

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 01-20600

LOUIS N. NINOS,

Debtor.

DECISION & ORDER

BACKGROUND

On February 26, 2001, Louis N. Ninos (the "Debtor") filed a petition initiating a Chapter 7 case. The Minute Report of the Section 341 hearing conducted by the Chapter 7 Trustee on April 5, 2001, as well as the Chapter 7 Trustee's April 20, 2001 Application for the Appointment of an Attorney, indicated that the March 1998 transfer by the Debtor of an interest in real property to his spouse would be pursued as an avoidable fraudulent conveyance.

On May 29, 2001, at the request of the Debtor, an Order was entered converting the case to a Chapter 13 case.

On October 23, 2001, at a conference requested by the attorney for the Debtor, the Court and the Chapter 13 Trustee advised the attorney for the Debtor of the net dollar amount they would accept as the estimated amount the Chapter 7 Trustee would recover in an avoidance action against the Debtor's

BK. 01-20600

spouse, so that the Debtor could meet the Section 1325(a)(4)¹ best interest of creditors test in connection with the confirmation of a plan by paying this amount plus a value factor to the unsecured creditors over the term of a plan.

The Debtor filed a plan (the "Plan") which provided for a payment of \$901.00 per month to the Chapter 13 Trustee over a period of sixty (60) months, which resulted in a thirty-nine percent (39%) distribution to unsecured creditors.² On November 16, 2001, the Court confirmed the Plan, subject to the Debtor obtaining a waiver from his spouse (the "546 Waiver") of the Section 546 two-year statute of limitations.³

¹ Section 1325(a)(4) provides that:

(a) Except as provided in subsection (b), the court shall confirm a plan if -

(4) 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[.]

11 U.S.C. § 1325 (2002).

² The best interest factor computed by the Trustee for purposes of confirmation required the payment of \$47,680.00 over the five-year term of the Plan.

³ This would allow the Chapter 7 Trustee to initiate his avoidance action in the event the Debtor's case was reconverted to Chapter 7 after the

BK. 01-20600

On July 1, 2002, the Chapter 13 Trustee filed a motion (the "Conversion Motion"), pursuant to Section 1307(c)⁴, which alleged that the Debtor was in arrears in his plan payments and he had failed to provide the Trustee with the 546 Waiver. At the July 1, 2002 hearing on the Conversion Motion, the Chapter 13 Trustee and the attorney of record for the Debtor appeared and agreed to adjourn the Motion to July 8, 2002.

statute of limitations had otherwise run.

⁴ Section 1307 provides, in part, that:

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.

(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

(c) Except as provided in subsection (e) of this section, on request of a party in interest or the United States trustee and after notice and hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of Creditors and the estate, for cause, including -

(1) unreasonable delay by the debtor that
Is prejudicial to creditors; ...

11 U.S.C. § 1307 (2002).

BK. 01-20600

On July 1, 2002, an attorney, other than the attorney of record for the Debtor, filed an *ex parte* Application (the "Application") and an Order to Dismiss the Debtor's Chapter 13 case pursuant to Section 1307(b) (the "Dismissal Order"). The Dismissal Order was inadvertently signed and entered when the Bankruptcy Court Clerk's Office failed to note for the Court that: (1) the Debtor's Chapter 13 case had previously been converted to Chapter 13 from Chapter 7; and (2) the Conversion Motion had been adjourned to July 8, 2002 with the consent of the attorney of record for the Debtor.

On July 8, 2002: (1) the Dismissal Order was vacated; (2) the Application was deemed to be a motion to dismiss to be decided along with the Conversion Motion; (3) the Court heard oral argument on the Conversion Motion and the Application; and (4) the Court afforded the attorneys for the Debtor and the Chapter 13 Trustee an opportunity to make written submissions.

