



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
July 02, 2019

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

In re:	)	Case No.: 18-12543-MKN
	)	Chapter 13
RICHARD J. KLOSINSKI,	)	
	)	
Debtor.	)	Date: June 19, 2019
	)	Time: 2:30 p.m.
	)	

**CONDITIONAL ORDER REGARDING ROARK ESTATES HOMEOWNERS ASSOCIATION’S MOTION TO CONVERT TO CHAPTER 7<sup>1</sup>**

On June 19, 2019, the court heard Roark Estates Homeowners Association’s Motion to Convert to Chapter 7 (“Conversion Motion”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

On May 2, 2018, Richard J. Klosinski (“Debtor”) filed a voluntary Chapter 13 bankruptcy petition<sup>2</sup> along with his schedules of assets and liabilities (“Schedules”), Statement of Financial Affairs (“SOFA”), and other required information. (ECF Nos. 1 and 4). On the same date, a notice of the Chapter 13 filing was issued scheduling a meeting of creditors for June 12, 2018, and notifying creditors of the appointment of a Chapter 13 trustee. (ECF No. 6). The

<sup>1</sup> In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the above-captioned Chapter 13 proceeding as they appear on the bankruptcy docket maintained by the clerk of court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “NRS” are to provisions of the Nevada Revised Statutes.

<sup>2</sup> Chapter 13 relief is available only to individuals who meet the eligibility requirements under Section 109(e). Chapter 13 relief is purely voluntary inasmuch as involuntary bankruptcy cases under Section 303 may not be commenced under Chapter 13. See 11 U.S.C. § 303(a).

1 Chapter 13 proceeding was assigned for administration to a panel Chapter 13 trustee, Kathleen  
2 A. Leavitt (“Trustee”).

3 On his Schedule A/B, Debtor listed two parcels of real property: 4470 Ray Way, Sloan,  
4 Nevada 89054-0000 (“Ray Property”) and 4471 Roark[e] Avenue, Sloan, Nevada 89054-0000  
5 (“Roark Property”). Debtor listed both properties as having or consisting of a manufactured or  
6 mobile home in which he claims a fee simple interest. He lists the value of the Ray Property at  
7 \$152,000 and the Roark Property at \$235,000. On his Schedule “C,” Debtor claims the Ray  
8 Property as exempt under NRS 21.090(1)(l) and NRS 115.050. On his Schedule “D,” Debtor  
9 lists no creditors having claims secured by any of this property. On his Schedule “E/F,” Debtor  
10 lists Roark Estates Homeowners Association (“Roark HOA”) as having a disputed claim in the  
11 amount of \$53,000 based on unpaid homeowners association dues assessed in 2015 and 2017. In  
12 response to Question 4 of his SOFA, Debtor lists three separate actions brought against him by  
13 Roark HOA in the Eighth Judicial District Court, Clark County, Nevada (“State Court”),  
14 denominated Case Nos. A-17-602535-C, A-15-717799-C, and A-15-727434-C (collectively  
15 “State Actions”). On his summary of assets and liabilities, Debtor attests that he has total assets  
16 valued at \$396,755.19, and total liabilities of \$66,705.43.<sup>3</sup>

17 On July 11, 2018, Roark HOA filed a proof of claim number 2 (“POC 2-1”) attesting that  
18 it is owed \$116,878.23 based on HOA assessments and attorney’s fees totaling \$93,703.38 in  
19 connection with the Roark Property, \$3,619.46 based on HOA assessments of \$3,619.46 in  
20 connection with the Ray Property, and an additional \$19,555.39 based on attorney’s fees and  
21 costs. All of the amounts claimed are alleged to be secured by both the Ray Property and the  
22 Roark Property. Attached as Exhibits “C” and “D” to POC 2-1 are copies of separate judgments  
23 entered by the State Court on March 30, 2017, in Case No. A-15-727434-C and on March 15,  
24 2018, in Case No. A-17-760235-C.

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25 <sup>3</sup> This is a Chapter 13 proceeding in which the Debtor must confirm a plan to pay his  
26 creditors. Confirmation of a Chapter 13 plan requires a debtor to pay creditors at least what they  
27 would receive in a Chapter 7 liquidation. See 11 U.S.C. § 1325(a)(4). If the Roark Property is  
28 worth \$235,000 and is not exempt, and the Debtor’s total liabilities are \$66,705.43, then it  
appears that the Debtor has far more assets than required to pay all of his creditors in full if his  
assets were simply liquidated in a Chapter 7.

1 On January 18, 2019, Debtor filed a motion for approval to sell the Roark Property.  
2 (ECF No. 41). Debtor represented that he had a buyer willing to purchase the Roark Property for  
3 \$245,000, sufficient to satisfy the full amount of the amount set forth in POC 2-1.

4 On February 12, 2019, an order was entered authorizing the Debtor to proceed with the  
5 sale of the Roark Property. (ECF No. 54).

6 On March 13, 2019, an order was entered shortening time to permit an initial motion to  
7 convert the case to Chapter 7, previously filed by Roark HOA (ECF No. 35), to be heard on  
8 March 20, 2019. (ECF No. 61). The basis for shortening time was that the Roark Property had  
9 appraised for less than the amount at which the Debtor was willing to proceed with the scheduled  
10 sale. See Ex Parte Application for Order Shortening Time With Respect to Roark Estates  
11 Homeowners Association’s Motion to Convert to Chapter 7 (“Roark HOA Ex Parte App”).  
12 (ECF No. 59).

13 On March 14, 2019, Roark HOA filed an amended to its proof of claim (“POC 2-3”)  
14 attesting that it is owed \$147,380.23. The difference between the amounts in POC 2-1 and POC  
15 2-3, consists of additional assessments and attorney’s fees made and incurred after the Debtor  
16 filed his Chapter 13 petition.<sup>4</sup> Substantially similar documents are attached as exhibits to the  
17 amended proof of claim.

18 On March 22, 2019, an order was entered denying without prejudice the initial motion by  
19 Roark HOA to convert the case to Chapter 7. (ECF No. 66).

20 On March 25, 2019, Debtor filed an amended Schedule “D” alleging that Roark HOA has  
21 a disputed claim in the amount of \$53,000 secured by the Roark Property having a value of  
22 \$235,000. (ECF No. 67).

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25  
26 <sup>4</sup> Section 506(b) provides that the holder of an allowed, oversecured claim shall be  
27 allowed “interest on such claim, and any reasonable fees, costs, or charges provided under the  
28 agreement or State statute under which such claim arose.” Because the Debtor attests that the  
Roark Property is worth far in excess of POC 2-1 as well as POC 2-3, it appears that Roark HOA  
may be able to include its post-petition amounts.

1 On March 29, 2019, Debtor, in pro se, filed an objection to POC 2-1 or POC 2-3 (“Claim  
2 Objection”).<sup>5</sup> (ECF No. 69).

3 On April 1, 2019, Debtor, in pro se, filed a proposed amended Chapter 13 Plan #3 (“Plan  
4 #3”), apparently “under protest.” (ECF No. 71).

5 On April 11, 2019, Roark HOA filed opposition to confirmation of Plan # 3. (ECF No.  
6 78).

7 On April 18, 2019, the Trustee filed opposition to Plan # 3, including a recommendation  
8 that the Chapter 13 proceeding be dismissed. (ECF No. 79).

9 On April 25, 2019, Roark HOA filed opposition to the Claim Objection. (ECF No. 80).

10 On May 17, 2019, Roark HOA filed the instant Conversion Motion, and noticed it to be  
11 heard on June 19, 2019. (ECF Nos. 84 and 86).

12 On May 20, 2019, Debtor’s bankruptcy counsel, David Mincin, filed a motion to  
13 withdraw from further representation of the Debtor (“Attorney Withdrawal Motion”). (ECF No.  
14 91).

15 On June 19, 2019, a combined hearing was conducted on the Claim Objection,  
16 confirmation of Plan #3, the Conversion Motion, and the Attorney Withdrawal Motion. At that  
17 hearing, the Attorney Withdrawal Motion was granted inasmuch as the Debtor did not oppose  
18 and no party in interest had objected. After arguments were presented in connection with the  
19 remaining matters, those pending matters were taken under submission.

20 **DISCUSSION**

21 The court having considered the written and oral arguments presented, as well as the  
22 representations of the parties and counsel, concludes that conditional conversion of the Chapter  
23 13 proceeding to Chapter 7 is appropriate.

24 Debtor acknowledges that his dispute with Roark HOA has been pending since 2015,  
25 well before he commenced this Chapter 13 proceeding. Although he insists that the Roark HOA  
26 assessment claims and fees are excessive, unauthorized, unwarranted, or unreasonable, he does  
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28 <sup>5</sup> Debtor filed the Claim Objection in pro se because his bankruptcy counsel, David Mincin, had agreed only to represent him in Chapter 13 matters.

1 not dispute that he is the subject of at least two judgments entered against him by the State Court  
2 well before he filed his bankruptcy petition. In at least two hearings in this court, Debtor has  
3 represented in pro se, the underlying factual basis for his dispute with Roark HOA, and that he  
4 was represented by counsel in the prior State Court proceedings. He does not dispute that the  
5 State Court entered judgments against him. The bottom line is that the Debtor had his  
6 opportunity to present his arguments to the State Court and he lost. Absent evidence that those  
7 State Court judgments were overturned on appeal, or are that the judgments have been stayed by  
8 the State Court pending appeal, those determinations are final and are not subject to review by  
9 this bankruptcy court. Compare In re Reyes, 2019 WL 1759749, at \*7 (B.A.P. 9th Cir. Apr. 19,  
10 2019)(under Rooker-Feldman doctrine, bankruptcy court lacked subject matter jurisdiction  
11 where Chapter 13 debtors sought relief from a state court unlawful detainer judgment).

12 Debtor also has not suggested a basis under bankruptcy law for avoiding the State Court  
13 judgments. According to his Schedules, neither the Ray Property nor the Roark Property are  
14 encumbered by consensual liens in favor of lenders, e.g., a deed of trust or mortgage. Debtor has  
15 claimed a homestead exemption in the Ray Property, but no exemption with respect to the Roark  
16 Property. Debtor attests that he was solvent at the time he filed his Chapter 13 petition, i.e., his  
17 assets were worth more than his liabilities. Presumably, that also was true when the obligations  
18 and liens arose in favor of Roark HOA. Because he was solvent, he likely would have little basis  
19 to seek to avoid those obligations and liens as fraudulent transfers or preferences. See 11 U.S.C.  
20 §§ 544, 548 and 547. Likewise, because the Roark Property apparently is not his dwelling for  
21 which he could claim a homestead exemption, he likely would not be able to avoid any judgment  
22 lien in favor of Roark HOA to the extent it impairs such an exemption. See 11 U.S.C. §  
23 522(f)(1)(A).

24 A proof of claim properly filed in a bankruptcy proceeding constitutes prima facie  
25 evidence as to its validity and amount. See Fed.R.Bankr.P. 3001(f). To overcome the  
26 evidentiary effect, an objecting party must over evidence in support of its assertion, not merely  
27 disagreement. See Diamant v. Kasparian (In re Southern California Plastics, Inc.), 165 F.3d  
28 1243, 1248 (9th Cir. 1999); In re Blas, 2018 WL 3343490, at \* 3 (Bankr. D. Alaska July 5,

1 2018).<sup>6</sup> At this stage, Debtor has offered no evidentiary or legal basis to contest the Roark HOA  
2 claim. Instead, Debtor has been in his voluntary Chapter 13 proceeding for more than a year and  
3 only recently has filed a proposed Plan #3 “under protest.”

4 Section 2.5 of proposed Plan #3 provides for payments of \$100 to be made for eight  
5 consecutive months from February 1, 2019, through September 1, 2019, totaling \$800.00.  
6 Thereafter, a single payment of \$16,200 would be paid “depending on sale of property under  
7 protest.” Section 4.6 provides for zero payments to be made to Roark HOA outside of the  
8 proposed plan. Section 5.4 estimates that \$10,674.00 will be available to pay non-priority  
9 unsecured claims, but that 100% of all filed and allowed non-priority unsecured claims will be  
10 paid “under protest.” Section 9.2 then provides that all sums deemed due and owing, whether by  
11 stipulation or court decree, will be paid directly to Roark Estates Homeowners Association  
12 “under protest.”

