FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
March 12, 2013
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE SCOTT PROSSER NORDIN, Debtor.	BAP No. CO-12-041
SCOTT PROSSER NORDIN, Appellant, v. NOREEN GALABA, JOSEPH G. ROSANIA, JR., Chapter 7 Trustee, and SALLY J. ZEMAN, Chapter 13 Trustee, Appellees.	Bankr. No. 10-35841 Chapter 7 OPINION*

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

Before KARLIN, SOMERS, and MOSIER[1], Bankruptcy Judges.

MOSIER, Bankruptcy Judge.

Scott Nordin appeals the bankruptcy court's orders precluding him from converting his Chapter 7 bankruptcy case to one under Chapter 13. Mr. Nordin contends that he is an honest but unfortunate debtor and the bankruptcy court erred when it concluded that he was acting in bad faith by attempting to convert

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

[1] Honorable R. Kimball Mosier, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Utah, sitting by designation.

his case. Mr. Nordin's assertion is belied by the evidence, and we therefore affirm.

I. Background and Procedural History.

Scott Nordin filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in October 2010, and Joseph Rosania was appointed as trustee. Prior to the meeting of creditors held a month later, Rosania received information that Nordin's bankruptcy filings were not accurate. In response to Rosania's questioning at the meeting of creditors, Nordin disclosed the first, of numerous, inaccuracies in his bankruptcy pleadings. In his original schedules, Nordin identified real property in Breckenridge, Colorado (Breckenridge Property) as his asset with a value of $800,000, subject to liens totaling approximately $795,000. What Nordin failed to reveal was that he owned only 48% of the Breckenridge Property and that the other 52% was owned by one of his acquaintances, Noreen Galaba.

Also at the meeting of creditors, once again in response to Rosania's questioning, Nordin revealed that he had failed to truthfully answer Question 5 on his Statement of Financial Affairs. Specifically, real property owned by Nordin had been sold at foreclosure and he had received a payment in excess of $20,000 approximately three months prior to filing his petition. After the foregoing inaccuracies were revealed, Nordin amended his schedules and statements, but corrected only these inaccuracies.

Rosania obtained an independent valuation of the Breckenridge Property which was consistent with Nordin's valuation and on January 7, 2011, Rosania filed his Report of No Distribution. Nordin was granted a discharge by the bankruptcy court in February 2011.

In early March of 2011, Galaba offered to purchase the bankruptcy estate's 48% interest in the Breckenridge Property. Rosania filed a notice of withdrawal of his Report of No Distribution and negotiated with Galaba for a sale of the

estate's interest in the Breckenridge Property. Nordin was informed of these negotiations and, in April 2011, filed an amended Schedule C to claim a homestead exemption in the Breckenridge Property.[2] Galaba and Rosania ultimately entered into an agreement for Galaba to purchase the estate's interest in the Breckenridge Property, subject to all liens and encumbrances, for a lump sum payment of $30,000. The agreement required the bankruptcy court's approval, and Rosania filed a motion to approve the proposed sale on May 9, 2011.

The next day, Rosania filed an objection to Nordin's claimed homestead exemption, and Galaba joined in the objection. Although Nordin stated on his bankruptcy petition that the Breckenridge Property was his residence on the date he filed bankruptcy, Rosania and Galaba disputed this claim. Nordin and Galaba both acknowledged that the Breckenridge Property had an apartment where they had at one point lived, but they leased out the remainder. Galaba testified that Nordin had vacated the Breckenridge Property approximately six months prior to his bankruptcy.

Nordin timely objected to Rosania's proposed sale and filed a response to the objections to his claim of homestead exemption. In the objection to the sale, Nordin asserted that Rosania had abandoned any interest in the Breckenridge Property by virtue of filing his Report of No Distribution. The bankruptcy court set the various motions and objections for a preliminary hearing to be held in August 2011.

On July 5, 2011, Nordin, counsel for Nordin, and counsel for Rosania conferred regarding the scheduled preliminary hearing. During that call, Nordin

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[2] In his amended Schedule C, Debtor claimed a $4,600 homestead exemption in the Property, pursuant to Colo. Rev. Stat. § 38-41-201, which limits homestead exemptions to the cash value of the exempt property that exceeds the liens on it. *See* Appellant's Appendix at 118. Thus, Debtor claimed the difference between the home's stated value of $800,000 and the Wells Fargo liens.

disclosed, for the first time, that he had various items of personal property at the Breckenridge Property and he wanted Rosania to abandon the estate's interest in that personal property and return it to him. Because Nordin had not disclosed this personal property, Rosania requested an itemized list of the personal property so he could assess its value. During this telephone conference, Nordin also claimed for the first time that, notwithstanding all of his sworn statements filed in his bankruptcy case clearly stating he was single, he and Galaba were actually married pursuant to common law.[3]

The bankruptcy court held a preliminary hearing on August 31, 2011, and considered the limited issue of Nordin's objection to Rosania's withdrawal of his Report of No Distribution. Nordin was given until September 2, 2011 to file a supplemental brief on this issue, but elected not to do so. The bankruptcy court set Rosania's motion to sell the Breckenridge Property and the objections to Nordin's claim of homestead exemption for evidentiary hearing on November 15, 2011.

Four days before trial, Nordin's counsel informed Rosania that Nordin was considering converting his case to Chapter 13. Rosania told Nordin's counsel he would oppose any conversion. Nevertheless, on the same day, Nordin filed a motion to convert his Chapter 7 case to Chapter 13. Pursuant to Colorado Local Bankruptcy Rule 1017-1(a)(1), the bankruptcy court clerk immediately entered an order converting Nordin's Chapter 7 case to one under Chapter 13 (Conversion Order). On November 17, 2011, Rosania and Galaba filed their Joint Motion to Reconsider and Vacate Order Granting Debtor's Motion to Convert From Chapter 7 to Chapter 13, and Joint Motion to Stay Chapter 13 Case (Motion to

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[3] On August 19, 2011, Debtor filed a petition for dissolution of his alleged marriage to Galaba in state court. Galaba moved to dismiss that petition on the basis that the parties were not in fact married. *Id.* at 402. Debtor failed to respond to the motion to dismiss, and the state court granted the motion and dismissed the dissolution proceeding on October 4, 2011. *Id.* at 394.

Reconsider).

An evidentiary hearing on the Motion to Reconsider was held in January 2012. The parties filed a Joint Statement of Stipulated Facts and Nordin, Galaba, and Rosania all testified at the hearing. After hearing the evidence, the bankruptcy court issued a written decision and order amending the Conversion Order, denying Nordin's motion to convert. It issued an order reconverting the case to Chapter 7 the same day, and Nordin filed a timely notice of appeal.

II. Jurisdiction and Standard of Review.

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[4] None of the parties elected to have this appeal heard by the district court, and they have therefore consented to appellate review by this Court.

An order denying conversion of a Chapter 7 case to a Chapter 13 case is a final order for purposes of appeal.[5] Nordin timely filed his notice of appeal and this Court therefore has jurisdiction over the appeal.

Nordin raises two issues on appeal. First, Nordin asserts that the bankruptcy court erred in amending its Conversion Order. The bankruptcy court clearly treated the Motion to Reconsider as a motion under Federal Rule of Civil Procedure 59. An order granting a motion under Civil Rule 59 is reviewed under

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[4] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

[5] *See Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007) (by implication, considered appeal without reference to finality); *In re Young*, 237 F.3d 1168, 1173 (10th Cir. 2001) (order converting to Chapter 7 is "necessarily more final in nature than an order converting to Chapter 13"); *In re Vista Foods U.S.A., Inc.,* 202 B.R. 499, 500 (10th Cir. BAP 1996) (Chapter 11 to Chapter 7 conversion final and appealable).

the abuse of discretion standard.[6]

The second issue raised by Nordin is whether the bankruptcy court erred in finding that he was proceeding in bad faith. The issue of a debtor's bad faith is a fundamentally factual matter that necessarily involves witness credibility and weighing of evidence. Neither party disputes that the appropriate standard of review with respect to this issue is clear error.[7] As noted by the Tenth Circuit:

> Findings of fact are clearly erroneous when they are unsupported in the record, or if after our review of the record we have the definite and firm conviction that a mistake has been made. If the [trial] court's account of the evidence is plausible in light of the record viewed in its entirety, the [appellate court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. This admonition applies equally regardless of whether the trial court's factual findings are based on credibility determinations or on documentary evidence.[8]

Accordingly, with respect to the bankruptcy court's determination of Nordin's bad faith, we review that determination for clear error.

