UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 03-10017
	)	
ALVIN C. TURNER,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

The debtor Alvin Turner filed his case under bankruptcy code chapter 7. He then converted it to chapter 13 without opposition. On the chapter 13 trustee's motion, the court re-converted the case to chapter 7. The debtor now moves to reconvert to chapter 13 and the chapter 7 trustee opposes the motion. (Docket 90, 92, 106, 107, 108, 109, 111, 113). For the reasons stated below, the motion is denied.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O).

ISSUES

1. Given that the debtor has converted his case once from chapter 7 to chapter 13, does he have the right to convert it a second time from chapter 7 to chapter 13?

2. Alternatively, has the debtor established a basis for relief from the order converting his case to chapter 7?

FACTS

These facts are drawn from the hearing evidence and the documents filed in this case.

The original chapter 7 filing

The debtor filed his chapter 7 case on January 2, 2003, at which time he owned a one-half undivided interest in real estate. The debtor attended the 341 meeting of creditors[1] with his attorney, Ronald Robinson (sometimes referred to as "former counsel"). At that meeting, the chapter 7 trustee stated that the house would have to be sold for the benefit of creditors because the debtor had substantial equity in it. The debtor conferred with his attorney after the meeting and asked what he could do to save his house; his attorney did not know. After speaking with other attorneys and the trustee, the debtor's former counsel told him that he could convert his case to chapter 13, which the debtor authorized him to do. The court granted the motion to convert from the bench.[2] At that point, the debtor's counsel should have submitted a proposed order for the court's consideration, but he did not. Two months later, the court vacated the bench ruling due to this inaction.

The chapter 7 trustee then filed an adversary proceeding to determine liens on the real estate and to sell it for the benefit of the estate.[3] The debtor's former counsel sent several electronic submissions in an unsuccessful attempt to convert the case to chapter 13. The matter

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[1] *See* 11 U.S.C. § 341.

[2] Docket results for 4/17/03.

[3] Adversary proceeding 03-1347.

finally made it to hearing and, on August 24, 2004, the court again granted the motion to convert.[4]

The chapter 13 case

On conversion to chapter 13, the debtor was required to file a plan, schedules, and statements. Although he did not timely do so, he eventually filed the necessary documents. The proposed plan required him to pay $491.00 each month to the chapter 13 trustee, with the payments to begin within 30 days from the date the plan was filed. This made the first payment due November 18, 2004.[5]

The debtor did not make any of the required payments to the chapter 13 trustee. The debtor failed to make the payments for two reasons: (1) he told his former counsel that after making monthly payments on his house note, car note, and insurance, he did not have any money left; and (2) his former counsel said that he would get the amount "chopped down" and the debtor did not need to start making payments.[6] This is contrary to the plan language and to written information provided by the chapter 13 trustee to all debtors.

On January 20, 2005, based on the debtor's failure to make any payments, the chapter 13 trustee moved to reconvert the case to chapter 7. Although the debtor was served with this motion, he did not file anything or appear at the hearing. On March 10, 2005, the court granted the motion.

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[4] Docket 60.

[5] Docket 71.

[6] Debtor's hearing testimony.

The debtor's handling of documents from the court

The debtor received numerous documents from the court about his case, starting in January 2003 when it was filed. Initially, he opened the mail. Soon, however, he stopped opening the mail, instead piling it up and delivering it unopened to his former counsel. He thought this was reasonable because he did not understand the papers. Even when his former counsel did not return his phone calls or provide substantive information about his case status, the debtor still did not open his mail. About one to one and a half years into the case, he began to suspect something was wrong because he knew other people with bankruptcy cases where the entire case was resolved within a few months. It was not until the former counsel's wife came to the debtor's house, gave him his file, and told him to find new representation that the debtor acted to get new counsel. Although the debtor did not say the date on which this happened, it must have been before April 29, 2005 when new counsel filed his first document on the debtor's behalf.

THE POSITIONS OF THE PARTIES

The debtor moves to reconvert to chapter 13 under 11 U.S.C. §§ 706(a) and/or (c), arguing that the statute gives him an absolute right to convert a second time. Alternatively, he contends that if the ability to convert a second time is discretionary with the court, the court should grant the motion because the debtor's troubles were caused by his former counsel. Again in the alternative, he argues that the court order converting the case to chapter 7 should be vacated under federal rule of civil procedure 60(b)(1) or (6) as incorporated into the bankruptcy rules. *See* FED. R. BANKR P. 9024. He bases this on the debtor's excusable neglect due to

reliance on inadequate advice of counsel or on general equitable principles based on that same reliance.

The trustee contends that the debtor does not have a right to convert a second time under § 706(a) and even if he does, he has not stated grounds for conversion. The trustee argues further the debtor did not bring himself within 60(b) because his attorney's neglect is attributable to the debtor and the debtor's delay has prejudiced the creditors.

DISCUSSION

11 U.S.C. § 706(a)

The debtor relies on bankruptcy code §§ 706(a) and (c) which state:

> (a) The debtor may convert a case under . . . chapter [7] to a case under chapter . . . 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.
>
> * * * * *
>
> (c) The court may not convert a case under this chapter to a case under chapter . . . 13 of this title unless the debtor requests such a conversion.

11 U.S.C. §§ 706(a) and (c).

I.

The courts have split over whether a debtor who has converted his case once from chapter 7 to chapter 13 may do so a second time. Some courts have held that the statute does not permit a second conversion, while others have found it is within the court's discretion to permit it under the right circumstances. *Compare, for example, In re Hanna*, 100 B.R. 591 (Bankr. M.D. Fla. 1989) with *In re Masterson*, 141 B.R. 84 (Bankr. E.D. Pa. 1992). This court believes the better

reasoned approach based on the plain language of the statute and the legislative history is that the debtor is limited to one opportunity to convert his case to another bankruptcy chapter. In reaching this conclusion, the court adopts the reasoning of *In re Hanna*:

> The decision [by Congress] to limit the right of conversion to a single opportunity is well reasoned. More specifically, it bars repeated attempts to convert which could otherwise delay the proceedings. As one treatise points out, § 706(a) 'prevents debtors from repeatedly seeking conversion back to Chapter 11, 12, or 13 once their case has been converted to liquidation under Chapter 7 . . . While it can be argued that making the right to convert discretionary with the court would curb the possible abuse of repeated conversions, such an interpretation would not prevent repeated attempts to convert. The harm of delay remains a real possibility with a discretionary right to convert, since a hearing upon due notice would be required in each instance to evaluate the debtor's motive and other relevant considerations.
>
> Obviously, Congress in granting the debtors a single chance to convert struck a balance between the competing policy of the debtor's opportunity to repay and the potential disadvantage of delay caused by repeated attempts to convert. Surely, Congress considered the goal of finality to be paramount to the goal of repayment.

In re Hanna, 100 B.R. at 594 (internal citation omitted). This reasoning has been adopted by at least one other bankruptcy court in this circuit. *In re Banks*, 252 B.R. 399, 403 (Bankr. E.D. Mich. 2000).

The debtor in this case exercised his statutory right to convert from chapter 7 to chapter 13. He does not have a right to seek such conversion a second time.

II.

Alternatively, if the court does have the discretion to permit re-conversion, the facts do not show that the court should exercise that discretion in the debtor's favor in this case. The trustee made a persuasive argument that permitting a second conversion would unduly prejudice

the creditors. This case has been pending about two and half years without moving forward in any meaningful way. The debtor knew from his own experience with friends and acquaintances that his case was taking far longer than it should have, and yet he did nothing. If he had even opened his mail, he would have seen that there was court activity in his case and he should have found counsel who would explain it to him and address the issues. The court would feel differently if the debtor had delayed taking action for a few weeks or even a few months. Relying for more than two years, however, on an attorney who was not returning phone calls or communicating in other ways is just too long to make equity favor the debtor.

The court also considers it significant that when the debtor was in a chapter 13 he did not make any payments. During or after that time, he did manage to save some money but he used it to buy a car. If he had been making his plan payments, those funds would have gone to creditors who were owed prepetition debt.

After considering all of the circumstances, if the court has discretion to permit a second conversion, it concludes this is not an appropriate case in which to do so.

Federal rules of civil procedure 60(b)(1) and (6)

The debtor's alternative argument is that he is entitled to relief from the judgment converting his case from chapter 13 to chapter 7. Federal rule of civil procedure 60(b) states in relevant part:

> On motion and on such terms as are just, the court may relieve a party. . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment.

