

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:) CHAPTER 7
)
JAMES J. SURACE,) CASE NO. 07-77545 - MHM
MARY T. SURACE,)
)
Debtors.)

**ORDER DENYING DEBTORS' MOTION TO SET
ASIDE DISCHARGE AND TO DISMISS OR CONVERT**

On May 28, 2009, Debtors filed a Motion to Set Aside Discharge and to Dismiss or Convert Chapter 7 Case to Chapter 13. Hearing is scheduled for June 23, 2009. The motion sets forth that when Debtors filed their Chapter 7 case in 2007, their residence was encumbered by two mortgages and a tax lien. The Chapter 7 Trustee determined that equity for the benefit of unsecured creditors exists and, therefore, listed the property for sale. Shortly after the property was listed for sale, Debtors vacated the property. On February 14, 2008, Debtors' discharge was entered. Subsequently, the Chapter 7 Trustee was apparently unable to find a purchaser for the residence and filed a no distribution report, effectively abandoning the real estate.

The tax lien that encumbers the property apparently arose from 2005 income taxes, which Debtors assert would be dischargeable if their case were filed today rather than in 2007. As a consequence, Debtors seek to set aside their discharge and dismiss this case so that they can refile and obtain a discharge of the taxes underlying the tax lien.

Alternatively, Debtors seek to convert this case to a Chapter 13 case.

Debtors who choose to place themselves in bankruptcy do not conversely possess the unfettered choice to dismiss a Chapter 7 bankruptcy proceeding. *In re Klein*, 39 B.R. 530 (Bankr. E.D. N.Y. 1984); *In re Blackmon*, 3 B.R. 167 (Bankr. S.D. Ohio 1980). Section 707(a) requires a party, including a debtor, to show cause for dismissal of a Chapter 7 bankruptcy case. *Dionne v. Simmons*, 200 F. 3d 738 (11th Cir. 2000). A primary consideration is whether dismissal is in the best interests of creditors. *In re Haque*, 256 B.R. 352 (Bankr. D.Mass. 2000).¹ "When dismissal will only allow the Debtor to hinder creditors, secret assets, and further the Debtor's abuse of the system, dismissal of her voluntary petition is not warranted." *Dionne v. Simmons* at 743. Where a voluntary dismissal by a debtor will cause legal prejudice to a creditor or other interested party, such dismissal will be denied. *Klein*, 39 B.R. 530. A debtor is not entitled to dismiss and refile where the debtor's intention is to thereby obtain a discharge of a tax claim to which he would not otherwise be entitled. *Hammerer v. IRS*, 18 B.R. 524, 525 (Bankr. E.D. Wisc. 1982).

Debtors' request to convert to Chapter 13, however, will be allowed. Because Debtors cannot obtain two discharges in one case, the discharge entered February 14, 2008, will be vacated and the case converted to a Chapter 13 case. Accordingly, it is hereby

ORDERED that Debtors' motion to dismiss is ***denied***. It is further

ORDERED that the discharge entered February 14, 2008, is ***vacated***. It is further

¹ Debtor was not allowed to dismiss to take advantage of a favorable change in homestead exemption laws, which, in turn, would have resulted in creditors' receiving no dividend.

ORDERED that Debtors' motion to convert to a Chapter 13 case is *granted* and this case is *converted* to a Chapter 13 case. It is further

ORDERED that the hearing scheduled for June 23, 2009, is *anceled*.

ORDERED that, within 14 days of the date of entry of this order, Debtors' attorney shall file (1) an appropriate motion that complies with BLR 9010-5 to accomplish a substitution of attorneys; and (2) a Bankruptcy Rule 2016 disclosure statement.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtor, Debtor's attorney, the Chapter 7 Trustee, the Chapter 13 Trustee, and all creditors and parties in interest.

IT IS SO ORDERED, this the ____ day of July, 2009.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE