IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE: )
) BK 84-782
) CV 85-0-167
MARGUERITE M. GRIFFIN, )
)
Debtor. ) MEMORANDUM AND ORDER

This matter is before the Court on appeal from an order of the Bankruptcy Court converting the debtor's Chapter 11 proceedings to a Chapter 7 bankruptcy case. After a review of the submitted materials, this Court finds this matter must be remanded to the Bankruptcy Court for further proceedings.

The Bankruptcy Court converted this case from Chapter 11 to Chapter 7 on the factual finding that Dorothy Oberg could never accept a proposed plan under 11 U.S.C. § 1129(a)(1) because as the Bankruptcy Court states:

> There is a great deal of doubt in my mind that Dorothy Oberg is any creditor of this estate at all, but even if she has some kind of a claim against the debtor, I do not believe that she has a claim which ever is impairable. I say that because apparently the condition of repayment was that the debtor was to repay Dorothy Oberg when she could, and I question seriously whether that is a type of claim that is ever due until the debtor decides that he wants to, and I conclude therefore that that claim, if it is a claim, is not an impairable claim at all.

Transcript, February 4, 1985 at 28-29.

There was no evidence of the nature of the Oberg claim properly before the Bankruptcy Court. There were no depositions, no documentary evidence, no testimony, not even any affidavits.

All that was before the Court were the arguments of the counsel. This is not a sufficient basis upon which to make a factual finding. This was clearly an abuse of discretion.

The standard of review of a Bankruptcy Court's determination to convert a case under 11 U.S.C. § 1112 is that of abuse of discretion. See In re Levinsky, 23 B.R. 210, 217 (Bankr. N.Y. 1982); In re L.S. Good & Co., 8 B.R. 318 (Bankr. D. Mo. 1980). "A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based that decision." Premium Service Corp. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975). See also, Booker v. Special School District No. 1, 585 F.2d 347, 353 (8th Cir. 1978), cert. denied, 443 U.S. 915 (1979).

This Court does agree with the Bankruptcy Court that Section 1129(a)(10) requires the accepting class be an impaired class. See In re Dreske, 25 B.R. 268, 270 n.2 (Bankr. D. Wisc. 1982); In re Barrington Oaks General Partnership, 15 B.R. 925 (D. Utah 1981). However, a finding that a class or claim is impaired requires a finding based on evidence in the record.

Accordingly,

IT IS HEREBY ORDERED that the issues raised in CV 85-0-167 are remanded to the Bankruptcy Court for further proceedings consistent with this Memorandum and Order and the Memorandum and Order of this Court entered in CV 84-0-685 and CV 84-0-704.

IT IS FURTHER ORDERED that the motion to extend the stay (filing 11) is denied as moot.

DATED this 1st day of May, 1985.

BY THE COURT:

C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE