UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: CHAPTER 7

CHRISTINE MARIE ANSIN Case No. 23-10366-BAH
a/k/a Christine M. Ansin
a/k/a Christine Ansin

Debtor

Christine Ansin

Appellant

v. BAP Case No 23-00025

Robert Ansin

Appellee

APPELLEE'S BRIEF

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STATEMENT OF JURISDICTION

The statutory basis for the relief sought by Appellant in Bankruptcy Court is 11 U.S.C. § 706, not Section 105(a).[1] This Bankruptcy Appellate Panel ("this Panel") has jurisdiction to hear and decide this Appeal.

STATEMENT OF TIMLINESS OF APPEAL

The Appeal taken by Appellant from the Order that denied the Motion is timely.

STATEMENT OF FINALITY OF ORDER

The Order denying the Debtor's motion to convert her case from Chapter 7 to Chapter 13 (the "Order")is a final order. *See, e.g., Zizza v. Pappalardo (In re Zizza)*, 500 B.R. 288 (B.A.P. 1st Cir. 2013).

STATEMENT OF ISSUES

I. WHETHER PRIOR TO DENYING THE DEBTOR'S MOTION TO CONVERT FROM CHAPTER 7 TO CHAPTER 13, THE BANKRUPTCY COURT WAS REQUIRED, BUT FAILED, TO CONDUCT AN EVIDENTIARY HEARING TO DETERMINE WHETHER TO ALLOW THE DEBTOR'S MOTION TO CONVERT.

Standard of Review: "Whether a bankruptcy court

[1] Footnote 1 to Appellant's Statement of Jurisdiction is incorrect if and insofar as it implies that the Bankruptcy Court scheduled a non-evidentiary hearing, instructed the parties that it would only consider offers of proof

properly denied a debtor's request for conversion is a question of law requiring *de novo* review on appeal." *Marrama v. Citizens Bank of Mass.*, 313 B.R. 525 (B.A.P. 1st Cir. 2004). To the extent that the Bankruptcy Court made findings of fact, the findings are reviewed for clear error. *Francis v. Desmond (In re Francis)*, 996 F.3d 10 (1st Cir. 2021)

II. EVEN ASSUMING THAT THE BANKRUPTCY COURT WAS NOT REQUIRED TO CONDUCT AN EVIDENTIARY HEARING, DID THE BANKRUPTCY COURT ABUSE ITS DISCRETION BY FAILING TO MAKE ANY FACT FINDINGS AS TO THE DEBTOR'S "BAD FAITH", "EXTRAORDINARY" OR "ATYPICAL" CONDUCT, JUSTIFYING THE DENIAL AS REQUIRED UNDER THE STANDARD EXPRESSED IN MARRAMA V. CITIZENS BANK OF MASS., 549 U.S. 365, 127 S. CT. 1105, 166 L. ED. 2D 956 (2007)?

Standard of Review: *See Statement of Issues, I.*

III. EVEN IF THE BANKRUPTCY COURT WAS NOT REQUIRED TO CONDUCT AN EVIDENTIARY HEARING, NOR MAKE FINDINGS OF FACT, DID THE COURT ABUSE ITS DISCRETION BY (1) DENYING THE DEBTOR'S MOTION TO CONVERT BECAUSE SHE SOUGHT A BROADER DISCHARGE IN CHAPTER 13 TO POSSIBLY DISCHARGE A DEBT THAT MAY NOT BE DISCHARGEABLE IN CHAPTER 7 AND (2) BY IMPERMISSIBLY SHIFTING THE BURDEN OF PROOF TO THE DEBTOR?

Standard of Review. *See Statement of Issues, I.*

STATEMENT OF THE CASE

Subject to the objections made in this Section of

Appellee's Brief ("Appellee Br."), Appellee accepts Appellant's Statement of the Case.

