

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
RUBEN FALCON and) CASE NO. 03-35333 HCD
LEANN KAY FALCON,) CHAPTER 13
)
DEBTORS.)

Appearances:

Loraine P. Troyer, Esq., attorney for debtors, 121 North Third Street, Goshen, Indiana 46526-3214; and

Thomas E. Panowicz, Esq., attorney for Chapter 13 Trustee, 100 East Wayne Street, P.O. Box 11550, South Bend, Indiana 46634-0550.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 1, 2005.

Before the court is the Trustee's Motion to Convert to Chapter 7, filed by Debra L. Miller, Chapter 13 Trustee, pursuant to 11 U.S.C. § 1307(c). A hearing on the motion was held on November 4, 2004. After the hearing, the court took the matter under advisement. For the reasons that follow, the court in its discretion dismisses rather than converts the debtors' chapter 13 bankruptcy case.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(A) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 7052. Any

conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The debtors filed a chapter 7 bankruptcy petition on September 18, 2003. When the United States Trustee filed an amended motion to dismiss the chapter 7, asserting a good faith violation under § 707(a), the debtors responded by requesting that their chapter 7 case be converted to a chapter 13. On March 19, 2004, they filed a Motion to Convert and filed a Chapter 13 Plan. The court converted the case to a chapter 13 on March 24, 2004.

The Plan provided for payments of \$840.43 monthly for 48 months. The debtors made their first payment a month late, on May 18, 2004. Thereafter they amended their chapter 13 Plan to lower the payments to \$643.00 a month. However, they never made any other payments. As of October 4, 2004, the date of the Trustee's Motion to Convert to Chapter 7, the debtors were delinquent \$2,374.57.

In the Motion, the Trustee stated that conversion back to chapter 7 was appropriate under § 1307(c) for cause – because the debtors had failed to make Plan payments and were delinquent. At the hearing on the Trustee's motion, held on November 4, 2004, counsel for the debtors expressed a preference that the bankruptcy case be dismissed. She stated that there were income assets but that the debtors were unable or unwilling to make the payments under their Plan. She suggested that converting the case to a chapter 7 was an inefficient use of the court's time and that dismissal would not harm the creditors. The Chapter 13 Trustee noted that the debtors did not make their payments under the chapter 13 Plan; however, he agreed that the issues could be resolved outside bankruptcy. The court took the matter under advisement on that date.

Discussion

Section 1307(c) states that “the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause.” 11 U.S.C. § 1307(c). It is within the court’s discretion to determine the best interests of the creditors and the estate. The court finds that the debtors failed to commence making timely payments under § 1326, in violation of § 1307(c)(4). Nevertheless, in spite of the fact that the debtors made their first payment one month late, the court did not dismiss or convert their case at that time. It permitted the debtors to amend their Plan to reduce their monthly payments by almost \$200. However, that amendment did not cure their difficulties, it appears, because the debtors never made a payment under the amended Plan. Indeed, they made only one payment in the six months between the filing of their chapter 13 Plan and the court hearing.

The court finds that the debtors have not claimed that there were exceptional or extenuating circumstances that caused their inability to make the required payments under the Plan. They have not given any justification for their tardy first payment or their failure to make any other payments. *See In re McDonald*, 118 F.3d 568, 570 (7th Cir. 1997) (affirming the bankruptcy judge’s discretionary dismissal of the debtor’s chapter 13 case). The court took note of the comment of debtors’ counsel that the debtors were unable or unwilling to make the payments under their Plan. In the view of the court, it appears either that the debtors’ chapter 13 Plan is unworkable or that “the case has been filed with no *bona fide* intention of proceeding.” 8 Collier on Bankruptcy ¶ 1307.04[4] at 1307-15 (Alan N. Resnick and Henry J. Sommer, eds., 15th ed. rev’d. 2004).

The court has considered the Trustee’s preference for conversion on the ground that the debtors have not made their payments. In the view of the court, however, dismissal rather than conversion is preferable in this case. It notes that the United States Trustee sought dismissal of the debtors’ chapter 7 case and that the debtors voluntarily converted to a chapter 13 case. However, the debtors have failed to make sufficient payments to maintain a feasible chapter 13 Plan. The Chapter 13 Trustee did not show the court that a creditor or any party in interest would be injured if the debtors’ case were dismissed. Upon dismissal of this chapter 13 case, the

automatic stay would be lifted, the creditors could pursue their claims in state court, and the debtors' rights and remedies would be limited to those available under Indiana law. After considering the arguments of counsel, the court finds that the best interests of the creditors and the estate would be served by the dismissal of the debtors' chapter 13 case without prejudice.

Conclusion

For the reasons presented above, the court denies the Trustee's Motion to Convert to Chapter 7. However, in its discretion, it determines that the debtors' chapter 13 case must be dismissed without prejudice pursuant to 11 U.S.C. § 1307(c).

SO ORDERED.



HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT