



**SO ORDERED,**

A handwritten signature in blue ink that reads "Neil P. Olack".

**Judge Neil P. Olack  
United States Bankruptcy Judge  
Date Signed: September 24, 2014**

**The Order of the Court is set forth below. The docket reflects the date entered.**

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:**

**GREGORY LEE DAVIS,**

**CASE NO. 12-01305-NPO**

**DEBTOR.**

**CHAPTER 13**

**ORDER DENYING MOTION TO DISMISS AND  
CONVERTING CHAPTER 13 CASE TO CHAPTER 7 CASE**

On September 22, 2014, a hearing (the "Hearing") was held on the Trustee's Motion to Dismiss (the "Motion to Dismiss") (Dkt. 36) and the proposed Amended Agreed Order on Trustees [sic] Motion to Dismiss and Judgment (the "Proposed Order") (Dkt. 61) in the above-styled chapter 13 bankruptcy case (the "Bankruptcy Case"). At the Hearing, Todd S. Johns and Justin B. Jones represented the standing chapter 13 trustee, Harold J. Barkley, Jr. (the "Trustee"); Timothy K. Byrne<sup>1</sup> represented the Debtor; and Christopher J. Steiskal represented the

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<sup>1</sup> Timothy K. Byrne was substituted for the firm of Bond, Botes & Woods as counsel for the debtor, Gregory Lee Davis (the "Debtor"), after the events described herein occurred. (Dkt. 59).

U.S. Trustee. Also, William B. Atchison and Kristopher W. Carter, Debtor's counsel in the personal injury action described below, participated at the Hearing by telephone.

In the summer of 2013, well after the Debtor had filed bankruptcy, the Debtor received \$162,500.00 in cash as the result of a pre-petition personal injury claim asserted under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (the "Personal Injury Action"). The Debtor did not disclose the cause of action in his bankruptcy schedules filed on April 23, 2012 but mentioned it at the 11 U.S.C. § 341 meeting of creditors (the "§ 341 Meeting") held on June 5, 2012. The Debtor's counsel in the Personal Injury Action was not approved by the Court to represent the Debtor, and the settlement of the Personal Injury Action and payment of the professional fees and expenses of the Debtor's counsel in the Personal Injury Action likewise were not approved by the Court. It is unclear whether Debtor's counsel in the Personal Injury Action was aware of the Bankruptcy Case at that time.

The Trustee filed the Motion to Dismiss more than two (2) years after the § 341 Meeting when he discovered that the Debtor had failed to amend his bankruptcy schedules<sup>2</sup> to disclose the cause of action or to notify the Trustee that the settlement funds had been disbursed. According to the Proposed Order, the Debtor spent the money on a 2014 Toyota Tundra and a 2006 Jayco Jay Flight Camper. At the Hearing, the Trustee described shopping sprees to such places as the Bass Pro Shops and the Outlets of Mississippi, both in Pearl, Mississippi. As a result, little to none of the proceeds allegedly remain in the Debtor's possession for payment to his creditors.

The Proposed Order reflects an agreement between the Trustee and the Debtor that would

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<sup>2</sup>After the Motion to Dismiss was filed, the Debtor amended Schedule B-Personal Property on August 20, 2014 to list a personal injury claim of \$162,500.00 (Dkt. 43).

require the Debtor, *inter alia*: (1) to amend his chapter 13 plan to pay unsecured creditors in full; (2) to grant a \$162,500.00 judgment against the Debtor in favor of the Trustee; (3) to affix a lien in favor of the Trustee on the 2014 Toyota Tundra, 2006 Jayco Jay Flight Camper and any other items purchased by the Debtor using the \$162,500.00 proceeds; and (4) to pay \$10,000.00 to the Trustee. There are also terms in the Proposed Order regarding the enforcement of the Debtor's plan payments in the event of a default. The agreement between the Debtor and the Trustee contained in the Proposed Order was purportedly reached after the Trustee conducted an examination of the Debtor under Rule 2004 of the Federal Rules of Bankruptcy Procedure as outlined in the Agreed Order (Dkt. 49) entered on August 28, 2014.

At the Hearing, the Court expressed its concern<sup>3</sup> that the Proposed Order unfairly placed the risk of nonpayment on the Debtor's creditors when the settlement funds should have been available to satisfy creditors last summer.<sup>4</sup> According to the Trustee, full payment to the secured creditors would require approximately \$14,000.00 and to the unsecured creditors, \$9,000.00, for a total of \$23,000.00. Thus, full payment to creditors in this Bankruptcy Case would have consisted of less than fifteen percent (15%) of the money disbursed to the Debtor from the Personal Injury Action. Under the Trustee's proposal, the Debtor would retain approximately \$129,500.00, more than five (5) times the amount paid to creditors. Additionally, payment to creditors over time, as contemplated in the Proposed Order, would not be the same as full payment

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<sup>3</sup> The Court also noted that the Trustee and the Debtor had failed to comply with Rule 9019 of the Federal Rules of Bankruptcy Procedure ("Rule 9019") in that the compromise or settlement was not presented in the form of a motion and, therefore, no motion was noticed to the parties as required in Rule 9019(a).

<sup>4</sup>There is no dispute that the Personal Injury Action is an asset of the estate. 11 U.S.C. § 541(a)(1). The Debtor has not asserted any theory why the settlement funds should be shielded from creditors.

to creditors at present value last summer. The Court's approval of the Proposed Order, where the only consequence to the Debtor is merely repayment of his debts in full<sup>5</sup> through the remaining life of his chapter 13 plan, which does not end until 2017, would set a bad precedent for other chapter 13 debtors who fail to make honest and accurate disclosures of assets of the estate and then freely dispose of those assets but who nevertheless are allowed to retain whatever they exchanged for those assets.

The Court also questioned at the Hearing whether any statutory or case authority existed that would support payment to the Trustee of \$10,000.00 in addition to the compensation authorized under 28 U.S.C. § 586(e). The Trustee was unable to allay the Court's concerns. The Trustee related the \$10,000.00 payment to the reimbursement of costs that the Trustee might incur if the Debtor defaulted on his plan payments or, in the alternative, to sanctions against the Debtor for his alleged misconduct. The Trustee, however, did not provide the Court with legal authority supporting either theory of recovery. Moreover, the Trustee was unable to distinguish this matter from this Court's decision in the Memorandum Opinion and Order Denying Chapter 12 Standing Trustee's Application for Reimbursement of Expense, *In re Bazor*, No. 08-50412-NPO (June 19, 2009) (Dkt. 223). In *Bazor*, this Trustee requested reimbursement of expenses of \$5,000.00 from proceeds generated from the sale of real property in which the debtor's interest was not disclosed in his bankruptcy schedules. The Court held that the Trustee was entitled only to the percentage

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<sup>5</sup> For unsecured creditors, the repayment of debts in full, as outlined in the Proposed Order, would be payment over the remaining life of the plan until 2017, without interest.

fee allowed under 28 U.S.C. § 586(e) and that 11 U.S.C. § 326(b)<sup>6</sup> precluded the Court from allowing the Trustee to recover his purported expenses. The stance taken by the Trustee in this Bankruptcy Case cannot be reconciled with the Court's holding in *Bazor*.

Accordingly, the Court finds that in light of the conduct described herein and the concerns of the Court regarding the Proposed Order, it is in the best interest of the creditors that the Motion to Dismiss be denied and that this case be converted from a chapter 13 case to a chapter 7 case under 11 U.S.C. § 1307(c). *Jacobsen v. Moser (In re Jacobsen)*, 609 F.3d 647 (5th Cir. 2010); *Elliott v. Sutton (In re Elliott)*, 506 F. App'x 291 (5th Cir. 2013) (unpublished) (holding that bankruptcy court has authority to invoke 11 U.S.C. § 1307(c) *sua sponte* and convert a chapter 13 case to a chapter 7 case). At this juncture, the statutory powers of a chapter 7 trustee are more conducive to a full and thorough investigation of the facts surrounding the Personal Injury Action, the settlement reached in that action, the disbursement of those settlement proceeds to the Debtor and his counsel, and the lack of prompt action to protect the best interests of the estate and the creditors more than two (2) years after the § 341 Meeting. Here, creditors are more likely to receive payment in full in the short term through the liquidation of assets by a chapter 7 trustee rather than in the long term through monthly plan payments continuing until 2017, as outlined by the Trustee in the Proposed Order, given the attendant risks to creditors. In summary, the Court finds that the chapter 13 plan, as modified by the Proposed Order, was not proposed in good faith

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<sup>6</sup>Section 326(b) provides, in pertinent part:

In a case under chapter 12 or 13 of this title, the court may now allow compensation for services or reimbursement of expenses . . . of a standing trustee appointed under section 586(b) of title 28.

and that it is in the best interests of creditors that this Bankruptcy Case be converted to a chapter 7 case.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss hereby is denied.

IT IS FURTHER ORDERED that this chapter 13 case hereby is converted to a chapter 7 case.

IT IS FURTHER ORDERED that a chapter 7 trustee shall be appointed without delay.

##END OF ORDER##