THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 05-19361
	)	
ARTHUR BOYD, JR.,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

The debtor Arthur Boyd moves to convert this chapter 7 case to a case under chapter 11 of the bankruptcy code. Mary Ann Rabin, the chapter 7 trustee in this case, and Sheldon Stein, chapter 7 trustee for the bankruptcy estate of creditor Larry Jones, object.[1] For the reasons stated below, the motion is denied.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered 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).

FACTS

This case began as an involuntary chapter 7 petition. After a contested hearing, the court ordered relief under chapter 7 against Arthur Boyd.

[1] Docket 81, 84, 103. Creditor FirstMerit Bank filed an objection but did not appear at the hearing. The court will not, therefore, address that objection.

According to the debtor's schedules,[2] his net income is $1,266.00 a month from Star Beverage Corporation. He lists assets of $15,091,700.00, which consist almost entirely of (1) a $15 million contingent claim against FirstMerit Bank and others that was pending in state court at the time of the bankruptcy filing; and (2) $90,000.00 in funds held in escrow by the state court in connection with that litigation. The debtor values his Star Beverage and Town Club International of Ohio stock at a combined value of $150.00 and his interest in intellectual property (eight beverage formulations) at zero. For liabilities, he lists $1,696,280.00 in unsecured, nonpriority debt. The scheduled unsecured debt does not include a $1.4 million judgment owed to Larry Jones[3] and does not quantify a debt owed to the Internal Revenue Service for federal income taxes.

On February 1, 2006, the court granted the trustee's motion to compromise the state court claims against FirstMerit for $150,000.00, which included FirstMerit releasing its claim to the $90,000.00 escrow fund. The debtor's actual assets as of this date, therefore, are valued at about $151,700.00 (the $150,000.00 settlement funds plus $1,700.00 in miscellaneous property).[4]

No party requested an evidentiary hearing on the motion to convert. At the oral argument, however, the debtor presented a document titled "Star Beverage Corporation of Ohio

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[2] Docket 57.

[3] The court made this factual finding in the memorandum of opinion dated February 1, 2006 granting the trustee's motion to compromise the claims against FirstMerit. (Docket 94).

[4] The estate still has an interest in the claims against the remaining state court defendants, but there was no evidence that the claims have any value or that the defendants are collectible. The only information presented to the court is that one defendant is deceased (leaving an insolvent estate), one is in receivership, and one is a chapter 7 debtor. *See* memorandum of opinion dated February 1, 2006. (Docket 94 at footnotes 2 and 3).

Proposal" dated February 2006 written by third parties.[5] A careful review of the document shows that it is a proposal designed to be distributed to potential lenders. The document includes a chart labeled projected income which makes it clear that Star Beverage is not an operating company. Instead, the document shows projected income starting with "month one" and going through "month twelve."[6] The timeline provided supports this conclusion, since it starts with "First Quarter-Months 1 through 3." The document goes on to say that "Star has a top-notch management and marketing team in place to launch this venture."[7] This description of Star as a start-up company is consistent with the chapter 7 trustee's statement that to her knowledge Star Beverage is not an operating entity.

ISSUES

(1) Does the debtor have an absolute right to convert his case from chapter 7 to chapter 11?

(2) If the debtor does not have an absolute right to convert, should the debtor be permitted to convert his case?

THE POSITIONS OF THE PARTES

The debtor argues that he has an absolute right to convert his case to chapter 11 under 11 U.S.C. § 706(a) because the case has not previously been converted. The chapter 7 trustee contends that the case should not be converted because the debtor does not have the means to

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[5] Although the document is hearsay, *see* FED. R. EVID. 801(c), the court will consider it as part of the totality of the circumstances analysis.

[6] Exhibit A, page 10.

[7] Exhibit A, page 14 (emphasis added).

formulate a plan of reorganization. Sheldon Stein, trustee for the Larry Jones estate, contends that the debtor does not have an absolute right to convert, but must show good faith under the recent Sixth Circuit case *Copper v. Copper (In re Copper)*, 426 F.3d 810 (6th Cir. 2005). He argues further that the debtor cannot show good faith because he does not have the financial ability to reorganize.

