

SO ORDERED.

SIGNED this 1st day of October, 2014.




Janice Miller Karlin
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

**In re:
Thomas Andrew Officer, III
Tiffani Danielle Officer,**

**Case No. 11-41306
Chapter 7**

Debtors.

**Order Granting Debtors' Motion to Convert Case to Chapter 13 and
Denying the United States Trustee's Motion to Dismiss**

Debtors filed a chapter 13 bankruptcy petition and two years later converted their case to one under chapter 7 of the Bankruptcy Code. Having subsequently realized they are not eligible for a chapter 7 discharge, Debtors now seek to convert their case again, this time back to chapter 13. The bankruptcy courts that have analyzed whether a debtor can, under 11 U.S.C. § 706, reconvert a chapter 7 case to a reorganization chapter are split, and that is true even in this District. I conclude that § 706 gives me the discretion to reconvert this chapter 7 case to chapter 13, and because Debtors have shown that such reconversion is appropriate here, Debtors'

motion to convert to chapter 13¹ is granted, and the United States Trustee's motion to dismiss² is denied.

I. Procedural and Factual Background

The following facts have been stipulated by the parties or are part of the record in this case. Debtors Thomas and Tiffani Officer have had two bankruptcy cases prior to the filing of their current case. Debtors filed a chapter 13 case (Case No. 01-40913) on April 10, 2001, and it was dismissed on January 14, 2002. Debtors then filed a chapter 7 case (Case No. 05-40033) on January 8, 2005, from which they received a discharge on May 2, 2005.

Debtors filed their current chapter 13 petition and plan on August 12, 2011. After resolution of objections to confirmation by the Trustee and one creditor, Debtors' plan was amended on September 25, 2011 and November 27, 2011, and ultimately confirmed on January 25, 2012. Debtors' monthly plan payment was \$1575. Due to a misunderstanding about when the plan payment was due, Debtors were late on their initial payment, and filed a motion to abate that payment.

During the course of the bankruptcy, one of the Debtors became unemployed at least twice. During the first period of unemployment, Debtors moved to amend their plan to surrender their home, and on October 11, 2012, an order was entered permitting surrender and lowering Debtors' monthly payment to \$430.

¹ Doc. 153.

² Doc. 148.

Almost two years later, during the second period of unemployment, Debtors requested that their counsel convert their case to chapter 7. Debtors' counsel reviewed Debtors' case for eligibility for discharge under chapter 7 and misread the filing date of Debtors' previous chapter 7 case. On August 11, 2014, Debtors filed a notice of voluntary conversion of their case under chapter 13 to a case under chapter 7. Quickly thereafter, the United States Trustee filed a motion to dismiss under 11 U.S.C. § 727(a)(8), arguing that Debtors were not eligible for another Chapter 7 discharge because they received a discharge in a case commenced within eight years of the current bankruptcy.

Prior to the filing of the notice of conversion, the unemployed Debtor regained employment, although Debtors did not immediately report the re-employment to their attorney. Upon receipt of the United States Trustee's motion to dismiss, Debtors' counsel realized he had misread the filing date of the prior bankruptcy. Debtors' counsel then also learned that the unemployed Debtor was re-employed, resulting in Debtors' household income being in excess of the median income for a family of their size. Debtors ultimately responded to the motion to dismiss by stating they would convert their case again, this time back to a case under chapter 13. They then filed the motion to convert that is the subject of this order.

This matter constitutes a core proceeding over which the Court has the jurisdiction and authority to enter a final order.³

³ See 28 U.S.C. § 157(b)(2)(A) (stating that "matters concerning the administration of the estate" are core proceedings); § 157(b)(1) (granting authority

II. Analysis

Debtors' motion to convert is filed pursuant to 11 U.S.C. § 706, which governs conversion of a chapter 7 case to a case under another chapter. Section 706 states in its entirety:

(a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

(b) On request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time.

(c) The court may not convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests or consents to such conversion.

(d) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

Generally stated, § 706(a) gives a debtor the right to convert a chapter 7 case to a case under chapter 11, 12, or 13 at any time, as long as the case commenced as one under chapter 7 and was not previously converted from another chapter. Section 706(b) then governs all other conversions from chapter 7, and permits a court, upon request from a party in interest, to convert a chapter 7 case to another chapter. Section 706(c) requires either a debtor's request, or the debtor's consent, before the debtor's chapter 7 case can be converted to either chapter 12 or 13. And finally, § 706(d) reiterates that a case cannot be converted to another chapter unless the debtor can be a debtor under _____
to bankruptcy judges to hear core proceedings).

that chapter.

