
SO ORDERED,



Judge Selene D. Maddox

United States Bankruptcy Judge

The Order of the Court is set forth below. The case docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: NATHANIEL AND CARLA RATLIFF
DEBTORS

CASE NO.: 22-12481-SDM
CHAPTER 7

**ORDER DISMISSING BANKRUPTCY CASE FOR THE FAILURE TO COMPLY
WITH THE PREPETITION CREDIT COUNSELING REQUIREMENT**

This bankruptcy case came before the Court for a show cause hearing due to the Debtors' failure to obtain prepetition credit counseling within 180 days of their bankruptcy filing as required under 11 U.S.C. § 109(h)¹. The Court conducted the show cause hearing on November 3, 2022, and at the conclusion of the hearing, afforded the Debtors an opportunity to file a written brief opposing dismissal of their bankruptcy case.² On November 22, 2022, the Debtors filed a *Memorandum in Opposition to Motion to Dismiss Case for Failure to Obtain Credit Counseling* (the "Brief") (Dkt. #21). After review of the relevant facts, law, and procedural history of the

¹ Unless noted otherwise, all later statutory references will be to Chapter 11 of the United States Code.

² The Court continued the show cause hearing pending submission of the Debtors' brief, and the Court also gave the Debtors' counsel the opportunity to present additional evidence and argument post brief submission. The Debtors' counsel responded, "[y]ou can rule based on the brief, your honor . . . I think that will be sufficient." *Digital Court Reporter*, 1:09, 11/3/22 at 11:42:20.

bankruptcy case, including arguments posited at the show cause hearing and in the Debtors' Brief, the Court finds that the Debtors' bankruptcy case should be dismissed.

The facts and procedural history of this bankruptcy case are simple. The Debtors filed their voluntary petition (the "Petition") on September 29, 2022. In Part 5 of the Petition, both Debtors checked the boxes indicating that "I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion." *The Petition, Part 5, Number 15* (Dkt. #1). On the same date, both Debtors filed their Certificates of Credit Counseling (collectively the "Certificates") (Dkt. #6). Both Certificates indicated that the Debtors completed credit counseling via the internet on January 1, 2022, at 1:27 p.m. PST—more than 180 days before the Petition date. A day later, the Court issued its *Order Scheduling Show Cause Hearing for Failure to Obtain Pre-Petition Credit Counseling (Failure to Obtain Thirty Day Exemption)* (Dkt. #8) and conducted the show cause hearing on November 3, 2022.

At the show cause hearing, the Debtors' counsel asserted that in addition to the credit counseling course completed on January 1, 2022, the Debtors attempted to retake the course (with the same company, Abacus Credit Counseling) after receiving notice from the Court that the credit counseling course requirement had not been satisfied.³ Further, the Debtors' counsel stated that the Debtors were unable to retake the prepetition credit counseling course on their own allegedly due to technical difficulties. The Debtors' counsel also stated to the Court that the Debtors came to her office, and she was able to navigate the website which would have allowed the Debtors to retake the credit counseling course. The Debtors did not, however, provide any testimony, and the

³ The admission by the Debtors' counsel made it clear that the Debtors did not attempt to retake the credit counseling course prepetition or within the 180 days prior to the Petition date as required under § 109(h).

Debtors' counsel did not advance any other reasons for why they failed to obtain credit counseling within 180 days prior to the petition date.

Nevertheless, the Court allowed the Debtors to submit a written brief by November 22, 2022, to provide a legal or factual basis as to why the bankruptcy case should not be dismissed for the failure to comply with the prepetition credit counseling requirement of § 109(h). In their Brief, the Debtors make one argument as to why their bankruptcy case should not be dismissed: the Debtors should be exempted from the prepetition credit counseling requirement due to incapacity or disability. Specifically, the Debtors allege that because Carla Ratliff receives social security disability benefits due to mental incapacity, she was unable to complete the credit counseling course. As to Nathaniel Ratliff, the Debtors claim that he spent time, prepetition, under the care of a psychiatrist and other professionals for his mental infirmities and has been mandated by a state court to attend counseling for his mental infirmities.

The Court will briefly discuss the relevant law on the prepetition credit counseling requirement and its applicability to this bankruptcy case. Section 109 of the Bankruptcy Code governs the eligibility of persons to be debtors in bankruptcy. Relevant here, § 109(h)(1) provides that an individual may not be a debtor unless such individual has, *during the 180-day period ending on the date of filing of the petition by such individual*, received from an approved nonprofit budget and credit counseling agency an individual or group briefing that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis. 11 U.S.C. § 109(h)(1) (emphasis added). There are, however, some limited exceptions to the prepetition credit counseling requirement.

One such exception that the Bankruptcy Code provides is for debtors who reside in districts for which the United States Trustee (the "UST") determines approved nonprofit budget and credit

counseling agencies cannot provide the necessary credit counseling services. 11 U.S.C. § 109(h)(2)(A). Another exception is made for debtors who submit, with their petition, a certification that describes exigent circumstances, states the debtor requested credit counseling but was unable to obtain such counseling within seven days of making the request, and persuades the bankruptcy court to grant the debtor a temporary waiver of the credit counseling requirement. 11 U.S.C. § 109(h)(3)(A) and (B)⁴; Fed. R. Bankr. P. 1007(b)(3)(C) and (c).

A final exception is made for debtors who the bankruptcy court determines, on the debtor's request *filed with the petition and after notice and a hearing*, are unable to complete credit counseling due to incapacity, disability, or active military duty in a military combat zone. 11 U.S.C. § 109(h)(4); Fed. R. Bankr. P. 1007(b)(3)(D) and (c). Section 109(h)(4) also defines the terms “incapacity” and “disability” for exemption purposes:

For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and “disability” means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).

