



SO ORDERED,

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

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: July 30, 2019

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

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

MARY L. BOYD,

CASE NO. 18-00832-NPO

DEBTOR.

CHAPTER 13

ORDER: (1) DENYING MOTION TO CONVERT UNDER 11 U.S.C. § 1307(c); (2) RESOLVING FADI ZAYED’S OBJECTION TO TRUSTEE’S MOTION TO CONVERT DEBTOR’S CHAPTER 13 TO A CHAPTER 7 UNDER THE PROVISIONS OF 11 U.S.C. SECTION 1307(c) AND MOTION AND REQUEST TO HAVE THE DEBTOR, MARY BOYD PROSECUTED FOR BANKRUPTCY FRAUD; (3) RESOLVING THE CREDITOR’S WRITTEN RESPONSE AND CREDITOR, FADY ZAYED-STAR PAYMENT CENTER’S OUT OF TIME FILING OF A PRIORITY PROOF OF CLAIM AGAINST THE DEBTOR, MARY BOYD FOR HER FRAUD AGAINST THE U.S. BANKRUPTCY COURT AND CREDITOR, FADI ZAYED STAR PAYMENT CENTER AND THROUGH HER FRAUDULENT ACTIONS OBTAINED THE SUM OF \$12,705.30; (4) APPROVING THE AMENDED APPLICATION TO APPROVE SETTLEMENT; (5) APPROVING THE AMENDED APPLICATION FOR COMPENSATION; AND (6) DISMISSING THE ORDER TO SHOW CAUSE

This matter came before the Court for a combined hearing and status conference on July 15, 2019 (the “Hearing”), on (1) the Motion to Convert Under 11 U.S.C. § 1307(c) (the “Motion to Convert”) (Dkt. 31) filed by the chapter 13 trustee, Harold J. Barkley, Jr. (the “Trustee”); (2) Fadi Zayed’s Objection to Trustee’s Motion to Convert Debtor’s Chapter 13 to a Chapter 7 Under the Provisions of 11 U.S.C. Section 1307(c) and Motion and Request to Have the Debtor, Mary Boyd Prosecuted for Bankruptcy Fraud (the “Objection to Motion to Convert”) (Dkt. 59) filed by

Fadi Zayed (“Zayed”); (3) the Response to Motion to Convert and Request to Prosecute (the “Response to Motion to Convert”) (Dkt. 64) filed by the debtor, Mary L. Boyd (the “Debtor”); (4) Fadi Zayed’s Objection to Trustee’s Motion to Convert Debtor’s Chapter 13 to a Chapter 7 Under the Provisions of 11 U.S.C. Section 1307(c) and Motion and Request to Have the Debtor, Mary Boyd Prosecuted for Bankruptcy Fraud (the “Motion to Prosecute Debtor”) (Dkt. 59) filed by Zayed; (5) the Response to Motion to Convert and Request to Prosecute (the “Response to Motion to Prosecute Debtor”) (Dkt. 64) filed by the Debtor; (6) the Amended Application to Approve Settlement (the “Amended Application to Approve Settlement”) (Dkt. 45) filed by the Debtor; (7) the Trustee’s Response to Amended Application to Approve Settlement (the “Response to Amended Application to Approve Settlement”) (Dkt. 58) filed by the Trustee; (8) the Amended Application for Compensation (the “Amended Application for Compensation”) (Dkt. 47) filed by the Debtor; (9) the Trustee’s Response to Amended Application for Compensation (the “Response to Amended Application for Compensation”) (Dkt. 57) filed by the Trustee; (10) the Notice of Status Conference (Dkt. 66) issued by the Clerk of Court for the United States Bankruptcy Court for the Southern District of Mississippi (the “Clerk”) for clarification on the Creditor’s Written Response and Creditor, Fadi Zayed-Star Payment Center’s Out of Time Filing of a Priority Proof of Claim Against the Debtor, Mary Boyd for her Fraud Against the U.S. Bankruptcy Court and Creditor, Fadi Zayed Star Payment Center and through her Fraudulent Actions Obtained the Sum of \$12,705.30 (the “Late-Filed Proof of Claim”) (Dkt. 65); and (11) the Order to Show Cause (the “Show Cause Order”) (Dkt. 67) issued to Harry J. Rosenthal to show cause why sanctions or other relief should not be imposed against him for his failure to comply with Local Rule 5005-1(a)(2)(A) of the Uniform Local Rules of the United States Bankruptcy Courts for the Northern and Southern Districts of Mississippi (“Local Rule 5005-1(a)(2)(A)”) when he filed the Objection to Motion to

Convert, the Motion to Prosecute Debtor, and the Late-Filed Proof of Claim on behalf of Zayed in the above-referenced chapter 13 bankruptcy case (the “Bankruptcy Case”). At the Hearing, Joshua Lawhorn represented the Trustee; Harry J. Rosenthal (“Rosenthal”) represented Zayed; Richard R. Grindstaff represented the Debtor; and Thomas Wayne Brock (“Brock”) appeared on behalf of himself but represented the Debtor as special counsel in the prosecution of the wrongful death suit, *In re Consolidated Fresenius Cases, Augustine Sanders, Anticipated Personal Representative of the Estate of Rosie Sanders*, Cause No. MICV2013-03400-0, Case No. 15-2603, Superior Court for Middlesex County, Commonwealth of Massachusetts (the “Wrongful Death Suit”). In support of the Motion to Convert, the Trustee introduced into evidence one (1) exhibit and presented the testimony of Zayed, owner of Star Payment Center a/k/a Star Groceries (“Star Groceries”). No other evidence was presented as to any of the other contested matters.

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of this Bankruptcy Case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and/or (O). Notice of the Hearing was proper under the circumstances.

Facts

1. On March 5, 2018, the Debtor filed a petition (the “Petition”) for relief under chapter 13 of the U.S. Bankruptcy Code (the “Code”) (Dkt. 1). The Debtor also filed her schedules and statements but initially did not indicate that she had any pending litigation, lawsuits, or claims against anyone (Dkt. 4).

2. On May 10, 2018, the Court entered the Order Confirming Chapter 13 Plan (Dkt. 17).

3. On May 28, 2019, the Trustee filed the Motion to Convert, asserting that he “received information regarding a settlement for which the Debtor had already received a disbursement check in the amount of \$12,705.30” resulting from a settlement reached in a wrongful-death suit brought to recover damages arising from the death of the Debtor’s mother. (Dkt. 31). On June 17, 2019, Zayed filed the Objection to Motion to Convert, asserting that he “is entitled to an equitable relief of Court, due to the Debtor’s intentional, willful fraud.” (Dkt. 59). On June 25, 2019, the Debtor filed the Response to Motion to Convert, asserting that the Court should not convert the Bankruptcy Case [and] that if the Court grants the Motion to Convert, then “creditors incurred between filing of Chapter 13 and Chapter 7 are part of the bankruptcy case.” (Dkt. 64).

4. On May 31, 2019, the Debtor filed the Application to Employ Counsel (Dkt. 35). On June 5, 2019, the Debtor filed the Amended Application to Employ Counsel (Dkt. 44), requesting that the Court approve Brock as special counsel to represent the Debtor’s interests in the Wrongful Death Suit. No objection was filed. Subsequently, the Court entered the Order on Amended Application to Approve Employment (Dkt. 49), *nunc pro tunc*, granting the Debtor’s request to employ Brock as special counsel.

5. Also on May 31, 2019, the Debtor filed the Application to Approve Settlement (Dkt. 36) and the Application for Compensation (Dkt. 38). On June 4, 2019, the Trustee filed the Trustee’s Response to Application to Approve Settlement (Dkt. 43) and the Trustee’s Response to Application for Compensation (Dkt. 42).

6. On June 5, 2019, the Debtor filed the Amended Application to Approve Settlement, requesting that the Court approve, *nunc pro tunc*, the settlement of the Debtor’s claims in the Wrongful Death Suit. (Dkt. 45). The Debtor also filed the Amended Application for

Compensation, requesting that the Court approve, *nunc pro tunc*, the payment of professional fees and expenses arising out of the Wrongful Death Suit. (Dkt. 47).

7. On June 11, 2019, the Trustee filed the Response to Amended Application to Approve Settlement and the Response to Amended Application for Compensation, asserting that the Motion to Convert is pending and that his office has received the net settlement proceeds from the Wrongful Death Suit. Additionally, the Trustee requests that the Court authorize his office to disburse the net proceeds to the appointed chapter 7 trustee if the Court grants the Motion to Convert or that the Court authorize his office to disburse the net proceeds to timely filed unsecured creditors if the Court denies the Motion to Convert. (Dkt. 57, 58).

