

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF )  
 )  
ROCCO JOHN ACCETURA, ) CASE NO. 05-33221 HCD  
 ) CHAPTER 13  
 )  
DEBTOR. )

Appearances:

Amber L. Blackford, Esq., counsel for debtor, 216 West Fort Wayne Street, Warsaw, Indiana 46580; and  
Debra L. Miller, Esq., Chapter 13 Trustee, 100 East Wayne Street, P.O. Box 11550, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on February 1, 2007.

Before the court is the “Notice of Completion of Plan and Motion for Entry of Closing Case” (“Motion”). Debra L. Miller, Trustee in this Chapter 13 case of debtor Rocco John Accetura, notified all creditors and parties in interest that the case was ready to be closed but stated that the debtor was “not entitled to a discharge in this Bankruptcy under Chapter 13 because of the previous discharge obtained in the Chapter 7.” R. 31, ¶ 8. The Trustee asked that the case be closed after notice and opportunity to object. No objection was filed in the matter.

The debtor filed this case under chapter 7 on June 10, 2005, and received a discharge on September 26, 2005.<sup>1</sup> Before the chapter 7 case was closed, however, on October 24, 2005, the debtor filed a motion to convert the case to a chapter 13 case. The Order granting that motion for conversion was entered two days later.<sup>2</sup>

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<sup>1</sup> Because the case was filed before October 17, 2005, it is governed by the Bankruptcy Code and not by the amendments to the Code recently enacted in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which became effective on October 17, 2005.

<sup>2</sup> The chapter 7 trustee completed his administration of the estate and submitted a final report on June 19, 2006. See R. 30. The chapter 7 case remained open, administratively, during that period. However, only the trustee’s  
(continued...)

The debtor's chapter 13 plan was confirmed by special order on March 17, 2006. The issue before the court is whether the debtor is entitled to a discharge upon the completion of his chapter 13 plan after he already had obtained a discharge in his chapter 7 case.

The court begins with the clearly established principles in this area of bankruptcy law. First, the Supreme Court has approved the concept of serial or sequential filings of chapter 7 and chapter 13 petitions, which are dubbed "chapter 20" cases. *See Johnson v. Home State Bank*, 501 U.S. 78, 87, 111 S.Ct. 2150, 2156, 115 L.Ed.2d 66 (1991) ("Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief."); *see also In re Bridges*, 326 B.R. 345, 352 (Bankr. D.S.C. 2005) (recognizing "the Supreme Court's holding that Chapter 20 filings are procedurally proper under the provisions of the Bankruptcy Code"); *In re Standfield*, 152 B.R. 528, 535 (Bankr. N.D. Ill. 1993) (describing a "sequential Chapter 20" as "a Chapter 7 case substantially completed, at least to the point of discharge, followed by a Chapter 13 case" and noting that it is a viable debtor's strategy). The Bankruptcy Code does bar certain serial filings, however. *See, e.g.*, 11 U.S.C. § 109(g) (prohibiting filings within 180 days of dismissal); § 727(a)(8) (barring a chapter 7 filing within 6 years of a chapter 7 or 11 filing); § 727(a)(9) (barring a chapter 7 filing within 6 years of a chapter 12 or 13 filing); *see Johnson*, 501 U.S. at 87, 111 S. Ct. at 2156 (listing those prohibitions). In addition, the Seventh Circuit Court of Appeals, along with a majority of courts, has held that simultaneous cases, involving concurrent pending chapter 7 and chapter 13 filings, are barred. *See In re Sidebottom*, 430 F.3d 893, 901 (7th Cir. 2005) (forbidding debtor's filing of a chapter 13 proceeding while his chapter 7 case involving the same debts is still open, affirming dismissal of chapter 13 petition).

Nevertheless, conversions from one chapter to another are established under the Bankruptcy Code and generally are found to be proper. *See* 11 U.S.C. § 348; *see also, e.g., Mason v. Young (In re Young)*, 237 F.3d 1168, 1173 (10th Cir. 2001); *In re Mosby*, 244 B.R. 79, 83-84 (Bankr. E.D. Va. 2000). The act of converting a

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<sup>2</sup>(...continued)

duties remained after the discharge. The court does not consider this chapter 7 case to be ongoing after the discharge on September 26, 2005.

case does not change the date of filing or commencement and does not create a new bankruptcy estate or two separate bankruptcy cases. *See* 11 U.S.C. § 348(a); *In re Starling*, \_\_ B.R. \_\_, 2007 WL 96678 at \*5 (Bankr. N.D. Ill. Jan. 11, 2007) (finding that “the act of conversion does not create an additional case requiring separate administration due to the existence of a newly created bankruptcy estate”). Because, in this converted case, a separate bankruptcy case was not filed and the debts discharged in Chapter 7 were not simultaneously litigated under Chapters 7 and 13, the prohibitions found in *Sidebottom* and §§ 109 and 727 are not at issue. *See Sidebottom*, 430 F.3d at 898 (rejecting “the effort to litigate the same matter simultaneously in the Chapter 13 proceeding” and the Chapter 7 proceeding); *In re Starling*, 2007 WL 96678 at \*4-\*5 (discussing conversion cases and distinguishing simultaneous and serial cases).

In this case, the debtor converted his case without objection and proceeded under chapter 13 through confirmation of his plan.<sup>3</sup> It is clear to this court that the debtor had a statutory right to convert from chapter 7 to chapter 13 “at any time” under § 706(a)<sup>4</sup> and that nothing in § 348, the conversion provision, or elsewhere in the Code prohibits the debtor’s right to convert after his chapter 7 discharge has been entered. *See, e.g., In re Carter*, 285 B.R. 61, 66-67 (Bankr. N.D. Ga. 2002); *In re Mosby*, 244 B.R. 79, 84 (Bankr. E.D. Va. 2000). As my Illinois colleague Judge Jack B. Schmetterer stated,

Chapter 7 debtors are given a clear right to seek conversion to Chapter 13 ‘at any time’ under § 706(a), and can try to save their homes or other property thereby. The Code should be viewed as encouraging and permitting debtors to pay their debts in Chapter 13 and thereby save property

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<sup>3</sup> Under the plan, the debtor has paid 100% to all allowed unsecured creditors, has surrendered a car to the bank, and has continued payments directly to two secured creditors. The plan fulfilled the standards for confirmation, and no challenge was raised that the plan was proposed in bad faith or that there was evidence of fraud, concealment, or manipulation of the bankruptcy system. The Trustee, after reporting that the debtor had made all required plan payments to the Trustee and that she had fully disbursed the funds to the allowed claims, stated that there was no reason to delay closing the case. *See* R. 31.

<sup>4</sup> The Supreme Court heard oral argument on November 6, 2006, on whether the right of conversion to chapter 13 is absolute or limited. *See Marrama v. Citizens Bank (In re Marrama)*, 430 F.3d 474 (1st Cir. 2005) (*cert. granted*, \_\_ U.S. \_\_, 126 S. Ct. 2859, 165 L.Ed.2d 894 (June 12, 2006)). The Seventh Circuit, in *In re Salem*, 465 F.3d 767, 776 (7th Cir. 2006), discussed the circuit split on this issue but it did not need to “choose sides” in order to resolve the appeal before it. *Id.* This court, as well, need not analyze § 706(a). This case was converted and the chapter 13 plan is complete; the issue of conversion was never challenged.

needed for their lives and families and should not be read to bar that possibility unless the statute clearly bars it.

*In re Starling*, \_\_ B.R. \_\_, 2007 WL 96678 at \*11. Furthermore, nothing in the Code bars that debtor from proceeding under chapter 13 or obtaining confirmation of a chapter 13 plan after having received a chapter 7 discharge. See, e.g. *In re Mosby*, 244 B.R. at 91.

However, the question of two discharges remains: May a debtor obtain a first discharge, in a chapter 7 case, of his dischargeable unsecured debts, and then a second discharge, in the chapter 13 case, of his remaining unsecured and secured debts? The Seventh Circuit, in dictum, tacitly approves the “chapter 20” sequence without commenting on a potential second discharge. See *United States v. Frontone*, 383 F.3d 656, 657-58 (7th Cir. 2004) (“[A]fter receiving a discharge of dischargeable unsecured debts in his Chapter 7 proceeding, the debtor may still be burdened with debts – non-dischargeable unsecured debts, plus secured debts – and Chapter 13 enables him to work them off in accordance with an installment payment schedule approved by the bankruptcy court.”) (citing *Johnson*, 501 U.S. at 87-88, and other cases and articles); see also *In re Starling*, \_\_ B.R. \_\_, 2007 WL 96678 at \*7 (reviewing *Frontone* and other conversion cases).

Some courts have concluded that “a debtor cannot obtain two discharges in the same case under two mutually exclusive chapters of the Bankruptcy Code.” *In re Hauswirth*, 242 B.R. 95, 95 (Bankr. N.D. Ga. 1999) (citing cases); see also *In re Standfield*, 152 B.R. at 538 (concluding that debtors cannot select more than one form of relief in the same case). When a debtor with a chapter 7 discharge moves to convert to a chapter 13, therefore, those courts forbid the entry of two discharges in one case and insist that the debtor’s chapter 7 discharge be vacated before the chapter 13 discharge is granted. See *In re Starling*, 2007 WL 96678 at \*7 (concluding that “the Debtors’ Chapter 7 discharge must be set aside if they wish to subject the debts listed in their Chapter 7 case to terms of a Chapter 13 plan”); *In re Hauswirth*, 242 B.R. at 97 (pointing out the “inconsistency of allowing a debtor two discharges in one case,” ordering that debtor’s chapter 7 discharge be vacated unless debtor acts). Other courts have disagreed, noting that there is no provision in the Bankruptcy Code that limits a debtor to only

one discharge in a single case or that either allows or bars more than one discharge in a single case.<sup>5</sup> *See, e.g., In re Carter*, 285 B.R. at 69 (“[T]he Court is not persuaded that the Code contains a *per se* prohibition against the receipt of two discharges in the same case.”); *In re Mosby*, 244 B.R. 79, 88 (Bankr. E.D. Va. 2000) (noting that no statutory prohibition of two discharges was included by Congress in § 348, § 1328, or any other Code section).

Just as Bankruptcy Judge Stephen S. Mitchell, in *In re Mosby*, was tempted to grant the debtor’s request because there was no opposition to the request and no apparent prejudice to creditors, this court has considered granting the Trustee’s unopposed request to close the debtor’s chapter 13 case without entering a discharge. *See In re Mosby*, 244 B.R. at 91. However, the court agrees with the thoughtful conclusions of Bankruptcy Judge W. Homer Drake, Jr., in *In re Carter*, that the debtor should be allowed to convert his chapter 7 case to chapter 13 and to file a plan, and that, once the court has considered any objections and has confirmed the plan, the debtor should be able to obtain a chapter 13 discharge because there is no *per se* bar to obtaining two discharges in the same case.

Finally, the Court is not persuaded that the Code contains a *per se* prohibition against the receipt of two discharges in the same case. If the debtor fails to confirm a plan or to complete the plan payments, the second discharge will never be granted, and, presumably, the case will be reconverted to Chapter 7 to allow for the liquidation of the debtor’s assets. In the event that the debtor completes the plan payments, the second discharge will discharge the same debts discharged by the first discharge and possibly additional debts that were not dischargeable in the Chapter 7 case. Therefore, the Chapter 13 discharge essentially renders the Chapter 7 discharge superfluous. While it is not generally the preference of this court to consider its own orders to be meaningless, the Court does not see this as a concern that would justify a *per se* requirement that Chapter 7 discharges be vacated prior to a debtor’s proceeding in a Chapter 13 case. On a practical note, if the Court routinely required the discharge to be vacated before the debtor were allowed to convert, the Court would then

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<sup>5</sup> It is noteworthy that the Bankruptcy Code explicitly denies a discharge to a chapter 7 debtor if the debtor was granted a chapter 12 or 13 discharge within the 6 years prior to the filing of the chapter 7 petition, *see* 11 U.S.C. § 727(a)(9), but did not provide for a similar denial of discharge under § 1328. However, Congress added a denial-of-discharge provision to § 1328 under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It provides that “the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge – (1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter.” 11 U.S.C. § 1328(f)(1).

face the question of whether and how to reinstate the discharge in the event the debtor were unable to confirm a Chapter 13 plan and wished to reconvert the case to Chapter 7.

*In re Carter*, 285 B.R. at 69 (footnote omitted). Judge Drake was persuaded by the *Mosby* court on this issue:

Finally, the argument that a debtor cannot convert after receiving a discharge because only one discharge can be received in a case, while it has a certain surface appeal, nevertheless has no direct support in the language of the Bankruptcy Code or Federal Rules of Bankruptcy Procedure. In this connection, it is illuminating that Congress, in crafting § 348, Bankruptcy Code, which specifies the effect of conversion from one chapter to another, included no language limiting the effect of a discharge entered prior to the conversion. Similarly, in drafting § 1328, Bankruptcy Code, the only express condition placed by Congress on eligibility for a discharge is “completion by the debtor of all payments under the plan.” Even if the earlier pre-conversion issuance of a chapter 7 discharge in the same case were viewed as sharply reducing the debtor’s incentive to complete plan payments, it is difficult to see how creditors could be prejudiced, since no debts would be discharged by the comprehensive chapter 13 discharge than had not already been discharged by the more limited chapter 7 discharge until plan payments were complete. The only likely area of ambiguity would be with respect to long-term obligations on which the debtor had maintained payments during the term of the plan – that is, would the chapter 13 discharge (which excludes such obligations) supercede the chapter 7 discharge or merely supplement it? Regardless of the answer to that question, the secured creditor would never be worse off than in the analogous “chapter 20” scenario, where the debtor’s personal liability on a mortgage is discharged in chapter 7 but the payment defaults under the mortgage are cured in a follow-up chapter 13.

*In re Mosby*, 244 B.R. at 88 (footnote omitted); *see also In re Oblinger*, 288 B.R. 781, 785-88 (Bankr. N.D. Ohio 2003) (finding that a chapter 7 discharge does not, as a matter of law, preclude a debtor from converting from chapter 7 to chapter 13 or preclude a debtor’s second discharge under chapter 13). This court, like the *Oblinger* court, is persuaded by the analyses of the *Mosby* and *Carter* courts that the concept of two discharges in one case is not inconsistent with the tenets of the Bankruptcy Code in spirit and is not disallowed by the statutory provisions. *See In re Oblinger*, 288 B.R. at 788 (“Despite the apparent awkwardness of two discharges under different Bankruptcy Code sections in the same case, the court cannot find anything in the letter or logic of the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure to which its unease can be anchored.”).

The Trustee in this case did not request that the court vacate the debtor’s existing chapter 7 discharge, but instead requested that the court close the case without granting the debtor a chapter 13 discharge. The Trustee stated, in her Motion for Entry of Closing Case, that the terms of the debtor’s chapter 13 plan have been satisfied and that distributions have been made. The court finds that the debtor successfully completed his chapter 13 plan.

The only reason given by the Trustee that the debtor is not entitled to a discharge under chapter 13 is that he obtained a previous discharge in the chapter 7 bankruptcy case. The court, however, convinced that there is nothing in the Bankruptcy Code that prohibits two discharges in the same case, declines to close the case without granting the debtor a discharge when the only ground for that request is that there was a prior discharge. The court finds that the debtor is entitled to a chapter 13 discharge and therefore denies the Trustee's Motion.

#### Conclusion

For the reasons presented in this Memorandum of Decision, the court grants in part and denies in part the Trustee's "Motion for Entry of Closing Case." It denies the Trustee's request to close the case without granting the debtor a discharge, but grants the Trustee's request that the case be closed once a discharge is entered. The court directs the clerk of the court to issue a discharge in the debtor's chapter 13 case and then to close the case.

SO ORDERED.

/s/ Harry C. Dees, Jr.  
HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT