

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
HENRY KIVLAHAN and : Case No. 90-1462-D H
PATRICIA KIVLAHAN, :
Debtors. : Chapter 11

ORDER--MOTION FOR RELIEF FROM THE COURT'S ORDER
ENTERED ON OCTOBER 17, 1990

On November 28, 1990, a hearing was held on the U.S. Trustee's motion for relief from the Court's order entered on October 17, 1990. The following attorneys appeared on behalf of their respective clients: Thomas Yeggy for Debtors; Joe W. Warford as Chapter 13 Trustee; and Terry L. Gibson as Assistant U.S. Trustee. At the conclusion of said hearing, the Court took the matter under advisement upon a briefing deadline. Briefs were timely filed and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2). The Court, upon review of the pleadings, arguments of counsel, and briefs submitted now enters its findings and conclusions pursuant to Fed.R.Bankr. 7052.

FINDINGS OF FACT

1. Debtors filed a voluntary Chapter 13 petition on January 10, 1989. This case was assigned Case No. 90-0057-D. This petition was filed without the benefit of a Chapter 13 statement and plan. Debtors were represented by attorney

Jerald Gregg.

2. The U.S. Trustee filed a motion to dismiss this Chapter 13 proceeding with prejudice on the basis that Debtors had failed to timely file their statement and plan.

3. The Court granted the U.S. Trustee's motion to dismiss on May 16, 1990. This Chapter 13 proceeding was dismissed with prejudice pursuant to 11 U.S.C. § 109(g)(1). The order provided that Debtors were barred for a period of 180 days from commencing further proceedings under Title 11 without prior approval of the Court.

4. On May 31, 1990, Debtors filed an application for permission to file under Title 11. Said application requested permission to commence a Chapter 7 bankruptcy and advised the Court that Debtors wanted to file a liquidation bankruptcy and abandon all non-exempt assets to the secured creditors and obtain a discharge of the unsecured debts. The application further advised the court that the secured and unsecured creditors would not suffer any prejudice by the filing as the secured would receive their security back and the unsecured would receive nothing, as there were no non-exempt assets on which the unsecured creditors could execute and levy upon. The application further advised the Court that if Debtors were not permitted to file a Chapter 7 petition, the utility company would stop all services and the tenants would suffer harm which would result in a diminution of value of the

property.

5. The Court granted Debtors' application and permitted the filing of a Chapter 7 petition upon payment of the filing fees and the matter was permitted to proceed as a normal filing under Title 11.

6. Debtors filed their Chapter 7 petition on May 31, 1990. The order for relief was entered on June 1, 1990, and the interim trustee was appointed on the same day.

7. Substitute counsel entered an appearance on behalf of Debtors on June 28, 1990.

8. The interim trustee filed a no asset report and on September 25, 1990, the Court granted Debtors a discharge pursuant to 11 U.S.C. § 727 and Fed. R. Bankr. P. 4004(c).

9. On October 10, 1990, Debtors filed a document labeled "Conversion to Chapter 13." Debtors stated in this document that pursuant to 11 U.S.C. § 706 that they elected to convert the case from Chapter 7 to Chapter 13 under the Bankruptcy Code.

10. The Bankruptcy Clerk's office entered an order converting this case from a case under Chapter 7 to a case under Chapter 13 on October 17, 1990.

11. U.S. Trustee received a copy of the order converting the case to a Chapter 13 proceeding, a copy of Debtors' "Conversion to Chapter 13", and the Chapter 13 statement, petition and plan on October 19, 1990.

12. On October 25, 1990, the U.S. Trustee filed this motion for hearing and/or relief from the Court's order entered on October 17, 1990.

DISCUSSION

I. Relief from October 17, 1990 Order Pursuant to Fed. Bankr. P. 9024

The U.S. Trustee requests relief from the Court's October 17, 1990 order converting the Kivlahan's Chapter 7 case to a Chapter 13 case. The U.S. Trustee's request for relief was submitted pursuant to Fed. R. Bankr. P. 9024, which incorporates Fed. R. Civ. P. 60(b). Under Fed. R. Civ. P. 60(b), relief may be granted on the basis of "mistake, inadvertence, surprise, or excusable neglect", "newly discovered evidence," or "any other reason justifying relief from the operation of the judgment." Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence.

In re Flanery, slip op. No. 87-977-C (Bankr. S.D. Iowa March 24, 1988), citing In re Pettibone Corp., 74 B.R. 293, 298 (Bankr. N.D. Ill. 1987).

In the instant case, the U.S. Trustee does not allege a manifest error of fact, or present newly discovered evidence.

Thus, the issue is whether the relief should be granted from the Court's order of October 17, 1990 to correct a manifest

error of law.

11 U.S.C. § 706 governs conversion of a Chapter 7 case and provides in pertinent part:

- (a) The debtor may convert a case under Chapter 7 to a case under Chapter 11, 12, or 13, *at any time*, if the case has not been converted under 11 U.S.C. § 1112, 1307, or 1208. Any waiver of the right to convert a case under this subsection is unenforceable.

Under 11 U.S.C. § 706(a), a Chapter 7 debtor has an absolute right to convert the case from a Chapter 7 to Chapter 11, 12, or 13 at any time and may do so even after having obtained a Chapter 7 discharge. In re Sieg, 120 B.R. 533, 535 (Bankr. D. N.Dak. 1990); In re Caldwell, 67 B.R. 296, 300 (Bankr. E.D. Tenn. 1986).

In the instant case, the Court finds that under 11 U.S.C. § 706(a) and applicable case law, Debtors had an absolute right to convert the case from a Chapter 7 case to a Chapter 13 case, even after having obtained a Chapter 7 discharge. Thus, there was no manifest error of law in entering the order dated October 17, 1990, and the U.S. Trustee's motion for reconsideration pursuant to Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60 is denied.

II. 11 U.S.C. § 1307(c) Motion to Dismiss

As an alternative, U.S. Trustee requests that the Court dismiss the Debtors' Chapter 13 proceeding for cause pursuant

to 11 U.S.C. § 1307(c), including the impropriety of the initiation of the Chapter 13 proceeding given the prior discharge of the indebtedness as obtained by the Debtors during the pendency of their Chapter 7 proceeding. However, the Court finds that this issue is best dealt with at the hearing on confirmation of Debtors' Chapter 13 plan where the Court can examine Debtors' good faith under 11 U.S.C. § 1325(a)(3) and other requirements for confirmation of Debtors' Chapter 13 plan. See In re Sieg, 120 B.R. 533, 536 (Bankr. D. N.Dak. 1990); In re Ligon, 97 B.R. 398, 405 (Bankr. N.D. Ill. 1989); In re Hagberg, 92 B.R. 809 (Bankr. W.D. Wisc. 1988).

ORDER

IT IS ACCORDINGLY ORDERED that U.S. Trustee's motion for reconsideration and alternative motion for dismissal are denied.

Dated this 29th day of March, 1991.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE