

Dated: June 22, 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
TONYA PETERSON,
Debtor.

Case No. 08-25065-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 3, 2009, dismissing her case for failure to pay the case filing fee. The Debtor's motion offers no legal basis for the court to set aside the dismissal but merely states that the remaining balance of the filing fee was paid on April 15, 2009, after her case was dismissed. There have been no objections filed by any party in interest. After carefully considering the request of the Debtor and reviewing the case file, the court has determined that the motion must be denied. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A).

FACTUAL BACKGROUND

The Debtor commenced this case by filing a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on May 27, 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. 4; *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.”). Subsection (b) provides for the payment of the filing fee in installments. Notwithstanding the requirements of Bankruptcy Rule 1006(b)(2), the application did not specify the number, amount, and dates of payments proposed to be made. *See* Official Bankruptcy Form 3A. Although 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 October 20, 2008, the Debtor filed a Notice of Voluntary Conversion from Chapter 13 to Chapter 7. Doc. No. 38. At the time of the Debtor’s conversion, no payments had been made toward the filing fee. On October 22, 2008, the Debtor’s attorney paid \$25.00 to the bankruptcy court clerk¹ and, on November 6, 2008, the Chapter 13 Trustee paid \$47.00 to the clerk. Both of these amounts were credited to the total fees due in the amount of \$299.00. On February 13, 2009, the court issued its Sua Sponte Order and Notice of Hearing to Consider Dismissal of Case for

¹ The court does not know whether the Debtor reimbursed her counsel for this amount. The court is aware of the policy of the bankruptcy court clerk that prohibits an attorney from using the court’s automated Electronic Case Filing system so long as there are outstanding fees owed with respect to previous filings. The only exception is made when an application to pay the filing fee in installments has been filed. In this case, no additional application to pay in installments was filed when the case was converted to Chapter 7. The court assumes that, as a result, the attorney was compelled to pay the \$25.00 conversion fee or face the inability to conduct business with the court.

failure to pay the unpaid filing fees of \$227.00. Doc. No. 55 (the “Sua Sponte Order”). That order provides as follows:

It appearing to the Court that the Debtor has failed to timely pay the case filing fee and/or administrative fees required by 28 U.S.C. § 1930(a)(1) and (b) and Fed. R. Bankr. P. 1006 and that there remains an outstanding balance due of \$227.00, now therefore,

Please take notice that a hearing will be conducted on March 19, 2009 at 9:30 a.m. in Courtroom No. 645 at 200 Jefferson Avenue, Memphis, TN, to consider whether this case should be dismissed for failure to pay the required fees. Payment may be made by cashier’s check, money order or attorney’s check to the Bankruptcy Court Clerk, 200 Jefferson Avenue, Memphis, Tennessee. If full payment is made prior to the scheduled hearing, it will not be necessary for the Debtor or the Debtor’s attorney to appear for the scheduled hearing.

If the required fees are not paid and the Debtor fails to appear at the scheduled hearing, this case may be dismissed without further notice.

The outstanding filing fee was not paid and no one appeared at the scheduled hearing. Therefore, the case was dismissed by order dated April 3, 2009. Doc. No. 60. On April 15, 2009, the Debtor filed the present motion to set aside the dismissal and on the same day, the Debtor paid \$227.00 to the clerk. *See* Doc. No. 63 and Filing Fee Receipt dated April 15, 2009.

The Debtor’s motion was set for hearing on June 11, 2009. The Debtor and her attorney were present. The Debtor testified that she failed to pay her filing fee because of periods of unemployment during the pendency of her case. When the court pointed out that she was unemployed when she filed her original petition on May 27, 2008, the Debtor testified that she lost her job just prior to the filing, and that she remained unemployed until the week that school resumed in August of 2008. She testified that after a short time at her new job, her hours were reduced before her employment was eventually terminated altogether. The Debtor’s bankruptcy case was dismissed on October 10, 2008, prior to confirmation of a plan, but was reinstated upon her request to enable

