

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:19-bk-6702-FMD
Chapter 7

Dorothy K. Dycus
aka Dorothy Kay Dycus,

Debtor.

**ORDER DENYING
DEBTOR'S MOTION TO DISMISS
OR IN THE ALTERNATIVE TO STRIKE
THE UNITED STATES TRUSTEE'S
MOTION TO DISMISS AS TO § 707(b)**

THIS CASE came on for hearing on October 17, 2019, to consider *Debtor's Motion to Dismiss or in the Alternative to Strike the United States Trustee's Motion to Dismiss as to § 707(b)* ("Debtor's Motion").¹ For the following reasons, the Court finds that the time limits of 11 U.S.C. § 704(b) do not apply to motions to dismiss filed under 11 U.S.C. § 707(b)(3) and will deny Debtor's Motion.

Debtor filed a petition under Chapter 7 of the Bankruptcy Code on July 17, 2019. The first meeting of creditors was held and concluded on August 20, 2019. On September 24, 2019, the United States Trustee ("UST") filed the United States Trustee's Motion to Dismiss Chapter 7 Case Pursuant to 11 U.S.C. § 707(a) and (b)(3) (the "Motion to Dismiss"),² alleging that the case should be dismissed "for cause" under § 707(a) and that the totality of the circumstances of Debtor's financial situation demonstrates abuse and bad faith under § 707(b)(3). Debtor contends that the Motion to Dismiss under § 707(b)(3) is untimely "pursuant to § 704 as the motion was filed more than 30 days after the conclusion of the meeting of creditors."³

Section 704(b)(1) provides that the UST shall review all materials filed by the debtor in an individual Chapter 7 case and, within ten days after the creditors' meeting, shall file a statement as to whether the case is presumed to be abusive under § 707(b).⁴ Section 704(b)(2) provides that, within thirty days after filing the statement under § 704(b)(1), the UST shall file either (i) a motion to dismiss or convert the case under § 707(b), or (ii) a statement that the motion is not appropriate.⁵

Under § 707(a), the Court may dismiss a case "for cause." Under § 707(b)(1), the Court may dismiss a case if it finds that "the granting of relief would be an abuse of the provisions of this chapter." Under § 707(b)(2), a presumption of abuse arises if the debtor's disposable income is greater than a calculated threshold amount.⁶ And § 707(b)(3) provides that in considering whether granting relief would be an abuse of the provisions of Chapter 7 under § 707(b)(1), the court shall consider whether the petition was filed in bad faith or the "totality of the circumstances."

Federal Rule of Bankruptcy Procedure 1017(e) states as follows:

The court may dismiss or, with the debtor's consent, convert an individual debtor's case for abuse under § 707(b) only on motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and any other entity as the court directs.

(1) Except as otherwise provided in § 704(b)(2), a motion to dismiss a case for abuse under § 707(b) or (c) may be filed only within 60 days after the first date set for the meeting of creditors under § 341(a), unless, on request filed before the time has expired, the court for cause extends the time for filing the motion to dismiss. . . .

Here, the UST did not file a statement as to whether Debtor's case is presumed to be abusive under § 707(b). Instead, more than 30 days after the

¹ Doc. No. 15.

² Doc. No. 10.

³ Doc. No. 15, ¶ 1.

⁴ 11 U.S.C. § 704(b)(1).

⁵ 11 U.S.C. § 704(b)(2).

⁶ 11 U.S.C. § 707(b)(2).

first meeting of creditors, but within the 60-day time limit of Rule 1017(e), the UST filed the Motion to Dismiss seeking relief under both § 707(a) and § 707(b)(3).

Debtor concedes that the time limitations of § 704(b) do not apply to the UST's request for relief under § 707(a). The issue before the Court is whether § 704(b) limits prohibit the UST from seeking relief under § 707(b)(3).

In *In re Draisey*, the Eighth Circuit Bankruptcy Appellate Panel determined that “§ 704(b)'s deadlines are inapplicable when the UST seeks relief under § 707(b)(3).”⁷ And more recently, in *In re Dinardo*, the bankruptcy court noted that the dismissal of a debtor's case under § 707(b)(2) is a distinct alternative from a dismissal under § 707(b)(3). The *Dinardo* court held that the “failure to timely file the Ten-Day Statement does not bar the UST from seeking dismissal under § 707(b)(3) based on the totality of circumstances.”⁸

The Court concurs with the analysis of the courts in *Draisey* and *Dinardo*, and concludes that the UST's failure to file a statement under § 704(b) does not preclude it from moving under § 707(b)(3), and the Motion to Dismiss was timely filed under Rule 1017(e).⁹

Accordingly, it is

ORDERED that Debtor's Motion to Dismiss or in the Alternative to Strike the United States Trustee's Motion to Dismiss as to § 707(b) is DENIED.

DATED: October 22, 2019.

/s/ Caryl E. Delano

Caryl E. Delano
United States Bankruptcy Judge

⁷ *In re Draisey*, 395 B.R. 79, 83 (B.A.P. 8th Cir. 2008).

⁸ *In re Dinardo*, 559 B.R. 32, 40-41 (Bankr. D. Conn. 2016).

⁹ Fed. R. Bankr. P. 1017(e)(1).