

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT**

BAP NO. MB 09-001

Bankruptcy Case No. 07-13967-JNF

**ROBIN HAYES,
Debtor.**

**ROBIN HAYES,
Appellant,**

v.

**MASSACHUSETTS DEPARTMENT OF REVENUE,
Appellee.**

**Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Joan N. Feeney, U.S. Bankruptcy Judge)**

**Before
Haines, Votolato, and de Jesús,
United States Bankruptcy Appellate Panel Judges.**

David G. Baker, Esq., on brief for Appellant.

Martha Coakley, Esq., and Stephen G. Murphy, Esq., on brief for Appellee.

August 3, 2009

de Jesús, U.S. Bankruptcy Appellate Panel Judge.

Robin Hayes (the “Debtor”) appeals from the bankruptcy court order converting her chapter 13 case to one under chapter 7 (the “Order”) and the order denying reconsideration of the Order. The Massachusetts Department of Revenue (the “MDOR”) had moved to convert or dismiss under 11 U.S.C. § 1307(e) as the Debtor had failed to file tax returns pursuant to 11 U.S.C. § 1308.¹ The Debtor objected on the grounds that the MDOR had failed to establish that she was required to file the tax returns under applicable nonbankruptcy law. The bankruptcy court disagreed, issued the Order, and thereafter denied the Debtor’s request to alter or amend. For the reasons set forth below, the Panel **AFFIRMS**.

BACKGROUND

After the Debtor filed for relief under chapter 13 but prior to the meeting of creditors, the MDOR filed a Notice By Commissioner of Massachusetts Department of Revenue of Unfiled Prepetition Tax Returns and Request for the Same Pursuant to 11 U.S.C. Section 1308 (the “Notice”). Therein, the MDOR explained that the Debtor had not filed income tax returns for the years 1999 - 2006 despite an obligation to do so under state law. If the Debtor failed to file the returns prior to the close of the meeting of creditors, the MDOR stated that it would seek to dismiss the case. The Debtor moved to strike the Notice arguing she had no obligation to file returns for those years because she either earned no income or a de minimus amount. The Debtor then moved for summary judgment on the Notice. In its response to both motions, the MDOR explained the basis for its conclusion that the Debtor was required to file a return if not pay

¹ References to sections in the Bankruptcy Code shall be to the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. §§ 101, et seq.

income tax for the 8 years. Ultimately, the bankruptcy court denied the Debtor's motion to strike the Notice and her request for summary judgment.

The MDOR filed a proof of claim for the unpaid taxes and the Debtor objected to the claim. In its response, the MDOR reiterated its earlier arguments and asserted that from 1999 through 2006, the Debtor earned considerable income as a real estate broker and filled out applications for credit by attesting to an annual income that exceeded \$100,000. The MDOR argued that the Debtor had not met her burden of establishing that her income during that period never exceeded \$8,000 annually.

Before the parties finished litigating the issue regarding the MDOR's proof of claim, the MDOR filed a motion to convert or dismiss the Debtor's case (the "Motion"). The MDOR explained that pursuant to § 1308(a), the Debtor was required to file not later than the date on which the first meeting of creditors was scheduled her tax returns for 2003 through 2006 if she were required to file such returns under applicable nonbankruptcy law.² It asserted that under Mass. Gen. Laws ch. 62C, § 6(a), the Debtor was required to file Massachusetts tax returns for those years because during that time she earned annual gross income in excess of \$8,000 as reflected in the attached statements from her bank accounts. Because the Debtor failed to file the returns pursuant to § 1308(a), the MDOR sought an order converting the case under § 1307(e), as the Debtor was likely to refile and conversion would be in the best interests of creditors.

