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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

6	In re:	)	BAP No.	CC-04-1589-KMoB
		)		
7	VIGEN KHACHIKYAN,	)	Bk. No.	LA 04-22852-ER
		)		
8	Debtor.	)		
		)		
9	_____	)		
		)		
10	VIGEN KHACHIKYAN,	)		
		)		
11	Appellant,	)		
		)		
12	v.	)	<b>OPINION</b>	
		)		
13	DAVID L. HAHN, Chapter 7	)		
	Trustee; UNITED STATES	)		
14	TRUSTEE,	)		
		)		
15	Appellees.	)		
		)		
16	_____	)		

Argued and Submitted on July 29, 2005  
at Pasadena, California

Filed - November 2, 2005

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Ernest M. Robles, Bankruptcy Judge, Presiding

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Before: KLEIN, MONTALI, and BRANDT, Bankruptcy Judges.

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1 KLEIN, Bankruptcy Judge:  
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3 The question is whether the dismissal of a bankruptcy case  
4 pursuant to 11 U.S.C. § 707(b) as a "substantial abuse" of  
5 chapter 7 was erroneous because the United States trustee did not  
6 prove there was a nexus between alleged credit card abuse that  
7 occurred seventeen months prebankruptcy and the filing of  
8 bankruptcy by one who is unable to fund a chapter 13 plan.  
9 Assuming, without deciding, that incurring potentially  
10 nondischargeable debt can be the basis of "substantial abuse,"  
11 and rejecting the debtor's contention that the "contested matter"  
12 procedure of Federal Rule of Bankruptcy Procedure 9014 did not  
13 afford him an adequate opportunity to respond, we REVERSE.  
14

15 FACTS

16 The appellant, Vigen Khachikyan ("debtor"), filed a chapter  
17 7 bankruptcy case on June 9, 2004. At the time, he lived rent-  
18 free with his mother and had income of \$500/month as a "self-  
19 employed driver" and expenses of \$453.33/month.

20 One year earlier, in May 2003, he had lost his \$37,000+/year  
21 job and, about the same time, separated from his employed spouse.

22 During 2002, while employed and not separated from his  
23 spouse, the debtor used seventeen credit cards to charge about  
24 \$20,000 for items ranging from fuel to luxury goods and to incur  
25 another \$95,000 in debt by way of balance transfers on old credit  
26 cards, cash advances (at casinos), and convenience checks.

27 The debtor made no credit card charges in 2003 or 2004, yet  
28 his total credit card debt had risen, due to the accumulated

1 interest and late and overlmit fees, from about \$120,000 to  
2 \$183,831.73 as of the eventual date of bankruptcy.

3 The United States trustee filed a § 707(b) Motion to Dismiss  
4 the same day as the deadline for filing nondischargeability  
5 complaints premised on fraud per 11 U.S.C. § 523(a)(2) and  
6 Federal Rule of Bankruptcy Procedure 4007(c). No creditor filed  
7 such a complaint.

8 Although no evidence was ever adduced that the debtor had  
9 any thought of filing bankruptcy when he incurred the credit card  
10 debt, the putative "substantial abuse" was that the accumulation  
11 of credit card debt in 2002 occurred in anticipation of the 2004  
12 bankruptcy. This, the United States trustee contended, abused  
13 chapter 7 despite the debtor's lack of income and resources that  
14 made it impossible for him to obtain relief under any other  
15 Bankruptcy Code chapter, despite his subsequent loss of  
16 employment and marital separation, and despite the absence of any  
17 nondischargeability complaints.

18 The debtor appeared at the scheduled hearing on November 12,  
19 2004, and contended that he was entitled to discovery and to have  
20 the § 707(b) issue resolved by adversary proceeding.

21 The court rejected the request for a further opportunity for  
22 discovery and, since there were no apparent contested issues of  
23 fact, proceeded to rule on the merits.