III. Discussion.

A. The Bankruptcy Court's Order Amending Its Conversion Order and Denying Nordin's Motion to Convert to Chapter 13 Was Proper.

Conversion of a Chapter 7 case under 11 U.S.C. § 706(a)[9] requires an order and "shall be on motion filed and served as required by [Bankruptcy] Rule 9013."[10] The Bankruptcy Court for the District of Colorado has adopted a local rule with respect to the conversion of a case from Chapter 7 to Chapter 13. If a

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6 *Phelps v. Hamilton*, 122 F.3d 1309,1325 (10th Cir. 1997).

7 *In re Gier*, 986 F.2d 1326, 1328 (10th Cir. 1993) (debtor's good faith is a factual inquiry and findings are reviewed for clear error).

8 *La Resolana Architects, PA v. Reno, Inc.* 555 F.3d 1171, 1177 (10th Cir. 2009) (citations and internal quotation marks omitted).

9 Statutory references herein are to Title 11 of the United States Code, unless stated otherwise.

10 Fed. R. Bankr. P. 1017(f)(2).

Chapter 7 case has not been previously converted, Colorado Local Bankruptcy Rule 1017-1(a)(1) provides that the clerk of the court will enter an order converting the case immediately upon the filing of a debtor's motion to convert. This local rule then permits parties in interest to "file a motion to reconsider the conversion of the case *within the time specified* by Federal Rules of Bankruptcy Procedure 9023 and 9024" (emphasis added).[11] Bankruptcy Rules 9023 and 9024 make Federal Rules of Civil Procedure 59 and 60 applicable to bankruptcy cases. Bankruptcy Rule 9023 requires a motion to alter or amend a judgment to be filed within 14 days after entry of a judgment, rather than within 28 days, as provided in Civil Rule 59. With a few specific exceptions, Bankruptcy Rule 9024 incorporates the time limitations set forth in Civil Rule 60.

Although "motions to reconsider" are not formally recognized by the Federal Rules of Civil Procedure, "regardless of how it is styled or construed . . . a motion filed within [14] days of the entry of judgment that questions the correctness of the judgment is properly treated as a Rule 59(e) motion."[12] The Motion to Reconsider was filed within 14 days after entry of the conversion order and the bankruptcy court treated the Motion to Reconsider as a motion to alter or amend a judgment under Rule 59(e). Grounds for relief under Civil Rule 59, made applicable by Bankruptcy Rule 9023, "include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice."[13] Nordin asserts that there were no grounds for the bankruptcy court to grant relief under Rule 59(e) because Rosania and Galaba failed to establish any

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[11] Colo. L.B.R. 1017-1(d).

[12] *Vreeken v. Davis*, 718 F.2d 343, 345 (10th Cir. 1983), *superseded by statute on other grounds, Grantham v. Ohio Cas. Co.*, 97 F.3d 434 (10th Cir. 1996).

[13] *Servants of the Paraclete v. Does,* 204 F.3d 1005, 1012 (10th Cir. 2000).

"newly discovered evidence." Nordin essentially argues that Colorado Local Bankruptcy Rule 1017-1 permanently eliminates the opportunity for parties in interest to object to a Chapter 7 debtor's motion to convert to Chapter 13. Because of the nature of the Conversion Order at issue in this case, we reject Nordin's contention.

