UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

EDWARD C. CHAMPAGNE, d/b/a
Honest Ed's Auto

Case No. 94-14425

Debtor

The Chapter 13 Trustee here seeks conversion of this case from Chapter 13 to Chapter 7 because (according to the Trustee's letter of December 10, 1996) of "the Debtor's demonstrated refusal to adhere to his obligations as a Debtor-in-Possession," among other things. In large part, the dispute stems from the fact that in August of 1995 the Debtor received $37,750 in insurance proceeds from the destruction of a vehicle which he held for resale and also used personally for a variety of purposes. His counsel knew of the proceeds and told him to hold them in escrow, but he did not do so. Rather, he started to use the funds to make payments on tax debts, Chapter 13 Plan payments, and payments on secured debts.

The Chapter 13 Trustee was not advised of the money until October of 1995 when the Debtor's counsel sought leave of Court for the Debtor to retain the money. By the time the Chapter 13 Trustee prevailed in her opposition to that Motion, nearly $12,000 was "gone."[1]

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[1]Debtor's counsel's argument that the money went to the benefit of creditors is specious. While it is true that the Debtor did not use those funds to take a vacation trip, for example, what did he do with the regular income that was supposed to be used for the purposes for which these funds were used? If the "other" $12,000 of regular income never existed, then devoting the insurance proceeds to the payment of creditors prevented an imminent Plan default that should have been brought to the attention of the Trustee and the Court. If the other income did exist, where did it go? It could have been used to pay the Plan off more quickly.

Still, there can be misunderstandings and good faith disagreements. What most disturbs this writer is the paucity of concern by the Debtor and his counsel for what has occurred thus far in this Court.

Another judge ruled that the Debtor could not use the money as he saw fit and that he must turn it over to the Trustee. The Trustee apparently pursued the Debtor for a proposal to "make up" the dissipated funds. When no proposal was offered, the Motion to Convert was filed. It came on for hearing before me on December 2 or 3, 1996, but the Debtor was not present other than by counsel. Recognizing that the Debtor resides in Plattsburgh, New York - a substantial geographic distance from Albany, particularly in winter weather - I instructed his counsel to reach him by telephone and to express to him my concerns regarding his failure to make a proposal to "make up" the dissipated funds, and I adjourned the matter for a few hours.

When the matter was recalled, his counsel acknowledged having spoken to the Debtor, and having related to him my concerns, but offered no proposal.

Now that the matter has been taken under submission upon the clarifying letters of counsel, the Debtor's counsel wants an evidentiary hearing unless she prevails on the questions of law she argues therein.

The geographic reach of the Northern District of New York is daunting, particularly in recent years when the press of business and the sudden demise of a judge has

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Clearly, under the law of the case as ruled upon by another judge of this Court in 1995, the insurance proceeds were "property of the estate" and presumably they were not a "slush fund" to be used at the Debtor's discretion. In light of the instructions the Debtor received from his counsel upon receipt of the proceeds, the Debtor should have known that fact, as described later herein.

rendered the Court unable to conduct sessions in its furthermost reaches. Perhaps a custom and practice has resulted (of which I am not aware) that dispenses with the need for a geographically-remote debtor's appearance before the Court unless and until the Court resolves any legal disputes that might obviate the need for personal appearance. If so, I will entertain a Motion for Reconsideration of the decision rendered herein. But in my view, the time for the Debtor to appear and to defend the Motion to Convert was when I heard the Motion on December 2 or 3, or at least he should have requested at that time that the matter be set over for evidentiary hearing.

The Debtor's counsel's position seems to be of a "tell-me-when-I-have-enough-to-win" nature. There was not enough to win on the morning of December 2 or 3, nor on the afternoon of whichever of those two dates this matter was heard. So the written submission asks for an evidentiary hearing if what is contained therein is not sufficient. I will not approve of that approach to advocacy and to the processes of any Court unless that has emerged as a means to deal with the territorial immensity of the Northern District. It is too late to ask for a further opportunity to be heard.

On the other hand, the Trustee's initial motion was not specific as to the grounds asserted for conversion in the context of this case. Furthermore, the Debtor still proposes to pay all creditors in full (though not with interest, as far as the unsecured creditors are concerned).

Finally, it is not conceivable that such a well-regarded bankruptcy firm would tell the Debtor to escrow the money but fail to tell him that he could not use it without a Court Order. Of course, any such communication might be privileged, and might explain counsel's present "tell-me-when-I-have-enough" efforts. The firm simply cannot conscientiously represent the

Debtor without trying to avoid, if possible, an evidentiary hearing at which its client would have to assert the privilege with regard to an issue of fact that might be dispositive of the matter at Bar. If the firm in fact advised the Debtor that he could use the funds for such purposes, then the failure of the firm to interpose an "advice-of-counsel" defense on behalf of its client would be a conflict of interest. This writer has always presumed that clients are properly and correctly advised by counsel, and will decide the present matter on that supposition.

Again, unless custom and practice dictates otherwise, this Debtor's (1) failure to appear personally before the Court in December, (2) failure to make a good-faith proposal on that date to address concerns conveyed to him by phone by counsel at the Court's direction, and (3) failure on that date to request an evidentiary hearing, coupled with (4) the fact that this Debtor has known at least since the November 19, 1995 ruling of the Court that the Court agrees with the Chapter 13 Trustee's interpretation of the law, and coupled with (5) the fact that even prior thereto he had been instructed by his own counsel to escrow the funds and (the present Court presumes) instructed that he could not use them as he sees fit, but did so anyway, all together bespeak a Debtor who expects the Court to adhere to his rules, rather than vice versa.

As the Trustee asserted, these facts demonstrate "the Debtor's . . . refusal to adhere to his obligation as a Debtor-in-Possession." This constitutes "cause" for conversion under 11 U.S.C. § 1307(c). However, that does not end the inquiry. Finding cause for conversion does not obviate the need to determine where "the best interests of creditors and the

estate" lie, as among conversion, dismissal or continuation in Chapter 13.[2] The Debtor's current promise to pay 100% to all creditors who filed claims does not elicit a great deal of warmth from the Court when that was the Debtor's promise in the first place, and all that the Trustee sought when she first learned of the insurance proceeds was that the Debtor complete his promise that much more quickly. The Trustee has been led a merry chase. The Chapter 13 program is indeed a program, an institution, and in some instances the "best interests of creditors and the estate" in a particular case is served by a result that punishes abuse of the program, even if that results in a lesser dividend to creditors in the particular case at bar. (Often, and perhaps even more often than not, creditors in one case are also creditors in many other Chapter 13 cases. This is common as to motor vehicle lenders, home mortgage lenders, and credit card issuers. They benefit overall from a Chapter 13 program that does not tolerate abuse, even if they suffer a loss in the case in which the abuse is punished.)

In the present Court's view, both the institutional goals and the interest of creditors and the estate in this particular case may be reconciled by deferring entry of the Order of Conversion pending either the Debtor's further default on his proposed 100% plan of reorganization (plus 9% present value factor to compensate all creditors for the delay) or his voluntary election to convert to Chapter 7. I would vacate the Order of Conversion if the Debtor completes his 100% plan. With one caveat, it will be so ordered. The Debtor's wrongful conduct here has cost him the alternative of a voluntary withdrawal from his Chapter 13 case and

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[2] *See In re Michalek*, No. CIV-90-12125, 1991 WL 222063 (W.D.N.Y. Oct. 22, 1991) (addressing identical language in 11 U.S.C. § 1112(b)).

will leave him only the option of paying all filed claims in full or converting his case to Chapter 7. If the Debtor defaults in any future payments under his modified plan or if he elects to convert to Chapter 7, then the Chapter 13 Trustee, the Debtor, or the Clerk's Office may submit to me a suitable Order of Conversion. If he completes the full-payment plan, then the operative language of the present decision shall be deemed vacated.

The single caveat mentioned above is this: Edward C. Champagne shall appear before a Bankruptcy Judge at Albany for examination by the Trustee, in the presence of the Judge, regarding the good faith and feasibility of his undertaking to pay all filed claims in full including the feasibility of this writer's insistence that a present value factor be added as to unsecured claims as well. Unless that judge orders otherwise, the examination shall extend only to Mr. Champagne's present and future conduct, knowledge and intent, and not to the past. If the Court is dealing with a good faith Debtor, then he should be permitted to fully repay filed claims. Otherwise his case should be converted.

SO ORDERED.

Dated: Buffalo, New York
January , 1997

/s/Michael J. Kaplan
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Michael J. Kaplan, U.S.B.J.