her to convert the case to Chapter 7. The case was converted to Chapter 7 on October 21, 2008. As noted, the Debtor's attorney paid the \$25.00 "conversion fee" on October 22, 2008.² The Debtor testified that she remained unemployed until the first Monday in April 2009. She said that she is now employed and earns \$250.00 per week. The court notes that the Debtor's original Schedule I lists income consisting of support in the amount of \$702.00 per month and food stamps in the amount of \$412.00 per month, for total income of \$1,114.00 per month. *See* Doc. No. 1. In other words, at the time that the original petition was filed in this case, although the Debtor was unemployed, she nevertheless had "regular income" and was thus eligible to be a debtor in a Chapter 13 case. *See* 11 U.S.C. § 109(e). To be sure, the Debtor's regular income was limited, but her proposed plan payment was to be only \$50.00 per month. *See* Doc. No. 2. The court is not certain why the Debtor chose to file a Chapter 13 petition rather than a Chapter 7 petition in the first instance – the proposed plan provided for payment of no secured debts – but the filing may have been related to the debt owed to Memphis Light, Gas and Water ("MLGW") described more fully below. The Debtor may also have believed that she would be able to find employment more quickly than actually proved possible.

At the hearing to consider the Debtor's motion to set aside the order of dismissal, the court was advised by the attorney for Sylvia Brown, Chapter 13 Trustee, that the Debtor's plan payments

² The Bankruptcy Court Miscellaneous Fee Schedule, Appendix to 28 U.S.C. § 1930, provides in pertinent part: "(10) . . . For filing a motion to convert or notice of conversion, a fee shall be charged in the amount of the difference between the current filing fee for the chapter under which the case was originally commenced and the current filing fee for the chapter to which the case is requested to be converted. If the filing fee for the chapter to which the case is requested to be converted is less than the fee paid at the commencement of the case, *no refund shall be provided*. [emphasis added]." The fact that no refund of the filing is provided upon conversion further bolsters the court's conclusion that the filing fee is owed and must be paid even in the event that a case is dismissed prior to discharge.

were set at \$71.00 per month, presumably because of changes that proved necessary at the meeting of creditors. The Debtor paid only \$50.00 to the Trustee during the pendency of her case. The plan was never confirmed. Of the \$50.00 paid in, \$47.00 was eventually paid to the bankruptcy court clerk to be applied toward the filing fee, and \$3.00 was retained by the Trustee as part of her commission. When asked why she was unable to make her proposed plan payments, the Debtor testified that rental costs and utility costs prevented her from making the payments.

The Debtor testified that she would like to receive a bankruptcy discharge because she owes \$2,000.00 to MLGW, which must be paid in full (if not discharged) before she will be permitted to obtain utility services. The court notes that at the time of the filing of her petition and after the conversion to Chapter 7, the Debtor acknowledged a debt to MLGW in the amount of \$600.00. *See* Doc. Nos. 1 and 46. The court is not clear whether this amount was listed in error or the Debtor incurred additional debt to MLGW during the pendency of her bankruptcy case. The Debtor said that she and her three children are currently living with her mother in a one-bedroom apartment, but that she must soon move because this living arrangement violates the terms of her mother's lease. The Debtor testified that she has nowhere to go, and that even if she did, she does not have the funds needed to obtain utility services.

DISCUSSION

Request to Set Aside Dismissal

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 pursuant to Rule 9024 of the Federal Rules of Bankruptcy Procedure, which incorporates Rule 60 of the Federal Rules of Civil Procedure.

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).

Upon the filing of an application to pay filing fees in installments, Bankruptcy Rule 1006(b) permits the court to fix the number, amount, and dates of installment payments. Rule 1006 specifies that the number of installments may not exceed four and that 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 date of the filing of the petition in this case (May 27, 2008) was Wednesday, September 24, 2008. 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 September 24, 2008. This period of time was not enlarged as the result of the conversion of the case to Chapter 7. The conversion of a bankruptcy case from one chapter to another constitutes an order for relief under the chapter to which the case is converted, but does not effect a change in the date of the filing of the petition. 11 U.S.C. § 348(a); see *In re Spoon*, 185 B.R. 758, 761 (Bankr. W.D. Tenn. 1995) (“Subject to limited exceptions . . . , where an originally filed chapter 13 case is converted to a case under chapter 7, it is deemed to have [been] commenced on the date the chapter 13 was filed.”).

