

IT IS SO ORDERED.



**Dated: December 10, 2007
10:55:13 AM**

**Honorable Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:

FRANK A. SHATTUCK,

Debtor.

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CASE NUMBER 03-46347

CHAPTER 13

HONORABLE KAY WOODS

**MEMORANDUM OPINION REGARDING MOTION
TO CONVERT DEBTOR'S CASE TO CHAPTER 7
Not Intended for National Publication**

The following Memorandum Opinion is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnb.uscourts.gov is not the result of direct submission by this Court. The opinion is available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This cause is before the Court on Motion to Convert Debtor's Bankruptcy Case to Case Under Chapter 7 ("Motion to Convert") filed by William Shattuck ("Creditor") on July 20, 2007. Creditor, who is the brother and business partner of Debtor Frank A. Shattuck ("Debtor"), has asserted two proofs of claim in Debtor's case, as follows: (i) Claim No. 13, filed by Creditor in his individual capacity in the amount of \$10,000.00, as a general unsecured claim for "money loaned;" and (ii) Claim No. 14, filed by Creditor as Vice President of DMW Insurance Agency, Inc. dba Donald M. Weibling Insurance Co., Inc. ("DMW") in the amount of \$49,735.53 for "money loaned." The Court notes that Creditor and Debtor are engaged in litigation in state court regarding their joint business, for which the automatic stay was lifted so that such lawsuit could proceed to trial. Despite (or perhaps because of) the familial connection, Creditor and Debtor have a contentious and litigious relationship.

Debtor filed this chapter 13 case on December 12, 2003. He filed several proposed plans of reorganization before filing the Fourth Amended Debtor's Plan ("Fourth Plan") on January 25, 2006. The Fourth Plan was filed in response to this Court's order dated January 11, 2006, requiring Debtor to file a further amended plan to resolve prior objections by January 25, 2006, or the case would be dismissed. Although three parties - Diane Shattuck (Debtor's ex-wife), Mission Pointe Condominium Association, and Creditor - all filed objections to the Debtor's third amended plan, no one objected to the Fourth Plan. Creditor objected to confirmation of

Debtor's previously proposed plan on the basis of Creditor's then-pending motion for relief from stay, which he estimated would result in net proceeds available to Debtor (implicitly for distribution pursuant to a chapter 13 plan).

Having resolved all objections to prior plans, the Fourth Plan was confirmed by Order dated May 15, 2006. Subsequently, Amended Order Confirming On [sic] Amended Plan ("Confirmation Order") was entered on May 22, 2006.

Nearly a year after confirmation of Debtor's Fourth Plan, Creditor filed a motion to conduct an examination of Debtor pursuant to FED. R. BANKR. P. 2004 ("Rule 2004 Exam"). The Court granted the Motion and Creditor took the Rule 2004 Exam of Debtor on April 30, 2007, and May 16, 2007. More than two months later, Creditor filed the instant Motion to Convert, which was accompanied by (i) Memorandum in Support of Motion to Convert Debtor's Bankruptcy Case to a Case Under Chapter 7 ("Memorandum in Support"), (ii) Affidavit of William Shattuck, and (iii) Affidavit of Dennis M. Weibling. The Motion to Convert contends that Debtor: (i) undervalued his assets (real estate, motor vehicles, personal property and household goods); (ii) conducts his business without regard to corporate boundaries; (iii) under-reported his income and expenses; and (iv) made a buy-sell proposal in February 2007 to purchase the stock of DMW based upon funds he would obtain from Dennis Weibling, which offer Mr. Weibling denies. Based upon all of these allegations, Creditor asserts that Debtor's chapter 13

case was not filed in good faith and should be converted to chapter 7. The gravamen of the Motion to Convert is that, because of the undervaluing of assets, and under-reporting of income and expenses, Creditor would receive more in a chapter 7 liquidation than under the confirmed Fourth Plan.

Debtor filed Debtor's Response to Motion to Convert Debtor's Bankruptcy Case to a Case Under Chapter 7 ("Debtor's Response") on August 21, 2007. Debtor counters that, at the request of the Chapter 13 Trustee and the Court, he eliminated expenses associated with one of the parcels of real estate and one of the vehicles by having a third party pay the expenses on the real estate and by transferring the vehicle to his son. Debtor argues that he has not undervalued his assets or under-reported his income and expenses.

The Court scheduled the Motion to Convert for an evidentiary hearing, which hearing was rescheduled several times at the request of the parties. At the rescheduled hearing on November 13, 2007, this Court, *sua sponte*, questioned why the Motion to Convert was not a collateral attack on the Confirmation Order. Counsel for Creditor requested an opportunity to brief this issue. Creditor timely submitted Supplemental Memorandum of William Shattuck in Support of Motion to Convert Debtor's Bankruptcy Case to a Case Under Chapter 7 ("Supplement to Motion") on November 27, 2007.

The Court has considered the Motion to Convert and attachments thereto, Debtor's Response, Supplement to Motion, as well as the argument of counsel at the November 13, 2007, hearing. For the

reasons set forth below, this Court finds that the Motion to Convert is not well-taken in that it is a collateral attack on the Confirmation Order. As a consequence, it must be denied.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (L) and (O). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. CREDITOR'S ASSERTION OF BAD FAITH

In the Motion to Convert, Creditor relies on *Marrama v. Citizens Bank of Mass.*, 127 S.Ct. 1105 (2007) to support his argument that "a debtor who filed false bankruptcy statements and schedules in an attempt to conceal or understate the value of assets has 'forfeited his right to proceed under Chapter 13.'" (Memorandum in Support at 19.) Creditor's reliance on *Marrama*, however, is misplaced. The *Marrama* case dealt with the motion of the debtor to convert from chapter 7 to chapter 13. Therein, the Supreme Court held that the debtor was not entitled to convert because his lack of good faith would make him ineligible to file a chapter 13 case. The *Marrama* case is inapposite to the instant case. Here, unlike *Marrama*, it is a creditor rather than Debtor who seeks to convert the case. In addition, Creditor seeks to convert Debtor's case from chapter 13 to chapter 7 rather than conversion in the direction dealt with by *Marrama*. The holding in

Marrama does not apply to the instant facts and has no bearing on the Court's concern about the Motion to Convert being a collateral attack on the Confirmation Order.

In the Supplement to Motion, Creditor cites to *In re Powers*, 135 B.R. 980 (Bankr. C.D. Cal. 1991). The court in *Powers* distinguished between the finding of good faith necessary to confirm a chapter 13 plan and the good faith requirement when a debtor files a bankruptcy case.¹ Unlike the situation presently before this Court, wherein the Fourth Plan was confirmed approximately two and one-half years after the case was filed, in the *Powers* case, the debtor's plan was confirmed approximately seven (7) weeks after the petition date. The creditor in *Powers* sought and obtained dismissal of debtor's case on the basis that she received a fractional interest in a third party's real property on the eve of her bankruptcy in order to stop foreclosure sale on such property. In the instant case, the Confirmation Order was entered two and one-half years after the case was filed and after four previous plans had been rejected. Unlike the creditor in *Powers*, Creditor objected to at least one of Debtor's previously proposed plans, but failed to object to Debtor's Fourth Plan prior

¹Although Creditor now attempts to make a distinction between lack of good faith in filing a plan and lack of good faith in filing a bankruptcy petition and schedules, Creditor blurred such distinction in the Motion to Convert. Therein, without explanation, Creditor states, "Indeed, the Debtor's success in obtaining confirmation of a Plan shows his bad faith." (Memorandum in Support at 20.) Creditor cannot refute that, by entry of the Confirmation Order, this Court found that Debtor's plan was proposed in good faith. See 11 U.S.C. § 1325(a)(3). As a consequence, Creditor's statement that Debtor's success in obtaining confirmation shows bad faith is unsupported by fact or law.

to confirmation. Indeed, Creditor's objection to the third amended plan was resolved in the Fourth Plan. The arguments now raised by Creditor could have been raised prior to confirmation of the Fourth Plan.

This Court recognizes that a debtor must demonstrate good faith at the time of filing the petition and when he proposes a chapter 13 plan. Such recognition, however, does not address whether this Motion to Convert is a collateral attack on the Confirmation Order. Creditor argues that because the Bankruptcy Code does not place any limitations on a creditor's ability to seek conversion or dismissal of a chapter 13 case, he is free to seek conversion of this case on the basis of lack of good faith at any time. Creditor contends, "As to conversion based upon the debtor's lack of good faith, no . . . limitation is found in the text [of § 1307(c)]." (Supplement to Motion at 4.)

II. RES JUDICATA VS COLLATERAL ATTACK AND LAW OF THE CASE

Creditor argues in the Supplement to Motion that the principle of *res judicata* is an affirmative defense that Debtor has waived because Debtor did not assert it in his Response.² Creditor goes on to argue that *res judicata* does not bar the Motion to Convert. Creditor has missed the mark in referencing the principle of *res*

²Creditor concedes that FED. R. CIVIL P. 8(c) (applicable through FED. R. BANKR. P. 7008), which requires *res judicata* to be set forth affirmatively, "does not strictly apply to this particular contested matter[.]" (Supplement to Motion at 2.) Even if Rule 8(c) did apply, however, this argument misses the mark.

judicata, which is not applicable here and which is not the basis of this Court's concern.

Res judicata is an affirmative defense because it involves a decision (usually issued) by another court involving the same issue and the same parties. If the defense is not raised affirmatively, the second court usually has no way of knowing about the first decision. *Res judicata* is defined as:

1. An issue that has been definitely settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been - but was not - raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.

BLACK'S LAW DICTIONARY 1337 (8th ed. 2004).

This Court did not rely on the principle of *res judicata* in questioning the viability of the Motion to Convert. Rather, the Court asked why the Motion to Convert was not a collateral attack on the Confirmation Order. Creditor implies that this Court is prohibited from questioning whether the Motion to Convert is a collateral attack on the Confirmation Order because the issue was not raised by Debtor in his Response. This is simply not the case. This Court has the right and the obligation to protect the sanctity of its prior orders and to limit unnecessary and fruitless litigation.

The Confirmation Order is not an order from another court that involved the same parties and issues, but is, instead, an order by

this Court, which represents the law of this case.

Res Judicata, or claim preclusion, serves to bar re-litigation of those matters which were or could have been litigated as part of an earlier case. . . . Closely related to the doctrine of claim preclusion is the doctrine of "law of the case." Properly understood, however, law of the case "is a rule of practice under which a rule of law enunciated by a federal court 'not only establishes a precedent for subsequent cases under the doctrine of stare decisis, but [also] establishes the law which . . . will, normally, apply to the same issues in subsequent proceedings in the same case.'" *Wallis v. Justice Oaks II, Ltd (In re Justice Oaks II, Ltd)*, 898 F.2d 1544, 1550 (11th Cir. 1990) (quoting *Morrow v. Dillard*, 580 F.2d 1284, 1289 (5th Cir. 1978) (citations and footnotes omitted)). Thus, as its name applies, "law of the case" prevents re-litigation of those matters directly or necessarily decided at some earlier point in an ongoing action. See *id.*

In re Bernard, 189 B.R. 1017, 1019 n.2 (Bankr. N.D. Ga. 1996).

By entering the Confirmation Order, this Court found that the Fourth Plan complied with all aspects of 11 U.S.C. § 1325(a). Neither Creditor nor any other party in interest appealed the Confirmation Order. Indeed, the time for appeal had long passed before Creditor filed the Motion to Convert fourteen (14) months after entry of the Confirmation Order. As a consequence, the Confirmation Order is a final, non-appealable order.

Section 1325(a) provides, among other things, that (i) the plan has been proposed in good faith (subsection 3); and (ii) "the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date" (subsection 4). Accordingly, by entry of the

Confirmation Order, this Court has found, among other things, that the plan was proposed in good faith and that the plan passes the "liquidation analysis." The Confirmation Order represents the law of the case regarding this Court's findings that: (i) Debtor proposed the Fourth Plan in good faith, and (ii) Creditor's claim will receive a distribution not less than Creditor would have received if Debtor's assets were liquidated in a chapter 7 plan. As a consequence, there is no reason to convert this case from chapter 13 to chapter 7 because Creditor will receive the same or greater distribution as he would receive in a chapter 7 case.

If Creditor believed he would receive less under Debtor's Fourth Plan than in a chapter 7 liquidation, he was obligated to object to the Fourth Plan on such grounds. He did not do so. Indeed, Creditor did not object to the Fourth Plan on any basis. Creditor does not argue that he could not have known about Debtor's alleged undervaluation of assets prior to confirmation of the Fourth Plan. Indeed, it appears that the timing of these arguments are based solely upon Creditor's late discovery pursuant to the Rule 2004 Exam. Nothing, however, prohibited Creditor from examining Debtor in the years prior to proposal of the Fourth Plan.

The real import of the Motion to Dismiss is Creditor's attempt to obtain more on his claim than provided for in the confirmed Fourth Plan. Creditor postulates, "Given the Debtor's undervaluation of his assets and misstatement of his income and expenses, it is likely that a liquidation case under Chapter 7 will

provide the creditors with a greater dividend than the mere 5% than [sic] the Debtor's confirmed Plan proposes." (Memorandum in Support at 23.)

Creditor's attempt to convert the case at this juncture is clearly a collateral attack on the Confirmation Order given that this Court has previously found that the Fourth Plan provides for distribution of property equal to the value of a chapter 7 liquidation. Creditor is, in essence, arguing that the Court's finding was incorrect and that a chapter 7 liquidation would provide a greater recovery. As such, the Motion to Convert is untimely. That argument needed to have been made in an appeal of the Confirmation Order rather than by this Motion fourteen months after confirmation.

Moreover, Creditor's conduct constitutes laches. Creditor sets forth no reason why he waited until almost a year after entry of the Confirmation Order to request a Rule 2004 Exam. By that time, the case had been pending for nearly three and one-half years. Creditor's delay in attempting to determine if Debtor's petition and schedules were filed in good faith cannot be justified.

III. CONVERSION VS. DISMISSAL

Creditor has only moved to convert Debtor's case. He has not asked for the Court to convert or dismiss the case, whichever the Court might determine to be in the best interests of the creditors and the estate. Indeed, Creditor asserts that conversion is the

only possible outcome. Creditor argues that to allow Debtor to continue with the chapter 13 case would ratify Debtor's alleged fraud, whereas dismissal of the case would permit Debtor to have engaged in alleged fraud without any consequences.

All of the cases this Court found that dealt with post confirmation motions based on lack of good faith sought dismissal rather than conversion. This seems to be because the parties in interest in those cases asserted that the debtor's lack of good faith required the denial of bankruptcy protection rather than merely seeking a greater distribution than provided under the confirmed plan. Creditor's insistence upon conversion of the case to a case under chapter 7 (as opposed to conversion or dismissal) underscores the fact that the Motion to Convert is a collateral attack on the Confirmation Order.

IV. CONCLUSION

For the reasons set forth above, the Motion to Convert represents a collateral attack on the Confirmation Order. This Court has already decided that the confirmed Fourth Plan provides for a distribution not less than a distribution pursuant to a chapter 7 liquidation. To the extent Creditor now argues that such distribution is less than what creditors would receive in a chapter 7 case, he has waived that argument by not raising it prior to confirmation. The arguments in the Motion to Convert could have been made at and as part of the confirmation process. Creditor failed or chose not to make such arguments at that time; it is too

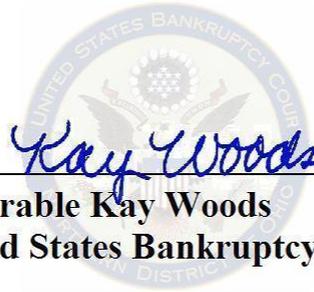
late now. The Confirmation Order is the law of the case regarding this Court's finding that the Fourth Plan passed the liquidation test.

Furthermore, Creditor waited more than three and one-half years after Debtor's petition date and more than two and one-half years after entry of the Confirmation Order. Creditor's lack of diligence in pursuing the issue of valuation of assets and reporting of income and expenses cannot be justified. Creditor sat on his rights; he cannot now question Debtor's good faith in filing schedules. Such delay will not be countenanced.

For the foregoing reasons, Creditor's Motion to Convert will be denied. An appropriate order will follow.

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IT IS SO ORDERED.



Dated: December 10, 2007
10:55:14 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

FRANK A. SHATTUCK,

Debtor.

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* CASE NUMBER 03-46347
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* CHAPTER 13
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* HONORABLE KAY WOODS
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ORDER DENYING MOTION TO CONVERT DEBTOR'S CASE TO CHAPTER 7

For the reasons set forth in this Court's Memorandum Opinion Regarding Motion to Convert Debtor's Case to Chapter 7, Creditor William Shattuck's Motion to Convert Debtor's Bankruptcy Case to a Case Under Chapter 7 is denied.

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