

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

IN RE: DAVID ALLEN ADAMS, Debtor

**No. 5:09-bk-70242
Ch. 13**

ORDER

Before the Court is creditor Carrie Adams's motion to reconvert the debtor's case to a case under chapter 7 and her objection to confirmation of the debtor's chapter 13 plan. The Court heard the motion and objection on March 30, 2011. For the reasons stated below, the Court denies Carrie Adams's motion to reconvert and sustains in part and overrules in part her objection to confirmation.

The Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (L). The following opinion constitutes findings of fact and conclusions of law in accordance with Federal Rules of Bankruptcy Procedure 7052 and 9014.

Background

The debtor filed a joint, voluntary chapter 7 petition on January 21, 2009, with his then spouse, Melinda Adams. The joint debtors obtained a divorce subsequent to the filing of the petition, and the Court entered its *Order to Sever Debtors* on March 25, 2010, over the objection of creditor Carrie Adams, the debtor's former spouse. On April 8, 2010, the debtor filed a motion to convert his chapter 7 case to a case under chapter 13, to which Carrie Adams also objected. In her objection, Carrie Adams argued that the debtor's reason to convert was to avoid a debt to Carrie Adams that would otherwise be nondischargeable in the debtor's chapter 7 case. After a hearing on the debtor's motion to convert, the Court overruled Carrie Adams's objection. The Court found that Carrie Adams did not meet her burden of proving the debtor was converting his case in bad faith. *See Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007). The Court

recognized that the debtor's divorce from Melinda Adams may have been a basis for the debtor's ability to fund a plan and that there were significant changes of facts and circumstances since the filing of the chapter 7 joint petition. The Court stated that it was "not satisfied that Mr. Adams is in bad faith." Further, the Court advised Carrie Adams that the ruling was not prejudicial to her being able to object to confirmation of a chapter 13 plan if she believed the plan was proposed in bad faith. *See* 11 U.S.C. § 1325(a)(3). The Court converted the debtor's case to a case under chapter 13 on July 1, 2010.

The debtor filed his proposed chapter 13 plan on July 19, 2010. On August 13, 2010, Carrie Adams filed an objection to confirmation of the debtor's plan pursuant to § 1325(a)(3) and (a)(7); she amended her objection on October 22, 2010. On November 30, 2010, Carrie Adams filed her motion to reconvert the case to a case under chapter 7 pursuant to § 1307(c). According to her motion, Carrie Adams's argument for reconversion is that the "[d]ebtor filed his petition in bad faith."

Standard for Determining Good Faith

All of the code provisions under which Carrie Adams is proceeding relate to the debtor's good faith in filing either his petition or his proposed plan. First, Carrie Adams argues that the debtor's case should be reconverted to a case under chapter 7 because the debtor filed his *petition* in bad faith. As authority, she cited § 1307(c). Under § 1307(c), the basis for conversion of a case from chapter 13 to chapter 7, or for dismissal, is "for cause," and the statute includes a nonexclusive list of events that constitute cause. 11 U.S.C. § 1307(c)(1)-(11). The filing of a petition in bad faith does not appear on the list; however, "[b]ankruptcy courts nevertheless routinely treat dismissal for prepetition bad-faith conduct as implicitly authorized by the words 'for cause.'" *Marrama*, 549 U.S. at 373 (recognizing in a pre-BAPCPA case at least two possible reasons a debtor may not qualify as a debtor under chapter 13: (1) the debtor exceeds the debt limitation under § 109(e), and (2) the debtor's case would be dismissed "for cause" under § 1307(c)); *Molitor v. Eidson (In re Molitor)*, 76 F.3d 218, 220-21 (8th Cir. 1996) (stating that "cause" under § 1307(c) includes filing a petition in bad faith). Second, Carrie Adams

objects to confirmation of the debtor’s proposed plan because either (1) the debtor filed his plan in bad faith in contravention of § 1325(a)(3), or (2) the debtor filed his petition in bad faith in contravention of § 1325(a)(7).¹

Statutory Background

Prior to BAPCPA, relating to chapter 13 cases, courts addressed bad faith (or more appropriately, lack of good faith) in one of three statutory provisions. First, the Supreme Court recognized in *Marrama* that § 105(a) allows a bankruptcy judge “to take any action that is necessary or appropriate ‘to prevent an abuse of process.’” *Marrama*, 549 U.S. at 375. According to the Court, § 105(a) is “surely adequate to authorize an immediate denial of a motion to convert” *Id.* Second, as discussed in the previous paragraph, bankruptcy courts--including the Eighth Circuit--have routinely interpreted “for cause” under § 1307(c) to include lack of good faith. And finally, under § 1325(a)(3), in order for a chapter 13 plan to be confirmed, it must have been “proposed in good faith and not by any means forbidden by law.”