The following documents included in Appellant's Appendix are not part of the record of the Hearing on the Motion and should be disregarded by this Panel or stricken from Appellant's Appendix:

1. Decree of Divorce, Appellant App, App-009.

2. Final Decree on Petition for Divorce, Appellant App, App-010-013.

3. Final Order [on Petition for Divorce],Appellant App, App-014-041.

The following statements made in the Appellant's Statement of the Case are not supported by evidence in the record of the hearing on the Motion and should be stricken from Appellant's Brief:

1. "In short, Ms. Ansin was left homeless, without health insurance, without money, a cell phone, or any other resources, and with only a used vehicle." *Appellant's Brief, at 3.*

2. "In December of 2021,as required by the

Decree, Ms. Ansin moved out of the marital home, and went to Florida to stay with family. Her mental state was very precarious, and she was to the point of being suicidal." *Id.*

3. "While Ms. Ansin was in Florida, her family members and friends took property from the marital home, and also from a storage unit that the parties had in Londonderry, New Hampshire. Ms. Ansin is not aware of where most the property went, nor who distributed or received it."[2] *Id.*

PROCEDURAL HISTORY

Subject to the objections made in this Section of Appellee's Brief ("Appellee Br."), Appellee accepts Appellant's Statement of the Procedural History of this Appeal.

Appellee disagrees with certain statements made by Appellee in her Procedural History of this Appeal. The Court held a hearing, not a non-evidentiary hearing, on the Debtor's Motion to Convert her

[2] This statement also directly contradicts a finding made by the Family Court, which is binding on Appellee in the adversary proceeding.

Chapter 7 to Chapter 13 on October 4, 2023. The Debtor appeared but did not offer any evidence, submit any requests for findings of fact or rulings of law. The Debtor did not file a post-order motion that questioned the evidentiary support for the Order or asked the Bankruptcy Court to make amended findings of fact or ruling of law or a motion to alter, amend, clarify or reconsider the Order or any other post-order motion for relief from the Order.

SUMMARY OF THE ARGUMENT

Ironically given the issues raised by Appellant in this Appeal, Appellant never filed a Reply to Appellee's Objection, which raised the question of whether Appellee was eligible to be a Chapter 13 debtor with regular income or could fund a confirmable plan of reorganization and other issues. She never (1) asked the Court to permit her to call witnesses or offer other evidence at the hearing held by the Court on October 4, 2023 (the "Hearing"), (2) submitted requests for findings of fact or rulings

of law before the Hearing, (3) never filed a motion that questioned the sufficiency of the evidence supporting the Order, (4) never filed a motion that asked the Bankruptcy Court to make amended findings and/or rulings of law, (5) never filed a motion to alter, amend or reconsider the Order or make post-order findings of fact or rulings of law or otherwise called the alleged errors to the attention of the Court below prior to filing the Notice of Appeal. As a result, this Appeal should be denied simply because the alleged errors complained of by Appellant may not be raised for the first time in this Appeal.

With respect to the errors alleged by Appellant, the Bankruptcy Court gave Appellant notice and an opportunity to be heard, which is all that is required since Appellant did not affirmatively request an evidentiary hearing. The bankruptcy court did not have to make findings of fact regarding debtor's "bad faith," "extraordinary" or "atypical"

conduct justifying the denial of her motion to convert under the standard expressed in Marrama v. Citizens Bank of Mass., 549 U.S. 365 (2007) because (1) it found "on the record" that the bankruptcy court was "not sure about" whether appellant had regular income (as required by Section 706 of the Bankruptcy Code) and did not know that Appellant was "really in a position to propose a plan" and (2) Appellant did not reply to the Objection or the factual allegations made therein in any way. In any event, the record is sufficient to permit this court to determine the bases upon which the court below acted, and clear enough for the Appellant to have recognized those grounds making any failure to comply with Bankruptcy Rule 7052(a) harmless. Finally, the Bankruptcy Court did not abuse its discretion by finding that the Motion was nothing more than a litigation tactic that was part of an overall effort to avoid paying Appellee by impermissibly shifting the burden of proof to Appellant as alleged in the

Appeal.

ARGUMENT

I. THE BANKRUPTCY COURT WAS NOT REQUIRED TO CONDUCT AN EVIDENTIARY HEARING TO DETERMINE WHETHER TO ALLOW THE DEBTOR'S MOTION TO CONVERT BECAUSE THE APPELLANT DID NOT REQUEST AN EVIDENTIARY HEARING ON THE MOTION.

In the absence of an affirmative request for an evidentiary hearing on the Motion, the Bankruptcy Court had no duty or obligation to conduct an evidentiary hearing. *Compare De Jounghe v. Mender*, 334 B.R. 760 (B.A.P. 1st Cir. 2005)(Order affirmed where Debtor did not request an evidentiary hearing) with *In re Rijos*, 263 B.R. 382 (B.A.P. 1st Cir. 2001)(Order reversed where court did not hold evidentiary hearing "affirmatively requested")[3]. *De Jounghe, supra* disposes of Appellant's argument that the Bankruptcy Court had to conduct an evidentiary hearing absent an affirmative request for one.

> The transcript of the bankruptcy court hearing on February 15, 2005 reflects that the court conducted a 72 minute hearing at which counsel for the Debtors appeared and

[3] Accord In re Blaise, 219 B.R. 946, 949 (B.A.P. 2d Cir. 1998)[3] and Wilmington Tr. Co. v. AMR Corp. (In re AMR Corp.), 490 B.R. 470, 479-80 (S.D.N.Y. 2013).

was heard. At no point in the transcript did counsel for the Debtors request an evidentiary hearing, offer any witnesses or offer any documentary evidence. The minutes of the hearing state "1) No witnesses or evidence presented. 2) Issues presented through oral argument." The Debtors did not request the bankruptcy court to alter or amend its order pursuant to Federal Rule of Bankruptcy Procedure 9023.

. . . . The term "after notice and a hearing" means after such notice and such opportunity for hearing as is appropriate. 11 U.S.C. § 102(1)(A). However, a full evidentiary is not required, so long as the parties had a fair opportunity to offer relevant facts and arguments to the court and to confront their adversaries' submissions. Prebor v. Collins (In re I Don't Trust), 143 F.3d 1, 3 (1st Cir. 1998); Aoude v. Mobil Oil Corp., 862 F.2d 890, 894 (1st Cir. 1988); In re Cabral, 285 B.R. at 576. The Debtors did not request an evidentiary hearing before the bankruptcy court or even offer any evidence. They did not contemporaneously object to the nature of the hearing conducted by the bankruptcy court. The failure to offer evidence at the hearing may constitute a waiver by the debtors. See In re City Stores Co., 42 B.R. 685, 689 (S.D.N.Y. 1984). Even if the Debtors didn't waive any right they may have had to an evidentiary hearing, they failed to raise that issue with the lower court. Absent extraordinary circumstances not present in this case, the Debtors may not raise it for the first time on appeal. Sammartano v. Palmas Del Mar Properties, Inc., 161 F.3d 96, 97-98 (1st

Cir. 1998).

Id., at 766. Leaving no doubt that an affirmative request for an evidentiary hearing is essential, this Panel reversed the decision of the bankruptcy court in *Rijos, supra,* specifically because "the bankruptcy court did not afford the Debtors an opportunity to address the issue of damages at the evidentiary hearing they affirmatively requested."

The Transcript documents the fact that Appellant appeared at the hearing on the Motion noticed by her counsel. It establishes that Appellant did not offer any evidence in support of the Motion; she did not ask for an opportunity to testify or present any evidence. Appellant had the hearing that she wanted to have as shown by the Transcript. Appellant does not even allege that she submitted requests for findings of fact or rulings of law or a post-Order motion that questioned the sufficiency of the findings made by the Bankruptcy Court or asked the Bankruptcy Court to set aside its findings or make

amended or additional findings pursuant to Bankruptcy Rule 7052. Since the Bankruptcy Court gave Appellant, who was aware of the factual bases of the Objection, a hearing and an opportunity to be heard on the Motion and Objection, the Appeal must be denied to the extent based on the failure of the Bankruptcy Court to conduct an evidentiary hearing.

II. THE BANKRUPTCY COURT DID NOT HAVE TO MAKE FINDINGS OF FACT REGARDING DEBTOR'S "BAD FAITH," "EXTRAORDINARY" OR "ATYPICAL" CONDUCT JUSTIFYING THE DENIAL OF HER MOTION TO CONVERT UNDER THE STANDARD EXPRESSED IN MARRAMA V. CITIZENS BANK OF MASS., 549 U.S. 365 (2007) BECAUSE IT FOUND THAT APPELLANT DID NOT SATISFY HER BURDEN OF PROOF REGARDING "REGULAR INCOME, A STATUTORY PREREQUISITIE TO CONVERSION TO CHAPTER 13 OR WHETHER SHE WAS "REALLY IN A POSITION TO PROPOSE A PLAN" AND, IN ANY EVENT, THE RECORD IS SUFFICIENT TO PERMIT THIS COURT TO DETERMINE THE BASES UPON WHICH THE COURT BELOW ACTED, AND CLEAR ENOUGH FOR THE APPELLANT TO HAVE RECOGNIZED THOSE GROUNDS MAKING ANY FAILURE TO COMPLY WITH BANKRUPTCY RULE 7052(a) HARMLESS.

In the Appellant's Brief, the Appellant argues that the Bankruptcy Court abused its discretion by failing to make findings of fact as to the Debtor's "Bad Faith," "Extraordinary" or "Atypical" Conduct justifying the denial of her Motion to Convert under

the standard expressed in Marrama v. Citizens Bank of Mass., 549 U.S. 365 (2007) as if those are required to justify the Order. The argument made by Appellant misunderstands Section 706 of the Bankruptcy Code. Appellant could not convert her case to a Chapter 13 case without first proving by a preponderance of the evidence that she was entitled to be a debtor under that chapter. *11 U.S.C. § 706(a).* The Motion did not even allege that Appellant was eligible to be a Chapter 13 debtor. In the Transcript, the Bankruptcy Court made it clear that Appellant did not prove by a preponderance of the evidence that she had regular income and was qualified to be a chapter 13 debtor, which makes the *Marrama* issues irrelevant.

On January 12, 2024, Appellant filed her six paragraph Motion to Convert from Chapter 7 to Chapter 13 (the "Motion"), which defined the scope of the contested matter. *Appellant App., App-001.* Appellant requested permission to convert her Chapter 7 case to a Chapter 13, wage earner reorganization case.

Appellant did not allege that she was eligible to be a Chapter 13 debtor. Appellant alleged nothing more than that:

> Debtor seeks to convert to Chapter 13 in order to obtain a discharge of Robert Ansin's claims, as well as her other non-priority unsecured debt, pursuant to 11 USC 1328.

Id. No declarations, affidavits or exhibits were attached to or submitted in support of the Motion.

The Appellee filed a detailed Objection to Motion to Convert from Chapter 7 to Chapter 13 by Debtor on September 22, 2023 The Objection is based on admissions made by the Appellant in her Statement of Financial Affairs and Schedules filed with her Chapter 7 Petition, as amended by Appellant after she filed the Motion. The Appellee asked the Bankruptcy Court to deny the Motion for a number of reasons, including the following:

> The Debtor is not eligible to be a Debtor under Chapter 13 because the Debtor does not have regular income. *App. 078 – 080, ¶¶ 1-9.*

> The Debtor does not have enough regular income to fund a confirmable plan of

reorganization. *App. 080 – 082, ¶¶ 10-16.*

> The Motion is a transparent effort to use the super-discharge provisions of Chapter 13 as a defense against the pending non-dischargeability adversary. *App. 089-090, ¶¶ 38-42.*

On October 4, 2023, the Bankruptcy Court heard the Motion. *Appellant's App., Transcript, App-042.* Appellant did not file a Reply to the Objection or otherwise challenge the Objection, particularly the fact that she did not have regular income (the "Eligibility Issue"). Counsel to the Appellant and the Appellant were in the courtroom. The Appellant did not testify or ask for an opportunity to testify. *Appellant's App., Transcript, App-042-054.* She did not offer any evidence in support of the Motion or in opposition to the Objection.[4] In short, Appellant stood on the Motion and the arguments made by her attorney, which left the Bankruptcy Court with any