8. On June 17, 2019, Zayed filed the Motion to Prosecute Debtor, asserting that the Debtor should be “pros[ecuted] for bankruptcy fraud under the provisions of Title 18, Section 152(a).” (Dkt. 59 at 3).

9. On June 25, 2019, the Debtor filed the Response to Motion to Prosecute Debtor, asserting that “Zayed is without standing to bring [the] Motion [to Prosecute Debtor].” (Dkt. 64).

10. On July 5, 2019, the Clerk issued the Notice of Status Conference, informing the parties that the Court will hold a status conference in the Bankruptcy Case on July 15, 2019. (Dkt. 66).

11. That same day, Zayed filed the Late-Filed Proof of Claim, asserting that the pleading constitutes a delayed proof of claim in the amount of \$12,705.30 and that the delayed proof of claim should be given “a ‘PRIORITY’ classification due to the fact that [Zayed] was an ‘innocent victim’ of the Debtor’s fraud[.]” (Dkt. 65 at 5).

12. Also on July 5, 2019, the Clerk issued the Show Cause Order, requesting that Rosenthal show cause why sanctions or other relief should not be imposed against him for his

failure to comply with Local Rule 5005-1(a)(2)(A) when he filed the Objection to Motion to Convert, the Motion to Prosecute Debtor, and the Late-Filed Proof of Claim on behalf of Zayed. (Dkt. 67).

13. Prior to the Hearing on July 15, 2019, the Debtor filed an amended Official Form 106 A/B Schedule A/B: Property (Dkt. 71) to include the Wrongful Death Suit and a \$21,000.00 claim arising out of an automobile wreck that occurred on July 6, 2018 (the “Automobile Wreck Claim”).

Discussion

A. Motion to Convert; Objection to Motion to Convert; Response to Motion to Convert

In support of the Motion to Convert, the Trustee explained to the Court at the Hearing that the Debtor received \$12,705.30 in net settlement proceeds arising out of the Wrongful Death Suit on May 15, 2019. The Trustee further explained that Brock, serving in his capacity as special counsel to represent the Debtor’s interests in the Wrongful Death Suit, provided the Debtor with a document entitled “Estate of Rosie Marie Sanders” (the “Agreement”) (Ex. 1). The Agreement, dated May 15, 2019, detailed the division of the net settlement proceeds from the Wrongful Death Suit among the heirs at law, including the Debtor, and required the Debtor’s signature. The Debtor signed the Agreement beneath a paragraph that ended with the following statement: “The undersigned further acknowledges that he/she has not filed any personal bankruptcy proceeding that is still pending discharge.” (Ex. 1). After signing the Agreement, the Debtor received a check from Brock made payable to her in the amount of \$12,705.30 (the “Check”), and the Debtor went to Star Groceries to cash the Check. Zayed testified that he cashed the Check for the Debtor and that she received the entire amount of the Check, less two percent (2%) in fees. Soon afterward, Brock learned that the Debtor filed the Bankruptcy Case and that she had not yet received a

discharge of her debts. Brock testified that he was successful in stopping payment on the Check before his bank paid it, and he issued a replacement check in the amount of \$12,705.30 payable to the Trustee. Unfortunately, however, the stop-payment order on the Check did not stop Zayed from cashing it and disbursing the funds to the Debtor.

Neither the Trustee nor Zayed has received from the Debtor any of the proceeds from the Check. Counsel for the Debtor explained to the Court at the Hearing that the Debtor no longer has the funds and that the Debtor did not attend the Hearing because she believes she is being threatened with criminal proceedings by Zayed. Based on the foregoing, the Trustee asserts that the Debtor has acted in bad faith because of her “failure to inform her bankruptcy counsel, the Trustee, and the Court of the settlement” and because “receipt of the settlement proceeds is a clear failure to disclose assets.” (Dkt. 31). Accordingly, the Trustee requests that the Court convert the Bankruptcy Case from a chapter 13 proceeding to a chapter 7 proceeding pursuant to 11 U.S.C. § 1307(c).¹

Zayed and counsel for the Debtor attended the Hearing to respond to the Motion to Convert. While Zayed failed to identify a specific objection to the Motion to Convert, he reiterated that he is an “innocent” victim and that the Debtor should not have “defrauded” him. (Dkt. 59). As a result of her actions, Zayed explained to the Court that it would be unfair for the Debtor to receive a discharge of her debts in bankruptcy.

In determining whether to convert the Bankruptcy Case from a case under chapter 13 to a case under chapter 7, the Court notes that property of the estate in the converted case, with some exceptions, would “consist of property of the estate, *as of the date of filing of the petition*, that

¹ Hereinafter, all code sections refer to the U.S. Bankruptcy Code found at Title 11 of the U.S. Code, unless otherwise noted.

remains in the possession of or is under the control of the debtor on the date of conversion[.]” 11 U.S.C. § 348(f)(1)(A) (emphasis added). In other words, the date of the commencement of the Bankruptcy Case would be unaffected by a conversion. Mindful of the effect of a conversion, the Court considers the extraordinary circumstances present in the Bankruptcy Case.

First, the Wrongful Death Suit was commenced in 2015 and, therefore, is a pre-petition claim that is included in property of the estate of the Bankruptcy Case and would be included in property of the estate of the converted case. Thus, this fact remains neutral with respect to conversion. Second, the Automobile Wreck Claim is a post-petition claim. As a result, the Automobile Wreck Claim would not be included in property of the estate of the converted case. This fact, then, weighs against conversion. Third, the Trustee has collected post-petition wages from the Debtor for distribution to creditors in the Bankruptcy Case. While the post-petition wages currently are property of the estate, “a debtor who converts to Chapter 7 is entitled to return of any postpetition wages not yet distributed by the Chapter 13 trustee.” *Harris v. Viegelahn*, 135 S. Ct. 1829, 1835 (2015). Thus, the post-petition wages still in possession of the Trustee would be returned to the Debtor upon conversion of the Bankruptcy Case and would not be included in property of the estate of the converted case. This fact, therefore, weighs against conversion. Finally, the Debtor presented the Check to Zayed at Star Groceries for cash payment despite knowing that she was not entitled to the funds because of the Bankruptcy Case. Although Brock successfully stopped his bank from paying the Check, the Debtor already had obtained the funds from Zayed. Since the Debtor has yet to turnover the funds to Zayed, Zayed has a potential claim against the Debtor in the Bankruptcy Case. The issue, however, is that Zayed’s claim against the Debtor arises from actions that occurred after the filing of the Petition. Whether Zayed’s post-petition claim can be included in the Bankruptcy Case, as proposed by counsel for the Debtor at

the Hearing, is not presently before the Court. Moreover, the treatment of Zayed's claim in either a chapter 13 case or a chapter 7 case is too speculative to determine at this juncture. Thus, the Court declines to consider this fact with respect to conversion.

While the Motion to Convert has merit, and the Court does not condone the Debtor's alleged conduct, the Court finds that, on balance, it would be in the best interests of creditors for the Debtor to remain in a chapter 13 proceeding so that the Automobile Wreck Claim and the post-petition wages in possession of the Trustee remain as property of the estate in the Bankruptcy Case. Accordingly, the Court finds that the Motion to Convert should be denied. The Court further finds that the Objection to Motion to Convert should be sustained to the extent that it opposes the conversion of the Bankruptcy Case and should be overruled to the extent that it seeks any other relief.

B. Motion to Prosecute Debtor; Response to Motion to Prosecute Debtor

Zayed filed the Objection to Motion to Convert and the Motion to Prosecute Debtor as one pleading. Having previously ruled on the Objection to Motion to Convert, the Court now considers the Motion to Prosecute Debtor, which Zayed should have filed as a separate pleading. At the Hearing, Zayed asserted that the Debtor has made no effort to return the funds she received from the Check and that she, therefore, should be "pros[ecuted] for bankruptcy fraud under the provisions of Title 18, Section 152(a)." (Dkt. 59 at 3). The Debtor argues in the Response to Motion to Prosecute Debtor that Zayed lacks standing. Zayed cited no authority for the Court to order the United States Attorney to file charges against the Debtor, and the Court is not aware of any such authority. Accordingly, the Court finds that the Motion to Prosecute Debtor should be denied.

C. Amended Application to Approve Settlement; Response to Amended Application to Approve Settlement; Amended Application for Compensation; Response to Amended Application for Compensation

In support of the Amended Application to Approve Settlement and the Amended Application for Compensation, Brock provided the Court at the Hearing with a detailed calculation of the Debtor's share of the proceeds paid in settlement of the Wrongful Death Suit and a detailed calculation of the professional fees and expenses incurred in representing the Debtor's interest in the Wrongful Death Suit. At the Hearing, the Trustee did not object to the Amended Application to Approve Settlement or the Amended Application for Compensation. The Trustee filed the Response to Amended Application to Approve Settlement and the Response to Amended Application for Compensation solely to remind the Court of its pending Motion to Convert and to inform the Court that the Trustee's office had received the Debtor's portion of the settlement reached in the Wrongful Death Suit. Accordingly, the Court finds that the Amended Application to Approve Settlement and the Amended Application for Compensation should be approved.

D. Late-Filed Proof of Claim

On July 5, 2019, Zayed filed the Late-Filed Proof of Claim, asserting that the pleading constitutes a delayed proof of claim in the amount of \$12,705.30 and that the delayed proof of claim should be given "a 'PRIORITY' classification due to the fact that [Zayed] was an 'innocent victim' of the Debtor's fraud[.]" (Dkt. 65 at 5). At the Hearing, the Court explained to counsel for Zayed that it was confused by the pleading and interpreted the Late-Filed Proof of Claim as a "request" to file a late proof of claim with priority status. Counsel for Zayed confirmed that the Court's interpretation of the Late-Filed Proof of Claim was correct. As a result, the Court

instructed counsel for Zayed to refile the pleading in proper format and to provide notice to all interested parties in the Bankruptcy Case.²

E. Show Cause Order

Local Rule 5005-1(a)(2)(A) provides that “[t]he courts for the Northern and Southern Districts have designated all cases to be assigned to the Case Management/Electronic Case Files (“CM/ECF”) system. Attorneys who practice in these courts shall register as CM/ECF users.” MISS. BANKR. L.R. 5005-1(a)(2)(A). Additionally, “[a]ll documents submitted in all cases and proceedings shall be filed electronically, and signed or verified by electronic means[.]” *Id.* The Clerk issued the Show Cause Order to Rosenthal to determine why sanctions or other relief should not be imposed against him for his failure to comply with Local Rule 5005-1(a)(2)(A) when he filed, by U.S. Mail, paper copies of the Objection to Motion to Convert, the Motion to Prosecute Debtor, and the Late-Filed Proof of Claim on behalf of Zayed. At the Hearing, Rosenthal explained that he was unaware of Local Rule 5005-1(a)(2)(A). The Court informed Rosenthal that it would accept the pleadings already mailed and filed in the Bankruptcy Case but that Rosenthal must file all future pleadings electronically and in accordance with the local rules. Accordingly, the Court finds that the Show Cause Order should be dismissed.

Conclusion

For the above and foregoing reasons, the Court finds that the Motion to Convert should be denied. The Court further finds that the Objection to Motion to Convert should be sustained to the extent that it opposes the conversion of the Bankruptcy Case and should be overruled to the extent

² As discussed *supra*, the issue of whether Zayed’s post-petition claim against the Debtor may be included in the Bankruptcy Case is not presently before the Court. While the Court instructed counsel for Zayed to refile his request to file a late proof of claim in the proper format and to provide notice to all interested parties, the Court declines at this time to rule on whether Zayed has a valid proof of claim in the Bankruptcy Case.

that it seeks any other relief. Additionally, the Court finds that the Motion to Prosecute Debtor should be denied. The Court further finds that the Amended Application to Approve Settlement and the Amended Application for Compensation should be approved. Finally, the Show Cause Order should be dismissed.

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

IT IS FURTHER ORDERED that the Objection to Motion to Convert hereby is sustained to the extent that it opposes the conversion of the Bankruptcy Case and hereby is overruled to the extent that it seeks any other relief..

IT IS FURTHER ORDERED that the Motion to Prosecute Debtor hereby is denied.

IT IS FURTHER ORDERED that the Amended Application to Approve Settlement hereby is approved.

IT IS FURTHER ORDERED that the Amended Application for Compensation hereby is approved.

IT IS FURTHER ORDERED that the Show Cause Order hereby is dismissed.

##END OF ORDER##