With the enactment of BAPCPA, Congress enlarged the requirements for confirmation of a debtor’s chapter 13 plan under § 1325(a) to include a determination of good faith in the filing of a debtor’s petition: “the court shall confirm a plan if--the action of the debtor in filing the petition was in good faith.” 11 U.S.C. § 1325(a)(7). In *Marrama*, the Supreme Court recognized that at the outset of a chapter 13 case, in response to a motion to dismiss the case or convert the case to a case under chapter 7 and prior to a confirmation hearing, a court can determine whether the debtor acted in bad faith prior to, or in the course of, filing a chapter 13 petition. *Marrama*, 549 U.S. at 368. It stated that “despite

¹ Section 1325 states, in relevant part:
[T]he court shall confirm a plan if--

. . .

(3) the plan has been proposed in good faith and not by any means forbidden by law;

. . .

(7) the action of the debtor in filing the petition was in good faith

the absence of any statutory provision specifically addressing the issue, the federal courts are virtually unanimous that prepetition bad-faith conduct may cause a forfeiture of any right to proceed with a Chapter 13 case.” *Id.* at 367-68. It later discussed the expansion of § 1307(c) to include prepetition bad-faith conduct as the statutory authority for the conversion or dismissal. *Id.* at 373. With BAPCPA, Congress added § 1325(a)(7), which specifically addresses bad faith in relation to confirmation of a chapter 13 plan by requiring that “the action of the debtor in filing the petition was in good faith.”

A review of the cases that discuss § 1325(a)(7) reveals that the addition of this subsection has presented courts with two queries: first, whether § 1325(a)(7) replaced § 1307(c) as a basis for conversion or dismissal for bad faith (or lack of good faith), and second, whether the standard for analysis of good faith under § 1325(a)(7) is different from the analysis courts have applied under § 1307(c) or § 1325(a)(3). *See In re Manno*, 2009 WL 236844, at n.9 (Bankr. E.D. Pa. Jan. 30, 2009) (collecting various courts’ answers to these questions in a footnote).

So far, these questions are unanswered in the Eighth Circuit. By making the good faith filing of a petition a requirement for confirmation of a chapter 13 plan, under BAPCPA Congress may have effectively eliminated the filing of a petition in bad faith under § 1307(c) as “cause” for the conversion or dismissal of a chapter 13 case to a case under chapter 7.² For example, if the court finds that the filing of the petition was not in good

² Interpreting the addition of § 1325(a)(7) in this manner does not mean that *Marrama* is abrogated by Congressional fiat or that “for cause” under § 1307(c) no longer incorporates the bad-faith filing of a petition in all circumstances. In *Marrama*, the Supreme Court considered a debtor’s right to convert a case under chapter 7 to a case under chapter 13. *Marrama*, 549 U.S. 365 (2007). The Court first recognized that “federal courts are virtually unanimous that prepetition bad-faith conduct may cause a forfeiture of any right to proceed with a Chapter 13 case.” *Id.* at 367-68. It then found that prior to conversion to chapter 13, a court, using its powers under § 105(a), could determine whether upon conversion “the case will *thereafter* be dismissed or immediately returned to Chapter 7.” *Id.* at 368 (emphasis added).

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faith, the proper remedy under BAPCPA would be for the court to deny confirmation of the debtor's plan, not convert the case to chapter 7. Upon denial of confirmation under § 1325(a)(7), the creditor or the U.S. Trustee could then move to convert the case to a case under chapter 7, or dismiss the case, whichever is in the best interest of the creditors and the estate. 11 U.S.C. § 1307(c)(5).³ Regardless of how courts are going to interpret Congress's intent in adding § 1325(a)(7), the Eighth Circuit has stated previously that "cause" under § 1307(c) includes filing a petition in bad faith. *Molitor*, 76 F.3d at 220. Likewise, the Supreme Court recognized in *Marrama* that prepetition bad-faith conduct is routinely reviewed by bankruptcy courts as "cause" for dismissal under § 1307(c). *Marrama*, 549 U.S. at 373.

Good Faith Factors

The terms "bad faith" and "good faith" are not defined in the code. However, the Eighth Circuit emphasizes six factors when analyzing good faith under both § 1307(c) and § 1325(a)(3):

Whether the debtor has accurately stated his debts and expenses on his bankruptcy statements and schedules. . . .

² (...continued)

At first blush it appears that the Court eliminated the obvious first step--converting the case to a case under chapter 13--in favor of analyzing dismissal or conversion under a chapter 13 statutory provision, which would be more appropriate *after* conversion. In fact, the Court analyzed Marrama's right to convert to chapter 13 under § 1307(c) for the sole purpose of determining whether he was eligible to be a debtor under chapter 13, as required by § 706(d). *Id.* at 374 (stating that prepetition bad-faith conduct is "tantamount to a ruling that the individual does not qualify as a debtor under Chapter 13"). If he is not eligible to be a chapter 13 debtor, then § 706(d) "provides adequate authority for the denial of his motion to convert." *Id.* When viewed in this light, *Marrama* would not be relevant when considering a creditor's request to convert or dismiss a case under § 1307(c) based on the debtor's alleged bad faith in filing a petition when the debtor is already proceeding under chapter 13.

³ Section 1307(c)(5) recognizes "denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan" as "cause" for conversion or dismissal.

Whether the debtor has made any fraudulent misrepresentation in connection with the case to mislead the Bankruptcy Court or his creditors. . . .

Whether the debtor has unfairly manipulated the Bankruptcy Code in any aspect of his plan. . . .

Whether a specific debt treated in the plan would be nondischargeable in a chapter 7 case. . . .

The type of debts which the debtor seeks to discharge in the chapter 13 case. . . . [and]

The debtor's motivations and sincerity in seeking chapter 13 relief. . . .

In re Ault, 271 B.R. 617, 619-20 (Bankr. E.D. Ark. 2002) (collecting cases by the Eighth Circuit Court of Appeals) (internal citations omitted).

The same factors are appropriate when analyzing good faith under § 1325(a)(7). In *Zellner*, the Eighth Circuit identified the first three factors relating to a finding of good faith in proposing a plan under § 1325(a)(3). *Education Assistance Corp. v. Zellner*, 827 F.2d 1222, 1227 (8th Cir. 1987). A few years later, the Eighth Circuit expanded the list to include the remaining three factors, also under § 1325(a)(3). *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1349 (8th Cir. 1990). The expanded list was in recognition of the preservation of the “totality of the circumstances” approach for a determination of good faith. Six years later, the Eighth Circuit stated that filing a petition in bad faith was “cause” under § 1307(c) sufficient to convert or dismiss a case filed under chapter 13. *Molitor*, 76 F.3d at 220. In *Molitor*, the court stated that a bad faith determination under § 1307(c) would be based on the totality of the circumstances, and then cited to *LeMaire*. *Id.* at 220-21. Because the six factors are based on the “totality of the circumstances” approach for a determination of good faith, the Court finds that the same factors are appropriate for an analysis of good faith under § 1325(a)(7).

Carrie Adams filed her motion to reconvert the debtor's case to a case under chapter 7 pursuant to § 1307(c). She objected to the confirmation of the debtor's plan pursuant to

§ 1325(a)(3) and § 1325(a)(7). Because the same factors are applicable in each of these sections, the Court will consider Carrie Adams's motion to reconvert alongside her objection to confirmation of the debtor's plan.

Objection to Confirmation

Section 1325(a) states that the court shall confirm a plan if it meets each of nine enumerated requirements set forth in § 1325(a). 11 U.S.C. § 1325(a). In the absence of an objection by a party in interest, the court can confirm a chapter 13 plan without a hearing. *In re Mendenhall*, 54 B.R. 44, 46 (Bankr. W.D. Ark. 1985); *Zellner*, 827 F.2d at 1226 (recognizing a chapter 13 plan that meets requirements of § 1325(a) would be confirmed absent objection). If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, the code imposes further requirements relating to the debtor's disposable income and the period of time for which the debtor must make payments under the plan, known as the applicable commitment period. 11 U.S.C. § 1325(b). Because a chapter 13 plan would be confirmed absent objection, an objecting creditor has the initial burden of producing sufficient evidence to support her objection. *Zellner*, 827 F.2d at 1226; *Mendenhall*, 54 B.R. at 46 (placing burden of persuasion on the creditor). The debtor then has the burden of coming forward with evidence "to rebut any evidence introduced in support of an objection by a creditor or the Chapter 13 trustee." *Mendenhall*, 54 B.R. at 47.

Counsel for Carrie Adams did not present to the Court either an opening statement or closing argument; however, the Court can glean the ambit of Carrie Adams's objection to confirmation of the debtor's plan from her *Amended Objection to Modified Plan* filed on October 22, 2010.⁴ In her pleading, Carrie Adams lists six specific objections to

⁴ At the hearing on March 30, the Court took judicial notice of the docket and the statements and schedules in both this case and a related adversary proceeding: 5:09-ap-7072. Although neither party requested the Court to take judicial notice of the debtor's plan, the Court will do so at this time. The Court notes that according to the Court's

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confirmation:

1. Debtor has been dishonest concerning his domestic support obligation.
2. Debtor has been dishonest concerning his income.
3. Debtor has improperly scheduled his assets.
4. Debtor has scheduled debts for which he is not liable.
5. Debtor's Plan is based upon an incorrect commitment period.
6. Debtor's Plan does not include Carrie Adams' priority domestic support claim.

The Court will address each objection separately in the light of § 1325(a) and (b).

1. Debtor has been dishonest concerning his domestic support obligation

Under this objection, Carrie Adams alleges that the debtor's testimony at the June 9, 2010, hearing on the debtor's motion to convert to a case under chapter 13 was not honest with regard to the timing of his support payments. Carrie Adams did not introduce any evidence to support either her allegation relating to the timing of the payments or of the debtor's testimony at the June 9 hearing. Therefore, the Court finds that Carrie Adams failed to produce sufficient evidence to support her objection and overrules her first objection.

2. Debtor has been dishonest concerning his income

Under this objection, Carrie Adams references four subparts, all of which relate to the debtor's income: (a) Statement of Financial Affairs, (b) Chapter 7 Means Test and Chapter 13 Statement of Current Monthly Income, (c) Amended Schedule I, and (d) Implications for Debtor's Plan. It is under the last subpart that Carrie Adams references the specific code provisions under which her objections are found--specifically, § 1325(a)(3) and (a)(7). Section 1325(a)(3) references good faith in the proposal of a

⁴ (...continued)
docket, the debtor filed his chapter 13 plan on July 19, 2010. Despite Carrie Adams's objection to a *modified* plan, no modified plan is listed on the docket, nor was the debtor's plan or the referenced "modified plan" admitted into evidence.

plan, and, as discussed above, § 1325(a)(7) references good faith in the filing of the petition.

(a) Statement of Financial Affairs

Under this subpart, Carrie Adams alleges the debtor understated his gross income on his Statement of Financial Affairs, which discloses an income of \$50,260.00 during 2007 and \$24,000.00 during 2008. In support of her allegation, Carrie Adams introduced the debtor's personal and commercial bank records and what purports to be a summary of the relevant transfers.⁵ The first page of the summary document reflects transfers from the debtor's commercial account to the debtor's personal account for 2007 and 2008. The supporting bank records for the personal account and the commercial account were introduced into evidence. The transfers total \$17,447.00 in 2007 and \$21,100.00 in 2008. The second page of the summary document reflects transfers from an account that was not entered into evidence, so it will not be considered by the Court.

The debtor testified that the listed transfers that appear on the first page of the summary document were transfers from his commercial account into his personal account. Carrie Adams did not introduce any additional evidence concerning the debtor's income in 2007 and 2008.⁶ Because the debtor's income as reflected on the Statement of Financial Affairs exceeds the income reflected as transfers from the debtor's commercial account,

⁵ Exhibit K-1 is the debtor's personal bank records for an account ending in 582; exhibit K-2 is the summary document for an account ending in 582 and an account ending in 417; and exhibit K-3 is the debtor's commercial bank records for an account ending in 970.

⁶ Carrie Adams did introduce the personal financial statement of the debtor that reported the debtor's statement of condition as of September 30, 2008. (Ex. K-10.) On that statement, the debtor indicated his salary was \$50,000.00. While this does not comport with his 2008 income as reported on the debtor's Statement of Financial Affairs--\$24,000.00--the financial statement predated the debtor's petition by almost four months. There was no testimony elicited with regard to the discrepancy.

the Court cannot conclude that the debtor “dramatically understated his gross income,” as alleged by Carrie Adams.⁷

(b) Chapter 7 Means Test and Chapter 13 Statement of Current Monthly Income

Under this subpart, Carrie Adams alleges that the income the debtor actually received during the time period reflected on his respective chapter 7 and chapter 13 means tests exceeded the amount of income the debtor reported on those means tests. In discussing the debtor’s chapter 7 means test and the allegation that all of the debtor’s income was not included, Carrie Adams references an Exhibit “D” in her written objection. The referenced Exhibit “D” was not entered into evidence at the hearing and there is no other evidence before the Court to support Carrie Adams’s allegation that the debtor under-reported his income on the chapter 7 means test.

