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

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NC-11-1002-JuHPa
)	
JAMES EARL DEFRANTZ,)	Bk. No. 10-40880
)	
Debtor.)	
_____)	
JOHN NADY,)	
)	
Appellant,)	
)	
v.)	O P I N I O N
)	
JAMES EARL DEFRANTZ; MARTHA G.))	
BRONITSKY, Chapter 13 Trustee;))	
FRED S. HJELMESET, Chapter 7))	
Trustee; UNITED STATES))	
TRUSTEE, OAKLAND,))	
)	
Appellees.)	
_____)	

Argued and Submitted on June 16, 2011
at San Francisco, California

Filed - July 12, 2011

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Roger L. Efremsky, Bankruptcy Judge, Presiding

Appearances: _____
Frederic D. Schrag, Esq. argued for Appellant
John Nady; and Sarah Lampi Little, Esq., argued
for Appellee James Earl DeFrantz.

Before: JURY, HOLLOWELL, and PAPPAS, Bankruptcy Judges.

JURY, Bankruptcy Judge:

1 Appellant, secured creditor John Nady ("Nady"), appeals the
2 bankruptcy court's order granting the motion of debtor, James
3 Earl DeFrantz, to convert his chapter 13¹ to one under
4 chapter 7. We AFFIRM.

5 **I. FACTS**

6 On September 1, 2000, debtor entered into a commercial
7 lease agreement to rent law office space from Nady.² On
8 April 27, 2005, Nady sued debtor for breach of the lease and
9 waste. On February 13, 2008, Nady obtained a default judgment
10 against debtor in the California Superior Court for \$58,811.25.
11 Thereafter, Nady sought to enforce the judgment by garnishing
12 debtor's earnings from his employer.

13 As a result, debtor filed a bare bones chapter 7 petition
14 in the Northern District of California (Bankruptcy Case No. 08-
15 47766). The bankruptcy court dismissed his case because debtor
16 was ineligible for a chapter 7 discharge at the time due to a
17 prior chapter 7 discharge obtained in 2002 (Bankruptcy Case No.
18 02-40324). After the case was dismissed, Nady resumed
19 garnishing debtor's earnings from his employer.

20 On September 21, 2009, debtor filed in state court a claim
21 of exemption from garnishment of his wages, which the state
22 court partially granted. Nady also began garnishing the
23 community property earnings of debtor's wife, Karen. Karen

24
25 ¹ Unless otherwise indicated, all chapter, section and
26 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
27 1532, and to the Federal Rules of Bankruptcy Procedure, Rules
28 1001-9037.

² Robert Byers is also listed as a lessee along with
debtor on the lease.

1 filed a claim of exemption in the state court which was
2 tentatively granted as to all her wages. At the January 22,
3 2010 hearing on Karen's claim of exemption, the court took the
4 matter under submission.

5 On January 27, 2010, debtor filed a chapter 13 petition pro
6 se. Debtor did not join Karen as a co-debtor in his chapter 13
7 petition. The following day, the state court issued its final
8 ruling on Karen's claim of exemption ordering the claim
9 partially granted, but allowing the garnishment of her wages in
10 the amount of \$436 per month. The enforcement of that order was
11 stayed by debtor's bankruptcy filing. See § 1301.

12 On April 6, 2010, Sarah Lampi Little entered an appearance
13 in the case as attorney for debtor. On the same day, debtor
14 filed amended schedules and a first amended chapter 13 plan.

15 On May 5, 2010, Nady filed a proof of claim for
16 \$113,720.50, designating \$70,811.25 as secured and \$42,909.25 as
17 unsecured. On the same day, Nady filed an objection to debtor's
18 first amended plan but did not include lack of good faith as one
19 of the grounds.

20 On June 24, 2010, Nady filed a motion to dismiss debtor's
21 case with prejudice for cause, including bad faith conduct,
22 under § 1307(c). Nady alleged that debtor filed his petition in
23 bad faith, that debtor failed to timely provide a copy of his
24 federal income tax return for the most recent tax year to either
25 the trustee or Nady, and that debtor's chapter 13 payments were
26 not current.

27 On July 6, 2010, debtor filed a second amended plan. At
28 the July 9, 2010 confirmation hearing, the bankruptcy court

1 confirmed the second amended plan over Nady's objection, without
2 prejudice to Nady's motion to dismiss which was scheduled for
3 hearing on August 25, 2010.

4 On August 25, 2010, after hearing oral argument on Nady's
5 motion to dismiss, the court revoked its prior order confirming
6 debtor's second amended plan based on improper expenses for a
7 time share and debtor's son's private schooling. The court did
8 not make any ruling on the issue of debtor's alleged bad faith,
9 but continued Nady's motion to dismiss to September 17, 2010.