There have been two lines of cases interpreting § 706 and the ability of a debtor to convert a previously converted case.⁴ Judge Nugent in *In re Fry*⁵ represents the first line of cases in this District. The procedural set up in *Fry* is similar to that at hand: in *Fry*, the debtor initially filed a chapter 13 petition but had difficulty making her chapter 13 plan payments, and converted her case to one under chapter 7.⁶ After converting, the United States Trustee filed a motion to dismiss because the debtor had received a discharge in a prior chapter 7 case within the allowed time.⁷ The debtor then moved to reconvert her case to chapter 13, which the chapter 13 trustee opposed, arguing that § 706(a) barred the debtor from reconverting to chapter 13.⁸ Judge Nugent noted the split in the bankruptcy court authority on this topic, stating:

Some courts hold that the debtor may only convert from chapter 7 to chapter 13 if the case has not been previously converted from chapter 13, and bar[] the debtor from seeking any further reconversion. Others have held that while § 706(a) allows a debtor a one time ‘absolute’ right to convert from chapter 7 to chapter 13, it does not bar a subsequent

⁴ A sample of cases outside this District permitting reconversion in the appropriate circumstances are: *Povah v. Hansbury & Finn, Inc. (In re Povah)*, 455 B.R. 328 (Bankr. D. Mass. 2011); *In re Johnson*, 376 B.R. 763 (Bankr. D.N.M. 2007); *In re Anderson*, 354 B.R. 766 (Bankr. D.S.C. 2006). Cases outside this District denying reconversion are: *In re Muth*, 378 B.R. 302 (Bankr. D. Colo. 2007); *In re Hardin*, 301 B.R. 298 (Bankr. C.D. Ill. 2003); *In re Banks*, 252 B.R. 399 (Bankr. E.D. Mich. 2000).

⁵ Case No. 04-16887, 2008 WL 4682266 (Bankr. D. Kan. Oct. 14, 2008).

⁶ *Id.* at *1.

⁷ *Id.*

⁸ *Id.* at *1–2.

discretionary conversion after notice and a hearing.”⁹

Judge Nugent sided with the line of cases holding that § 706(b) and (c) do *not* provide the court a discretionary basis for the reconversion of a debtor’s chapter 7 case to chapter 13, but only make clear that involuntary chapter 12 and 13 cases are prohibited.¹⁰ Judge Nugent concluded that “[t]he language of § 706(a) clearly and unambiguously states that a debtor may convert out of chapter 7 only if the case has not been previously converted.”¹¹

A more recent opinion, *In re Bange*,¹² decided by Judge Somers, represents the other line of thinking in this District. In *Bange*, the debtor originally filed a chapter 12 petition, and his case was converted to chapter 7.¹³ The court then assessed whether it could convert the chapter 7 case back to a reorganization chapter case.¹⁴ Again, like Judge Nugent had in *Fry*, Judge Somers recognized the two paths taken by bankruptcy courts on this subsection under § 706. Judge Somers then reasoned:

[Section] 706(a) is phrased as a restriction on the debtor’s ability to

⁹ *Id.* at *2 (citing example cases).

¹⁰ *Id.*

¹¹ *Id.* at *3. Although never discussed in the opinion, the facts of *Fry* may demonstrate why Judge Nugent ruled the way he did. Judge Nugent referred to “a series of motions to dismiss for delinquent plan payments” prior to the case’s conversion from chapter 13 to chapter 7, *id.* at *1, and there was no indication the debtor in *Fry* would be successful if permitted to reconvert back to chapter 13.

¹² Case No. 08-40156-7C, 2010 WL 3829632 (Bankr. D. Kan. Sept. 23, 2010).

¹³ *Id.* at *1.

¹⁴ *Id.* at *1–2.

convert a case; it says nothing explicit about the court's authority to do so. . . . Unlike subsection (a), [subsection (c)] is phrased as a limitation on the bankruptcy court's authority to convert a case. A leading bankruptcy treatise relies on this distinction to support the conclusion a court may reconvert a case to a reorganization chapter. The wording of another subsection of § 706 supports the conclusion the identification of the relevant actor in subsections (a) and (c) was no accident. Section 706(d) provides: "Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter." Unlike subsections (a) and (c), this provision is phrased as a limitation on any conversion, no matter who is doing it. The Court concludes subsections (c) and (d) impose limitations on its authority to convert a case, but subsection (a) does not. Therefore, the Court joins those courts that have held a case previously converted to Chapter 7 may nevertheless be reconverted to a reorganization chapter. This result helps further the general bankruptcy policy of encouraging debtors to choose to pay their debts to the extent they can.¹⁵

Judge Somers ultimately concluded that reconversion to chapter 12 was appropriate in that case.

Unfortunately, there are no Tenth Circuit or Tenth Circuit BAP cases discussing this issue. In fact, there do not appear to be *any* appellate court decisions on this matter. The parties are split, each urging opposite positions. The United States Trustee relies on *Fry* to argue this case cannot be reconverted to chapter 13.¹⁶ Debtors rely on *Bange* to argue that I have the discretion to allow reconversion, and that when the reconversion would further the bankruptcy policy of allowing Debtors to pay their creditors, the reconversion is justified.