Absent Colorado Local Bankruptcy Rule 1017-1, Nordin would have been required to give 21 days notice of his motion to convert to Rosania, Galaba and all his creditors pursuant to Fed. R. Bankr. P. 2002(a)(4). Rosania and Galaba would have had an opportunity to object to the motion to convert and litigate their objections. Nordin would have us treat a pro forma conversion order, entered automatically by a clerk of court, as a ruling on the merits of a motion to convert and all issues that might be raised in opposition to it. We decline that invitation. The rule is procedural – designed to simplify the process for good faith debtors to convert to Chapter 13 while reserving parties' rights to object to bad faith conversions; it does not eliminate substantive consideration of the merits of the conversion.

The Motion to Reconsider also asserted manifest injustice as grounds for the motion. Contrary to Nordin's assertion, to deny Rosania and Galaba the right to litigate their objection to Nordin's efforts to convert to Chapter 13 would be manifestly unjust. The Local Rule clearly does not prejudice Nordin, and it should not be read to prejudice Rosania or Galaba.

Even though it is not the basis for our decision, we also note the futility of Nordin's challege to the bankruptcy court's amendment of the Conversion Order. Even if we were to reverse the bankruptcy court and convert Nordin's case to one under Chapter 13, Rosania and Galaba would still be able to move to reconvert Nordin's case back to Chapter 7. The United Sates Supreme Court has recognized that a debtor's bad faith conduct is cause for conversion or dismissal of a case under § 1307(c), and in *Marrama v. Citizens Bank of Massachusetts* held that the

same bad faith analysis that is appropriate under § 1307(c) is also appropriate under § 706(d).[14] Thus, precisely the same conduct that the bankruptcy court considered and found sufficient to deny conversion of Nordin's case to Chapter 13, would be sufficient to convert his case back to Chapter 7. Under these circumstances, it would serve little purpose to reverse the bankruptcy court's Rule 59(e) decision.

The procedural entry of a conversion order, immediately upon the filing of a motion to convert, should not preclude a party who opposes conversion from having the bankruptcy court consider the merits of an objection allowed by *Marrama*. We therefore conclude that the bankruptcy court did not abuse its discretion when it amended the Conversion Order and denied Nordin's motion to convert.

B. The Bankruptcy Court Did Not Commit Clear Error When Finding That Nordin Was Acting In Bad Faith.

Federal courts have consistently held that a debtor's bad faith conduct may cause a forfeiture of the debtor's right to proceed under Chapter 13. However, prior to the United States Supreme Court's decision in *Marrama,* some courts had "suggested that even a bad-faith debtor has an absolute right to convert at least one Chapter 7 proceeding into a Chapter 13 case."[15] Resolving this apparent incongruity, *Marrama* held that the "absolute right" to convert a case from Chapter 7 to Chapter 13 is possessed by "[t]he class of honest but unfortunate debtors" who seek "the chance to repay their debts should they acquire the means to do so."[16]

The Supreme Court concluded that a debtor's right to convert a case under

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14 *Marrama v. Citizens Bank of Mass.,* 549 U.S. 365, 374 (2007).

15 *Id.* at 368.

16 *Id.* at 374.

§ 706(a) is limited by § 706(d). The relevant text of § 706 provides:

> (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.[17]

A debtor seeking to convert his case under § 706(a) must, pursuant to § 706(d), be eligible to be a debtor under the chapter to which he seeks to convert. The class of eligible Chapter 13 debtors does not include an "atypical" debtor whose bad faith demonstrates that he is not entitled to relief afforded to a good faith debtor.[18] Under "the broad authority granted to bankruptcy judges" by § 105(a), bankruptcy courts may deny "a motion to convert filed under § 706 in lieu of a conversion order that merely postpones the allowance of equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors."[19] Pursuant to its authority recognized by *Marrama*, the bankruptcy court denied Nordin's motion to convert in lieu of a conversion order that merely postponed the allowance of equivalent relief.

Nordin challenges the bankruptcy court's "bad faith" findings but has "done little to establish that those findings are clearly erroneous."[20] It is Nordin's burden to establish clear error and his failure to carry this burden is fatal to his

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17 11 U.S.C. § 706.

18 *Marrama,* 549 U.S. at 374-75.

19 *Id.* at 375.

20 *Pacini v. Ennis (In re Ennis)*, No. CO-12-008, 2012 WL 3727324 at *8 (10th Cir. BAP Aug. 29, 2012).

appeal.[21] Having reviewed the entire appellate record, this Court is unable to conclude that clear error exists. There is ample evidence in the record to establish the fact that Nordin is an "atypical" debtor who was proceeding in bad faith. Nordin's bankruptcy pleadings are replete with omissions, half truths and inaccuracies, and during his case he asserted inconsistent and meritless positions in an attempt to maneuver his case for his sole benefit.

The Court specifically notes: (1) Nordin initially failed to disclose not only that Galaba was a co-owner of the Breckenridge Property, but the majority co-owner; (2) Nordin claimed that he resided at the Breckenridge Property when he filed his petition, even though Galaba's testimony–which the bankruptcy court found more credible–indicated otherwise; (3) Nordin failed to disclose the payment, in excess of $20,000, he received from a foreclosure of his property and failed to provide any meaningful accounting for these funds; (4) postpetition, Nordin purchased a motorcycle for $8,000 cash, and was unable to reveal the source of the funds used for the purchase; (5) Nordin failed to disclose that he owned several items of personal property located at the Breckenridge Property; (6) Nordin did not claim a homestead exemption in the Breckenridge Property until after he became aware of Galaba's offer to purchase his interest from the estate; (7) despite having represented in his bankruptcy pleadings that he was single, and having repeatedly referred to Galaba as his "former girlfriend," Nordin filed a divorce proceeding against her after the bankruptcy court set a preliminary hearing on Rosania's motion to sell the Breckenridge Property; (8) even though he failed to prosecute the divorce action and it was dismissed, in his testimony at the Rule 59(e) hearing, he continued to assert he was married to Galaba; (9) Nordin attempted to convert his case to Chapter 13 only after Rosania's motion to sell was set for hearing; (10) Nordin attempted to convert his

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[21] *Id.*

case even though he presented no evidence that there was any change in circumstance from the petition date; (11) Nordin attempted to convert his case even though his bankruptcy pleadings showed a negative cash flow and no ability to fund a Chapter 13 plan; and (12) Nordin did not seek to convert his case until after he had already received his Chapter 7 discharge.

Even Nordin's response to the Motion to Reconsider supports the bankruptcy court's findings of bad faith; in it, he continued his misstatements and trivialized his omissions and maneuvering. Nordin denied his schedules were inaccurate, asserted that his failure to list personal property was insignificant because the personal property was of little value, and, in an attempt to shift blame to Rosania, criticized the administration of the bankruptcy case.

On appeal, Nordin fails to address most, if not all, of these facts. To the extent that Nordin even responds to the bankruptcy court's factual findings, it is essentially to insist that the bankruptcy court ignored his explanations. He continues to maintain that his bankruptcy pleadings are accurate by minimizing his omissions and inconsistencies.

The determination of a debtor's "bad faith" is a factual question. Bad faith determinations require the bankruptcy court to weigh the evidence and assess witness credibility, which is within the trier of fact's particular province.[22] As noted by the Tenth Circuit in *Young*, "we may not disturb th[e] trier of fact's credibility determinations on appeal."[23] Quite simply, it is clear that the bankruptcy court did not find Nordin to be a credible witness. The record before us amply supports the bankruptcy court's finding that Nordin was proceeding in bad faith by attempting to convert his case from Chapter 7 to Chapter 13. Neither

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[22] See Fed. R. Bankr. P. 8013 ("due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses").

[23] *In re Young*, 237 F.3d 1168, 1176 (10th Cir. 2001).

our review of the record, nor Nordin's attempts to controvert the bankruptcy court's findings, leads us to conclude that the bankruptcy court's findings were clearly erroneous.

IV. Conclusion.

Because we have concluded that the bankruptcy court did not abuse its discretion in amending the Conversion Order and that the bankruptcy court's finding that Nordin was proceeding in bad faith was not clearly erroneous, the order denying conversion and the order reconverting Nordin's case to Chapter 7 are therefore AFFIRMED.