

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

Futon Gallery Furniture, Inc.
BKY No. 97-33193

Debtor.

ORDER

This matter came before the Court on May 14, 1998 on Motion to Dismiss by U.S. Bancorp Republic Commercial Finance, Inc. ("Republic"). Appearances are as noted in the record. This ORDER is entered pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.
FACTS

The Debtor commenced this Chapter 11 case on May 8, 1997. On February 11, 1998, the Court confirmed the Debtor's First Amended Plan of Reorganization dated December 22, 1997. Republic is the Debtor's largest secured and unsecured creditor. The plan provided that the Debtor was to make a \$225,000 payment to Republic on the effective date of the plan. No payment was ever made.

II.
DISCUSSION

Republic moves to dismiss the case pursuant to 11 U.S.C. Section 1112(b)(8) based on a "material default by the debtor with respect to a confirmed plan". Republic asserts that the failure of the Debtor to pay it \$225,000 on the effective date of the plan is a material default. The Debtor consents to dismissal of the case, but opposes conversion. The Debtor asserts that conversion only benefits Republic as the largest creditor in case.

The Court requested the parties supplement their legal memoranda on the issue of the effect of dismissal or conversion on a confirmed Chapter 11 plan. In its supplemental memorandum, Republic asserts that neither dismissal nor conversion would impact the confirmed Chapter 11 plan. The Debtor argues that either dismissal or conversion would nullify the plan because there was no "substantial consummation" of the plan.

Republic filed this motion as a motion to dismiss, but in its supplemental memorandum argued

that conversion would be most appropriate. The Debtor asserts that a motion to convert is not properly before the Court. Local Rule 1017-2(a) provides:

A motion to dismiss or a motion to convert a case shall be deemed a motion either to dismiss or to convert whichever is in the best interest of the creditors and the estate.

It is in accordance with this Rule that the Court considers Republic's motion as a motion to dismiss or convert.

In order to dismiss or convert a case under 11 U.S.C. Section 1112, cause must be shown. Under the confirmed plan, a payment of \$225,000 was due to Republic on the effective date. The effective date of the plan was March 13, 1998.(1) The Debtor never made this payment to Republic. It is clear that the failure to make this payment to Republic, the largest secured and unsecured creditor, constitutes a material default under Section 1112(b)(8) giving the Court the basis to dismiss or convert the case.(2) Once cause to dismiss or convert is established, the Court has broad authority to chose to dismiss or convert the case, or to do neither. In re Burner Service & Combustion Control Co., No. BKR 4-87-1104, 1991 WL 30160 at *2 (Bankr.D.Minn. March 4, 1991), citing, In re Economy Cab & Tool Co., 44 B.R. 721 (Bankr.D.Minn. 1984).

A. THE CONFIRMED PLAN IS BINDING

The Debtor's First Amended Plan of Reorganization dated December 22, 1997 was confirmed by this Court through order entered on February 11, 1998. 11 U.S.C. Section 1141 sets out the effects of confirmation. It provides:

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

. . .

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan--
(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title. . .

The Debtor asserts that the confirmed plan would not be binding on the parties if the case was dismissed or converted because there has not yet been a "substantial consummation" of the plan under 11 U.S.C. Section 1101. This argument is without merit. The concept of "substantial consummation" is only relevant in situations involving post-confirmation modification of plans under 11 U.S.C. Section 1127. "Substantial consummation" of a plan has no bearing on the effects of confirmation such as the discharge; transfer of property to the debtor; and, the binding of the plan on the debtor and creditors.

Dismissal or conversion of a case has limited effect on the confirmed Chapter 11 plan.(3) See, Burner, 1991 WL 30160. This is evident from the language in Section 1141(a) which states that, "the provisions of a confirmed plan bind the debtor . . . and any creditor . . . whether or not the claim or interest of such creditor . . . is impaired under the plan and whether or not such creditor . . . has accepted the plan." If there is a failure to perform the obligations of the plan, the appropriate remedy is to recover under the plan. Burner, 1991 WL 30160 at *3, ftn.2. The confirmed plan controls the rights of the parties and binds all parties to the plan provisions, even if the case is dismissed or converted. See, Burner, 1991 WL 30160.

1. Conversion Not Appropriate

Upon the confirmation of the plan, property of the estate was vested in the Debtor, as no provision in the plan or confirmation order provided otherwise. 11 U.S.C. Section 1141(b). Conversion or dismissal of the case would not reverse this vesting; the Debtor would still retain the property. As there would be no "property of the estate" for the trustee to administer, conversion is not appropriate. Burner, 1991 WL 30160 at *2.

2. Dismissal Not Appropriate

The Debtor also received its discharge upon confirmation of the plan. 11 U.S.C. Section 1141(d)(1)(A). Dismissal of a case does not vacate the discharge. Burner, 1991 WL 30160 at *3, ftn.2. The only way to revoke a Chapter 11 discharge is set out in 11 U.S.C. Section 1144 which allows for revocation only if the order for

confirmation was procured by fraud. No allegation of fraud has been asserted. As the plan remains binding and property of the estate is vested in the Debtor, no benefit exists to dismissing the case.

Based on the foregoing analysis, the Court in exercise of its broad discretion, will neither dismiss nor convert this case as no purpose would be served by either.

III.

DISPOSITION

IT IS HEREBY ORDERED THAT: The motion to dismiss or convert the case is DENIED.

Dated:

By the Court:

Dennis D. O'Brien
Chief United States
Bankruptcy Judge

(1). The term "Effective Date" is defined in the First Amended Disclosure Statement dated December 22, 1997. It is defined as follows:

1.2. "Effective Date" means the 30th day following the Confirmation Date.

1.1. "Confirmation Date" means the date on which the Confirmation Order is entered by the Bankruptcy Court.

The confirmation date was February 11, 1998.

(2). 11 U.S.C. Section 1112(b)(8) provides:

(b). . . the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including-

(8) material default by the debtor with respect to a confirmed plan

(3). 11 U.S.C. Section 348 sets out the effects of a conversion. 11 U.S.C. Section 349 sets out the effects of a dismissal. The only apparent effects on a confirmed plan are potential effects of dismissal through the reinstatement provisions of 11 U.S.C. Section 349(b).