The debtor responded in oral argument that he owns stock in Star Beverage and that Star Beverage is going to get contracts that will enable it to pay the debtor a salary that will be used to fund a plan.

DISCUSSION

Bankruptcy code § 706(a) provides that:

> The debtor may convert a case under . . . chapter [7] to a case under chapter 11. . . of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. . . .

11 U.S.C. § 706(a). Bankruptcy courts nationwide have taken two different approaches to this statute, with one line of cases holding that the right to convert is absolute if the other statutory conditions are met and the other line holding that an exception exists if the debtor filed the motion to convert in bad faith. The Sixth Circuit recently resolved the issue for this circuit in *Copper v. Copper (In re Copper)*, 426 F.3d 810 (6th Cir. 2005). The Circuit held that a debtor does not have an absolute right to convert from chapter 7 to chapter 13 and that a motion to convert may be denied in the absence of good faith. *Id.* at 817.

In this case, the debtor seeks to convert from chapter 7 to chapter 11, presumably because he is not eligible for chapter 13 due to the amount of his debt. *See* 11 U.S.C. § 109(e). Chapter 11, like chapter 13, is available to an individual wage earner. *Toibb v. Radloff*, 501 U.S. 157

(1991). The reasoning employed in *Copper* in the context of chapter 13 is equally applicable to the chapter 11 context. The debtor does not, therefore, have an absolute right to convert to chapter 11. Instead, when his good faith is challenged, he must prove that he is entitled to convert. *See In re Manouchehri*, 320 B.R. 880, 884 (Bankr. N.D. Ohio 2004).

The bankruptcy code does not define good faith. A court must determine whether a debtor is acting in good faith by examining the totality of the circumstances. *See Metro Employees Credit Union v. Okoreeh-Baah (In re Okoreeh-Baah),* 836 F.2d 1030, 1033 (6th Cir. 1988) (good faith in chapter 13 context requires inquiry into all circumstances relating to the proposed plan). *See also In re Mickler*, 324 B.R. 613, 617 (Bankr. W.D. Ky. 2005) (a chapter 11 case filed by an individual debtor may be dismissed for lack of good faith after examining totality of circumstances). One relevant good faith consideration is whether the chapter 11 debtor proposes or has a reasonable possibility of proposing a plan that can be confirmed. *See Laguna Assocs. P'ship Ltd. v. Aetna Cas. & Surety Co. (In re Laguna Assocs. Ltd. P'ship)*, 30 F.3d 734, 738 (6th Cir. 1994) (discussing lack of good faith in context of motion for relief from stay). *See also In re Okoreeh-Baah,* 836 F.3d at 1033; 11 U.S.C. § 1129(a). To be confirmed, a chapter 11 plan must be proposed in good faith and must address a number of issues, including specifying how each class of claims will be treated, identifying the property to be distributed, providing adequate means for the plan's implementation, and comparing whether a creditor would be better off in chapter 7 or chapter 11. *See* 11 U.S.C. §§ 1123 and1129.

The debtor in this case has net income of $1,266.00 a month, $1,700.00 in miscellaneous assets plus $150,000.00 in cash, debt greater than $3 million, and tax debt that is not classified or quantified. He has not explained how he would propose a feasible plan to repay the debt with his

current income and indeed it appears impossible. Instead of relying on his existing income, the debtor pins his hopes on his earnest belief that Star Beverage will be able to borrow money to implement the proposal discussed in its financing request, pay him a larger salary, and enable him to pay his creditors an unidentified amount. Enthusiasm cannot, however, substitute for reality. This proposal is far too speculative to show that the debtor's motion to convert to chapter 11 is proposed in good faith. Mr. Boyd's creditors will clearly be better off if the trustee continues to collect and reduce to money the estate's assets and distribute them under chapter 7. Because the debtor did not meet his burden of proof, the motion to convert to chapter 11 must be denied.

CONCLUSION

For the reasons stated, the debtor's motion to convert to chapter 11 is denied. A separate order will be entered reflecting this decision.

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 motion filed by the debtor Arthur Boyd, Jr. to convert his case from chapter 7 to chapter 11 is denied and the objections are sustained. (Docket 81, 84, 103).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge