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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE NINTH CIRCUIT

In re:) BAP No. CC-15-1426-LKiTa
)
 MARLOW CURTIS LAFOUNTAINNE,) Bk. No. 6:14-bk-22000-SY
)
 Debtor.)
)
)
 MARLOW CURTIS LAFOUNTAINNE,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
 HOWARD B. GROBSTEIN,)
 Chapter 7 Trustee,)
)
 Appellee.)
)

Argued and Submitted On May 19, 2016
at Pasadena, California

Filed - June 7, 2016

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

Honorable Scott H. Yun, Bankruptcy Judge, Presiding

Appearances: Krystina T. Tran of Law Offices of Tran &
 Iserhien, PC argued for Appellant Marlow Curtis
 LaFountaine; Michael R. Adele argued for Appellee
 Howard B. Grobstein, Chapter 7 Trustee.

* 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 8024-1.

1 Before: LANDIS,¹ KIRSCHER, and TAYLOR Bankruptcy Judges.

2 **INTRODUCTION²**

3 This appeal arises from debtor/appellant Marlow Curtis
4 LaFontaine's unsuccessful attempts to convert his chapter 7
5 bankruptcy case to a chapter 11 proceeding. The bankruptcy court
6 denied the Debtor's conversion motion. We AFFIRM.

7 **STATEMENT OF FACTS**

8 On September 25, 2014, Debtor/Appellant Marlow Curtis
9 LaFontaine ("Debtor") filed a voluntary petition under
10 chapter 13 of the Bankruptcy Code for the purpose of protecting
11 his family home, located in Banning, California (the
12 "Property").³ Thirty-nine (39) days later, on November 3, 2014,
13 Debtor consented to conversion of his case to chapter 7.

14 Ninety-one days after agreeing to convert from chapter 13 to
15 chapter 7, Debtor cited changed circumstances and sought
16 conversion once again, this time to chapter 11. After a hearing
17 on Debtor's motion to convert to chapter 11, the bankruptcy court
18 entered an order denying Debtor's motion. Denial was due to a

19
20 ¹ Hon. August B. Landis, Bankruptcy Judge for the District
of Nevada, sitting by designation.

21 ² Unless specified otherwise, all chapter and section
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
23 All Rule references are to the Federal Rules of Bankruptcy
24 Procedure, Rules 1001-9037. All Local Rule references are to the
Local Rules of the United States Bankruptcy Court for the Central
District of California.

25 ³ This case commenced with the filing of Debtor's second
26 chapter 13 bankruptcy petition in the Central District of
27 California. Debtor's first chapter 13 case was filed in 2011,
and was dismissed on July 29, 2014, for failure to make plan
28 payments. Neither Debtor nor the Trustee has provided the case
number of Debtor's first chapter 13 bankruptcy.

1 lack of supporting evidence regarding Debtor's changed financial
2 circumstances, in particular, the bankruptcy court noted that
3 Debtor had not even filed an amended Schedule I or J to support
4 his allegations.

5 Eight months later, Debtor filed another motion to convert
6 his chapter 7 case to a chapter 11 proceeding (the "Motion").
7 The Motion again cited changed financial circumstances as the
8 predicate for conversion to chapter 11. That same day, Debtor
9 filed Amended Schedules I and J.

10 The Trustee filed a timely Opposition to Debtor's Motion,
11 asserting that Debtor provided absolutely no evidence in support
12 of the Motion. The Trustee specifically argued that neither the
13 Motion nor Debtor's Amended Schedules provided any explanation of
14 how Debtor would be able to cure the current deficiency on the
15 loan payments regarding the Property or to make the monthly
16 payments on the Property during the term of the proposed plan of
17 reorganization.

18 The day before the hearing on the Motion, Debtor belatedly
19 filed a Reply Brief to the Trustee's Opposition (the "Reply").
20 Attached to the Reply was Debtor's Declaration, a letter
21 regarding Debtor's employment, a lease agreement regarding the
22 Property, and an appraisal of the Property.⁴

23 At the commencement of the December 3, 2015 hearing on the
24 Motion, the bankruptcy court noted that Debtor had filed his
25 Reply late, that the court had therefore not read the Reply, and
26

27 ⁴ Counsel for the Trustee argued at the December 3 hearing
28 on the Motion that the copy of the Reply served upon their office
did not include all of the exhibits referenced in the Reply.

