



SO ORDERED.

SIGNED this 03 day of February, 2006.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
JENNIFER LYNN JAY,)	Case No. 05-13397
)	Chapter 7
Debtor.)	
_____)	
CHASE BANK USA, N.A.,)	
)	
Plaintiff,)	
v.)	Adversary No. 05-5680
)	
JENNIFER LYNN JAY,)	
)	
Defendant.)	
_____)	

ORDER GRANTING MOTION TO DISMISS COMPLAINT

Plaintiff Chase Bank USA, N.A. filed a complaint under § 532(a)(2) seeking to except from Jennifer Lynn Jay’s discharge certain credit card indebtedness. Defendant Jay moves to dismiss the complaint on the grounds that Chase filed it after expiration of the sixty (60) day filing period provided by Fed. R. Bankr. P. 4007(c).

Debtor filed her bankruptcy case on June 3, 2005.¹ As provided by Fed. R. Bankr. P. 2002(a)(1), this Court issued a notice of the first meeting of creditors to be held under § 341, the same being scheduled on July 7, 2005. Stated on the face of the notice was the last day upon which to commence an adversary proceeding taking exception to the discharge of a particular debt or generally objecting to the entry of a discharge. That date was September 6, 2005. Chase filed its complaint on September 8, 2005. Chase did not seek an order of this Court extending the time in which to file its complaint. In lieu of answer, defendant filed this motion to dismiss on October 19, 2005. More than 23 days have passed and Chase has not filed a response, as allowed by this Court's local rules, D. Kan. LBR 7012.1(b). The Court is now ready to rule.

Defendant's motion recites no statutory or rule basis for her motion, but the Court construes it as a motion to dismiss brought under either Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction or Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.² Section 523(c) requires the Court to discharge a debtor's debts unless a creditor commences an adversary proceeding alleging that the debt falls into one of the categories of exceptions from discharge contained in §§ 523(a)(2), (a)(4), (a)(6), or (a)(15). Debtor's motion recites that Chase did not file its complaint until after the expiration of 60 days from the date of the first setting of the first meeting of creditors as specified by Fed. R. Bankr. P. 4007(c). According to the Court's calculations, the 60th day after July 7, 2005 was actually September 5, 2005, but that day was Labor Day, a legal holiday on which the United States Courthouse was closed, thus making the complaint

¹ The 1978 Bankruptcy Code, 11 U.S.C. § 101, et seq., and the 2005 Rules govern this case.

² Fed. R. Civ. P. 12(b) is made applicable to bankruptcy adversary proceedings by Fed. R. Bankr. P. 7012.

to determine dischargeability of a debt due on September 6, 2005.³

As suggested by *Kontrick v. Ryan*,⁴ Fed. R. Bankr. P. 4007(c)'s 60 day deadline is not a jurisdictional one; rather it is a "claims processing" deadline, the effect of which must be raised sometime prior to the date of trial. While the Supreme Court did not specify whether bankruptcy courts should treat the passing of such a deadline as an affirmative defense or a failure to state a claim, it did make clear when the passage of the deadline becomes fatal to the cause of action raised.⁵

In this case, defendant raised the passage of the deadline at the earliest procedural point in the case, during the answer period. Chase made no effort to secure an extension and has made no response to the defendant's motion. Chase filed its complaint 62 days after the first meeting of creditors. Fed. R. Bankr. P. 4007(c) states that a complaint under § 523(c) "shall be filed no later than 60 days" after the first date set for the meeting of creditors. Chase's complaint is out of time and therefore this Court could not grant it relief on its complaint.

The Court therefore GRANTS defendant's motion to dismiss and Chase's complaint is dismissed with prejudice. It is SO ORDERED.

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³ See Fed. R. Bankr. P. 9006(a).

⁴ 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004) (Holding that the 60 day deadline for making a general objection to a discharge set out in Fed. R. Bank. P. 4004 is not jurisdictional. Rule 4004's wording is very similar to that of Rule 4007(c)).

⁵ *Id.* at 458-59 (A defense based upon a time bar generally must be raised in an answer or responsive pleading; debtor's assertion of the time constraints of Fed. R. Bankr. P. 4004(a) after the merits of the case had been determined came too late.).