On September 3, 2002, the Court conducted a telephone conference at the request of the attorneys for the Debtor. During the conference: (1) the attorneys for the Debtor indicated that they did not intend to file written submissions; and (2) the Court indicated that it would issue a Decision &

Order that would grant the Conversion Motion and set forth the reasons why the Court believed that a conversion rather than a dismissal would be in the best interests of creditors and the bankruptcy estate.

DISCUSSION

The United States Court of Appeals for the Second Circuit has made it clear in its decision in *In re Barbieri*, 199 F.3d 616 (2d Cir. 1999) that when a case is originally commenced as a Chapter 13 case, a debtor has an absolute right to dismiss the case under Section 1307(b). However, when a case has been converted to Chapter 13 from Chapter 7, a debtor's request to dismiss requires that the Court, in its discretion under Section 1307(c), determine whether dismissal or conversion is in the best interests of creditors and the bankruptcy estate.⁵

Accordingly, the Debtor's Chapter 13 case must be reconverted to a Chapter 7 case in the best interests of creditors and the bankruptcy estate for the following reasons:

1. Prior to his retirement, the Debtor operated a collection agency. Therefore, it is reasonable to assume that: (a) the Debtor is skilled in collecting

⁵ See *In re Blaise*, 219 B.R. 946 (2d Cir. BAP 1998).

monetary obligations and money judgments; (b) the Debtor also has extensive experience with techniques used by debtors to avoid collection efforts; and (c) if the Debtor's case is dismissed, he could paint a picture of his financial condition that would discourage most, if not all, of his unsecured creditors from pursuing him;⁶

2. The Debtor and his spouse are both retired, and their source of income is Social Security. The Debtor's Chapter 13 Plan required him to work part-time in order to meet the best interest test. However, in the absence of a Chapter 13, there is no evidence to indicate that the Debtor would continue to be so employed in the face of collection efforts by creditors. Since the Debtor has alleged that he has no non-exempt assets and any money judgment levied against the Debtor could not be collected from his Social Security income, he is judgment proof. These circumstances would present the type of financial position that would discourage the Debtor's creditors

⁶ The Debtor scheduled unsecured claims of \$124,000.00.

from pursuing him and discovering the transfer to his spouse if his case is dismissed;

3. If the Debtor's case is dismissed and a creditor discovered the transfer to the Debtor's spouse and elected to pursue an action in state court to avoid it, the creditor would most likely be required to retain an attorney on a contingent fee basis at a rate of 33% of any recovery plus expenses, and then, if successful, would be required to pay additional expenses and poundage fees to collect any judgment against the Debtor's spouse or to enforce a lien on the transferred property if the transfer was avoided;
4. If the Debtor's case is converted to a Chapter 7 case, the Chapter 7 Trustee will pursue the fraudulent conveyance cause of action on behalf of all of the creditors who: (a) were in existence at the time of the transfer; and (b) file allowed claims. These creditors would receive a pro rata distribution from any recovery made by the Chapter 7 Trustee at a significantly reduced cost to creditors than as discussed above;

5. If the Debtor's case is dismissed and each individual creditor pursues its own fraudulent conveyance cause of action, some might get paid in full, up to the value of the Debtor's transferred interest, leaving others not paid at all;
6. In the Chapter 13 case, the Debtor's spouse failed to provide the 546 Waiver required in connection with confirmation, which indicates that she would vigorously defend any state court fraudulent conveyance actions brought against her if the Debtor's case is dismissed;
7. If the Debtor's case is dismissed, the creditors would have less than two years to commence their state court fraudulent conveyance actions; and
8. The Chapter 7 Trustee has already obtained Court approval for the employment of an attorney to pursue the alleged avoidable fraudulent conveyance.

CONCLUSION

BK. 01-20600

The Conversion Motion is hereby granted. The Debtor's request to dismiss his Chapter 13 case is in all respects denied.

IT IS SO ORDERED.

HON. JOHN C. NINFO, II
CHIEF U.S. BANKRUPTCY JUDGE

Dated: September 12, 2002