10 On September 10, 2010, debtor filed a third amended plan
11 and amended Schedule J which eliminated the timeshare expense
12 and reduced the expenses for his son's schooling. Debtor's
13 third amended plan increased the plan payment from \$421 monthly
14 to \$1,000, which, in turn, increased the dividend to unsecured
15 creditors from two percent to twenty-five percent.

16 On September 17, 2010, the court continued Nady's motion to
17 dismiss to October 20, 2010, to allow Nady to file an objection
18 to the third amended plan before the notice time ran. The
19 bankruptcy court also asked Nady to make an effort to settle
20 with debtor.

21 Nady then moved for a 2004 exam of debtor and his wife and
22 requested numerous documents. Because debtor could not timely
23 comply with Nady's request, they agreed to continue Nady's
24 motion to dismiss from October 20, 2010 to December 7, 2010.

25 On November 24, 2010, Nady filed a lengthy argument in
26 support of his objection to the confirmation of debtor's third
27 amended plan. Apparently at this point debtor did not believe
28 he could confirm a plan without considerable expense.

1 Accordingly, on December 2, 2010, debtor filed a motion to
2 convert his case to chapter 7. Although debtor's pleading was
3 styled as a motion, he gave no notice to Nady or any other
4 parties. Moreover, there is no indication in the record that
5 the court treated debtor's request as a motion with notice
6 required because the court entered the order approving the
7 conversion on December 6, 2010, just three days after debtor
8 filed the motion.

9 Despite the conversion, Nady's counsel appeared at the
10 December 7, 2010 continued hearing on Nady's motion to dismiss.
11 Nady argued then, as he does now, that debtor did not have the
12 absolute right to convert his case under § 1307(a), relying on
13 the holdings in Marrama v. Citizens Bank of Mass., 549 U.S. 365
14 (2007) and Rosson v. Fitzgerald (In re Rosson), 545 F.3d 764
15 (9th Cir. 2008). That argument was not fully developed at the
16 hearing, but the court briefly distinguished Marrama on the
17 ground that it spoke of conversion from chapter 7 to chapter 13.
18 The court declined to hear Nady's motion to dismiss since
19 debtor's case had already been converted. The court stated that
20 "[i]f you have issues you'll need to take it up in the Chapter 7
21 proceeding" Hr'g Tr. (December 7, 2010) at 2:24-25.

22 Nady timely appealed the order converting debtor's case.

23 Subsequent to this appeal, on January 7, 2011, Nady filed a
24 motion to dismiss debtor's chapter 7 case with prejudice under
25 § 707(a) and for abuse of process. On February 2, 2011, the
26 bankruptcy court denied Nady's motion, finding that there were
27 no grounds for dismissal under § 707(a) and no abuse of
28

1 process.³

2 **II. JURISDICTION**

3 The bankruptcy court had jurisdiction over this proceeding
4 under 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have jurisdiction
5 under 28 U.S.C. § 158.

6 **III. ISSUE**

7 Whether debtor's right to convert from chapter 13 to
8 chapter 7 under § 1307(a) was conditioned by Nady's pending
9 motion to dismiss under § 1307(c).

10 **IV. STANDARDS OF REVIEW**

11 Statutory interpretation is a question of law subject to de
12 novo review. Onink v. Cardelucci (In re Cardelucci), 285 F.3d
13 1231, 1233 (9th Cir. 2002).

14 An order converting a case is reviewed for abuse of
15 discretion. In re Rosson, 545 F.3d at 771. However, this case
16 involves the alleged failure of the trial court to exercise its
17 discretion, not the abuse of it. Here, the bankruptcy court did
18 not address the merits of Nady's motion to dismiss debtor's
19 chapter 13 case under § 1307(c) because it had approved
20 conversion of debtor's case to chapter 7. Because the
21 bankruptcy court did not exercise its discretion, the issue of
22 whether or not it should have done so presents a legal question
23 which is subject to de novo review. Garrett v. City and County
24 of S.F., 818 F.2d 1515, 1518 n.3 (9th Cir. 1987).

25
26 ³ We take judicial notice of the order which was filed
27 with the bankruptcy court through the electronic docketing
28 system. Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),
293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 We may affirm the bankruptcy court's decision on any ground
2 fairly supported by the record. Wirum v. Warren (In re Warren),
3 568 F.3d 1113, 1116 (9th Cir. 2009) (citing Leavitt v. Soto
4 (In re Leavitt), 171 F.3d 1219, 1223 (9th Cir. 1999)).

5 **V. DISCUSSION**

6 Section 1307, which governs conversion or dismissal of
7 chapter 13 cases, provides in part:

8 (a) The debtor may convert a case under this chapter
9 to a case under chapter 7 of this title at any time.
10 Any waiver of the right to convert under this
11 subsection is unenforceable.

12 (b) On request of the debtor at any time, if the case
13 has not been converted under section 706, 1112, or
14 1208 of this title, the court shall dismiss a case
15 under this chapter. Any waiver of the right to
16 dismiss under this subsection is unenforceable.

17 (c) Except as provided in subsection (e) of this
18 section, on request of a party in interest or the
19 United States trustee and after notice and a hearing,
20 the court may convert a case under this chapter to a
21 case under chapter 7 of this title, or may dismiss a
22 case under this chapter, whichever is in the best
23 interests of creditors and the estate, for cause
24⁴

25 (g) Notwithstanding any other provision of this
26 section, a case may not be converted to a case under
27 another chapter of this title unless the debtor may be
28 a debtor under such chapter.

Nady argues on appeal that debtor's right to convert his
case under § 1307(a) is not absolute and, therefore, once Nady
raised the issue of debtor's bad faith by a motion to dismiss
under § 1307(c), the bankruptcy court should have conducted a
hearing on his motion prior to converting debtor's case. From a

⁴ Bad faith is not listed as an example of "cause" in the
statute. However, under Ninth Circuit precedent, bad faith is
"cause" for a dismissal of a chapter 13 case with prejudice under
§ 1307(c). In re Levitt, 171 F.3d at 1224.

1 policy perspective, Nady also contends that § 1307(a) should not
2 be available for a debtor to dodge the consequences of his bad
3 faith conduct and to avoid a hearing on the issue of bad faith.
4 In this regard, Nady complains that he is foreclosed from
5 seeking dismissal for debtor's bad faith under § 707(b)(3)
6 because debtor's debts are primarily business debts. He further
7 maintains that he is foreclosed from seeking dismissal for
8 debtor's bad faith under § 707(a) due to the holding in Neary v.
9 Padilla (In re Padilla), 222 F.3d 1184, 1191 (9th Cir. 2000)
10 (bad faith does not constitute "cause" under § 707(a)).

11 In support of his position, Nady relies on a California
12 Practice Guide for Bankruptcy which opines that after Marrama,
13 bad faith conduct may also forfeit the debtor's "absolute right"
14 to convert from chapter 13 to chapter 7. See March, Ahart and
15 Tchaikovsky, CALIFORNIA PRACTICE GUIDE: BANKRUPTCY, § 5:1878, p.
16 5(II)-15 (2009). Nady also relies on the Ninth Circuit's
17 decision in In re Rosson, 545 F.3d 764, which, in turn, relied
18 on the Supreme Court's decision in Marrama, 549 U.S. 365, to
19 conclude that a chapter 13 debtor does not have an absolute
20 right to dismiss his or her case under § 1307(b). According to
21 Nady, the reasoning of Rosson applies equally here – if a
22 debtor's right of voluntary dismissal under § 1307(b) is not
23 absolute, a debtor's right of voluntary conversion under
24 § 1307(a) is also not absolute.

25 Bankruptcy courts within the Ninth Circuit have
26 historically considered the right to convert from chapter 13 to
27 chapter 7 as "absolute" due to the language of § 1307(a)
28 (chapter 13 debtor has a non-waivable right to convert his case

1 at any time). See In re Torres, 2000 WL 1515170, at *2 (Bankr.
2 D. Idaho 2000) (chapter 13 debtor has the absolute right to
3 convert his or her case at any time); In re Boggs, 137 B.R. 408,
4 410 (Bankr. W.D. Wash. 1992) (noting that "while § 1307(b)
5 conditions dismissal and requires court action, § 1307(a) gives
6 debtors the absolute right to convert to Chapter 7 at any
7 time"); In re Humphreys, 64 B.R. 215, 216 (Bankr. D. Or. 1986)
8 (noting that "[s]ince, under § 1307(a), the debtor has an
9 absolute right to convert a case under Chapter 13 to a case
10 under Chapter 7, the court is not called upon to exercise
11 discretion in ordering a conversion. The order of conversion is
12 merely ministerial.").

13 Whether the right to convert from chapter 13 to chapter 7
14 is truly "absolute" has been called into question by the Supreme
15 Court's decision in Marrama. Marrama examined language from
16 § 706(a), which is nearly identical to that of § 1307(a), and
17 held that a chapter 7 debtor's right to convert to a chapter 13,
18 once thought to be absolute, could be forfeited by bad faith
19 conduct. Of particular importance was § 706(d) which provides
20 that "a case may not be converted to a case under another
21 chapter of this title unless the debtor may be a debtor under
22 such chapter." The Supreme Court viewed this section as a
23 "limitation" on a debtor's right to convert.⁵ 549 U.S. at 371-
24 72.

25 The court further explained that under § 1307(c), "a ruling
26 that an individual's chapter 13 case should be dismissed or
27

28 ⁵ Section 1307(g) is identical to § 706(d).

1 converted to chapter 7 because of prepetition bad faith conduct
2 . . . is tantamount to a ruling that the individual does not
3 qualify as a debtor under chapter 13." Id. at 374. The court
4 concluded that nothing in the text of either § 706 or § 1307(c)
5 (or the legislative history of either provision) limited the
6 authority of the bankruptcy court to take appropriate action in
7 response to fraudulent conduct by the atypical litigant who has
8 demonstrated he is not entitled to the relief available to the
9 typical debtor. Finally, the court emphasized that the broad
10 authority of bankruptcy courts to prevent abuse of process
11 described in § 105(a) authorized an immediate denial of a motion
12 to convert filed under § 706(a). Id. at 374-75.

13 Extrapolating from the principles espoused in Marrama, the
14 Ninth Circuit in Rosson held that a chapter 13 debtor's right of
15 voluntary dismissal under § 1307(b) was not absolute, but was
16 qualified by the authority of a bankruptcy court to deny
17 dismissal on grounds of bad faith conduct or "to prevent an
18 abuse of process." 545 F.3d 774 (citing § 105(a)).

19 However, Marrama did not address the precise question
20 raised here: whether a debtor's right to convert from chapter
21 13 to chapter 7 under § 1307(a) is "absolute." Therefore, we
22 are not persuaded that the court's analysis in Marrama controls
23 the outcome of this case.

24 Nady's primary concern is that § 1307(a) can be used by
25 unscrupulous debtors to dodge the consequences of their bad
26 faith conduct and avoid a hearing on the issue of bad faith.
27 This assertion simply has no support in light of the statutory
28 framework for chapter 7 bankruptcy cases. In reality, applying

1 § 1307(a) by its terms does not grant chapter 13 debtors
2 immunity from misconduct once they convert their case – quite
3 the opposite.

4 Unlike dismissal, upon conversion a debtor's case
5 continues, the court retains jurisdiction over the debtor and
6 the debtor's estate, and the court has continuing power to
7 address any improprieties that may result from the change in the
8 nature of the proceedings. Furthermore, if bad faith is
9 involved, chapter 7 debtors may be denied a discharge for
10 engaging in improper conduct under § 727, including
11 § 727(a)(4)(A) (authorizing denial of discharge for making false
12 oath or account).⁶ There is also the possibility that a debtor
13 may face criminal penalties under 18 U.S.C. § 152 for knowingly
14 and fraudulently making a false oath or account in or in
15 relation to any case under title 11. Therefore, any concern
16 that a debtor can escape the consequences of bad faith conduct
17 or for abuse of process is simply unwarranted.

18 In addition, the procedural rules recognize the differences
19 between a conversion from chapter 7 to chapter 13 and vice
20 versa. Under Rule 1017(f)(2), conversion from chapter 7 to
21 chapter 13 under § 706(a) shall be "on motion filed and served
22 as required by Rule 9013." Thus, before conversion under
23 § 706(a), a court must have the opportunity to scrutinize the
24

25 ⁶ In fact, Nady's motion to dismiss was largely based on
26 debtor's misrepresentations in his bankruptcy schedules regarding
27 the amount of his and Karen's projected monthly gross income and
28 the amount of their reasonable, necessary and allowable monthly
expenses. Nady also alleged that debtor misrepresented the
amount of his current monthly income on his Official Form 22C.

1 request. In contrast, Rule 1017(f)(3) provides that a
2 chapter 13 case shall be converted to chapter 7 without court
3 order when the debtor files a notice of conversion under
4 § 1307(a). Therefore, the Rule contemplates that a debtor may
5 convert his or her chapter 13 case by simply filing a notice of
6 conversion and not a motion. From a practical point of view,
7 such a procedure avoids delays and fosters judicial economy,
8 while at the same time moving a debtor toward a "fresh start"
9 under chapter 7.

10 The Bankruptcy Rules in general are binding and we must
11 abide by them unless there is an irreconcilable conflict with
12 the Code. See 28 U.S.C. § 2075; Hefta v. Am. Classic Voyages
13 Co. (In re Am. Classic Voyages Co.), 405 F.3d 127, 132 (3d Cir.
14 2005). We do not perceive that Rule 1017(f)(3) causes an
15 irreconcilable conflict with the Code under these circumstances
16 despite the holding and reasoning in Marrama.

17 In sum, being governed by no binding precedent, we need not
18 adopt the interpretation of the statutory language in § 1307(a)
19 espoused by Nady that, in our view, fosters delay in the
20 administration of bankruptcy cases in general, and which is at
21 variance with Rule 1017(f)(3). Given that other mechanisms
22 exist to prevent a debtor from abusing chapter 7 of the
23 Bankruptcy Code, we follow the plain language of § 1307(a) which
24 allows conversion.

25 VI. CONCLUSION

26 For the reasons stated, we AFFIRM.
27
28