Id. As stated above, the exceptions allowed under the Bankruptcy Code are limited, and bankruptcy courts rarely grant debtors permanent exemptions—those that have done so have generally reserved such relief for debtors who are “severely impaired.” *In re Grantham*, 617 B.R. 344, 348 (Bankr. C.D. Cal. 2020) (citing *In re Alexander*, 432 B.R. 41, 44 (Bankr. N.D.N.Y. 2010)). Bankruptcy courts rarely grant prepetition credit counseling exemptions because the legal standard

⁴ The Court notes that even the exigent circumstances exemption is temporary. Specifically, § 109(h)(3)(B)(1) provides that the exemption is allowed for only 30 days unless the court, for cause, orders an additional 15 days.

for obtaining an exemption is “very high”. *Id.* (citing *In re Tulper*, 345 B.R. 322, 326 (Bankr. D. Colo. 2006)).

Here, it is clear to the Court that, despite checking the box in the Petition indicating that the Debtors timely satisfied the prepetition credit counseling requirement, the Debtors did not obtain prepetition credit counseling within the prescribed 180-day time limitation. The Debtors’ counsel admitted this fact at the show cause hearing and continued to do so in the Debtors’ Brief.⁵ While the Debtors did complete a prepetition credit counseling course, the Certificates were obtained on January 1, 2022, which is more than 180 days prior to the September 29, 2022, Petition date.

In addition, the Debtors failed to follow the statutory requirements to qualify for any of the exemptions in § 109(h). Neither the Debtors nor the Debtors’ counsel suggested the UST has determined there are no nonprofit budget and credit counseling agencies in the Northern District of Mississippi that can provide the required credit counseling services. And neither the Debtors nor the Debtors’ counsel submitted—with the Petition or otherwise—the required certification to obtain a temporary waiver of the credit counseling requirement due to exigent circumstances.

While the Debtors now claim in their Brief that they are entitled to a permanent exemption from the prepetition credit counseling requirement due to disability or incapacity, the Court disagrees for several reasons. First, the Debtors did not follow the Federal Rules of Bankruptcy Procedure, which requires the Debtors to file, with the Petition, the request that the bankruptcy court determine they were unable to complete credit counseling due to incapacity, disability, or active military duty in a military combat zone. Indeed, the Debtors failed to make this argument at

⁵ The Court expects in the future that the Debtors’ counsel ensures any individual meets the eligibility requirements under § 109(h) to be a debtor. A debtor’s counsel has and owes a duty to his or her client and this Court to verify that information prepetition.

the show cause hearing held on November 3, 2022, and only raised the issue after being given an opportunity to support their position(s) in written form.

Second, while the Court is sympathetic to the Debtors' situation, the Debtors failed to present any evidence, through testimony or verified documents, of the assertions made in their Brief. And even if the Debtors had presented some evidence of incapacity or disability, the Court need not get that far in the inquiry because of the procedural defects stated above. Nevertheless, while it is apparent from the Debtors' schedules that Carla Ratliff is receiving social security disability benefits, the Court has no evidence before it to determine why Carla Ratliff is receiving those benefits. As such, the Court cannot determine whether she is incapable of making rational decisions with respect to her financial responsibilities or physically impaired to the point where she is unable to take the credit counseling course. Similarly, concerning Nathaniel Ratliff, the Court has no evidence before it to determine whether the time he spent under the care of a psychiatrist for mental infirmities or ongoing counseling rises to the level of incapacity or disability under § 109(h).

Last, the Debtors' claims of incapacity or disability are greatly undermined by the fact that the Debtors did complete a credit counseling course. The Debtors simply failed to complete the course within 180 days from the date of filing the Petition. The Court finds it curious that the Debtors had the mental and physical capacity and ability to take the credit counseling course in January of 2022 (and the same capacity and ability to eventually file a bankruptcy case) but are now arguing they are incapacitated or disabled. In any event, the Court finds it far too speculative an inquiry to decide whether the Debtors qualify for an exemption based on mere assertions that the Debtors only completed the prepetition credit counseling course and received the Certificates due to assistance of a family member. This Court is certainly aware of other avenues (e.g., via

telephone) and other UST approved credit counseling agencies the Debtors could have utilized to timely complete a credit counseling course.

In conclusion, the Court has its doubts about the effectiveness of the credit counseling requirement implemented through the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”), which required credit counseling for all individual debtor cases with the effective date of October 17, 2005. Nevertheless, the Bankruptcy Code and Rules governing such requirements are clear. Absent exemption, the failure to timely obtain credit counseling prior to filing bankruptcy renders debtors ineligible to be debtors in bankruptcy. As such, the Debtors’ failure in this bankruptcy case to comply with the 180-day time requirements imposed in § 109(h) (or the exemption requirements prescribed by § 109(h) and/or Rule 1007(b)(3)(D)) warrants dismissal. See generally, *In re Burton*, Case No. 16-02009-NPO, *Order Denying Request for 30-day Temporary Waiver of Credit Counseling Requirement and Dismissing Bankruptcy Case* (Dkt. #35) (Bankr. S.D. Miss. July 19, 2016) (citing *In re Arkuszewski*, 550 B.R. 374, 377 (N.D. Ill. 2015) (holding that because eligibility is determined at the time the petition is filed, a petition may be dismissed if the eligibility requirements are not met)).

Based on the above, it is **ORDERED** that the bankruptcy case is hereby **DISMISSED**.

##END OF ORDER##