

Dated: May 21, 2009
The following is ORDERED:



Jennie D. Latta

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re VERA D. KYLES,

Debtor.

Case No. 08-30619-L

Chapter 7

ORDER DENYING MOTION TO SET ASIDE DISMISSAL

BEFORE THE COURT is the motion of the Debtor to set aside the order entered April 23, 2009 dismissing her case for failure to pay the case filing fee. The Debtor asserts that she was unable to pay the filing fee because she was off work for back surgery, but “can now come into substantial compliance.” The court has reviewed the record in this bankruptcy case and concludes that it is without authority to grant the Debtor’s motion. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A).

The Debtor commenced this case by filing a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on October 10, 2008. *See* 11 U.S.C. § 301(a). The petition was not accompanied by the case filing fee, but instead was accompanied by an Application to Pay Filing

Fee in Installments. Doc. No. 3; *see* Fed. R. Bankr. P. 1006(a) (“Every petition shall be accompanied by the filing fee except as provided in subdivisions (b) and (c) of this rule.”). Notwithstanding the requirements of Bankruptcy Rule 1006(b)(2), the application did not specify the number, amount and dates of payment proposed to be made. *See* Official Bankruptcy Form 3A. Although the local custom permits an application to pay filing fee in installments to be conditionally approved by the Bankruptcy Court Clerk without prejudice to judicial review, no approval or order was entered in this case. On January 23, 2009, the court issued its Sua Sponte Order and Notice of Hearing to Consider Dismissal of Case for Failure to Pay Filing Fee. Doc. No. 15. The order indicated an outstanding balance owed of \$299.00, consisting of the statutory filing fee of \$245.00, the \$39 administrative fee and the \$15 case trustee fee. *See* Appendix to 28 U.S.C. § 1930 specifying fees to be paid for filing a Chapter 7 case. The matter was set for hearing on February 12, 2009. Although the debtor did not appear at the scheduled hearing and the fees remained unpaid, on February 19, 2009, the court issued a second Order Directing Dismissal of Case Unless Full Case Filing Fee is Paid. That order directed the Debtor to pay the full case filing fee on or before April 8, 2009, and provided that in the event the full case filing fee was not paid by that date, the case would be dismissed without further notice or hearing. Doc. No. 19. The fees were not paid and the case was dismissed by order entered April 23, 2009. Doc. No. 20.

Although the Debtor’s motion does not specify the statute or rule pursuant to which she seeks relief, the court will treat the motion as a motion for relief from the order pursuant to Rule 9024 of the Federal Rules of Bankruptcy Procedure, which incorporates Rule 60 of the Federal Rules of Civil Procedure, rather than a motion for new trial pursuant to Rule 9023 of the Federal Rules of Bankruptcy Procedures. This is because Rule 9023 motions must be filed within ten days of the

entry of judgment. The operative order in this case was the order entered February 19, 2009, directing dismissal of the case unless the full case filing fee was paid, rather than the ministerial order of April 23, which actually dismissed the case. Rule 60 permits the court to relieve a party from a final order under certain specified conditions or “for any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(6). The reason given by the Debtor in support of her motion was financial inability to pay the fee as the result of being off work for back surgery. The Debtor gives no information about when the surgery occurred or the amount of time that she missed from work.

Bankruptcy Rule 1006 permits the court to fix the number, amount and dates of installment payments, but specifies that the number of installments may not exceed four and the final installment may not be payable beyond 120 days after the filing of the petition. Fed. R. Bankr. P. 1006(b)(2). The 120th day after the filing of the petition in this case was Saturday, February 7, 2009. When the last day of a computed period of time falls on a Saturday, Sunday or other legal holiday, the period runs until the end of the next day which is not one of those days. Fed. R. Bankr. P. 9006(a). As a result the last day to pay the filing fees, which should have been specified in the Clerk’s Approval of the Application to Pay Filing Fee in Installments, was February 9, 2009.

Prior to the expiration of 120 days after the petition was filed, the Bankruptcy Court Clerk caused to be issued the Order and Notice of January 23, 2009, which alerted the Debtor that the filing fees had not been paid. The Debtor did not pay the filing fee, did not appear at the scheduled hearing, and did not otherwise demonstrate cause for enlarging the time to pay the filing fee. Notwithstanding the inaction of the Debtor, the court enlarged the time to pay the filing fee to Wednesday, April 8, 2009, which was the 180th day after the petition was filed. Bankruptcy Rule 1006 permits the court to extend the time for payment of any installment for cause, but not beyond

180 days after the filing of the petition. Fed. R. Bankr. P. 1006(b). The Debtor was given the maximum permissible period of time to pay the filing fee.

The Debtor's motion thus raises the question whether the court may, in an appropriate case, extend the period for paying the filing fee beyond the 180th day notwithstanding the clear direction of Rule 1006(b).¹ In many instances, the court may enlarge a specified period of time, even after that time has expired, where the failure to act was the result of excusable neglect. *See* Fed. R. Bankr. P. 9006(b)(1). In other instances, the court may not enlarge the time for taking action for any reason (Fed. R. Bankr. P. 9006(b)(2)), and in still others, the court may enlarge the time "only to the extent and under the conditions stated" in other rules. Fed. R. Bankr. P. 9006(b)(3). Bankruptcy Rule 1006(b)(2), which sets the parameters for paying filing fees in installments, is one of the rules governed by Rule 9006(b)(3). As a result, the only enlargement of time permitted for paying the filing fee in installment is limited by the requirement that the last installment be paid not later than 180 days after the filing of the petition. Fed. R. Bankr. P. 1006(b)(3); *See, e.g., Goldrich v. Gart Property Management, Inc. (In re Goldrich)*, 1992 WL 404725, at *5 (E.D.N.Y. 1992). In *Goldrich* the district court ruled that the bankruptcy court properly refused to vacate order of dismissal even though, as the result of a clerical error, the debtor was denied an opportunity to request additional time to pay the last installment of his filing fee because the bankruptcy case was not actually dismissed until more than 180 days after the petition was filed.

The Debtor has suggested no authority pursuant to which the court might override the clear mandates of Rules 1006(b)(2) and 9006(b)(3). Although the bankruptcy court is given broad

¹ In an appropriate case, the court may waive the filing fee, but the Debtor in this case has not sought that relief. *See* 28 U.S.C. § 1930(f)(1); Fed. R. Bankr. P. 1006(b)(3).

authority under section 105(a) of the Bankruptcy Code to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [title 11], that section may not be used to override a specific provision of the Bankruptcy Code or Rules. *See, e.g., Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 969 (1988)(“[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.”); *Omni Manufacturing , Inc. v. Smith (In re Smith)*, 21 F.3d 660, 666 (5th Cir. 1994)(“Bankruptcy courts cannot use their equitable powers created by Section 105(a) to expand the requirements of Rule . . . 9006(b)(1)”); *Matter of Danielson*, 981 F.2d 296, 298 (7th Cir. 1992)(“Courts have no standby power to excuse violations of statutes and rules.”). As the Supreme Court has cautioned, “Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality.” *Taylor v. Freeland & Kronz*, 503 U.S. 638, 644, 112 S.Ct. 1644, 1648 (1992).

For the foregoing reasons the court concludes that even if the failure of the Debtor to timely pay the case filing fee resulted from excusable neglect or another compelling cause, the court is without authority to extend the time for payment of the filing fee beyond the 180th day after the petition was filed. As a result, the motion of the Debtor to vacate the prior order of dismissal is **DENIED.**