



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
August 19, 2019

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:)	Case No.: 17-11328-MKN
)	Chapter 11
ANTHONY DIAZ,)	
)	Date: August 14, 2019
Debtor.)	Time: 9:30 a.m.
)	

**ORDER ON UNITED STATES' MOTION TO CONVERT
CHAPTER 11 TO CHAPTER 7¹**

On August 14, 2019, the court heard the United States' Motion to Convert Chapter 11 to Chapter 7 ("Conversion Motion"). At the same time, the court heard the Motion to Dismiss Chapter 11 Case ("Dismissal Motion") brought by the above-captioned debtor. The appearances of counsel were noted on the record. After arguments were presented, the matters were taken under submission.

BACKGROUND

On March 21, 2017, a voluntary Chapter 11 petition was filed by Anthony Diaz ("Debtor"). (ECF No. 1).² On the same date, a Notice of Chapter 11 Bankruptcy Case ("Bankruptcy Notice") was issued and served on all creditors. (ECF No. 5). Among other things, the Bankruptcy Notice scheduled a meeting of creditors to be conducted by the Office of

¹ In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure.

² Debtor filed two previous Chapter 11 proceedings in this judicial district, denominated Case No. 10-33765 and Case No. 13-15881. Both of those cases were dismissed at the request of different parties in interest.

1 the United States Trustee (“UST”) on April 27, 2017, and established a 30-day deadline,
2 beginning on the date of conclusion of the meeting of creditors, for parties to object. The
3 Bankruptcy Notice also set forth a deadline of July 26, 2017, for creditors to file proofs of claim,
4 and a deadline of September 18, 2017, for governmental units to file proofs of claim (“Claims
5 Bar Date”).

6 On April 4, 2017, Debtor filed his schedules of assets and liabilities (“Schedules”) along
7 with a statement of financial affairs. (ECF No. 18). On his property Schedule A/B, Debtor listed
8 assets having a total value of \$697,503.51, primarily consisting of a personal residence valued at
9 \$690,000, located at 7009 Via Bella Luna Avenue, Las Vegas, Nevada 89131 (“Residence”). On
10 his Schedule C, Debtor did not claim an exemption in the Residence, but did claim an exemption
11 for all of his other assets, including his fifty percent ownership interest in an entity identified as
12 Zenza Life Sciences, LLC DBA LifeQuest Network, LLC (“LifeQuest”). With respect to
13 LifeQuest, he claims an exemption in “100% of fair market value, up to any applicable statutory
14 limit” but does not specify what that value is. On his income Schedule I, Debtor attests that he
15 receives an estimated gross monthly income of \$11,000, as a consultant with LifeQuest. On his
16 expense Schedule J, Debtor attests that he has three dependent adult children, but that they are
17 not part of his household.
18

19 On May 31, 2017, Debtor filed amended Schedules of unsecured creditors. (ECF No.
20 35). In his Schedules, Debtor identifies eight creditors holding secured, priority unsecured, and
21 non-priority, general unsecured claims.³ According to the claims register maintained by the
22 court clerk, as of the Claims Bar Date, proofs of claim had been filed by nine separate creditors
23 asserting claims in the total amount of \$2,300,028.24. The secured claims total \$1,872,391.56,
24 and the priority unsecured claims total \$215,941.08, with the balance consisting of non-priority,
25 general unsecured claims. The secured claims were filed by two creditors asserting liens against
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³ Some of these creditors are listed in Debtor’s Schedules as having more than one claim.

1 the Residence, while the priority unsecured claim is asserted entirely by the Internal Revenue
2 Service (“IRS”).

3 On July 20, 2017, the UST reported that the meeting of creditors had been concluded.
4 (ECF No. 42).

5 On March 12, 2018, an order was entered in favor of the IRS to allow it to complete a
6 certain proceeding in the United States Tax Court. (ECF No. 77).

7 On March 28, 2019, the United States of America (“USA”), on behalf of the IRS, filed
8 the instant Conversion Motion. (ECF No. 102).

9 On April 24, 2019, Debtor filed an opposition to the Conversion Motion (“Opposition”)
10 accompanied by the Declaration of Anthony Diaz (“Diaz Declaration”). (ECF Nos. 108 and
11 109).

12 On May 6, 2019, the USA filed a reply (“Reply”). (ECF No. 110).

13 On May 8, 2019, the hearing on the Conversion Motion was continued to August 14,
14 2019.

15 On July 3, 2019, The Bank of New York Mellon (“BONY”) filed a motion for relief from
16 stay (“MRAS”) to proceed with foreclosure on the Residence. (ECF No. 113).

17 On July 10, 2019, Debtor filed his Dismissal Motion that was noticed to be heard on
18 August 14, 2019, along with the Conversion Motion. (ECF Nos. 117 and 118).

19 On August 8, 2019, an order was entered granting the MRAS, thereby permitting BONY
20 to proceed with foreclosure on the Residence.

21 **DISCUSSION**

22 By the instant request, the USA seeks to convert this individual Chapter 11
23 reorganization proceeding to a liquidation under Chapter 7, pursuant to Section 1112(b)(1).
24 Under Section 1112(b)(1), the bankruptcy court determines whether conversion of a Chapter 11
25 proceeding to liquidation under Chapter 7, or dismissal of the case, is in the best interests of
26 creditors or the estate. That determination must be predicated on a finding of “cause.” A non-
27 exclusive list of circumstances constituting cause is found in Section 1112(b)(4).
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1 The USA's request is straightforward. First, it maintains that cause exists under Section
2 1112(b)(4)(I) based on the Debtor's failure to file his 2017 income tax return that was due in
3 2018. See Conversion Motion at 2:11-14. Second, the USA asserts that cause exists under
4 Section 1112(b)(4)(J) because the Debtor has not even proposed, much less confirmed, a Chapter
5 11 plan in more than two years. Id. at 2:16-28. Third, the USA argues that there is no evidence
6 supporting a finding of "unusual circumstances" under Section 1112(b)(2) to prevent conversion
7 or dismissal of the case. Id. at 3:11-23. Finally, the USA suggests that conversion to Chapter 7,
8 rather than dismissal of the case, is in the best interest of creditors and the estate.

9 Debtor's response to the Conversion Motion is also straightforward. He asserts that his
10 accountant provided him with assurances that the 2017 tax return was filed. See Diaz
11 Declaration at ¶¶ 5 and 6.⁴ Debtor also argues that his failure to file a proposed plan and
12 proposed disclosure statement is excusable by the failure of the Debtor and IRS to resolve his tax
13 issues. See Opposition at 3:25 to 4:7. Debtor's Opposition to the Conversion Motion does not
14 discuss at all whether conversion to Chapter 7 or dismissal of the case is in the best interests of
15 creditors and the estate.

16
17 Having considered the arguments of the USA as well as the Debtor, the court concludes
18 that cause for relief has been established under Section 1112(b)(1) and that no unusual
19 circumstances have been established under Section 1112(b)(2). The court also concludes,
20 however, that dismissal of the Chapter 11 proceeding, rather than conversion to Chapter 7, is in
21 the best interests of creditors and the estate. Several reasons lead to this conclusion.

22 First, relief from stay has been granted in favor of the Debtor's primary secured creditor,
23 and the Residence will be foreclosed. The junior lienholder's interest may be wiped out, but that
24 will be determined by non-bankruptcy law. A conversion of a bankruptcy case from one chapter
25 to another will not reimpose the automatic stay that was previously terminated, see Ramirez v.
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27 ⁴ In its reply, the USA attached a copy of a redacted 2017 tax return dated April 20, 2019,
28 apparently received from Debtor's counsel. The USA, however, does not know whether that
return was ever submitted to the IRS. See Reply at 1:17-23.

1 Whelan (In re Ramirez), 188 B.R. 414-415 (B.A.P. 9th Cir. 1995), citing British Aviation Ins.
2 Co., Ltd. v. Menut (In re State Airlines, Inc.), 873 F.2d 264 (11th Cir. 1989), nor will it prevent
3 the loss of the Residence to the estate.

4 Second, no party in interest, including the IRS, ever objected to the Debtor's exemptions,
5 including his fifty percent interest in LifeQuest. Those assets were deemed exempt as a result of
6 Section 522(l), but upon conversion to Chapter 7, a new deadline arises under FRBP 4003(b) to
7 object to an individual debtor's exemptions. See Fed.R.Bankr.P. 1019(2)(B). There is no
8 evidence in the record and no suggestion has been made, however, that the assets listed by the
9 Debtor have any non-exempt value to the bankruptcy estate.

10 Third, while the Debtor's postpetition earnings were property of his Chapter 11 estate
11 under Section 1115(a)(2), any postpetition earnings still in his possession upon conversion to
12 Chapter 7 might be excluded from the Chapter 7 estate under Section 541(a)(6). Compare Harris
13 v. Viegelahn, 135 S.Ct. 1829, 1837 (2015) (funds held by Chapter 13 trustee at time of
14 conversion to Chapter 7 must be turned over to the debtor), with In re Gorniak, 549 B.R. 721,
15 724-25 (Bankr. W.D. Wisc. 2016) (funds held by individual Chapter 11 debtor in possession at
16 time of conversion must be turned over to the Chapter 7 trustee). See also Wu v. Markosian (In
17 re Markosian), 506 B.R. 273 (B.A.P. 9th Cir. 2014) (post-petition earnings of individual debtor
18 reverted to the debtor when initial Chapter 7 was converted to Chapter 11 and then reconverted
19 to Chapter 7).

20 Fourth, Debtor has requested a voluntary dismissal of this Chapter 11 proceeding after
21 the MRAS was granted in favor of BONY. By operation of Section 109(g)(2), the Debtor will
22 be precluded from commencing another bankruptcy proceeding for 180 days if his Dismissal
23 Motion is granted. During that period of time, all of the Debtor's creditors, including the IRS,
24 are free to pursue collection of their claims.
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1 Fifth, Debtor acknowledges that his obligations to the IRS may well be non-
2 dischargeable. See Dismissal Motion at 3:9-10. Thus, whether the case is dismissed or proceeds
3 under Chapter 7, there is no apparent prejudice to the IRS.⁵

4 Sixth, Debtor's monthly gross income of \$11,000 appears to be far above the applicable
5 median, and he might be precluded from obtaining relief under Chapter 7.⁶ See 11 U.S.C. §§
6 707(b)(1) and (b)(6).⁷ Moreover, his unsecured debt also may exceed the amount permitted to
7 obtain relief under Chapter 13. See 11 U.S.C. § 109(e).⁸ In other words, the Debtor may be a
8 high-income individual with substantial debt and no meaningful bankruptcy options.

9 For these reasons, the court concludes that conversion to Chapter 7 is not in the best
10 interests of the few remaining creditors of the estate, nor will there be substantial assets available
11 to administer. Accordingly, the court will deny the Conversion Motion brought by the USA and
12 will grant the Dismissal Motion brought by the Debtor. As to the latter, a separate order will be
13 entered contemporaneously herewith.

14 **IT IS THEREFORE ORDERED** that the United States' Motion to Convert Chapter 11
15 to Chapter 7, Docket No. 102, be, and the same hereby is, **DENIED**.

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17 Copies sent via BNC to all parties

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19 ⁵ Moreover, Debtor represents that the IRS is unwilling to discuss an "offer-in-
20 compromise" while he is in bankruptcy. See Dismissal Motion at 2:15-16. At the hearing,
21 counsel for the USA could not confirm or deny whether that representation is correct.

22 ⁶ The median annual income applicable to individuals seeking bankruptcy relief in the
23 District of Nevada begins at \$53,046 for a single earner. See Census Bureau Median Family
24 Income By Family Size (Cases Filed On or After May 1, 2019), found at
25 <https://www.justice.govv/ust/means-testing/20190501>.

26 ⁷ As an above-median income debtor, the allowable expense deductions are governed by
27 the fixed standards used by the IRS. See 11 U.S.C. § 707(b)(2)(a)(ii).

28 ⁸ If the Residence is sold at foreclosure for the \$690,000 value estimated by the Debtor, a
substantial deficiency may remain on the \$1,872,391.56 in total secured claims filed in the case.
If the collateral securing those claims is sold, the deficiency, if any, would be unsecured. To be
eligible for Chapter 13 relief under Section 109(e), an individual with regular income can have
no more than \$394,725.00 in noncontingent, liquidated, unsecured debt.

1 Copies sent via BNC to all parties

2 Copies sent via BNC to:

3 ANTHONY DIAZ

4 6440 SKY POINTE DR STE 140-424

5 LAS VEGAS, NV 89131-4047

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