¹⁵ *Id.* at *1 (internal footnotes omitted).

¹⁶ In response to Debtors' motion to convert to chapter 13, the United States Trustee merely argues that Debtors' motion is moot, given the United States Trustee's motion to dismiss relying on *Fry*. Doc. 159.

Because I find Judge Somers' reasoning in *Bange* (and the line of cases in agreement with *Bange*) more persuasive, I conclude that § 706 does not prohibit a debtor from reconverting a chapter 7 case back to a reorganization chapter. Rather, I find that the wording of § 706 gives me the discretion to determine whether reconversion is appropriate upon a proper motion requesting same. I find persuasive that § 706(a) refers to a *debtor's* ability to convert his case, thereby placing limits on a debtor's ability to convert, while § 706(c)'s reference to the court's conversion of a case implies that judicial discretion and decision-making is allowed. Again, § 706(d)'s restrictions on cases being converted reinforces my thinking that different types of actors are at play in the different subsections of § 706. A leading bankruptcy treatise underscores this conclusion. As stated in *Collier on Bankruptcy*:

A few courts have read [§ 706], and the absence of a specific authorization for a motion to convert to . . . chapter 13 when there is no absolute right to convert, to preclude reconversion to . . . chapter 13 after a case has been converted from one of those chapters to chapter 7. However, had Congress meant to bar such reconversions completely, it would not have used the language it used. Unlike section 706(a), which speaks of the debtor converting a case when the debtor has a right to convert, subsection 706(c), like subsection 706(b), speaks of the court converting the case. Both sections 706(b) and 706(c) refer to a decision of the court in its discretion, to permit conversion at the request of a party. Section 706(c) serves simply to limit who may request conversion to . . . chapter 13, permitting only the debtor to make such a request. If the court were not authorized to convert a case to chapter 13 in the first place, there would be no need for section 706(c). Therefore, the power of the court to convert a case to chapter 13 is implicit in section 706(c), which limits that power.

Most courts have recognized that it would make little sense to deny the debtor any opportunity to convert back to . . . chapter 13 if the debtor decides an earlier conversion to chapter 7 was a mistake. While Congress did not give debtors an absolute right to reconvert, so that debtors cannot frustrate creditors by continually converting and reconverting, it did

generally want to give debtors every opportunity to repay if they chose. Moreover, a debtor who is denied the right to convert may still file a chapter 13 case after the chapter 7 case is concluded, a fact recognized by even those courts denying reconversion. . . . The courts permitting reconversion have properly recognized that the decision whether to permit reconversion should rest in the sound discretion of the court based on what most inures to the benefit of the parties in interest. When no party objects to the reconversion it should normally be granted.¹⁷

I agree with this assessment; I do not read § 706 as prohibiting me from exercising my discretion to allow reconversion of a previously converted case back to chapter 13. Rather, in the appropriate circumstances, and upon motion with an opportunity for objection and hearing, such reconversion could be appropriate.

For courts following the *Bange* line of cases, the courts reiterate, however, that discretion to permit reconversion should only be exercised in appropriate cases—the debtor’s circumstances “must be closely scrutinized, and the debtor must also establish both good faith and the feasibility of any plan of reorganization.”¹⁸ Here, the parties have stipulated that the factors causing the first conversion—from chapter 13 to chapter 7—were based on one Debtor’s loss of employment. That Debtor is now re-employed, and is earning more than he was in his prior employment. The only missed payment in this case resulted from a misunderstanding about the due date, and was resolved with an abatement. In addition, during a prior period of unemployment,

¹⁷ 6 *Collier on Bankruptcy* ¶ 706.04, at 706-10 to 706-11 (Alan N. Resnick & Harry J. Sommer eds., 16th ed.) (internal footnotes omitted).

¹⁸ *Povah v. Hansbury & Finn, Inc. (In re Povah)*, 455 B.R. 328, 341 (Bankr. D. Mass. 2011). In *Povah*, the court held that the debtor had not carried her burden to show that reconversion was appropriate, because she did not show that her chapter 13 case would be feasible. *Id.* at 342.

Debtors surrendered their home and did what they needed to do in order to make their chapter 13 plan work, showing their commitment to the chapter 13 repayment process. Neither the United States Trustee, nor any other party, has argued that this conversion would be in bad faith. I conclude, therefore, that Debtors have carried their burden of proof to show that reconversion of their case to chapter 13 is appropriate.

III. Conclusion

Because I conclude that § 706 gives me the discretion to reconvert this chapter 7 case to chapter 13, and conclude that Debtors have met their burden to show that such reconversion is appropriate under the facts of this case, Debtors' motion to convert to chapter 13¹⁹ is granted, and the United States Trustee's motion to dismiss²⁰ is denied.

IT IS SO ORDERED.

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¹⁹ Doc. 153.

²⁰ Doc. 148.