FED. R. CIV. P. 60(b) (made applicable by FED. R. BANKR. P. 9024). The party seeking relief from a judgment has the burden of proving he is entitled to relief. *See Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 385 (6th Cir. 2001).

I.

The debtor requests relief from the conversion under 60(b)(1) based on excusable neglect. This requires considering the Supreme Court's analysis of that term in *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'shp*, 507 U.S. 380 (1993). Under *Pioneer*, the court is to make an equitable determination based on these factors: "(1) the danger of prejudice to the other party, (2) the length of the delay; (3) its potential impact on judicial proceedings, (4) the reason for the delay, and (5) whether the movant acted in good faith." *Jinks*, 250 F.3d at 386 (citing *Pioneer Inv. Servs.*, 507 U.S. at 395). In making this determination, parties are "held accountable for the acts and omissions of their chosen counsel." Pioneer Inv. Servs. Co., 507 U.S. at 397.

The debtor argues that his former attorney's malfeasance warrants relief from the conversion under this rule. The relevant factors do not, however, support this argument. The debtor's case has been pending for more than two and a half years. The chapter 7 trustee's attempts to sell the real estate for the benefit of creditors were delayed for more than one year while the debtor was in chapter 13. The debtor's argument that his chapter 13 case did not succeed due solely to his counsel's malfeasance is problematic because the debtor is not without fault in this situation. He could have reasonably done more to prosecute his case, including making plan payments to the chapter 13 trustee, opening his mail when he suspected his case was not proceeding as it should, and making arrangements for other counsel when former counsel

was habitually unresponsive. The debtor did not prove that 60(b)(1) relief from the conversion order based on excusable neglect is appropriate under these circumstances.

II.

The debtor also requests relief under rule 60(b)(6). Rule 60(b)(6) applies "only 'as a means to achieve substantial justice when 'something more' than one of the grounds contained in Rule 60(b)'s first five clauses is present'." *Olle v. The Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990) (quoting *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989)). This subsection is limited to "exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." *Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001). The debtor's stated excuse–excusable neglect–comes within the express terms of 60(b)(1). A party's failure to obtain relief under 60(b)(1) does not permit the party to fall back on 60(b)(6). *McCurry v. Adventist Health System/Sunbelt, Inc.*, 298 F.3d 586, 596 (6th Cir. 2002). Rule 60(b)(6) is not, therefore, available to the debtor.

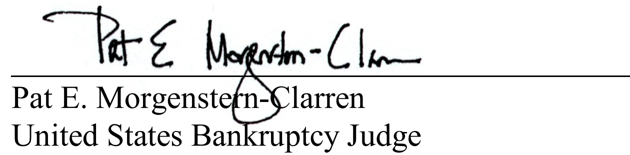
Alternatively, if the debtor's position does come within 60(b)(6), the debtor is still not entitled to relief. While there is case law permitting relief from a judgment under rule 60(b)(6) based on gross attorney misconduct, *see for example Fuller v. Quire*, 916 F.2d 358 (6th Cir. 1990), relief on that basis must be limited to situations where the party is faultless, *see Pioneer*, 507 U.S. at 393 (stating that to obtain relief under rule 60(b)(6) "a party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay" and that "[i]f a party is partly to blame for the delay, relief must be sought within one year under subsection (1) and the party's neglect must be excusable."). As discussed above, the debtor did not act

reasonably and was not faultless in the events leading up to his case being converted to chapter 7. Relief under rule 60(b)(6) is, therefore, not appropriate.

CONCLUSION

For the reasons stated above, the debtor's motion to reconvert his case from chapter 7 to chapter 13 is denied. A separate order will be entered reflecting this decision.

Date: 6 September 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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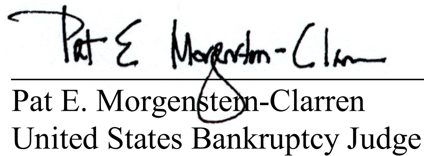
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the memorandum of opinion filed this same date, the debtor's motion to reconvert this chapter 7 case to chapter 13, or alternatively for relief from the order converting this case to chapter 7, is denied. (Docket 90).

IT IS SO ORDERED.



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