1 that the court was going to disregard the Reply and the attached
2 declaration and exhibits in rendering its decision on the
3 Motion.⁵

4 The bankruptcy court referenced Debtor's earlier motion to
5 convert to chapter 11, which it denied for lack of evidence of
6 changed circumstances.⁶ During the course of the hearing, the
7 court engaged Debtor's counsel in a dialog regarding Debtor's
8 bankruptcy history, including his prior and unsuccessful
9 chapter 13 bankruptcy case, Debtor's choice to convert his second
10 chapter 13 case to chapter 7, Debtor's failure to support his
11 previous motion to convert to chapter 11 with any evidence of
12 changed circumstances, Debtor's delay in filing the pending and
13 second Motion to convert to chapter 11, as well as the secured
14 creditor's desire to move forward with a negotiated sale on the
15 Property.

16 At the end of the hearing, the court sua sponte struck the
17 Debtor's late-filed Reply. The court denied Debtor's motion to
18 convert his case from chapter 7 to chapter 11; Debtor timely
19 appealed.

20 JURISDICTION

21 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
22 §§ 1334 and 157(b) (2) (A). We have jurisdiction under 28 U.S.C.
23 § 158.

24
25 ⁵ Pursuant to Local Rule 9013-1(g) (3): "Unless the court
26 finds good cause, a reply document not filed or served [at least
7 days prior to the hearing] . . . will not be considered."

27 ⁶ During the earlier hearing, the court specifically looked
28 for and noted the lack of an amended Schedule I and Schedule J to
support Debtor's purported changed financial circumstances.

1 **ISSUE**

2 Did the bankruptcy court commit reversible error when it
3 denied the Debtor's Motion to convert this case from chapter 7 to
4 chapter 11?

5 **STANDARDS OF REVIEW**

6 We review a bankruptcy court's order denying conversion to
7 chapter 11 under Section 706(b) for abuse of discretion.
8 In re Parvin, 2016 W.L. 1584068, *1 (W.D. Wash. 2016). A
9 bankruptcy court abuses its discretion if it applies the wrong
10 legal standard, misapplies the correct legal standard, or if its
11 factual findings are illogical, implausible, or without support
12 in inferences that may be drawn from the facts in the record.
13 See TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832
14 (9th Cir. 2011) (citing United States v. Hinkson, 585 F.3d 1247,
15 1262 (9th Cir. 2009) (en banc)); Willis v. Rice (In re Willis),
16 345 B.R. 647, 654 (8th Cir. BAP 2006) (quoting H.R.Rep. No. 595,
17 95th Cong., 1st Sess. at 380 (1977), as reprinted in
18 1978 U.S.C.C.A.N. 5963; S.Rep. No. 989, 95th Cong.2d Sess. at 94
19 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787).

20 **DISCUSSION**

21 Debtor raises a single argument in assigning error to the
22 bankruptcy court's denial of his Motion. Specifically, Debtor
23 argues that the Motion should have been granted because he was
24 acting in good faith when it was filed. That argument lacks
25 merit. The bankruptcy court should be affirmed.

1 **A. Conversion pursuant to Section 706(b) is within the**
2 **discretion of the bankruptcy court, based upon what will**
3 **inure to the benefit of all interested parties, including**
4 **the Debtor.**

5 A motion to convert a chapter 7 case to a case under
6 chapter 11 is governed by Section 706 of the Code. Under
7 Section 706(a), a debtor may voluntarily convert a chapter 7 case
8 to one under chapter 11 if the case has not previously been
9 converted under Section 1307. Debtor originally filed this case
10 under chapter 13 and then consented to having his case converted
11 to chapter 7. Since Debtor could not convert his case to
12 chapter 11 under Section 706(a), Debtor necessarily looked to
13 Section 706(b) in seeking conversion to chapter 11.

14 Section 706(b) provides that "[o]n request of a party in
15 interest and after notice and a hearing, the court may convert a
16 case under this chapter to a case under chapter 11 of this title
17 at any time." Under Section 706(b) then, any party in interest,
18 including a debtor, may request conversion of the case to
19 chapter 11 at any time.

20 "The decision whether to convert [a case under
21 Section 706(b)] is left in the sound discretion of the court,
22 based on what will most inure to the benefit of all parties in
23 interest." H.R.Rep. No. 595, 95th Cong., 1st Sess. at 380
24 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963; S.Rep. No. 989,
25 95th Cong.2d Sess. at 94 (1978), as reprinted in
26 1978 U.S.C.C.A.N. 5787. In the course of the hearing on the
27 Motion, the bankruptcy court determined that conversion of the
28 Debtor's case to chapter 11 would not benefit all parties in
interest.

1 Section 706(b) does not provide guidance regarding the
2 factors a court should consider in resolving a conversion motion.
3 Schlehuber v. Fremont Nat'l Bank & Trust Co. (In re Schlehuber),
4 489 B.R. 570, 573 (8th Cir. BAP 2013), aff'd, 558 Fed. App'x 715
5 (8th Cir. 2014) (footnote omitted). "Since there are no specific
6 grounds for conversion, a court 'should consider anything
7 relevant that would further the goals of the Bankruptcy Code.'" Proudfoot Consulting Co. v. Gordon (In re Gordon), 465 B.R. 683,
8 692 (Bankr. N.D. Ga. 2012) (quoting In re Lobera, 454 B.R. 824,
9 854 (Bankr. D. N.M. 2011)).

11 While Section 706(b) does not mandate a balancing of
12 parties' interests as a predicate to conversion of a chapter 7
13 case to chapter 11, courts consistently consider several factors,
14 including a debtor's ability to fund a chapter 11 plan, in
15 exercising their discretion under Section 706(b). See
16 In re Parvin, 538 B.R. 96, 102 (Bankr. W.D. Wash. 2015), aff'd,
17 --- B.R. ---, 2016 W.L. 1584068 (W.D. Wash. March 22, 2016);
18 In re Decker, 535 B.R. at 838 (citing In re Baker, 503 B.R. 751,
19 755 (Bankr. M.D. Fla. 2013)); In re Gordon, 465 B.R. at 692;
20 In re Graham, 21 B.R. 235, 238 (Bankr. N.D. Iowa 1982).

21 A debtor's ability to pay typically is a starting point
22 in the [§ 706(b)] analysis, however, since the whole
23 reason for asking [for] a case to be converted is the
assumption that creditors would receive more in a
chapter 11 than in a chapter 7.

24 In re Parvin, 538 B.R. at 102 (quoting In re Peterson, 524 B.R.
25 at 815); see also In re Karlinger-Smith, 544 B.R. 126, 134
26 (Bankr. W.D. Tex. 2016) (quoting In re Decker, 535 B.R. 828, 839
27 (Bankr. D. Alaska 2015) ("[T]he U.S. Trustee's focus on the
28 Debtors' ability to pay makes sense as 'an exceedingly relevant,

1 if not necessary, factor and the obvious starting point for any
2 analysis under section 706(b).'""); In re Gordon, 465 B.R. at
3 692-93 ("The cases considering conversion to Chapter 11 begin the
4 analysis with the acknowledgment that the debtor can pay more in
5 a Chapter 11 case than in a Chapter 7 case, which is a benefit to
6 creditors."); In re Schlehuber, 489 B.R. at 574 ("The Debtor's
7 ability to fund a Chapter 11 plan if he chooses to do so was
8 certainly an important and relevant consideration.").

9 **B. Debtor failed to carry his burden of proving that conversion**
10 **would inure to the benefit of all parties.**

11 The burden is on the moving party to establish that the case
12 should be converted under Section 706(b). In re Parvin, 538 B.R.
13 at 101. Debtor made no such showing in support of the Motion.

14 Debtor based his Motion to convert from chapter 7 to
15 chapter 11 upon an assertion that his financial circumstances had
16 changed. Debtor did file amendments to Schedule I, Debtor's
17 Income, and Schedule J, Debtor's Expenses. These amended
18 schedules were presumably filed to document changes in his
19 financial circumstances. In addition to his amendments to
20 Schedules I and J, Debtor belatedly filed a Reply with an
21 attached Declaration, an employment letter, lease agreement on
22 the Property, and an appraisal of the Property as additional
23 evidence of his changed financial circumstances. Because the
24 Reply and related attachments were not timely filed, they were
25 disregarded by the bankruptcy court in its consideration of
26 Debtor's claim of changed circumstances in accordance with Local
27 Rule 9013-1(g)(3). Ultimately, the Reply and attachments were
28 stricken from the record by the bankruptcy court.

1 Although the bankruptcy court chose to disregard the Reply,
2 together with its attachments and exhibits, Debtor's Amended
3 Schedules I and J were filed well before the hearing and are part
4 of the bankruptcy court's docket. They were not stricken and
5 could, depending upon their contents, independently support
6 Debtor's claim of changed financial circumstances.

7 On close examination, however, Debtor's Amended Schedules I
8 and J undermine Debtor's claim that he can successfully
9 reorganize in a chapter 11.⁷ Amended Schedule I reflects monthly
10 rental income of \$3,605.92 on line 8a. When combined with \$5,000
11 Independent Contractor Income reflected on line 8h, Debtor's
12 Amended Schedule I reflects monthly income of \$8,605.92.

13 Debtor's Amended Schedule J shows monthly expenses of
14 \$6,017.00, yielding monthly net income of only \$2,588.92.
15 Debtor's Amended Schedule I fails to address how Debtor would
16 cure the existing arrearage of over \$318,000 on the mortgage
17 encumbering the Property if his case were converted to
18 chapter 11. Even if Debtor applied the entirety of his monthly
19 net income to paying the arrearage, simultaneously paying no
20 other creditors, it would take Debtor roughly eleven years to
21 cure the arrearage. Further clouding the arrearage repayment
22 issue, the current lease on the Property is for only three years,
23 not eleven, leaving a significant plan funding gap. Ultimately,
24 Amended Schedules I and J provide little independent support for
25

26 ⁷ Debtor failed to include his original Schedules I and J in
27 the appellate record, so there is no baseline for comparison to
28 determine whether and to what extent Debtor's financial
circumstances had changed.

1 Debtor's claim of changed financial circumstances, and they
2 undercut his claim that he is able to reorganize under
3 chapter 11.

4 More importantly, Debtor's purported actions in renting out
5 the Property after the case was converted to chapter 7 create a
6 potentially significant problem for both the estate and the
7 Chapter 7 Trustee. As the bankruptcy court noted, Debtor is not
8 the real party in interest in his chapter 7 bankruptcy⁸ and had
9 no legal authority or right to lease estate property
10 postpetition. Accordingly, the purported lease of the Property
11 cannot support Debtor's claim of changed financial circumstances.

12 **C. The bankruptcy court properly applied a multi-factor test in**
13 **evaluating Debtor's Motion.**

14 Debtor firmly believes that:

15 [t]here is a realistic possibility of an effective
16 reorganization, because Debtor has sufficient income
17 and resources to obtain confirmation of a plan.

18 ⁸ When Debtor declared bankruptcy, all the "legal or
19 equitable interests" he had in the Property became the property
20 of the bankruptcy estate. See 11 U.S.C. § 541(a); Suncrest
21 Healthcare Center LLC v. Omedga Healthcare Investors
22 (In re Raintree Healthcare Corp.), 431 F.3d 685, 688 (9th Cir.
23 2005). When Debtor's case converted to chapter 7, Debtor
24 relinquished possession of the estate to the trustee for
25 liquidation and distribution to his creditors. See 11 U.S.C.
26 § 704. To effectuate this purpose, the trustee's management of
27 the estate – including renting or selling outright the Debtor's
28 real property – must necessarily be free from interference by the
Debtor. Thus, the chapter 7 trustee, not the Debtor, became the
real party in interest with authority to control the Debtor's
estate property upon conversion of the case. Therefore, Debtor
had no standing or authority to rent the property to anyone.
Accordingly, the lease signed by Debtor is voidable, since he had
no right or authority to affect the future use of the Property
following conversion.

1 Consistent with this premise, Debtor's counsel argued before the
2 bankruptcy court that Debtor could provide proof that, upon
3 conversion to chapter 11, he could propose and confirm a 100%
4 plan. The evidentiary record before the bankruptcy court at the
5 conversion hearing failed to support that contention.

6 On appeal, Debtor also argues that:

7 [t]he issue of **good faith was the deciding factor** that
8 the bankruptcy judge **considered most** in making his
9 decision on the Motion to Convert filed on October 22,
10 2015.

11 (Emphasis added). Debtor is incorrect.

12 A careful search of the hearing transcript establishes that
13 the bankruptcy court never used the phrase "good faith" nor the
14 phrase "bad faith" during the course of the hearing on Debtor's
15 Motion. The bankruptcy court did, however, engage in a fairly
16 substantial discussion with Debtor's counsel regarding Debtor's
17 history in bankruptcy, including Debtor's prior unsuccessful
18 chapter 13 bankruptcy case, Debtor's failure to support his first
19 motion to convert to chapter 11 with any evidence, Debtor's delay
20 in filing the second Motion to convert, and the secured
21 creditor's desire to move forward with a negotiated sale on the
22 Property.⁹

23 The record evidences that the bankruptcy court based its
24 decision upon consideration of three factors, none of which
25 involved a determination of bad faith. These factors were:

26 ⁹ The Trustee negotiated with the secured creditor to obtain
27 a carve-out that would pay both the Trustee's professionals as
28 well as general unsecured creditors from a sale of the Property,
even though the creditor will receive far less than the full
amount of its debt.

1 whether the debtor can propose and confirm a plan; the
2 primary purpose of converting the case to a different
3 chapter; and whether the conversion benefits all
4 parties in the case.¹⁰

5 The bankruptcy court specifically found that Debtor was not
6 likely to be able to propose and confirm a chapter 11 plan.
7 Debtor failed to present any evidence, other than Amended
8 Schedules I and J, to establish that his financial circumstances
9 had changed. As noted previously, those Amended Schedules do not
10 substantiate Debtor's changed circumstances claim, and, absent
11 evidence of changed circumstances, Debtor was not capable of
12 confirming a chapter 11 plan.

13 The bankruptcy court also found that while Debtor's stated
14 purpose for converting to a chapter 11 was to save his house, a
15 chapter 11 plan simply was not feasible. The bankruptcy court
16 noted that:

17 I just don't believe this debtor has shown the
18 ability to propose and confirm a plan. I'm very
19 skeptical that the debtor will be able to keep this
20 house, even if I allow the debtor to propose a plan in
21 Chapter 11. I mean, this is a big loan. Whether the
22 property is worth one point -- a million dollars or
23 1.3, I think the amount owed is 1.3 million. That's a
24 big loan for a home in the Inland Empire in Riverside
25 Division. Maybe the debtor really likes the home but,
26 you know what, sometimes house is just a thing. Don't
27 let the things that you own, own you. At this point,
28 Mr. LaFontaine doesn't own this home; that home owns
him.

He clearly cannot afford this house. If he hasn't
paid a mortgage payment in two years, come on. How is

¹⁰ Consistent with the bankruptcy court's ruling, courts
have held that "[a]mong the factors considered are whether the
debtor can propose a confirmable plan, whether the primary
purpose of the chapter 11 is to liquidate or reorganize, and
whether conversion benefits all parties in the case."
In re Peterson, 524 B.R. 808, 815 (Bankr. S.D. Ind. 2015) (citing
In re Gordon, 465 B.R. at 691-92); In re Parvin, 538 B.R. at 101.

1 he going to -- to try to propose and confirm this
2 Chapter 11 plan? And it's very clear U.S. Bank would
3 rather get paid less with the Trustee now through a
short sale than count on the debtor over time to cure
that arrearage.

4 Finally, the bankruptcy court found that Debtor failed to
5 present evidence establishing that an effort to keep his house
6 and reorganize his debts would inure to the benefit of any
7 parties in interest other than the Debtor and his family. The
8 bankruptcy court found that secured creditor U.S. Bank, in
9 particular, and the Debtor's unsecured creditors, in general, had
10 been waiting four years to be paid by the Debtor and should not
11 have to wait an additional five years to get their money,
12 assuming that Debtor made his plan payments.

13 Put simply, Debtor failed to establish that he had the
14 ability to propose and confirm a chapter 11 plan that would inure
15 to the benefit of all parties in interest. Thus, Debtor failed
16 to carry his burden of proving that his case should be converted
17 to chapter 11 under Section 706(b). The bankruptcy court did not
18 abuse its discretion, or otherwise commit reversible error, in
19 denying Debtor's Motion.

20 **CONCLUSION**

21 For all of the reasons set forth above, the bankruptcy
22 court's order denying Debtor's Motion to convert this case to
23 chapter 11 under Section 706(b) is AFFIRMED.