

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

January 6, 2021 at 10:30 a.m.

1.	<u>20-24477-E-7</u> <u>TMO-1</u>	SUSANA SANTANA Mark O'Toole	MOTION TO CONVERT CASE FROM CHAPTER 7 TO CHAPTER 13 11-18-20 [28]
-----------	---	--	--

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 18, 2020. By the court's calculation, 49 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(4) (requiring twenty-one-days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen-days' notice for written opposition).

The Motion to Convert has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Convert the Chapter 7 Bankruptcy Case to a Case under Chapter 13 is denied.
--

Susana Elianet Santana ("Debtor") seeks to convert this case from one under Chapter 7 to one under Chapter 13. The Bankruptcy Code authorizes a one-time, near-absolute right of conversion from Chapter 7 to Chapter 13. 11 U.S.C. § 706(a); *see also Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007).

Debtor asserts that the case should be converted because the trustee is considering making this an asset case, possibly threatening the exemption on debtor's home.

Moreover, in her Declaration, Debtor asserts that she will be able to pay their unsecured creditors through a Plan rather than having the Trustee sell her assets in order to pay creditors with unsecured claims, and she will be able to pay a larger percentage to the creditors with unsecured claims. Dckt. 30. Debtor has filed as Exhibit A, a probable Chapter 13 Plan which proposes \$255.00 plan payments and a 7% dividend to creditors with unsecured claims. Dckt. 31.

DISCUSSION

Here, Debtor's case has not been converted previously, and Debtor qualifies for relief under Chapter 13. Notice was provided to the Chapter 7 Trustee, Office of the United States Trustee, and other interested parties.

Trustee filed an Opposition to the conversion on December 8, 2020. Dckt. 33. Trustee also filed the Declarations of Garry Farrar and Bob Brazeal in support of the Opposition. Dckts. 34, 35.

Trustee opposes conversion to Chapter 13 on the basis that Debtor does not qualify as a debtor under Chapter 13 because Debtor is not seeking to convert to Chapter 13 in good faith and appears to be abusing the bankruptcy process. Opposition, ¶ A.

Trustee makes this assertion on the grounds that Debtor seeks to convert after Trustee has employed a realtor to investigate Debtor's residence, 5716 Tallahatchey Drive, Stockton, California ("Property"), and discovered that its value was much higher than Debtor states in her Schedules. *Id.*, at 4:3-5. Trustee further asserts that after he employed the realtor, Debtor amended her schedules claiming to have positive income of \$255.00 (after her original schedules stated a negative net income) which is the amount she proposes as the monthly plan payment. *Id.*, at 4:6-10.

Additionally, Trustee opposes conversion on the basis that Debtor cannot propose a confirmable Chapter 13 as Debtor cannot meet the liquidation test of 11 U.S.C. 1325(a)(4). Opposition, ¶ B. Trustee asserts that there are non-exempt assets available for distribution to Debtor's creditors with unsecured claims, namely Debtor's Property which would generate approximately \$94,646.90 (projected net proceeds of sale of the Property after payment of costs, liens, and Debtor's exemption). *Id.*, at 4:20-25. Trustee argues that the sale of the Property would also generate sufficient funds to pay administrative expenses in full. *Id.*

Lastly, Trustee contends that Debtor is unable to fund a plan after having failed to show that she has sufficient regular income to fund the plan where a net monthly income of \$255.00 is insufficient to fund a Chapter 13 plan to pay creditors with unsecured claims in full. *Id.*, at 5:1-9.

Here, Trustee has already investigated the Property and a realtor has been employed. Trustee shows that it is in the benefit of the creditors for the Trustee to proceed in the administration of this estate by selling the Property as the creditors will be paid in full.

Debtor commenced this bankruptcy case with the assistance of experienced, knowledgeable, bankruptcy counsel. This is not a situation where a *pro se* debtor mistakenly seeks relief under Chapter 7.

On Schedule I Debtor states that Debtor and non-debtor spouse have \$3,918 a month in take home income after minimal tax withholding. Dckt. 1 at 28-29. On Schedule J Debtor states that Debtor and non-debtor Spouse have three minor dependants (ages 4, 11, and 16). *Id.* at 30. On Schedule J Debtor states under penalty of perjury that the reasonable and necessary monthly expenses for Debtor, non-debtor Spouse, and their three minor dependants are (\$4,165), causing Debtor being unable to even afford those expenses (which exceeds Debtor's and non-debtor Spouse's take home income. *Id.* at 30-31.

Debtor has now filed an Amended/Supplemental Schedule I. Dckt. 26 at 10-11. (The Schedule I can either be amended, it correcting an error in the original schedule, or supplemental, stating changed that have occurred since the bankruptcy case was filed – but not both.)