[4] The Appellant does not allege nor does the Appendix contain any evidence that the Appellant requested the Bankruptcy Court to make findings of fact or rulings of law before the entry of the Order or questioned the sufficiency of the evidence after the entry of the Order as permitted by FRCP 52(a)(4).

evidence that would have supported granting the Motion or overruling the Objection supported by judicial admissions made by the Plaintiff regarding the Eligibility Issue or her and inability to fund a confirmable plan that would pay a meaningful dividend to creditors (the ”Confirmable Plan Issue”).

At the conclusion of the hearing, the Bankruptcy Court denied the Motion “for the reasons stated on the record” (the “Order”)as permitted by Bankruptcy Rule 7052. The Record consists of the Motion, the Objection and the Transcript. The Transcript demonstrates the Bankruptcy Court focused on the Motion and Objection filed by Appellant and Appellee.

> THE COURT: Ms. Daniele. In terms of the conversion of the case, which you’ve candidly said is to avail the debtor of the provisions of the Chapter 13 to discharge debt would discharge claims under -- that otherwise might not be dischargeable under 523(a)(6), but there’s a 523(a)(4) count in the complaint that pretty much encompasses the same conduct as the 523(a)(6) has because we’re going to have -- I mean, ... So I’m really not sure what conversion accomplishes here. *App. 043-044.*

THE COURT: And it [the Objection] does raise

a host of issues about, you know, whether it's Mr. Ansin says, you know, the tactical move by the debtor is to accomplish an objective in the litigation as opposed to, you know, plain intent as your (inaudible).

THE COURT: I'm not -- I hear lots of Chapter 13 debtors in this court and other courts who are real estate brokers and their income will not -- regular from the standpoint of, you know, bi-weekly payments.

THE COURT: I think, you know, can barely be considered regular in terms of those -- being eligible for a Chapter 13. So I'm not sure about that.

THE COURT: But I am concerned about this motion, you know, being more of a litigation tactic than being in the context of the adversary than anything else. And frankly, your client could have filed a Chapter 13 on day one, right?

THE COURT: . . . . I still think that on balance the motion in the context of the adversary proceeding and the candid admission that motivation for converting is to get the benefit of a broader discharge under Section 1328 really doesn't get us past the threshold for converting the case . . . . And I don't know that the debtor is really in a position to propose a plan . . . . But I really think in the overall context of this matter that it's hard for me to get past the aspect of it that really is a litigation tactic. . . . . I'm just saying that I don't think that it carries the burden sufficient to provide cause to convert the case. So for those reasons, the motion to convert the case to a

Chapter 13 is denied.

App. 047-048.

In order to satisfy the Bankruptcy Rule 7052, "[t]he findings [made on the record] need only be explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision." *See, e.g., Farnsworth v. Morse (In re Farnsworth)*, 2009 Bankr. LEXIS 3699, at 23 (B.A.P. 1st Cir. 2009). Although the Bankruptcy Court could have denied the Motion based on the lack of evidence offered by Appellant, the findings and conclusions of the Bankruptcy Court on the record – the Transcript – satisfy the requirements of Bankruptcy Rule 7052.

The adequacy or sufficiency of the findings and rulings must be viewed in the context of the Motion and Objection that defined the scope of the issues before the Bankruptcy Court. The Motion itself is fatally defective in that it does not even allege

that Appellant was eligible to be a Chapter 13 Debtor. Appellee objected to the conversion to Chapter 13 on the grounds that Appellant did not have regular income. Appellant did not reply to the Objection or offer any evidence on the Eligibility or Confirmable Plan Issues. The findings and rulings are clear and unambiguous in that context. As a result, there was no need for the Bankruptcy Court to reach or make findings on the *Marrama* issues.

The Bankruptcy Court determined that at least one (1) of the two non-dischargeability counts alleged by Appellee would survive a conversion to Chapter 13. The Bankruptcy found and ruled in essence that the conversion was nothing other than a litigation tactic adopted as "part of an overall effort to avoid paying creditors." *See, e.g., In re Nesbit, Appellee Br., infra* at 28. Appellant bore "the burden of proof in establishing his ability to make the payments needed under the plan, and must provide sufficient factual basis for the Court to determine both the regularity

and stability of his income." *In re Porter*, 276 B.R. 32, 38 (Bankr. D. Mass. 2002). There is no evidence in the Record that would support a finding in Appellant's favor on the Eligibility or Confirmable Plan Issues. The findings and rulings made by the Bankruptcy Court on the record are clear and unambiguous. Since the Bankruptcy Court could not and did not find that Appellant was eligible to be a Chapter 13 debtor, lack of findings and rulings made on the *Marrama* issues is irrelevant.

With respect to the Objection, the findings and rulings on the Objection issues satisfy the requirement of Bankruptcy Rule 7052. Appellee supported the Objection by incorporating the State Court Contempt Order finding that Appellant had:

> [W]illfully violated the parties' Final Decree . . . by deliberately taking items of personal property . . . that had been awarded to" Appellee.

Appellant's App., Objection at APP-086. Appellee also cited the following judicial admissions made by Appellant pertaining to the Eligibility and

Confirmable Plan Issues:

> The Debtor's Schedules show that the Debtor has less than $19.00 per month in net disposable income even if the [Appellant] is permitted to include unsubstantiated gifts from unidentified "friends" who seem to have become "family members" in the amended Schedule I filed the Debtor . . . .
>
> . . . . Schedule I, which requires a disclosure of the "Details About Monthly Income," shows no monthly income, no overtime pay and no gross income. The Debtor claims in paragraph 8 of Schedule I that she receives $983.33 per month from some source. Paragraph 11 of Schedule I seems to assert that her "income" came from "rental assistance" and "family contributions.

Appellant's App. at APP-080 and 081 (emphasis added).

A "bankruptcy court may properly consider a debtor's petition, schedules and statement of affairs as evidentiary admissions made by the debtor. *In re Rehman, 479 B.R. 238, n. 11(Bankr. D. Mass. 2012)*[5] The Bankruptcy Court was entitled to rely on the judicial admissions made by Appellant under oath in Schedule I to her Statement of Financial Affairs. Appellant did not offer any contrary evidence on the Eligibility or Confirmable Plan Issues. Appellant did not even deny the

[5] Accord *Gourdin v. Agin (Gourdin)*, 431 B.R. 885, 892 (B.A.P. 1st Cir. 2010).

allegations made by Appellee with respect to those issues.

On the record, the Bankruptcy Court stated that:

> THE COURT: I'm not -- I hear lots of Chapter 13 debtors in this court and other courts who are real estate brokers and their income will not -- regular from the standpoint of, you know, bi-weekly payments.
>
> THE COURT: I think, you know, can barely be considered regular in terms of those -- being eligible for a Chapter 13. So I'm not sure about that.
>
> THE COURT: And I don't know that the debtor is really in a position to propose a plan . . . .

Being left "not sure about" regular income and not "know[ing that [Appellant] is really in a position to propose a plan" is equivalent to a finding that Appellant did not meet her burden of proof on these critical issues. As a result, the findings and rulings made by the Bankruptcy Court on the record are sufficiently clear and unambiguous to satisfy Bankruptcy Rule 7052.

The Bankruptcy Court properly concluded that the Motion was nothing more than a litigation tactic that

"did not carr[y] the burden sufficient to provide cause to convert the case." *Appellee Br., infra* at 16. "But I think just in the context of where we are at this point in the case, there's sufficient (sic) grounds to grant (sic) the motion, so that's why I'm denying it."

Even if this Panel should determine that the "reasons on the record" lack as much clarity as desirable or are somewhat ambiguous, the question becomes whether the error is harmless. A violation of Bankruptcy Rule 7052 is harmless where, as in this Appeal:

> [I]t is possible to determine the bases upon which the court below acted, and the record is clear enough for the appellant to recognize those . . . . [bases].

Leighton v. One Williams St. Fund, Inc., 343 F.2d 565, 567 (2nd Cir. 1965).[6]

The Court of Appeals for the Second Circuit recognized in *Leighton* the "apparent non-compliance of

[6] Accord *In re Chapter 13, No. 97-50046*, 1998 Bankr. LEXIS 407, at 6-8 (B.A.P. 2d Cir. Apr. 8, 1998).

the trial court with Rule 52(a)"[7] which did not at that time permit the use of for the reasons stated on the record, and the fact that the "concise opinion [did not] satisfy the requirements of Rule [52]. *Id.* The Second Circuit ruled that:

> Thus, where the court's failure to make the required findings does not have the effect of prejudicing a party's position the error may be merely harmless. . . . . Where, as in this case, it is possible to determine the bases upon which the court below acted, and the record is clear enough for appellant to recognize those grounds, appellant has not been prejudiced.

Id. In *in re Chapter 13, supra,* the Second Circuit BAP affirmed the decision despite the "apparent non-compliance with 52(a)" because it did not prejudiced the appellant and was merely harmless error.

The Transcript coupled with the Motion and Objection make it possible to determine the bases upon which the court below acted, and the record is clear enough for Appellant to recognize those grounds. Appellant has not been prejudiced by any

[7] At that time of the *Leighton* decision, FRCP 52 seems not to have permitted the use of the phrase "for the reasons stated on the record."

non-compliance with Bankruptcy Rule 7052. Appellant does not even allege in her Brief that she did not recognize or understand the bases on which the Bankruptcy Court acted or that any non-compliance with Bankruptcy Rule 7052 prejudiced her in any way. Having failed to exercise post-Order options with respect to the findings and rulings made by the Bankruptcy Court, Appellant may not complain about them for the first time in this Appeal.

III. THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION BY FINDING THAT THE MOTION TO CONVERT TO CHAPTER 13 WAS A LITIGATION TACTIC THAT WAS PART OF AN OVERALL EFFORT TO AVOID PAYING CREDITORS OR IMPERMISSIBLY SHIFTING THE BURDEN OF PROOF TO THE DEBTOR.

IV.

In this Appeal, Appellant requested permission to convert her Chapter 7 case to a case under Chapter 13 pursuant to Section 706 of the Bankruptcy Code. The statute reads as follows:

> (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 [11 USCS § 1112, 1208, or 1307].

. . . .

> (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.

A bankruptcy court's decision to deny a debtor permission to convert a Chapter 7 case to a Chapter 13 proceeding is reviewed for an abuse of discretion. A court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact. *Ho*, 274 B.R. at 871. In order to find an abuse of discretion, this Panel must be left with the definite and firm conviction that a mistake has been committed despite evidence supporting the ruling.

The Bankruptcy Court did not make a mistake in denying the Motion, which was inevitable given the Debtor's admission that she was trying to escape her long-term liability to Appellee, failure to allege that she had regular income or could fund a confirmable plan that would pay a meaningful dividend or reply to the allegations made by Appellee on those issues or offer

any evidence that would have permitted a finding in her favor on them. Forming a firm conviction that a mistake was made with respect to the 706(a) issue of eligibility is impossible on this record.

Appellant argues that an abuse of discretion resulted from the Bankruptcy Court's alleged reliance on one factor – the only reason for the Motion was Appellant's avowed plan to "get the benefit of a broader discharge under [11 U.S.C. 1328]." *Appellant Br., at 10.* Appellant concedes in her Brief that Appellant "ha[d] the initial burden of proof on the issue of eligibility for conversion from Chapter 7 to Chapter 13, i.e. no prior conversion, eligibility under § 109, and seeking conversion for permissible purposes." *Id.* Appellant then asserts that:

> Having cited the permissible purpose of seeking a broader discharge as her motivation for conversion as well as other relevant [but unidentified] facts and circumstances, the burden then shifts to Appellee to demonstrate the Debtor's bad faith.

Appellant Br., at 10-11. As a result of the "burden-shifting," the Order must be reversed according to

Appellant.

However, the Bankruptcy Court did not rely on "one factor" – the litigation tactic issue admitted by Appellant on the Transcript. Appellee offered Appellant's judicial admissions made in Schedule I to her Statement of Financial Affairs that she did not have regular income and was not eligible to be a Chapter 13 debtor as required by Section 706(d) of the Bankruptcy Code and that she could not propose a plan of reorganization to fund a plan of reorganization that would pay a meaningful dividend to creditors. In the Order, the Bankruptcy Court made it clear by the use of the words "doubt" and "not knowing" that Appellant, who offered no evidence on the Eligibility or Confirmable Plan Issues, had not carried her burden of proving that she was eligible to be a Chapter 13 debtor or could fund a confirmable plan of reorganization.

Ignoring the Eligibility and Confirmable Plan Issues, Appellant insists that the Order must be

reversed based on her assertion that seeking a broader discharge in Chapter 13 is a permissible purpose, *per se*, citing *In re Nisbet, 1999 BNH 038 (Bankr. 1999) (arose from objection to confirmation), In re Borriello, Bk. No. 08-111568 – MWV (Bankr. N.H. 2009)*[8] *(evolved from motion to convert), and In re Kafanelis, Bk. No. 99-12383 – MWV (Bankr. 2000)(evolved from objection to confirmation).* Appellant concedes that *Borriello* holds only that a debtor's attempt to:

> [D]ischarge a claim in Chapter 13 that is not dischargeable in a Chapter 7, on its own, is not necessarily evidence of bad faith, unless the Debtor's only goal is to avoid paying creditors.

Borriello, supra, at 6 (emphasis added). *Nisbet, supra,* holds in the context of an objection to confirmation that "an attempt to discharge a debt in a Chapter 13 case that is not dischargeable in a Chapter 7 case is not per se bad faith unless combined with other factors that show an overall

[8] *Borriello* and *Kafanelis* appear to be unpublished opinions although they are available on the internet. Copies will be provided on request.

effort to avoid paying creditors. (Emphasis added). In fact, the cases cited by Appellant support the Order given the uncontroverted proof offered by Appellee on the Eligibility and Confirmable Plan Issues and the total lack of response by Appellant.

In this Appeal, the record includes evidence that the Appellant's Motion is part of an effort to avoid paying Appellee and other creditors a meaningful dividend. Appellant admits as much in the Motion. Appellee asserted in his Objection based on Appellant's judicial admissions that:

> In this case, spreading the Debtor's net disposable income of $18.45 per Schedule I for 60 months or a total of $1,107 over $294,615 in unsecured claims will result in a dividend of three-tenths of 1%, which is virtually indistinguishable from a financial perspective.

The Bankruptcy Court concluded that it did not "know [from the evidence] that [Appellant] is really in a position to propose a plan" that would pay a meaningful dividend to Appellee and other creditors. Put differently, the record below left the Bankruptcy

Court with no reasonable alternative other than taking Appellant at her word as expressed in the Motion – the only purpose of the Motion was to eliminate one of the two non-dischargeability claims made by Appellee and escape liability to him.

CONCLUSION

In this Appeal, Appellant is making arguments that were not presented to the Bankruptcy Court, which alone requires this Panel to deny the Appeal in its entirety. The Appeal is futile. The record below will not change. If the Panel should direct the Bankruptcy Court to make further or more detailed findings of fact and/or rulings of law, the result will be the same. Given the record below, the Bankruptcy Court acted will within its discretion in denying the Motion.

Respectfully submitted,

Dated: February 12, 2024 /s/ William S. Gannon
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CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing brief on all persons and entities named on the CM/ECF Electronic Service List by causing it to be filed electronically via the CM/ECF filing system.

DATED: February 12, 2024 /s/ William S. Gannon
William S. Gannon