24 The court, reasoning that the debtor's pattern of credit  
25 card charges and cash advances in 2002, his inadequate income in  
26 2002, and his inability to make minimum payments warranted a  
27 conclusion of § 707(b) "substantial abuse," dismissed the case.  
28 The court ruled that "[t]he facts of this case show misuse of

1 credit cards by the Debtor, amounting to a substantial abuse of  
2 the bankruptcy system.”

3 This timely appeal ensued.  
4

5 JURISDICTION

6 The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334  
7 and 157(b)(1). We have jurisdiction under 28 U.S.C. § 158(a)(1).  
8

9 ISSUES

10 1. Whether it was correct to deny a request to continue the  
11 “contested matter” hearing to permit discovery and to decline to  
12 take testimony.

13 2. Whether “substantial abuse” of chapter 7 under 11 U.S.C.  
14 § 707(b), for a reason other than ability to repay creditors  
15 under another chapter, requires a link between the putatively  
16 abusive conduct and the filing of bankruptcy.  
17

18 STANDARD OF REVIEW

19 Decisions regarding continuances and discovery are reviewed  
20 for abuse of discretion. Childress v. Darby Lumber, Inc., 357  
21 F.3d 1000, 1009 (9th Cir. 2004); Orr v. Bank of Am., 285 F.3d  
22 764, 783 (9th Cir. 2002). An order dismissing a case for  
23 substantial abuse under § 707(b) is also reviewed for an abuse of  
24 discretion. Price v. United States Tr. (In re Price), 353 F.3d  
25 1135, 1138 (9th Cir. 2004); Voelkel v. Naylor (In re Voelkel),  
26 322 B.R. 138, 144 (9th Cir. BAP 2005).

27 An abuse of discretion may be based on an incorrect legal  
28 standard, or a clearly erroneous view of the facts, or a ruling

1 that leaves the reviewing court with a definite and firm  
2 conviction that there has been a clear error of judgment. SEC v.  
3 Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001); Ho v. Dowell (In re  
4 Ho), 274 B.R. 867, 871 (9th Cir. BAP 2002).

5  
6 DISCUSSION

7 The debtor contends that the dismissal was accomplished in a  
8 procedurally incorrect manner and that the determination of  
9 "substantial abuse" of chapter 7 was substantively incorrect. We  
10 reject the first argument but agree with the second.

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12 I

13 We perceive no error in the court's refusal to require an  
14 adversary proceeding and refusal to grant a continuance for an  
15 additional opportunity for discovery.

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17 A

18 The debtor's position that § 707(b) motions to dismiss must  
19 be resolved by adversary proceeding is contradicted by Federal  
20 Rule of Bankruptcy Procedure 1017(f)(1), which prescribes the  
21 "contested matter" procedure of Rule 9014 for § 707(b) motions.<sup>1</sup>  
22 Since a contested matter is the prescribed method for resolving a  
23 § 707(b) motion, the court did not err in employing that  
24 procedure.

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<sup>1</sup> The rule provides:

27 (1) Rule 9014 governs a proceeding to dismiss or suspend  
28 a case, or to convert a case to another chapter, except  
under §§ 706(a), 1112(a), 1208(a) or (b), or 1307(a) or (b).

Fed. R. Bankr. P. 1017(f)(1).

1 While there are significant differences between adversary  
2 proceedings and contested matters, the similarities between them  
3 are greater than appellant assumes. In a contested matter, there  
4 is no summons and complaint, pleading rules are relaxed,  
5 counterclaims and third-party practice do not apply, and much  
6 pre-trial procedure is either foreshortened or dispensed with in  
7 the interest of time and simplicity. Nevertheless, as will be  
8 seen, discovery is available, testimony regarding contested  
9 material factual disputes must be taken in the same manner as in  
10 an adversary proceeding, and the court must make findings of fact  
11 and conclusions of law before entering an order that has the  
12 status of a judgment. Compare GMAC Mortgage Corp. v. Salisbury  
13 (In re Loloee), 241 B.R. 655, 660-62 (9th Cir. BAP 1999), with  
14 United States v. Valley National Bank (In re Decker), 199 B.R.  
15 684, 690 (9th Cir. BAP 1996 (Klein, J., concurring); see  
16 generally Christopher M. Klein, Bankruptcy Rules Made Easy  
17 (2001): A Guide to the Federal Rules of Civil Procedure that  
18 Apply in Bankruptcy, 75 AM. BANKR. L.J. 35, 38-42 (2001).

19 In each instance in which the choice of a contested matter  
20 over an adversary proceeding is in question, one needs to focus  
21 on the actual procedural differences that are implicated.  
22 Decker, 199 B.R. at 690. As relevant here, appellant bases his  
23 argument on the false premise that the use of a contested matter  
24 deprived him of the opportunity for discovery and for trial.

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27 Contrary to the debtor's position, discovery was available  
28 to him as of right in the § 707(b) contested matter. Rule 9014

1 generally makes the discovery rules of the Federal Rules of Civil  
2 Procedure 26-37 applicable to contested matters. Fed. R. Civ. P.  
3 26-37, incorporated by Fed. R. Bankr. P. 7026-37 & 9014(c);  
4 Decker, 199 B.R. at 690.

5 The are two differences between contested matters and  
6 adversary proceedings with respect to discovery. First, the  
7 portions of Civil Rule 26 regarding disclosures (including  
8 mandatory disclosure), discovery plans, and conferences do not  
9 ordinarily apply in contested matters. Fed. R. Bankr. P.  
10 9014(c).<sup>2</sup> Second, less time is ordinarily available in which to  
11 conduct discovery in a contested matter than in an adversary  
12 proceeding.

13 In short, the appellant could have launched discovery the  
14 moment the United States trustee filed its § 707(b) motion.

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17 The trial of a contested matter under Rule 9014, by virtue  
18 of a 2002 amendment to that rule, ordinarily requires trial  
19 testimony in open court with respect to disputed material factual  
20

21 <sup>2</sup> The discovery provisions of Rule 9014(c) are:

22 (c) Application of Part VII rules. Except as otherwise  
23 provided in this rule, and unless the court directs  
24 otherwise, the following rules shall apply: . . . 7026,  
25 7028-37 . . . . The following subdivision of Fed. R. Civ.  
26 P. 26, as incorporated by Rule 7026, shall not apply in a  
27 contested matter unless the court directs otherwise:  
28 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures  
regarding expert testimony), and 26(a)(3) (additional pre-  
trial disclosure), and 26(f) (mandatory meeting before  
scheduling conference/discovery plan). An entity that  
desires to perpetuate testimony may proceed in the same  
manner as provided in Rule 7027 . . . .

Fed. R. Bankr. P. 9014(c).

1 issues in the same manner as an adversary proceeding. Fed. R.  
2 Bankr. P. 9014(d).<sup>3</sup> The advisory committee's note makes clear  
3 that this requirement is intended to require a trial when there  
4 is a genuine factual dispute.<sup>4</sup> The court must also provide  
5 procedures to enable parties to ascertain whether a scheduled  
6 hearing will be an evidentiary hearing at which witnesses may  
7 testify. Fed. R. Bankr. P. 9014(e).

8 It follows that the resolution of § 707(b) disputes through  
9 a contested matter, as required by Rule 1017(f)(1), afforded  
10 adequate due process to the debtor.

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12 B

13 When a Rule 9014 contested matter is the procedure  
14 prescribed by the Federal Rules of Bankruptcy Procedure for  
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16 <sup>3</sup> Rule 9014 (d) provides:

17 (d) Testimony of witnesses. Testimony of witnesses with  
18 respect to disputed material factual issues shall be taken  
19 in the same manner as testimony in an adversary proceeding.

20 Fed. R. Bankr. P. 9014(d).

21 <sup>4</sup> The advisory committee note explains:

22 Subdivision (d) is added to clarify that if the motion  
23 cannot be decided without resolving a disputed material  
24 issue of fact, an evidentiary hearing must be held at which  
25 testimony of witnesses is taken in the same manner as  
26 testimony is taken in an adversary proceeding or at a trial  
27 in a district court civil case. Rule 43(a), rather than  
28 Rule 43(e), F.R. Civ. P., would govern the evidentiary  
hearing on the factual dispute. Under Rule 9017, the  
Federal Rules of Evidence also apply in a contested matter.  
Nothing in the rule prohibits a court from resolving any  
matter that is submitted on affidavits by agreement of the  
parties.

Fed. R. Bankr. P. 9014(d), advisory comm. note to 2002 amendment.



1 resolving a dispute, as is the case with a motion to dismiss  
2 under § 707(b), considerations of timing dictate that parties  
3 wishing discovery and desiring an actual trial must be nimble and  
4 proactive in obtaining appropriate scheduling accommodations.

5 Time is short because exigencies of bankruptcy necessitate  
6 prompt resolution of a § 707(b) motion to dismiss. If the case  
7 is going to be dismissed, it is unfair to creditors to burden  
8 them with the automatic stay. Moreover, if the debtor is going  
9 to need to convert the case to another chapter in order to obtain  
10 bankruptcy relief, fairness requires an early decision so that  
11 the process of preparing a plan will begin in a timely fashion.

12 As a strategic matter, where one wants discovery in a  
13 contested matter, it is generally too late to wait to the day of  
14 the hearing on the merits to request to conduct discovery in the  
15 future. Since the mandatory disclosure requirement of Civil Rule  
16 26 does not apply to contested matters, there is no impediment to  
17 immediately seeking discovery. Fed. R. Bankr. P. 9014(c).

18 Tactically, one desiring discovery needs to be in the  
19 position of being able to argue that discovery was timely  
20 propounded, is appropriate to the situation, and that the  
21 contested matter should not be resolved until the required  
22 responses are provided. The court has discretion to shorten  
23 response times or to continue the hearing to permit responses to  
24 appropriate discovery that has been timely requested.

25 In this instance, the debtor did nothing until the day set  
26 for the hearing on the merits and then asked for discovery in the  
27 future without articulating what factual issues requiring  
28 discovery might make a difference in the outcome of the contested

1 matter. This was too late and too little to be persuasive.

2 We cannot say that the court abused its discretion in  
3 rejecting a continuance of the hearing so as to permit discovery.  
4 The court did not reject the discovery request out of hand.  
5 Rather, it sought to ascertain whether discovery could yield any  
6 information that might affect the outcome of the dispute. As a  
7 matter of law, the only likely fact-based defense by the debtor  
8 that could have been discovered would have been based on the  
9 restriction in the current version of § 707(b) that prohibits the  
10 U.S. trustee from acting "at the request or suggestion of any  
11 party in interest." It seems improbable that this defense would  
12 apply in view of the timing of the motion, which was not filed  
13 until the last day for filing nondischargeability actions under  
14 the usual credit card fraud theories and none had been filed. 11  
15 U.S.C. § 707(b). Moreover, the debtor was unable to point to any  
16 utility to discovery under the circumstances. Hence, the court  
17 did not err in refusing further opportunity for discovery.

18 Similarly, we perceive no error in the court's refusal to  
19 grant a continuance in order to have a trial. The court inquired  
20 whether there were disputed material factual issues. The debtor  
21 pointed to none. Since there were no such issues, the  
22 requirement of Rule 9014(d) that testimony of witnesses regarding  
23 disputed material factual issues in contested matters be taken in  
24 the same manner as testimony in the trial of an adversary  
25 proceeding did not apply. Fed. R. Bankr. P. 9014(d).

26 Hence, the court did not abuse its discretion in proceeding  
27 to resolve the § 707(b) motion without an actual trial.

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1 II

2 Although we perceive no procedural error, we are persuaded  
3 that it was error to dismiss the case under § 707(b).<sup>5</sup> The  
4 United States trustee did not carry its burden to prove the  
5 existence of "substantial abuse."

6 A chapter 7 case may be dismissed if the debtor has  
7 "primarily consumer debt" and if granting relief would be a  
8 "substantial abuse" of chapter 7. 11 U.S.C. § 707(b). The  
9 statute further stipulates that "[t]here shall be a presumption  
10 in favor of granting the relief requested by the debtor." Id.

11 The existence of "substantial abuse" is determined by  
12 examining the totality of the circumstances. The ability to  
13 repay debts is the most important factor but is not necessarily  
14 dispositive. Price, 353 F.3d at 1139-40 (ability to pay debts  
15 justifies, but "does not compel, a [§] 707(b) dismissal as a  
16 matter of law"); Zolg v. Kelly (In re Kelly), 841 F.2d 908, 914-  
17 15 (9th Cir. 1988).

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19 <sup>5</sup> Section 707(b) provides:

20 (b) After notice and a hearing, the court, on its own  
21 motion or on a motion by the United States trustee, but not  
22 at the request or suggestion of any party in interest, may  
23 dismiss a case filed by an individual debtor under this  
24 chapter whose debts are primarily consumer debts if it finds  
25 that the granting of relief would be a substantial abuse of  
26 the provisions of this chapter. There shall be a  
27 presumption in favor of granting the relief requested by the  
28 debtor. In making a determination whether to dismiss a case  
under this section, the court may not take into  
consideration whether a debtor has made, or continues to  
make, charitable contributions (that meet the definition of  
"charitable contribution" under section 548(d)(3) to any  
qualified religious or charitable entity or organization (as  
that term is defined in section 548(d)(4)).

11 U.S.C. § 707(b) (2000).

1 Correlatively, an inability to pay, as here, does not shield  
2 a debtor from § 707(b) dismissal for other forms of abuse that  
3 may overcome the statutory presumption in favor of chapter 7  
4 relief. Kelly, 841 F.2d at 915.

5 The question, then, becomes whether the debtor's filing of  
6 his chapter 7 case seventeen months after accumulating about  
7 \$120,000 in credit card debt is a form of abuse that should  
8 overcome the statutory presumption in favor of chapter 7 relief.

9 The salient factual circumstances are easily stated. The  
10 debtor accumulated credit card debt (by way of charges, balance  
11 transfers, cash advances, and convenience checks) of about double  
12 his combined family income ending in late 2002. During 2003, he  
13 lost his job and separated from his spouse. In June 2004, while  
14 living rent-free with his mother and earning about \$500/month, he  
15 filed his chapter 7 case. There is no evidence that the debtor  
16 contemplated filing bankruptcy when he was incurring the debt.

17 The existence of other Bankruptcy Code provisions also bear  
18 on the totality of the circumstances. First, credit card fraud  
19 is a basis for excepting credit card debt from discharge under  
20 U.S.C. § 523(a)(2). No such action, however, was filed. Since  
21 the United States trustee did not file the § 707(b) motion until  
22 the day of the deadline for filing § 523(a)(2) actions, it seems  
23 unlikely that credit card creditors would have been misled into  
24 thinking that the United States trustee could be relied upon to  
25 obviate the need for them to protect their interests.

26 Second, the Bankruptcy Code regulates the grant and denial  
27 of chapter 7 discharges in § 727. While some forms of  
28 prepetition misconduct are designated as the basis for denying

1 discharge under 11 U.S.C. § 727(a), neither "substantial abuse"  
2 of chapter 7 by consumers nor credit card abuse are independent  
3 basis for denying discharge.

4 Third, there is the puzzle of why credit card abuse should  
5 be treated differently than, for example, fiduciary fraud, which  
6 is nondischargeable under § 523(a)(4). If a consumer debtor  
7 obtains \$120,000 in breach of a fiduciary duty, one wonders  
8 whether § 707(b) would be appropriate to apply.

9 A bankruptcy court in this circuit has thoughtfully analyzed  
10 the utility of a § 707(b) dismissal to deal with credit card  
11 abuse, even when the debtor lacks the ability to fund a chapter  
12 13 plan. It concluded that dishonesty or the lack of need for a  
13 bankruptcy, when combined with a variety of other factors, might  
14 warrant § 707(b) dismissal in a context of credit card abuse. In  
15 re Motaharnia, 215 B.R. 63, 69-73 (Bankr. C.D. Cal. 1997) (Mund,  
16 J.).