13 Although Debtor may be sincere in protesting his situation, he has not made effective use  
14 of his time under the protection of the automatic stay. Debtor apparently had an opportunity to  
15 sell the Roark Property for an amount in excess of POC 2-1, but remains of the opinion that the  
16 Roark Property is worth \$235,000; Debtor’s opinion was not shared by the appraiser employed  
17 by the prospective purchaser’s lender. See Roark HOA Ex Parte App at ¶ 4. Apparently, that  
18 appraiser also did not share the prospective purchaser’s sentiment as to the value of the Roark  
19 Property. There is nothing in the record evidencing that the Debtor has attempted to borrow  
20 sufficient funds from another lender to satisfy the Roark HOA claim.

21 Debtor’s proposed Plan #3 provides no source for periodic payments to Roark HOA  
22 through the plan, nor does it provide for periodic payments to be made directly by the Debtor or  
23 from another source. It provides for a payment of \$16,200 to be paid into the plan on October 1,  
24 2019, but that payment is dependent on the sale of property, presumably the Roark Property.  
25 Moreover, there is no indication of when such a sale will ever occur or that the previous sale

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27 <sup>6</sup> See also In re Davis, 2017 WL 3014349, at \*4 (B.A.P. 9th Cir. July 14, 2017)(“In order  
28 to overcome the presumption of validity, an objector must rebut the presumption with evidence.  
Because Mr. Davis failed to offer any evidence to support his Objection, the bankruptcy court  
did not err by ruling on the Objection without holding an evidentiary hearing.”).

1 authorized by the court remains a possibility. Finally, the suggestion that all sums due and  
2 owing to Roark HOA will be paid directly by the Debtor or by another source is meaningless  
3 because all sums encompassed by POC 2-3 are currently deemed allowed due to the Debtor's  
4 failure to assert a sustainable objection. By not identifying a means of satisfying that claim,  
5 including an income stream, available financing of the property, or, a scheduled sale of property,  
6 there is no reason to suggest that the Debtor is actually attempting to confirm a Chapter 13 plan.

7 More important, because a Chapter 13 debtor is required to pay creditors at least what  
8 they would receive in a Chapter 7 liquidation, the instant Debtor will be unable to confirm a plan  
9 without paying all of the allowed claims, including the amounts owed to Roark HOA, in full.

10 See discussion at note 3, supra. Thus, the Debtor's submission of his Plan #3 "under protest"  
11 reflects a fundamental misunderstanding of the Chapter 13 process.

12 Under these circumstances, the record supports a conclusion that cause exists under  
13 Section 1307(c)(1) to convert the case to Chapter 7 due to an unreasonable delay by the Debtor  
14 that is prejudicial to creditors.

15 Because Chapter 13 proceedings are entirely voluntary, however, the court will convert  
16 this proceeding to Chapter 7 effective on July 12, 2019. Upon conversion to Chapter 7, a trustee  
17 will be appointed with authority to liquidate the non-exempt assets of the bankruptcy estate,  
18 including the Roark Property, if the appointed trustee determines that liquidation is in the best  
19 interests of the creditors. If the Debtor chooses to voluntarily dismiss this Chapter 13 proceeding  
20 prior to July 12, 2019, he must file a notice of voluntary dismissal no later than July 11, 2019.

21 **IT IS THEREFORE ORDERED** that Roark Estates Homeowners Association's  
22 Motion to Convert to Chapter 7, Docket No. 84, be, and the same hereby is, **GRANTED AS**  
23 **PROVIDED HEREIN.**

24 **IT IS FURTHER ORDERED** that debtor Richard J. Klosinski may seek to dismiss this  
25 Chapter 13 proceeding without prejudice by filing a **notice of voluntary dismissal** of this  
26 Chapter 13 case **no later than July 11, 2019.**

27 **IT IS FURTHER ORDERED** that in the event the above-captioned Debtor does not file  
28 a notice of voluntary dismissal by the close of business on July 11, 2019, **a further order will be**

1 entered on July 12, 2019, converting the above-captioned Chapter 13 proceeding to  
2 Chapter 7.

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4 Copies sent via CM/ECF ELECTRONIC FILING

5 Copies sent via BNC to:  
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