENSON,)	
)	
Debtors.)	
)	
RONDA SUE EICKS, aka)	Bankruptcy Case No. 82A-01108
Ronda Sue Benson,)	
)	
Debtor.)	
)	
RICHARD A. CARLGREN,)	Bankruptcy Case No. 82A-01128
)	
Debtor.)	
)	
GARY ALLEN WILLDEN,)	Bankruptcy Case No. 82A-01156
)	
Debtor.)	
)	
EVERETT JOHNSON)	Bankruptcy Case No. 82A-01157
aka Joe Everett Johnson,)	
aka Peppermint Parlor)	
Burgers & Ice Cream and)	
BEATRICE L. JOHNSON,)	
)	
Debtors.)	MEMORANDUM OPINION AND ORDER
)	

APPEARANCES

Richard Calder of Salt Lake City, Utah, attorney for each debtor; Judith A. Boulden, BOULDEN & GILLMAN, Salt Lake City, Utah, trustee, acting pro se in each case.

CASE SUMMARY

These matters come before the Court on the trustee's objections to the debtors' request for dismissal, under Section 1307(b) of the Code, and trustee's motions to convert these cases to cases under Chapter 7.

JURISDICTION

This Court has jurisdiction over these cases under 28 U.S.C. 157; and further finds that these are "core matters" within the meaning of 28 U.S.C. 157(b)(1), as exemplified in 28 U.S.C. 157(b)(2)(A) and (O).

FACTS AND PROCEDURAL BACKGROUND

In 1982, these debtors by and through their attorney, Richard Calder, filed separate petitions under Chapter 13 of the Bankruptcy Code. No schedules of any kind were ever filed with the Court in any of these cases. On June 2, 1982, the respective debtors requested the Court to dismiss each case, pursuant to Section 1307(b) of the Code. In each matter, an Order of Dismissal was signed by Judge Ralph R. Mabey on the same date; and, on June 28, 1982, orders approving the final report of and discharging the Chapter 13 trustee were also entered in each case. On July 8, 1982, the trustee filed belated objections to

the debtors' request for dismissal, and a motion to convert each case to one under Chapter 7. On August 16, 1982, a hearing was held before this Court at which the trustee argued that the Order of Dismissal in each case should be vacated because none of the debtors had filed schedules and, without the information provided on them, the trustee could not ascertain whether each dismissal was in the best interest of creditors or whether each case should be converted to a case under Chapter 7, pursuant to Section 1307(c) of the Code.

DISCUSSION

The dismissals of these Chapter 13 cases are governed by Section 1307(b),¹ which provides in pertinent part that:

(b) On request of the debtor at any time if the case has not been converted under section 706 or 1112 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

11 U.S.C. 1307(b). This Court has found four cases that interpret and apply this section of the Code:

- (1) In re Gillion, 31 B.R. 550, 10 B.C.D. 1354, C.C.H. Para. 69330 (Bky. E.D. Ark. 1983);
- (2) In re Gillion, 36 B.R. 901 (E.D. Ark. 1983);
- (3) In re Benediktsson, 34 B.R. 349, 11 B.C.D. 209, 9 C.B.C. 2d 840, C.C.H. Para. 69553 (Bky. W.D. Wa. 1983);
and,

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Also governing dismissals in general are Section 305 of the Code and Bankruptcy Rule 1017.

(4) In re Zarowitz, 36 B.R. 906, 11 B.C.D. 703 (S.D. N.Y. 1984).

The case of In re Gillion was treated twice: once, in the United States Bankruptcy Court for the Eastern District of Arkansas, Western Division and again, on appeal, in the United States District Court for the District of Arkansas, Western Division. In that case, the bankruptcy court found that the debtor filed a petition under Chapter 13 on February 2, 1982. The debtor's plan was confirmed on April 4, 1982. The plan was subsequently modified on May 27, 1982, June 29, 1982, and October 8, 1982. The debtor eventually defaulted in her payments under the plan. After an unsuccessful attempt to rehabilitate herself through negotiations with the Chapter 13 trustee, the debtor, on May 27, 1983, moved the court to dismiss the Chapter 13 proceeding, pursuant to Section 1307(b) of the Code. The court denied the debtor's motion to dismiss and her motion to reconsider, reasoning that, while Section 1307(b) gives the debtor the right to dismiss, "that section must be read in conjunction with 11 U.S.C. § 1307(c) which confers upon the Court the discretion to dismiss or convert." As further grounds for its denial, the court said that to allow the debtor to dismiss "would be contrary to the spirit and purpose of this Chapter 13 and clearly not in the best interest of the creditors." In re Gillion, 31 B.R. 550 at 552.

On appeal, the United States District Court for the District of Arkansas overruled the bankruptcy court and vacated its order

denying the debtor's motion to dismiss, holding that, prior to the entry of an order converting the case, a bankruptcy court has no discretion in ruling on a debtor's motion to dismiss a Chapter 13 case. The court reasoned that "from the plain and ordinary meaning" of Section 1307(b) "a Chapter 13 debtor has an absolute right to dismiss his [sic] action prior to the conversion of such proceeding to a Chapter 7. . ." The court further rejected the theory that Sections 1307(b) and 1307(c) were to be construed together, "in pari materia," because they have a common purpose:

On the contrary, each [section] is intended to accomplish an objective separate and apart from the other. Therefore, they should not have been construed in pari materia. Sutherland Statutory Construction, 4th Edition, ¶51.03 provides:

[Sections of a statute] are considered to be in pari materia . . . when they . . . have the same purpose or object.

In re Gillion, 36 B.R. 901, at 906.

Moreover, the district court found in error the bankruptcy court's reasoning that a dismissal would not be in the best interest of creditors. In upholding a Chapter 13 debtor's absolute right to dismiss under Section 1307(b), the Arkansas District Court concluded:

By electing to dismiss her Chapter 13 action, the debtor has elected to limit her remedies and rights available in the state courts and the Bankruptcy Court may not nullify this choice by finding that it would be equitable to the debtor and creditors to have their rights and remedies resolved in the Bankruptcy Court.

In re Gillion, 36 B.R. 901, at 906.

In the case of In re Benediktsson, supra, the trustee of a Chapter 13 case moved to have the case converted to one under Chapter 7. The debtors responded with a motion to dismiss. The court noted that:

At the nub of this dispute is the fact that certain alleged preferential mortgages have been released to the debtors' counsel subsequent to the filing of the debtors' Chapter 13 petition. If the debtors' case were now to be dismissed, it is likely that debtors will record the releases of the mortgages, thereby increasing their homestead exemptions, with the effect that potential recovery of the benefits of avoidance of the alleged preferential transfer may be lost by debtors' creditors.

In re Benediktsson, supra, at 350.

In spite of these facts, the Benediktsson court dismissed the case stating (1) that Section 1307(b) means what it says and that, without notice and a hearing, debtors could dismiss their Chapter 13 case at any time prior to the conversion of the case; (2) that the legislative history fully supports the court's conclusion;² (3) that to prevent a Chapter 13 debtor's exercise of an absolute right to dismiss would be a significant departure from prior law, which is unlikely to have gone unnoticed in the

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"Subsections (a) and (b) confirm, without qualification, the rights of a chapter 13 debtor to convert the case to a liquidating bankruptcy case under chapter 7 of title 11, at any time, or to have the chapter 13 case dismissed. Waiver of any such right is unenforceable." See H. Rep. 95-595, 95th Cong., 1st Sess. (1977) 428, U.S. Code Cong. & Admin. News 1978 p. 5787, 6384; and S. Rep. 95-595, 95th Cong., 2nd Sess. (1978) 141, U.S. Code Cong. & Admin. News 1978, p. 5927.

legislative history; and (4) that the court's conclusion accords with the strong social policy behind Chapter 13, favoring the voluntary payment of debts by individuals. The court also held that subsections (b) and (c) of Section 1307 mean that, in the event "the debtor does not move for dismissal, the Court may exercise discretion and convert or dismiss the Chapter 13 case for cause shown." Id. at 351.

In the case of In re Zarowitz, supra, the court found that the joint debtors, Zarowitz and Buchalter, formerly business associates, filed companion Chapter 13 cases. A secured creditor moved to dismiss them for lack of feasibility of the plans. At the hearing, the Chapter 13 trustee appeared and moved to convert the cases to cases under Chapter 7. The debtors then joined the creditors in their motion to dismiss, opposing the trustee's motion to convert, with the object of refinancing the properties to provide funds for a payout to creditors greater than could be effected by a liquidation.

The court held that debtors had an absolute right to dismiss prior to an entry of an order of conversion unless "it can be demonstrated that the Chapter 13 case was filed for an improper purpose, in bad faith or otherwise filed to abuse or misuse the bankruptcy process . . ." Id. at 908. Since no improper cause was shown, the case was dismissed.

DECISION

In light of the foregoing analysis, this Court finds that the present cases possess none of the factual complications attending the cases cited herein. Moreover, the debtors in the present cases have moved this Court for voluntary dismissals under Section 1307(b) prior to the entry of any order for conversion. Furthermore, the trustee has made no showing whatsoever that these Chapter 13 cases were filed for an improper purpose, in bad faith, or to abuse or misuse the bankruptcy system. It is the holding that under Section 1307(b), the debtors, under these circumstances, have an absolute right to the dismissals they sought.

ORDER

IT IS THEREFORE ORDERED that the trustee's Objections to Request for Dismissal and the trustee's alternative Motions to Convert the Case be, and hereby are, denied in each of the cases set forth above.

DATED this 15 day of September, 1984.

BY THE COURT:


GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE

Rule 5009(c) Designation

- The Court directs that a copy of this order be filed with the Clerk of Court.
- Entry of this order is not necessary.