Unfortunately, in the present case, the bankruptcy clerk appears to have calculated a “new” 120-day period from the date of the conversion to chapter 7. The Sua Sponte Order indicated that the Debtor might pay the remaining balance of the filing fee up until March 19, 2009. Notwithstanding this error, the fees were not paid until May 15, 2009, well after the date specified in the Sua Sponte Order and 353 days after the filing of the petition.

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 120th day. Bankruptcy Rule 1006 permits the

court to extend the time for payment of any installment, but only for cause, and not beyond 180 days after the filing of the petition. *See* Fed. R. Bankr. P. 1006(b).³ 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 fee 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 installments is limited by the requirement that the last installment be paid not later than 180 days after the filing of the petition. *See, e.g., Goldrich v. Gart Property Management, Inc. (In re Goldrich)*, 1992 WL 404725, at *5 (E.D.N.Y. 1992) (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 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*

³ In an appropriate case, the court may waive the filing fee, but the Debtor in this case has not sought that relief. The court expresses no opinion concerning its authority to waive the filing fee at this late date. *See* 28 U.S.C. § 1930(f)(1); Fed. R. Bankr. P. 1006(b)(3).

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).”). 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).

Further, even if it had the authority to further enlarge the period of time to pay the filing fee, the facts in this case would not persuade the court to do so. The Debtor filed her original Chapter 13 petition at a time when she was unemployed but receiving regular income, yet she never paid more than \$50 toward her Chapter 13 plan. During the pendency of her case, she was employed for at least some period of time as reflected in her testimony and her amended Schedule I filed after conversion, yet she made no payments toward her filing fee. When given an opportunity to appear at the hearing to consider the dismissal of her case for failure to pay the filing fee, the Debtor failed to show up. Although the Debtor’s current financial condition appears dire now, the court is not certain that the Debtor never had the ability to pay the filing fee during the pendency of her bankruptcy case. Instead, the Debtor enjoyed the protection of the automatic stay for approximately eleven months without paying the full amount of the required fee. The equities are thus not in her favor.

Request for Refund of Filing Fee

At the close of the hearing on the motion, counsel for the Debtor requested that the funds paid by the Debtor after the dismissal of her case be refunded in the event that the court denied her

motion to set aside the prior order of dismissal. Counsel suggested that the Debtor needs these funds in order to file a new bankruptcy case. The Debtor testified that she does not have the funds to pay another filing fee.

It is the policy of the Judicial Conference of the United States that filing fees not be refunded. In a memorandum to the United States Bankruptcy Courts dated July 29, 2005, the Administrative Office states that “[t]he Judicial Conference’s current policy regarding refunding of filing fees, in effect since 1949, has been broadly interpreted to generally prohibit refunds of fees due upon filing, even if a party filed the case in error, or the court dismissed the case or proceeding.” *See* Memorandum of Administrative Office, July 29, 2005, citing JCUS-MAR 49, p. 202.⁴ As stated previously, the Debtor in fact received value for the payment of the required fee: she enjoyed the protection of the automatic stay during the pendency of her case. The mere fact that her case was dismissed does not mean that the filing fee was not due. *See In re Moynahan*, 2008 WL 141585 (Bankr. N.D. Ohio 2008) (“The only basis upon which filing fees can be waived is if a debtor qualifies for in forma pauperis status under 28 U.S.C. §1930(f).”).

In the event that the Debtor does file another bankruptcy petition, she may be eligible for a waiver of the filing fee. *See* 28 U.S.C. §1930(f)(1). Section 1930(f)(1) requires that an individual establish two facts in order to proceed with a Chapter 7 bankruptcy case without paying the filing fee. First, a debtor must establish that his or her income is below 150 percent of the income official poverty line; and second, a debtor must establish that he or she is unable to pay the filing fee in

⁴28 U.S.C. 331 establishes the Judicial Conference of the United States, specifies the membership of the conference and outlines the duties of the Conference.

installments. The court expresses no opinion at this time about the eligibility of the Debtor for this relief.

CONCLUSION

For the foregoing reasons, the court concludes that it is without authority to extend the time for payment of the case filing fee beyond 180 days after the filing of the petition. As enlargement of the time to pay the filing fee in order to qualify for discharge was the only object of the Debtor's motion, the motion to vacate the prior order of dismissal is **DENIED**.

cc: Debtor
Debtor's Attorney
United States Trustee
Case Trustee (if any)
Matrix