The Debtor admitted that she had not yet filed her 2006 return. She also argued that the MDOR had failed to establish that she was required to file a return and the evidence regarding

² The MDOR explained that the bankruptcy court docket did not reflect that the Debtor had sought an extension of that deadline and, in any event, the extended deadline had expired.

her involvements in any businesses were likely the workings of her ex-husband. In a subsequent supplement, however, the Debtor explained that after she carefully reviewed the attachments to the Motion, she consulted with a tax preparer, filed returns for the years 2004, 2005, and 2006, and expected to receive refunds for each of those years.

The bankruptcy court held a hearing on the Motion and allowed not only the MDOR and the Debtor to speak to the Motion, but also heard from a state deputy attorney general and the Internal Revenue Service. In the Order, the bankruptcy court found that the Debtor had neither filed the appropriate returns before the meeting of creditors nor sought an extension of the deadline. The court explained that the Debtor had not offered a “legitimate reason” for her failure and that she only realized her obligations to file certain returns after reviewing the exhibits to the Motion. Based upon the court’s findings that the Debtor took inconsistent positions during her present and prior cases, she would likely file another case, and there appeared to be nonexempt assets available for liquidation and distribution, the court granted the Motion, concluding that conversion was in the best interest of creditors.

Reiterating her earlier arguments, the Debtor moved to alter or amend the Order. In response, the MDOR asserted that the Debtor had not presented any newly discovered evidence or revealed any manifest errors of law. The bankruptcy court issued an order denying the request to alter or amend and a memorandum supporting the order. Therein, the bankruptcy court wrote that by the Motion, the MDOR had satisfied its burden under § 1307(e) and in the motion before the court, the Debtor had failed to satisfy her burden for reconsideration citing In re Wedgestone Financial, 142 B.R. 7 (Bankr. D. Mass. 1992). The bankruptcy court explained that by way of the motions to strike the Notice and for summary judgment, the Debtor had failed to understand

that it was her burden to establish that she was not required to file returns, rather than the MDOR's burden to prove the necessity that the Debtor comply with § 1308. The MDOR, the court explained, had put the Debtor on notice of her obligation to file returns via the Notice and its proof of claim. Specifically, the court wrote:

[h]er 'belief' that she did not have income sufficient to trigger the necessity of filing a return for 2005 is insufficient to shift the burden to the MDOR to establish that she had such income. . . . The Debtor had an obligation at the beginning of the chapter 13 case to ascertain whether she had sufficient income to trigger the requirement to file tax returns. She cannot now purport to file returns and argue that the provisions of section 1308 do not apply because her understanding of her income was wrong.

The Debtor filed a timely appeal of the Order and the order denying her request to alter or amend the Order.

JURISDICTION

A bankruptcy appellate panel may hear appeals from "final judgments, orders and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Id. at 646 (citations omitted). An order converting a chapter 13 case to one under chapter 7 is a final order. Cabral v. Shamban (In re Cabral), 285 B.R. 563, 571 (B.A.P. 1st Cir. 2002). Orders denying reconsideration are final appealable orders. See, e.g., Balzotti v. RAD Invest., LLC (In re Shepherds Hill Dev. Co., LLC), 316 B.R. 406, 416 (B.A.P. 1st Cir. 2004).

STANDARD OF REVIEW

Orders converting a case and denying reconsideration are subject to an abuse of discretion review. See Vélez v. Awning Windows, Inc., 375 F.3d 35, 42 (1st Cir. 2004); In re Cabral, 285 at 570; Shepherds Hill, 316 B.R. at 417; see also Bushay v. McDonnell (In re Bushay), 327 B.R. 695, 701 (B.A.P. 1st Cir. 2005), aff'd, 187 Fed. Appx. 17 (1st Cir. 2005). An “abuse of discretion presents itself ‘when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.’” Vélez, 375 F.3d at 42 (citing Indep. Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir. 1988)).

DISCUSSION

The Debtor argues that the bankruptcy court abused its discretion in entering the Order because she had no obligation to file tax returns until the MDOR proved that she was required to file any returns and/or the bankruptcy court ordered her to do so, and also because she ultimately complied by filing the returns before the hearing on the Motion. The Debtor contends that the Motion was flawed because it did not contain any plausible facts which would establish that she had to file any returns from the time she started earning income in 2004. Moreover, she argues that § 1308 likely did not apply because there was a good faith, actual dispute as to whether the Debtor had an obligation to file any returns. The Debtor contends that the bankruptcy court should not have converted the case, but rather should have denied the Motion.

The MDOR counters that the bankruptcy court did not abuse its discretion as it correctly found that the Debtor failed to comply with § 1308, which addresses whether a debtor has filed a

return, not whether there was an unpaid tax liability. Based upon this failure to file and the plain meaning of § 1307(e), the MDOR contends that the only decision the bankruptcy court could have made was to convert or dismiss. Lastly, the MDOR asserts that there is no indication that the bankruptcy court erred in converting the case.

BAPCPA added to the Bankruptcy Code §§ 1307(e) and 1308. Section 1307(e) provides:

Upon the failure of the debtor to file a tax return under section 1308, on request of a party in interest or the United States trustee and after notice and a hearing, the court shall dismiss a case or convert a case under this chapter to a case under chapter 7 of this title, whichever is in the best interest of the creditors and the estate.

11 U.S.C. § 1307(e).

11 U.S.C. § 1308 provides:

(a) Not later than the day before the date on which the meeting of the creditors is first scheduled to be held under section 341(a), if the debtor was required to file a tax return under applicable nonbankruptcy law, the debtor shall file with appropriate tax authorities all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition.

(b)(1) Subject to paragraph (2), if the tax returns required by subsection (a) have not been filed by the date on which the meeting of creditors is first scheduled to be held under section 341(a), the trustee may hold open that meeting for a reasonable period of time to allow the debtor an additional period of time to file any unfiled returns, but such additional period of time shall not extend beyond-

(A) for any return that is past due as of the date of the filing of the petition, the date that is 120 days after the date of that meeting; or

(B) for any return that is not past due as of the date of the filing of the petition, the later of-

- (i) the date that is 120 days after the date of that meeting; or
- (ii) the date on which the return is due under the last automatic extension of time for filing that return to which

the debtor is entitled, and for which request is timely made, in accordance with applicable nonbankruptcy law.

(2) After notice and a hearing, and order entered before the tolling of any applicable filing period determined under this subsection, if the debtor demonstrates by a preponderance of the evidence that the failure to file a return as required under this subsection is attributable to circumstances beyond the control of the debtor, the court may extend the filing period established by the trustee under this subsection for-

(A) a period of not more than 30 days for returns described in paragraph (1); and

(B) a period not to extend after the applicable extended due date for a return described in paragraph (2).

In a recent decision regarding what is meant by the phrase “hold open” found in § 1308(b)(1), this Panel wrote the following regarding the history of the statutes:

In reviewing the legislative history behind §§ 1307 and 1308, one court explained that Congress enacted the statutes first, “to help state revenue agencies figure out whether they had claims against the debtor,” and second, “to punish debtors who were delinquent in filing tax returns, by withholding confirmation until they did so.” In re French, 354 B.R. 258, 260-61 (Bankr. E.D. Wis. 2006) (addressing another aspect of statute and finding directives of statute unambiguous). Aside from French, there is scant case law addressing the statute. See, e.g., In re Perry, 389 B.R. 62 (Bankr. N.D. Ohio 2008) (“Although the Debtor may view this as a harsh penalty, the Court must construe a statute according to its unambiguous terms. Under the circumstances of this case, failure to comply with § 1308 results in case dismissal pursuant to § 1307(e).”). In parsing through the statutes, one court wrote that it “behooves a debtor who has not filed all returns to advise the case trustee so the meeting can be held open.” In re McCluney, 2007 WL 2219112 (Bankr. D. Kan. June 22, 2007) (concluding that court lacked discretion and could only decide to convert or dismiss even though late returns filed).

United States v. Cushing (In re Cushing), 401 B.R. 528, 533-34, 536 (B.A.P. 1st Cir. 2009).

As explained in Cushing, there is only a handful of cases that have addressed §§ 1307(e) and 1308. In two of those cases, the courts were confronted with a similar fact pattern. See In re

Kuhar, 391 B.R. 733 (Bankr. E.D. Pa. 2008); In re French, 354 B.R. 258 (Bankr. E.D. Wis. 2006). In Kuhar, the debtor argued that she did not fail to meet the requirements of § 1308 as she had no obligation to file a return based upon her negligible income. Disagreeing, the court wrote that even if the debtor were

. . . correct with respect to her federal returns, Pennsylvania has more stringent tax return filing requirements, i.e., “a tax return under this article shall be made and filed by or for every taxpayer having income for the taxable year.” 72 P.S. § 7330. Debtor’s own Pennsylvania returns [subsequently filed] indicate that she had income and was therefore required to file a tax return under Pennsylvania law. Exhibit T-4. Thus, her conceded failure to timely file the Pennsylvania returns alone is a breach of her duty under § 1308.

In re Kuhar, 391 B.R. at 737.

In French, the debtor argued that because her federal return was not due by the time she filed for relief, she did not have to comply with §§ 1307(e) and 1308. The court disagreed and ruled that “[s]ection 1308 does not speak of debtors who aren’t required to file yet, only of debtors who are required to file at all.” In re French, 354 B.R. at 262; see also In re Broussard, No. 09-50009, 2009 WL 1531817 (Bankr. W.D. La. May 29, 2009). The French court further wrote:

Under 26 U.S.C. § 6012 of the tax code, a debtor who did not earn taxable gross income equal to or in excess of the exemption amount is not required to file a tax return. Neither is a debtor who is a surviving spouse and had gross taxable income less than the sum of the exemption plus the basic standard deduction. Under 26 U.S.C. § 6017 of the tax code, a self-employed person who makes less than \$400 a taxable year from that self-employment isn’t required to file a return. None of these debtors would be “required to file a tax return under applicable nonbankruptcy law,” and therefore would not have to file returns under § 1308.

354 B.R. at 262-63.

In the forgoing cases, the courts did not specifically discuss the burdens of proof, rather they looked solely at whether the debtor complied with § 1308. Procedurally, § 1307(e) provides that a party in interest or a trustee must request dismissal. A party bringing a motion to dismiss under § 1307(e) based upon the failure to comply with § 1308 would have to demonstrate that a debtor had failed to comply with § 1308 and thereafter address whether conversion or dismissal was appropriate. The MDOR established those facts in the Motion and in its exhibits took the extra step of demonstrating the income that the Debtor had presumably earned during the time periods for which the Debtor had not filed returns.³ In her supplementary response to the Motion, the Debtor acknowledged that she was required to file returns and failed to meet the statutory deadline.

Nowhere in the statute or rules is it evident that the taxing authority is obligated in a motion to convert or dismiss to demonstrate that a debtor had an obligation to file a return but failed to do so. That a debtor would have the duty to determine whether he or she is required to file a return is consistent with those sections of the Bankruptcy Code which place on debtors additional duties for filing a petition. As one court wrote about the enactment of § 1308, “Congress appears to have wanted to make sure tax returns were filed in order to assist state taxing authorities in determining whether they had claims for delinquent taxes. Second, Congress wanted to create a strong incentive for debtors who had delinquent tax returns to get them filed.” In re French, 354 B.R. at 264. If the duty to establish that returns are due were on

³ In the affidavit it attached to opposition to the Debtor’s request for summary judgment, the MDOR suggested that in order to overcome the facts suggested in a notice of delinquent returns, a debtor could file a “signed and sworn statement . . . asserting and presenting credible grounds or evidence that [the Debtor] was not required for any of these years [to file] Massachusetts personal income tax returns.”

the taxing authority, the statute would neither “assist” the taxing authorities nor create an incentive for debtors to get returns filed.

In this case, the Debtor had an obligation to file returns and chose instead to rely on her lack of knowledge and/or her belief that it was up to the MDOR to prove otherwise. Before the Debtor attended her meeting of creditors, she knew that the MDOR believed she had failed to file returns. At the meeting of creditors, the Debtor did not exercise her option to seek an extension of time to review her records to determine whether she needed to file returns. Despite these warnings and the available safety net, the Debtor took no action. Similar to the rulings in Kuhar and French, the Debtor’s protestations are insufficient to overcome the facts set forth in the Motion.

The Debtor contends that the question of who bears the burden of demonstrating that she was required to file returns is readily answered by looking to In re Healthco Int’l, Inc., 257 B.R. 379 (Bankr. D. Mass. 2001). In that case, the bankruptcy court wrote that “Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15[. . .] (2000), dictates that underlying state law determines which party bears the burden of proof when an objection is made to a tax claim in bankruptcy.” Id. at 381. While Raleigh and Healthco are instructive with respect to burdens for proofs of claim and the underlying state law, it is important to note that they arise in the context of claims litigation which is not the context under which this appeal arose.⁴ Moreover, even under Healthco the Debtor bore the burden and failed to meet the same.

⁴ Although the bankruptcy court explained that it was not addressing the objection to claims and the MDOR’s response, it addressed burdens of proof for proofs of claim in the memorandum regarding reconsideration.

Under Massachusetts law, “every individual inhabitant of the commonwealth who receives or accrues during the taxable year Massachusetts gross income . . . in excess of eight thousand dollars shall make a return of such income.” Mass. Gen. Laws ch. 62C, § 6. The Supreme Judicial Court of Massachusetts has explained that taxation is the general rule and exemptions from taxation should be strictly construed. See, e.g., Born v. Board of Assessors of Cambridge, 696 N.E. 2d 142 (Mass. 1998); Animal Rescue League of Boston v. Bourne’s Assessors, 37 N.E. 2d 1019 (Mass. 1941). Further, it has explained that the “burden is on the taxpayer to demonstrate entitlement to an exemption claim.” South Boston Sav. Bank v. Comm’r of Revenue, 640 N.E.2d 462 (Mass. 1994). Therefore, viewed either under the Bankruptcy Code or state law, the MDOR, as the moving party, satisfied its burden that the Debtor had failed to file statutorily mandated tax returns by the date on which the meeting of creditors was conducted. Thereafter, the Debtor not only failed to demonstrate that she was not obligated to file returns but admitted that she was required to file the returns. On appeal, the Debtor has failed to demonstrate that the bankruptcy court abused its discretion in converting rather than dismissing the case, and the record supports the court’s actions. Accordingly, the bankruptcy court did not abuse its discretion and the Order should be affirmed.⁵ Based on our

⁵ In her brief, the Debtor also argues that the bankruptcy court erred in not applying § 105 to alleviate the harsh results of the statute. The Debtor never raised this argument in response to the Motion. In her motion to alter or amend, the Debtor wrote in a footnote that because § 1308 does not contemplate that there may be a dispute as to whether a debtor must file a return, the bankruptcy court should have applied § 105 to reach a just result. A mere passing in a footnote is insufficient for us to conclude that the Debtor raised the issue below. As she failed to raise the issue squarely before the bankruptcy court, she waived the argument. Eastern Savings Bank v. LaFata (In re LaFata), 483 F.3d 13, 21 n.15 (1st Cir. 2007); Fleet Mortg. Group Inc. v. Kaneb, 196 F.3d 265, 268 (1st Cir. 1999).

conclusion that the Order should be affirmed, we need not address the issue regarding the order denying the Debtor's motion to alter or amend.

CONCLUSION

For the reasons set forth above, the Panel **AFFIRMS** the Order.