Amended/Supplemental Schedule I states Debtor and non-debtor Spouse have combined take home income of \$3,918. *Id.* At 11. This is the same as on the Original Schedule I.

Debtor has filed under penalty of perjury an Amended/Supplemental Schedule J to state the expenses of Debtor, non-debtor spouse, and their three minor dependants. *Id.* at 12-13. Amended/Supplemental Schedule J reduces Debtor's reasonable and necessary monthly expenses so as to show a purported monthly net income of \$255.00. Debtor has not identified the expenses that have been reduced.

Before the court performing such a comparison, it first reviews Debtor's Declaration in support of this Motion to see if it is explained in the Declaration. Dckt. 30. No explanation is provided in the Declaration.

On Original Schedule J Debtor states under penalty of perjury that there are (\$125) of necessary monthly expenses to care for Debtor's residence. On Amended/Supplemental Schedule J Debtor states that now she reduces this expense to only (\$80) a month without explanation.

Debtor also states under penalty of perjury that the necessary monthly expense for food and household supplies is (\$975). But on Amended/Supplemental Schedule J this expense drops, without explanation, to only (\$590) a month for these two adults and three children. Assuming (\$75) a month for household supplies, that would leave (\$515) a month for food for five people. Over a thirty-day month, that is only (\$1.14) per meal per person. Debtor offers no explanation how these two adults and the three growing children can survive for three years on only (\$1.14) per person per meal.

Under Debtor's Plan, she will pay \$255 a month into the plan for thirty-six months, for gross plan funding of \$8,100.00. However, the Trustee projects that from the sale of the property, after paying all expenses, there will be \$94,646 generated for the bankruptcy estate - a 1,068% increase over Debtor's proposed plan amount.

The Chapter 7 Trustee proposes to sell the property of the estate, hand over \$100,000 cash in exempt sales proceeds to the Debtor, and then have almost \$100,000, not \$8,000 as proposed by Debtor, to pay creditor claims. The Claims bar date in this case does not expire until February 21, 2021. Debtor projecting that the \$8,000 in plan monies would provide a 7% dividend, which would indicate that Debtor anticipates \$114,000 in creditor claims.

Debtor's has demonstrated that she has no good faith plan to propose. It does not appear that

the Amended/Supplemental Schedule J states real, accurate expenses in good faith. If the Trustee's broker's statement of value is anywhere close, Debtor shall reap the benefit of \$100,000 cash and creditors will be paid.

Trustee and Trustee's counsel have appeared in this court many times and are well aware that any proposed sale will have to be approved by the court and that such sale must serve a bona fide purpose for the estate - generate monies to pay creditors and not merely the exemption and trustee/professional fees. Thus, there will not be a sale and Debtor having to move unless this properly is worth substantially more than stated by the Debtor under penalty of perjury on Schedule A.

The court finds that cause exists to deny Debtor's motion to convert to a Chapter 13 case.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Convert filed by Susana Elianet Santana ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Convert is denied.

FINAL RULINGS

2. [20-21616-E-7](#) **KLS AIR EXPRESS INC. DBA
FREIGHT SOLUTION
Daniel Egan** **CONTINUED AMENDED OBJECTION
TO CHAPTER 7 TRUSTEE'S
REPORT OF NO DISTRIBUTION
7-27-20 [24](#)**

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on July 27, 2020. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Amended Objection to Chapter 7 Trustee's Report of No Distribution has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

Pursuant to Order of the court (Dckt. 62), and as stipulated by the Parties, the Amended Opposition/Objection to the Chapter 7 Trustee's Report of No Distribution is dismissed without prejudice, and **this Matter is removed from the calendar.**

On July 27, 2020, Transportation Revenue Management, Inc. ("TRM") filed an Objection to Report of No Distribution. Dckt. 24. TRM believed that there are assets to be administered, addressing it in detail in the Objection.

October 13, 2020 Stipulation

The Parties requested continuance of the October 29, 2020 hearing to December 10, 2020 on the basis that TRM is presently conducting discovery regarding avoidable transfers and bank accounts belonging to Debtor which will not be completed prior to the October 29, 2020 hearing. Dckt. 49.

The court's order granting the continuance to December 10, 2020 at 10:30 a.m. was entered on October 16, 2020. Dckt. 51.

DISCUSSION

Nothing further has been filed by the parties. At the hearing, the Parties requested a continuance in light of the unavailability of one of the attorneys.

December 29, 2020 Stipulation and Order

On December 29, 2020, the Chapter 7 Trustee and the Creditor filed a stipulation agreeing to dismiss the Objection to the report of no distribution. Dckt. 61. The court issued an order dismissing the Objection without prejudice on December 29, 2020. Dckt. 62.