In relation to the debtor’s chapter 13 means test, Carrie Adams compares the income line item on the chapter 13 means test with the earlier filed chapter 7 means test. On his chapter 7 means test, the debtor indicated a monthly income from “Gross wages, salary, tips, bonuses, overtime, commissions” in the amount of \$3266.67. On his chapter 13 means test, the debtor indicated zero income from his wages or salary but included “Income from the operation of a business, profession, or farm” in the amount of \$5518.17. When asked to explain the discrepancy and state whether either number was accurate, the debtor replied, “I’m going to refer the 13 to my attorney because I’m not quite sure where that number came from.” No additional information was solicited by Carrie Adams or provided by the debtor to explain the difference between the two means tests.

⁷ Additionally, the Court notes that the testimony was not conclusive as to the purpose of the transfers--for instance, whether the transfers were from income, loans, distributions, or money from some other source.

(c) Amended Schedule I

Under this subpart, Carrie Adams bases her allegation on the previous two subparts and the debtor's alleged dishonesty that "raises serious questions" regarding the veracity of the debtor's Schedule I. However, Schedule I reflects the debtor's income as of the time the case was filed, and Carrie Adams did not introduce any evidence to contradict the debtor's statement regarding his income at that time.

(d) Implications for Debtor's Plan

Finally, under this subpart, Carrie Adams states that confirmation of the debtor's plan should be denied as a result of the debtor's dishonesty concerning his income. This subpart is the culmination of Carrie Adams's argument that the debtor has been dishonest concerning his income and is based on the debtor's income as stated on Schedule I. In essence, it is a prayer for relief relating specifically to Carrie Adams's second objection.

Application of Factors to Second Objection

The Court will summarize its findings concerning Carrie Adams's second objection with regard to the six factors recognized by the Eighth Circuit relating to good faith and their application in the present case. The first factor is "[w]hether the debtor has accurately stated his debts and expenses on his bankruptcy statements and schedules." The Court finds that Carrie Adams did not present sufficient evidence to support her contention that the debtor did not accurately state his debts and expenses on his bankruptcy statements and schedules. Carrie Adams specifically objected to the debtor's debts that were listed as joint debts on the debtor's petition. These are discussed in more detail under Carrie Adams's fourth objection, below. Regardless, Carrie Adams did not provide the Court with any evidence to support her allegation or explain the alleged inaccuracy and failed on her burden of proof.

Although not specifically related to the first factor, under the totality of the circumstances approach recognized by the Eighth Circuit, and to the extent the good-faith inquiry extends to an accurate reporting of the debtor's income, the Court notes that there appear

to be significant discrepancies in reporting the debtor's income. The debtor's chapter 7 means test discloses a monthly income in the amount of \$3266.67 from wages, salary, and commissions; the debtor's chapter 13 means test discloses a monthly income from his business in the amount of \$5518.17. Although the Court cannot say that either entry is more correct than the other, when given the opportunity to explain the discrepancy, the debtor deferred to counsel. However, Carrie Adams did not question the debtor further about the discrepancy or introduce any additional evidence to support her objection relating to the alleged dishonesty concerning the debtor's income. Simply because the income amounts are different is not sufficient proof of the debtor's lack of good faith.

Additionally, the debtor's financial statement (Ex. K-10) that was presented to the Bank of Fayetteville disclosed the debtor's statement of condition as of September 30, 2008. At that time, the debtor indicated a salary of \$50,000.00. However, nearly four months later when the debtor filed his chapter 7 petition, the debtor disclosed on his Statement of Financial Affairs an income of only \$24,000.00 during 2008. Again, even though Carrie Adams introduced sufficient evidence for the Court to note a discrepancy, Carrie Adams did not question the debtor further about the discrepancy or introduce any additional evidence to support her objection relating to the alleged dishonesty concerning the debtor's income.

There are inconsistencies relating to both the debtor's monthly income and his 2008 income. However, Carrie Adams failed to introduce sufficient evidence to prove the inconsistencies are a result of the debtor's lack of good faith in either the filing of the plan or the filing of the petition.

The second factor is whether the debtor made a fraudulent misrepresentation in connection with the case that would mislead the Court or the debtor's creditors. The Court will discuss below in further detail the debtor's testimony regarding listing all of his property as joint property, even though the debtor testified that he is the sole owner of

many of the items listed on his petition. Suffice it to say that the Court does not find that entry to be a fraudulent misrepresentation.

However, there are two representations of concern to the Court for which no explanation was requested or offered:

1. Exhibit K-10, which is the debtor's personal financial statement of condition as of September 30, 2008, indicates the debtor had "coins & metal" with a value of \$10,000.00. The coins and metal are not specifically listed on the debtor's schedules, nor are they listed under "Other transfers" on the debtor's Statement of Financial Affairs.
2. Exhibits K-9 and K-10 are the debtor's financial statements. Exhibit K-9 is dated September 27, 2007, and stamped "Received" by an unknown entity on September 28, 2007. Exhibit K-10 is dated September 30, 2008, and was given to Bank of Fayetteville. Even though both of these financial statements are dated within two years of the filing of the debtor's petition, the debtor stated on his Statement of Financial Affairs, line 19. d., that he has not provided any financial institution, creditor, or other party a financial statement within two years immediately preceding the commencement of his case.

The Court finds that these representations are indicative of "an abuse of the provisions, purpose or spirit of Chapter 13." *Zellner*, 827 F.2d at 1227 (quoting *In re Estus*, 695 F.2d 311, 316 (8th Cir. 1982)). However, the Court cannot find they are fraudulent misrepresentations. Under Arkansas law, there are five elements to establish a fraudulent misrepresentation: "(1) a false representation of a material fact; (2) knowledge or belief on the part of the person making the representation that the representation is false; (3) an intent to induce the other party to act or refrain from acting in reliance on the misrepresentation; (4) a justifiable reliance by the other party; and (5) resulting damages." *O'Mara v. Dykema*, 942 S.W.2d 854, 857 (Ark. 1997); *Tyson Foods, Inc. v. Davis*, 66 S.W.3d 568, 580 (2002).

Carrie Adams failed to introduce sufficient evidence to meet the five elements.

Concerning the first representation, Carrie Adams did not introduce any evidence to support even one of the five elements of a fraudulent representation with regard to the “coins & metal” listed on the debtor’s 2008 financial statement. Although the Court may speculate as to the accuracy of the representation, the debtor’s intent, and Carrie Adams’s reliance, the Court could also speculate that the reason the transfer was not listed on the debtor’s Statement of Financial Affairs was because it was transferred in the ordinary course of the debtor’s business as a jeweler.⁸ Alternatively, the debtor may have included the coins and metal on Schedule B, Line 29, with the “Jewelry and inventory at David Adams Fine Jewelry” that the debtor valued at \$70,000.00. The Court simply was not provided with any evidence from which it could make a finding.

Concerning the second representation, the debtor stated on his Statement of Financial Affairs that he did not issue a financial statement to any financial institution, creditors, or other parties within the two years preceding the filing of his petition. However, Carrie Adams introduced two such financial statements, and the Court finds that the debtor made a false representation. Even so, there is no proof that the misrepresentation was material--that it affected in any way any decision Carrie Adams had to make. *See Ellis v. Litter*, 841 S.W.2d 155, 156-57 (Ark. 1992) (explaining a material misrepresentation as a substantial factor relating to a decision and quoting extensively *W. Page Keeton et al., Prosser & Keeton on the Law of Torts* § 108, at 753-54 (5th ed. 1984)). The Court could speculate that the reason the debtor failed to disclose the previous financial statements was to prevent the trustee or creditors from knowing about the “coins & metal” that were listed on the financial statements but not disclosed on his petition and schedules. But, as previously stated, there are other reasons why the coins and metal may not have appeared on his petition and schedules: they were transferred in the ordinary course of the debtor’s

⁸ Question 10 on the Statement of Financial Affairs requires the listing of “all other property, *other than property transferred in the ordinary course of the business* or financial affairs of the debtor”

business as a jeweler, or the debtor included the coins and metal on Schedule B, Line 29, with the “Jewelry and inventory at David Adams Fine Jewelry.” Regardless, Carrie Adams failed to introduce any additional evidence with regard to the remaining elements. Although the representations may be indicative of “an abuse of the provisions, purpose or spirit of Chapter 13,” that is not sufficient for the Court to find a fraudulent misrepresentation in connection with the case as a result of the debtor’s lack of good faith in either the filing of the plan or the filing of the petition.

The Court cannot give much weight to the remaining four factors. The Court was not provided with any evidence or indication that the debtor unfairly manipulated the bankruptcy code in any aspect of his plan. Although Carrie Adams previously argued that the debtor’s reason to convert to chapter 13 was to discharge a debt to Carrie Adams that would otherwise be nondischargeable in the debtor’s chapter 7 case, she did not present any evidence or argument on this issue at trial. The Court recognizes that the alleged domestic support obligation that is the subject of the pending adversary proceeding in this case would be nondischargeable in a chapter 7 case regardless of whether the Court determines it to be a domestic support obligation or a debt incurred in connection with a property settlement agreement.⁹ However, if the Court determines that the domestic support obligation is a debt incurred in connection with a property settlement, the debt may be discharged in a case under chapter 13. Regardless, the Court did not find that the dischargeability of Carrie Adams’s claim was the debtor’s motivation to convert to chapter 13. In fact, as stated by the Court at the hearing on the motion to convert the debtor’s case to a case under chapter 13, there were significant changes of facts and circumstances regarding the debtor since the filing of his chapter 7 petition, the Court was “not satisfied that Mr. Adams [was] in bad faith,” and the timing

⁹ In a chapter 7 case, a discharge under § 727 does not discharge a debt for either a § 523(a)(5) domestic support obligation or a § 523(a)(15) debt incurred in connection with a property settlement agreement.

of the conversion may have been relative to the debtor's divorce from his then-current spouse.

For the above reasons, the Court finds that Carrie Adams failed to produce sufficient evidence to support her objection and overrules Carrie Adams's second objection.

3. Debtor has improperly scheduled his assets

Under this objection, Carrie Adams alleges that a number of assets are listed on the debtor's petition as joint property when, in fact, they are the debtor's sole property. Carrie Adams suggests that the purpose of listing the assets as joint property was to "take improper advantage of his joint debtor's exemptions." Her third objection to confirmation also falls under § 1325(a)(7)--lack of good faith in filing the debtor's petition. As discussed above, the Court will apply the factors of a good faith analysis currently recognized under § 1307(c) and § 1325(a)(3) to its analysis of good faith under § 1325(a)(7).

In support of her allegation, Carrie Adams referred to the debtor's Schedule B on which all of the listed personal property is identified as joint property. When asked whether specific property listed on the schedule was the debtor's sole property, the debtor responded in the affirmative each time. The Court agrees that misidentifying the property ownership interests of specific items may, in fact, be done for the purpose of maximizing the debtor's exemptions, as suggested in Carrie Adams's objection. However, it is not clear to the Court what time period Carrie Adams was referring to during the trial when she asked the debtor if "that was your sole property" with regard to each piece of property. When the debtor's case was filed, the debtor and his then spouse, Melinda Adams, filed the petition as a joint petition. According to the bankruptcy code, with regard to a joint petition, the exemptions allowed under the code "shall apply separately with respect to each debtor in a joint case." 11 U.S.C. § 522(m). The debtor and his then spouse may have held the property jointly at the time the petition was filed. Further, when their divorce was granted, the property settlement may have transferred the

property to each debtor individually according to their respective interests. Hence, the debtor may have been responding as to his ownership interest in the specific property after his divorce.¹⁰ Regardless, the Court is aware this is speculation. There is no evidence before the Court from which the Court can find that the debtor's purpose of listing the property on his petition as "joint" property was to take an improper advantage of the exemptions allowed by the code. Therefore, the Court finds that Carrie Adams failed to produce sufficient evidence to support her objection and overrules her third objection.

4. Debtor has scheduled debts for which he is not liable

Under this objection, Carrie Adams alleges that "a number of debts which are scheduled as 'joint' on his Schedule F (Docket No. 1) were actually the sole responsibility of his ex-wife Melinda." The allegation apparently arises because of the debtor's testimony at a Rule 2004 examination. Carrie Adams did not introduce any evidence to support her allegation, nor did she identify the specific debts to which she was referring at trial. Therefore, the Court finds that Carrie Adams failed to produce sufficient evidence to support her objection and overrules her fourth objection.

5. Debtor's Plan is based upon an incorrect commitment period

Under this objection, Carrie Adams objects to the debtor's proposed plan length of three years. Her objection is sustained. The debtor's Form B22C (the chapter 13 means test) indicates an annual income of \$66,218.04. The median family income for a family of

¹⁰ The divorce decree and any related property settlement were not introduced at trial. However, the Decree of Divorce, dated October 8, 2003, was included as an attachment to Carrie Adams's adversary proceeding. It states that the parties entered into a Mediation Agreement that settled issues of property and debt division. The Mediation Agreement was not attached to the decree.

The joint debtors amended Schedule B on February 18, 2009, but did not change the stated ownership interest at that time. After the debtors were severed and shortly after the debtor's individual case was converted to chapter 13, the debtor amended Schedules E, I, and J; he has not amended Schedule B.

three in Arkansas is \$47,101.00. Because the debtor exceeds the median family income, his applicable commitment period is five years, not three years. 11 U.S.C. § 1325(b)(4).

The debtor is under a current obligation to file a modification of his plan as a result of a previous objection filed by the chapter 13 trustee, which was sustained.¹¹ One of the trustee's objections also related to the applicable commitment period. The debtor shall modify his plan to provide for a five-year commitment period in conjunction with the Court's order relating to, and consistent with, the trustee's objection.

6. Debtor's Plan does not include Carrie Adams' priority domestic support claim

Under this objection, Carrie Adams objects to the confirmation of the debtor's plan because the plan does not provide for payment of her claim for a domestic support obligation. Carrie Adams filed her claim in the amount of \$102,550.00 on June 29, 2009, and indicated the claim was entitled to a priority under § 507(a) as a domestic support obligation [Claim No. 13]. The debtor scheduled Carrie Adams's claim on his Schedule F as an unsecured claim related to a property settlement agreement in the amount of \$120,000.00.¹² He did not list any domestic support obligations in his chapter 13 plan, which was filed on July 19, 2010. However, in this Court's order entered on July 19, 2010, the Court sustained an objection by the previous chapter 7 trustee relating to an earlier claim by Carrie Adams [Claim No. 5] and stated that "Claim No. 13 filed as a priority domestic support claim in the amount of \$102,550.00 is hereby allowed as

¹¹ The order appears as entry [134] on the Court's docket.

¹² The determination of whether the claim is a domestic support obligation or a debt related to a property settlement agreement is properly before this Court in a related adversary proceeding that was filed on May 5, 2009. The adversary proceeding was held in abeyance pending the completion of a state court action. The adversary proceeding is now ready for hearing.

filed.”¹³ Unless the Court finds to the contrary in a pending adversary proceeding relating to the nature of the domestic support obligation, Carrie Adams has a priority domestic support claim in the amount of \$102,550.00.

One of the requirements for confirmation under § 1325(a) is that the plan comply with the provisions of chapter 13, which includes § 1322--Contents of Plan. 11 U.S.C. § 1325(a)(1). Section 1322 requires that a plan provide for the full payment of all claims entitled to priority under § 507 unless the holder of the claim, in this case Carrie Adams, agrees to a different treatment. No such agreement is before the Court. Therefore, Carrie Adams’s objection to confirmation related to the payment of her claim for a domestic support obligation is sustained.

As stated above, the debtor is under a current obligation to file a modification of his plan as a result of a previous objection filed by the chapter 13 trustee. The debtor shall modify his plan to provide for Carrie Adams’s allowed domestic support claim in conjunction with the Court’s order relating to, and consistent with, the trustee’s objection.

Motion to Reconvert

Carrie Adams also moved to reconvert the debtor’s case to a case under chapter 7 under § 1307(c) because of the debtor’s alleged bad faith in filing his petition. Because the same factors are applicable under § 1307(c), § 1325(a)(3), and § 1325(a)(7), based on the above discussion, the Court also finds that Carrie Adams failed to prove the debtor filed his petition in bad faith and denies her motion to reconvert the case to a case under chapter 7 pursuant to § 1307(c).

Conclusion

For the reasons stated above, the Court denies Carrie Adams’s motion to reconvert this

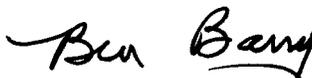
¹³ The order appears as entry [99] on the Court’s docket.

case to a case under chapter 7, and sustains in part and overrules in part Carrie Adams's objection to confirmation. To the extent Carrie Adams's objection is sustained, the debtor shall modify his plan in accordance with this order and in conjunction with the Court's order relating to, and consistent with, the trustee's objection.

IT IS SO ORDERED.

May 13, 2011

DATE



BEN T. BARRY

UNITED STATES BANKRUPTCY JUDGE

cc: Robert Jeffrey Conner, attorney for the debtor
K. Vaughn Knight, attorney for creditor Carrie Adams
Mason Wann, attorney for creditor Carrie Adams
Joyce B. Babin, chapter 13 trustee