17 We understand Motaharnia, which did not actually dismiss any  
18 of the three cases involved in that decision, to articulate a  
19 cautious, case-by-case, totality-of-the-circumstances approach.

20 We agree with the analysis in Motaharnia, which correctly  
21 emphasizes that § 707(b) dismissal of a case in which the debtor  
22 lacks an ability to pay is reserved for the rare situation in  
23 which there is a powerful basis for finding substantial abuse and  
24 for overcoming the § 707(b) statutory presumption in favor of the  
25 relief requested by the debtor. Id. at 73.

26 Our approbation of Motaharnia, however, should not be  
27 understood to endorse the numbered list of factors mentioned in  
28 that decision, all of which are focused on whether ordinary

1 bankruptcy processes, such as nondischargeability actions and  
2 objections to discharge, are not adequate to the task. The  
3 difficulty with lists of factors that purport to corral an  
4 unbounded totality of circumstances is that they tend to be  
5 fundamentally misleading and to achieve an undeserved life of  
6 their own that ultimately diverts attention from the totality of  
7 the circumstances -- i.e., from the forest to only some of the  
8 trees. Nor do we construe the list that appears in Motaharnia to  
9 have been intended by Judge Mund as stating any kind of test for  
10 determining the totality of the circumstances. Rather, the list  
11 merely suggests examples of circumstances that commonly may bear  
12 on the totality of circumstances.

13 If there is an abuse of chapter 7, the analysis must be  
14 substantively based on the totality of circumstances and should  
15 not degenerate to an exercise in arithmetic.<sup>6</sup>

16 In the present appeal, the totality of the circumstances  
17 does not amount to substantial abuse. There is no apparent  
18 factual nexus between the accumulation of the credit card debt  
19 and the filing of the chapter 7 case long afterwards. Moreover,  
20 subsequent loss of employment and marital separation suggest that  
21 changed circumstances may have been an important consideration in  
22 filing the case.

23 As articulated in Motaharnia: "If the debtor does not have  
24 the ability to repay [unchallenged here], the presence of other  
25 factors indicating dishonesty or lack of need will overcome the  
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27 <sup>6</sup> We agree with the comments of Professors White and  
28 Summers about lists of so-called "factors": "We number these  
cases with some trepidation, for we realize that those who can  
analyze, do, and those who cannot, number." JAMES J. WHITE & ROBERT  
J. SUMMERS, UNIFORM COMMERCIAL CODE § 1-3 at p. 7 (4th ed. 1995).

1 presumption [of entitlement to the relief sought by the debtor  
2 under § 707(b)]. However, the factors must clearly demonstrate a  
3 substantial abuse . . . ." Motaharnia, 215 B.R. at 73. It  
4 follows that "substantial abuse" under § 707(b) that is premised  
5 upon merely having incurred debt by a debtor who lacks the  
6 ability to fund a chapter 13 plan requires a finding regarding  
7 the debtor's state of mind at the time he incurred the debt. The  
8 bankruptcy court's conclusion that there was "misuse of credit  
9 cards" does not, without more, suffice to warrant its inference  
10 of § 707(b) substantial abuse of chapter 7, particularly when the  
11 misuse in question occurred seventeen months before debtor filed  
12 for bankruptcy relief.

13 Thus, we are persuaded that the bankruptcy court applied the  
14 wrong legal standard and that there was a clearly erroneous  
15 assessment of the evidence. This leaves us with the firm and  
16 definite conviction there has been a clear error of judgment.

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19 It was procedurally correct for the court to apply Rule 9014  
20 contested matter procedure to the § 707(b) motion to dismiss the  
21 case. The court did not err when it declined to continue the  
22 matter in order to permit discovery that did not appear to be  
23 necessary and that should, in any event, have previously been  
24 initiated. Since there were no disputed material factual issues,  
25 the court was not required by Rule 9014(d) to take testimony.  
26 The court did, however, abuse its discretion in dismissing the  
27 case. REVERSED.