

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: July 15 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No. 04-31441
)	
Christy O’Larry,)	Chapter 7
)	
Debtor.)	
)	JUDGE MARY ANN WHIPPLE

MEMORANDUM AND ORDER REGARDING MOTION TO DETERMINE ESTATE ASSET

This matter came before the court for hearing on Debtor’s Motion to Determine Estate Asset [Doc. # 65]. Debtor requests a determination as to the amount of her 2004 tax refund that must be turned over to the Chapter 7 Trustee (the “Trustee”) as property of the bankruptcy estate. The issue presented in this motion is whether the bankruptcy estate’s pro rata share of the refund should be determined as of the date of Debtor’s filing of a Chapter 13 petition or the date the case was converted to a Chapter 7 proceeding. Resolution of this issue turns on whether Debtor converted her case to a Chapter 7 proceeding in bad faith as contemplated under 11 U.S.C. § 348(f)(2). Having considered the motion, Debtor’s testimony and the exhibits submitted by her, and after hearing arguments of the Trustee and Debtor’s counsel, the court concludes that estate assets must be determined as of the original filing date and that none of the 2004 tax refund must be turned over to the Trustee.

FACTUAL BACKGROUND

Debtor is a single mother of four minor children. She has been employed at the Ford Motor Company for approximately 6 years where she works as a press operator. However, due to a difficult pregnancy, Debtor was on an extended leave from work from mid-2003 until May, 2004. Although her home mortgage payments of \$1,427 per month were current until her maternity leave began, during her leave, she became delinquent in her payments and foreclosure proceedings were commenced. As a result, she filed a petition for relief under Chapter 13 of the Bankruptcy Code on March 4, 2004. Debtor's confirmed Chapter 13 plan required her to make weekly payments of \$87.23 to the Chapter 13 trustee beginning May 14, 2004, after her anticipated return to work, and for a period of sixty months.

After returning to work in May 2004, she worked for only one and one-half weeks before she was injured in a non-work-related fall. Her injury involved multiple fractures of her arm, requiring a full arm cast and resulted in an additional twelve weeks on medical leave from work. During this time, she received no disability payments due to the procedures involved before any such payments could be made. While she eventually received approximately \$2300 before taxes in disability payments for that period of time, she did not receive them until after she returned to work in August 2004. As a result, she was forced to borrow money from her parents and to seek public assistance from Jobs & Family Services.

By the time she returned to work in August 2004, she had begun suffering from depression and, as a result, missed additional days of work. Although deductions from her pay were made to fund her Chapter 13 plan when she was working, and she had made two additional voluntary payments on her own, she was behind on her Chapter 13 plan payments. By late September, Debtor testified that she realized she was too far behind in both her post-petition mortgage payments and Chapter 13 plan payments. She concluded that she could not complete her Chapter 13 plan and, on October 29, 2004, moved to convert her case to a Chapter 7 proceeding. The court granted her motion on November 3, 2004. At that time, a total of only \$818.92 had been paid to the Chapter 13 trustee.

Thereafter, Debtor received a sizeable income tax refund for 2004. The Trustee represented, and Debtor does not disagree with her computations, that if estate assets are determined as of the conversion date, \$3,922.38 is the bankruptcy estate's pro rata share of the refund. But if estate assets are determined as of the date Debtor originally filed her Chapter 13 petition, and after considering Debtor's exemption amount in her tax refund, no funds are due to the estate.

LAW AND ANALYSIS

Section 348 of the Bankruptcy Code provides in relevant part as follows:

(f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title--

(A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion;

. . . .

(2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property in the converted case shall consist of the property of the estate as of the date of conversion.

11 U.S.C. § 348(f). Thus, the general rule is that when a Chapter 13 case is converted to a case under Chapter 7, the Chapter 7 case is deemed to have commenced as of the date the Chapter 13 petition was filed for purposes of determining property of the estate. *See In re Carter*, 260 B.R. 130, 133 (Bankr. W.D. Tenn. 2001) (citing 11 U.S.C. § 101(42) and explaining that “a bankruptcy case can statutorily commence only one time—upon the filing of the ‘petition’”). As such, after-acquired property does not form part of the converted estate. But when a case is converted in bad faith, the property of the Chapter 7 case is extended to include all property of the estate as of the date of the conversion.

While the Bankruptcy Code does not define “bad faith,” courts applying § 348(f)(2) have employed a “totality of the circumstances” test. *See Warren v. Peterson*, 298 B.R. 322, 328 (N.D. Ill. 2003); *In re Bejarno*, 302 B.R. 559, 562 (Bankr. N.D. Ohio 2003); *In re Messer*, 2000 WL 33673748, *3 (Bankr. M.D.N.C. 2000). As one court explained,

[a]ny inquiry into a debtor’s good faith or bad faith will necessarily be very fact driven. A court must apply broad standards and general definitions of bad faith to the specific facts of the case to determine if there is fraud, deception, dishonesty, lack of disclosure of financial acts or an abuse of the provisions, purpose or spirit of the Bankruptcy Code. In other words, a court will have to determine if there has been an unfair manipulation of the bankruptcy system to the substantial detriment or disadvantage of creditors.

In re Siegfried, 219 B.R. 581, 585 (Bankr. D. Colo. 1998). Similarly, in *Bejarno*, the court noted that “bad faith,” as defined by the Sixth Circuit albeit in another context, means “not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . it contemplates a state of mind affirmatively operating with furtive design or ill will.” *Bejarno*, 302 B.R. at 562 (quoting *United*

States v. True, 250 F.3d 410, 423 (6th Cir. 2001). By contrast, courts should not find that bad faith exists if the debtor is simply unable to complete a Chapter 13 plan due to a change in circumstances or financial hardship. *Carter*, 260 B.R. at 134.

In this case, the court finds that Debtor's Chapter 13 case was not converted in bad faith. In asserting bad faith, the Trustee relies solely on the fact that Debtor failed to make all payments as required under her Chapter 13 plan. However, it was the occurrence of unforeseen circumstances after Debtor was to begin such payments that resulted in less than full payment being made. Debtor expected to, and did, return to full employment at Ford Motor Company in May 2004, at which time she was to begin making payments to the Chapter 13 trustee. Unfortunately, she sustained an injury shortly thereafter prohibiting her from working for another twelve weeks. During that time she received no disability payments and relied on public assistance and loans from her family to meet her family's needs. When she returned to work in August, she was suffering from depression that resulted in additional time off work. Although she was able to make some of her Chapter 13 payments, by October 2003, she no longer believed she could successfully complete her Chapter 13 plan.

Based on the foregoing, the court finds no attempt to unfairly manipulate the bankruptcy system and no conscious wrongdoing that would support a finding of bad faith under § 348(f)(2). Rather, Debtor's changed circumstances after filing her Chapter 13 case and resulting financial difficulties formed the basis of her decision to convert her case to a Chapter 7 proceeding. As such, the bankruptcy estate's pro rata share of Debtor's 2004 income tax return must be determined as of March 4, 2004, the date she filed her Chapter 13 petition. As represented by the Trustee, after consideration of the amount of Debtor's exemption in the tax refund, none of the refund is due to the bankruptcy estate.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that, after consideration of Debtor's exemption in her 2004 tax refund, the bankruptcy estate has no interest in the refund.