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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NV-06-1440-BSR
)		
CATHERINE L. BROWN,)	Bk. No.	05-24999
)		
Debtor.)	Ref. No.	06-26
_____)		
)		
CATHERINE L. BROWN,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM ¹	
)		
YVETTE WEINSTEIN, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

Argued and Submitted on July 26, 2007
at Las Vegas, Nevada

Filed - August 8, 2007

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Linda B. Riegler, Bankruptcy Judge, Presiding

Before: BRANDT, SMITH and RUSSELL,² Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. Barry Russell, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

1 The bankruptcy court granted the former chapter 7³ trustee's motion
2 to reconvert debtor's chapter 13 case. Debtor appeals. We AFFIRM.

3
4 **I. FACTS**

5 Appellant Catherine L. Brown filed a chapter 7 petition on
6 14 October 2005. On her schedules, Brown listed four promissory notes
7 and deeds of trust encumbering real property in Las Vegas that she had
8 sold in December 2004. Her only other creditor was Donald Fuller, listed
9 on Schedule F with a claim of \$160,234.49, with the notation
10 "June 5, 2003 Lawsuit Filed for Breach of Settlement Agreement."

11 Yvette Weinstein ("Trustee") was appointed chapter 7 trustee. She
12 ascertained that Brown had received proceeds in excess of \$370,000 from
13 the sale of her house, which she had allegedly gambled away. She also
14 ascertained that on 30 December 2004 Brown paid \$40,000 to her daughter,
15 Deborah Greer, allegedly as repayment of loans for expenses Greer
16 incurred in connection with the real property.

17 Brown received her discharge on 1 February 2006. Shortly
18 thereafter, Trustee filed an adversary proceeding seeking avoidance of
19 the \$40,000 transfer as a fraudulent conveyance. Trial was scheduled for
20 November 2006. During the course of the adversary proceeding, Trustee
21 discovered that at the time of the transfer and during the pendency of
22 the Fuller lawsuit, Brown made a series of daily withdrawals of just
23 under \$10,000 from her checking account that eventually depleted the
24 entire proceeds from the sale of the property. Trustee also ascertained

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26

³ Absent contrary indication, all "Code," chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to
28 its amendment by the Bankruptcy Abuse Prevention and Consumer
Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from
which this appeal arises was filed before its effective date
(generally 17 October 2005).

1 that the notes and deeds of trust Brown had listed on Schedule D had been
2 paid pre-petition, and reconveyances issued. Further, check copies
3 obtained by Trustee through discovery revealed that Brown had actually
4 paid the real property expenses purportedly paid by her daughter.

5 Brown moved for conversion to chapter 13 under § 706(a) on 22 August
6 2006, which the bankruptcy court granted over Trustee's opposition.⁴
7 Brown's chapter 13 plan proposed payments of \$500 per month for 42
8 months, a total of \$20,555. Trustee thereafter moved to reconvert on
9 grounds that the conversion to chapter 13 was in bad faith. Brown
10 opposed. After a contested hearing, the bankruptcy court granted the
11 Trustee's motion. Brown timely appealed.

12

13 **II. JURISDICTION**

14 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and
15 § 157(b) (1) and (b) (2) (A) and (O), and we do under 28 U.S.C. § 158(c).

16

17 **III. ISSUE**

18 Whether the bankruptcy court abused its discretion in reconverting
19 Brown's case from chapter 13 to chapter 7.

20

21 **IV. STANDARD OF REVIEW**

22 We review an order converting a bankruptcy case for abuse of
23 discretion. In re Beatty, 162 B.R. 853, 855 (9th Cir. BAP 1994). A
24 bankruptcy court necessarily abuses its discretion if it bases its
25 decision on an erroneous view of the law or clearly erroneous factual

26
27 ⁴ At the hearing on the motion, Trustee's counsel conceded
28 that at that time in the Ninth Circuit the debtor had an absolute
right to convert. Hr'g. Tr., page 4, 27 September 2006. The Supreme
Court has since held to the contrary. Marrama v. Citizens Bank of
Mass., ___ U.S. ___, 127 S. Ct. 1105, 1109 (2007).

1 findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).
2 We may reverse for abuse of discretion only when we have a definite and
3 firm conviction that the bankruptcy court committed a clear error of
4 judgment in the conclusion it reached. S.E.C. v. Coldicutt, 258 F.3d
5 939, 941 (9th Cir. 2001); In re Black, 222 B.R. 896, 899 (9th Cir. BAP
6 1998).

8 V. DISCUSSION

9 The bankruptcy court may dismiss or convert a chapter 13 case for
10 "cause." § 1307(c); In re Leavitt, 171 F.3d 1219, 1224 (9th Cir. 1999).
11 "Cause" is not defined in the Code. Id. Section 1307(c) contains
12 several nonexclusive circumstances, none of which are relevant here.

13 Although Trustee argued bad faith as a basis for reconversion, the
14 bankruptcy court made no such finding. Rather, it weighed the relative
15 benefit and detriment to the parties and found cause to reconvert
16 because:

- 17 1. Brown had only one creditor;
- 18 2. Chapter 13 plan confirmation was unlikely because of good
19 faith issues;
- 20 3. The fraudulent conveyance claim would still have to be
21 liquidated in a chapter 13;
- 22 4. The creditor would have to wait five years to get paid;
- 23 5. Staying in a chapter 13 would incur more attorney's fees
24 with no benefit to the debtor;
- 25 6. The chapter 13 was not proposed to save a house or a car;
- 26 7. The only harm to Brown in reconversion is that her
27 daughter will have to pay back the funds if the trustee
is successful in the fraudulent conveyance action; and
- 28 8. In a chapter 13, attorney's fees would come out of the
funds creditor would otherwise receive.

28 Hr'g. Tr., pages 19-20, 18 October 2006.

1 Brown argues that the bankruptcy court abused its discretion in
2 reconverting her case because (1) it should have held an evidentiary
3 hearing and (2) it should have afforded debtor the opportunity to propose
4 and perform under a confirmable chapter 13 plan. Brown does not identify
5 the factual issues to be determined at an evidentiary hearing. The
6 bankruptcy court's ruling was based on undisputed facts, and on
7 consideration of the likely impact of the case remaining in chapter 13
8 versus being reconverted.

9 Moreover, at the hearing on the reversion motion, Brown's counsel
10 did not request an evidentiary hearing. His only reference to an
11 evidentiary hearing was a request to allow the chapter 13 to proceed to
12 confirmation, when he stated:

13 [I]f we have to have an evidentiary hearing because it seems
14 like there's so many factual issues . . . and you can hear for
15 yourself from the debtor, and you make your decision based
upon that, but I would ask at this point that we don't
reconvert it, and we allow it to go to confirmation hearing.

16 Transcript, 18 October 2006, page 14. We need not consider arguments not
17 raised in the bankruptcy court. In re Roberts, 331 B.R. 876, 881 (9th
18 Cir. BAP 2005).

19 In support of her argument that reversion was premature, Brown
20 cites In re Searles, 317 B.R. 368 (9th Cir. BAP 2004), aff'd, 212 Fed.
21 Appx. 589 (9th Cir. 2006), in which the bankruptcy court reconverted a
22 chapter 13 case after affording the debtor an opportunity to perform
23 under a plan. However, neither Searles nor any other case she cites
24 mandates that outcome. In fact, the propriety of reversion was not
25 before the Panel in Searles. Id. at 373 n.1.

26 Brown also cites Marrama in support of her contention that denial
27 of a conversion to chapter 13 should be limited to extraordinary
28 circumstances, 127 S. Ct. at 1111 n.11, suggesting that this implies her

1 case should be allowed to proceed to confirmation. The problem with this
2 argument is that Brown's conduct here could fairly be labeled
3 "extraordinary." It is certainly much more egregious than most of the
4 bad faith cases we have seen as trial judges; had Marrama been the law
5 at the time of Brown's motion to convert her case, that motion would
6 likely (and could properly) have been denied.

7 The decision to convert (or reconvert) for cause is a case-by-case
8 determination left to the discretion of the bankruptcy court after
9 considering the totality of the circumstances. See In re Ho, 274 B.R.
10 867, 876 (9th Cir. BAP 2002) (outlining four factors for the court's
11 consideration). Here, the bankruptcy court properly determined that
12 remaining in a chapter 13 would result in added costs and delay. While
13 there was no bad faith finding, the timing of conversion (post-discharge,
14 during the pendency of Trustee's fraudulent conveyance action) and other
15 circumstances (only one creditor, no secured debt) indicate that the sole
16 purpose of conversion was to circumvent Trustee's fraudulent conveyance
17 action: Brown had already received her discharge, presumably discharging
18 the debt to Fuller. In the chapter 7, the only source of payment would
19 be whatever the Trustee could recover from Greer. Other than the fact
20 that attorney's fees could get paid through a chapter 13 plan, there was
21 no detriment to Brown in remaining in a chapter 7. The economic
22 detriment would be to Greer, not Brown, if Trustee prevailed. At oral
23 argument, Brown's counsel conceded that conversion was essentially to
24 protect Greer.

25 Brown argues that, had she been allowed to stay in a chapter 13, she
26 would have been willing to withdraw funds from her exempt retirement
27 account to fund the plan if necessary. This argument was not made in the
28 bankruptcy court and thus need not be considered. Roberts, 331 B.R. at

1 881. Nor did she propose such a plan. Finally, nothing prevents Brown
2 from repaying her daughter over time, or reimbursing her from the
3 retirement plan.

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VI. CONCLUSION

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Even without a bad faith finding, the bankruptcy court properly
found "cause" to reconvert. There was no reorganization purpose to be
served by Brown remaining in chapter 13, and the benefit to the estate
and creditors outweighed any detriment to Brown. Brown has not shown any
abuse of discretion.

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Accordingly, we AFFIRM.

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