

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

IN RE:

**GLENDA F. RUDOLPH,
Debtor.**

BK. NO. 91-22026

DECISION AND ORDER

BACKGROUND

On July 16, 1991 the debtor Glenda F. Rudolph (the "Debtor") filed a petition initiating a Chapter 13 case. On December 3, 1991 an Order confirming the Debtor's Chapter 13 Plan was entered. By motion returnable August 26, 1992, the Chapter 13 Trustee requested that the Debtor's Chapter 13 case be dismissed pursuant to Section 1307 for cause on the grounds that, based upon the Debtor's payments to date, the money received by the Trustee was insufficient to complete the Debtor's Plan as confirmed. On the August 26, 1992 return date there was no appearance by or on behalf of the Debtor. The Trustee indicated that he had discussed this matter with the Debtor's attorney and the attorney had requested that a conditional order be entered allowing the Debtor 30 days to convert the case to a Chapter 7 case or the case would be dismissed. This Conditional Order of Dismissal was entered on September 17, 1992.

On October 28, 1992 a Final Order of Dismissal was entered since no written request to convert the case pursuant to the Conditional Order of Dismissal or the provisions of Section 1307(a) had been made to the Court by the Debtor within the time provided by the Conditional Order of Dismissal. No appeal was taken from the Final Order of Dismissal.

By motion dated January 13, 1993 and returnable on February 3, 1993 the Debtor, by her attorney, moved to reinstate her Chapter 13 case so that she could convert the case to a Chapter 7 case. Since the Court does not believe that the Bankruptcy Code or Rules provide for a motion to reinstate a Chapter 13 case, the Court treated the Debtor's motion as a request pursuant to Rule 9024 of the Rules of Bankruptcy Procedure seeking relief from the October 28, 1992 Final Order of Dismissal. The Court requested that the Debtor's attorney advise it as to what, if any, grounds for such relief existed under Rule 9024 of the

Rules of Bankruptcy Procedure which makes Rule 60 of the Federal Rules of Civil Procedure applicable under the Bankruptcy Code.¹ The Debtor's attorney offered no such grounds for relief but simply stated that the Debtor now wished to convert her case to a Chapter 7 case so that she could obtain a discharge.

The Court denied the relief requested and was asked to issue a written decision.

On the return date of motions to dismiss for failure to make Chapter 13 plan payments, this Court often affords Chapter 13 debtors, at their request or the request of the Chapter 13 Trustee, a reasonable period of time before the Chapter 13 case is dismissed to either cure plan payment arrearages or to exercise the debtor's right under Section 1307(a) to convert a Chapter 13 case to a Chapter 7 case. In this case the Debtor failed to take advantage of a 30-day grace period to convert and failed to appeal from the October 28, 1992 Final Order of Dismissal. (In this case the Debtor actually had over 60 days from the date the motion was heard to convert her case.) Now, nearly three months later, the Debtor appears to have finally decided that she wishes to obtain a Chapter 7 discharge. However, none of the grounds provided for by Rule 9024 of the Rules of Bankruptcy Procedure or Rule 60 of the Federal Rules of Civil Procedure which might result in the Court granting relief from its Final Order of Dismissal are present.²

¹Rule 60(b) of Federal Rules of Civil Procedure provides:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

² In a case such as the one at hand where at the Debtor's request a substantial period of time to convert was provided and the Debtor was at all times represented by competent counsel, the Court would require a very substantial showing under Rule 9024 in order to grant relief from such a Final Order of Dismissal.

Here the Debtor had the option to convert and obtain a Chapter 7 discharge not only upon being served with the Trustee's motion to dismiss but during the 30-day period provided for by the Conditional Order of Dismissal. However, the Debtor chose not to exercise her option to convert and the case was dismissed. The Debtor still has the ability to obtain the desired discharge. She can simply file a Chapter 7 case at this time. In this regard, this Court has consistently held that the simple failure of a debtor to make plan payments pursuant to a confirmed Chapter 13 case is not a willful failure of the debtor to abide by a Court Order within the meaning of Section 109(g) which prevents a debtor from filing a subsequent case within 180 days of the dismissal of a prior case under certain circumstances.³

CONCLUSION

The Debtor's motion to reinstate her Chapter 13 case is denied.

IT IS SO ORDERED.

/s/
HON. JOHN C. NINFO, II
UNITED STATES BANKRUPTCY JUDGE

Dated: February 11, 1993

³ Accord In re Patel, 48 B.R. 418, 419 (Bankr. M.D. Ala. 1985); In re Nelkovski, 46 B.R. 542, 544 (Bankr. N.D. Ill. 1985). However, by this decision, this Court would not preclude a party in interest from showing an actual willful failure to obey a court order under Section 109(g)(1) if the failure to make payments was purposeful and with the motive of obtaining a dismissal to file another Chapter 13 case. See Patel, 48 B.R. at 419.