

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:) Bankr. No. 23-40410
) Chapter 7
KRISTIE LYNN HUET)
SSN/ITIN xxx-xx-1312) DECISION RE:
) DEBTOR'S ELIGIBILITY
Debtor.)

The matter before the Court is Debtor's eligibility to be a chapter 7 debtor and, in particular, Debtor's compliance with 11 U.S.C. §109(h)(1). This is a core proceeding pursuant to 28 U.S.C. §157(b)(2). The Court enters these findings and conclusions pursuant to Fed.Rs.Bankr.P. 7052 and 9014(c). For the reasons discussed below, the Court must dismiss this case.

I.

No material facts are in dispute. On December 21, 2023, Debtor Kristie Lynn Huet filed a chapter 7 bankruptcy. The same day, Debtor also filed a Certificate of Counseling (doc. 3) which showed Debtor completed the credit counseling required under 11 U.S.C. §109(h) on June 19, 2023. The number of days between December 21, 2023, and June 19, 2023, counting back from and including the petition date of December 21, 2023, is 186.

On Debtor's voluntary petition (doc. 1, page 5) Debtor did not check the box certifying under 11 U.S.C. §109(h)(3) that she was requesting a temporary waiver of the credit counseling requirement. Further, Debtor did not attach a separate sheet explaining what efforts she made to obtain the credit counseling briefing, why she was unable to obtain it before she filed for bankruptcy, and what exigent circumstances required Debtor to file this case.

The Court entered an Order to Show Cause (doc. 7) directing Debtor to show cause why her case should not be dismissed for her failure to complete a credit counseling briefing within the time allowed under 11 U.S.C. §109(h)(1). Debtor responded (doc. 11) and argued that pursuant to 11 U.S.C. §109(h)(3)(A)(i) having a nondischargeable debt to the Internal Revenue Service is an exigent

circumstance that merits a waiver of the 180-day requirement and that she filed her case within 195 days of taking the class, so the extra 15 days caused no harm and promotes the fresh start policy under the Bankruptcy Code.

The Court entered an Order Setting Deadline Re: Debtor's Response (doc. 12) and a subsequent Amended Order (doc. 15) directing Debtor to fully comply with 11 U.S.C. §109(h)(3), Fed.R.Bankr.P. 1007(b)(3), and Official Form 101, and cite authority for her statement that having a nondischargeable debt owed to the Internal Revenue Service qualifies as an exigent circumstance which merits a waiver of the credit counseling requirement. Debtor responded (doc. 16) and defined "exigent" under Black's Law Dictionary as "requir[ing] immediate action or [aid]; urgent" and cited for authority In re Henderson, 339 B.R. 34, 38 (Bankr. E.D.NY 2006).

II.

Under 11 U.S.C. §109(h)(1), an individual may not be a debtor under Title 11 unless, during the 180-day period ending on the date of the filing of her petition, the individual received from an approved nonprofit budget and credit counseling agency a credit counseling briefing. The Code provides three limited exceptions to this credit counseling requirement. See 11 U.S.C. §109(h)(2)-(4).¹

III.

Debtor failed to file with her petition a certificate of credit counseling that complies with 11 U.S.C. §109(h)(1). As previously stated herein, the number of days between Debtor filing her petition and her receiving her credit counseling is 186. "The event that triggers the 180-day period is the filing of a petition for relief, not the completion of the credit counseling, and the Court must count backward from the petition date, not forward from the date credit counseling is

¹ The first exception is when the United States trustee determines there are no approved nonprofit budget and credit counseling agencies reasonably able to provide adequate services to the debtor. See 11 U.S.C. §109(h)(2). The third exception is when the debtor is not able to complete an approved nonprofit budget and credit counseling briefing due to incapacity, disability, or active military duty. See 11 U.S.C. §109(h)(4). Neither of these exceptions apply in this case.

received.” In re Urbanec, 2014 WL 5449651, at *1 (Bankr. D.Neb. Oct. 24, 2014) (citing In re Meng, 2010 WL 1329397, at *1 (Bankr. D.S.D. Mar. 30, 2010)). Since the credit counseling briefing took place on June 19, 2023, it did not occur during the 180-day period ending on the date of the filing of Debtor’s bankruptcy petition.

Next, the Court addresses whether Debtor claimed an exception to the credit counseling requirement. Debtor never filed a certification with her petition requesting a temporary waiver. Certifications pursuant to 11 U.S.C. §109(h)(3) must be prepared as prescribed by the appropriate Official Form and must be filed with the petition. Fed.R.Bankr.P. 1007(b)(3) and (c). Debtor filed her petition certifying compliance with the credit counseling requirement under 11 U.S.C. §109(h)(1), and therefore did not request an exception to the requirement.

In addition, the only exception that may apply to Debtor is found under 11 U.S.C. §109(h)(3)(A), the exigent circumstances exception², as follows:

(A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that—

(i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);

(ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 7-day period beginning on the date on which the debtor made that request; and

(iii) is satisfactory to the court.

However, Debtor did not comply with the requirements of 11 U.S.C. §109(h)(3)(A) because Debtor did not file a certification requesting a temporary waiver. Instead, Debtor filed a certification with her petition stating she received

² The exigent circumstances exception has three statutory requirements: (1) exigent circumstances that merit a waiver, (2) inability to obtain the briefing within the 7-day period, and (3) the certification must be satisfactory to the court. Dixon v. LaBarge (In re Dixon), 338 B.R. 383, 387-88 (B.A.P. 8th Cir. 2006).

the credit counseling briefing under 11 U.S.C. §109(h)(1).

Further, Debtor must prove all three elements in 11 U.S.C. §109(h)93(A) to succeed on her argument for a temporary waiver. Debtor has failed to prove exigent circumstances as required under 11 U.S.C. §109(h)(3)(A)(i). This prong has two substantive components: “first, there must be exigent circumstances and, second, those circumstances must merit a waiver of the briefing requirements.” In re Dixon, 338 B.R. at 388; In re Talib, 335 B.R. 417, 422-423 (Bankr. W.D.Mo. 2005); In re Rodriguez, 336 B.R. 462, 470-71 (Bankr. D.Idaho 2005); In re Cleaver, 333 B.R. 430, 434 (Bankr. S.D.Ohio 2005). Debtor has failed to prove any exigent circumstances existed for her urgency in filing the petition without first obtaining a new credit counseling certificate within the 180-day period. Having an alleged nondischargeable debt owed to the Internal Revenue Service, which Debtor states was paid pre-petition, does not constitute an exigent circumstance which prevented Debtor from obtaining a new credit counseling certificate prior to filing her bankruptcy. Debtor also failed to prove that owing a nondischargeable debt to the Internal Revenue Service merits a waiver of the briefing requirements.

Next, Debtor failed to establish the second statutory requirement since she failed to submit a certification stating she requested credit counseling services but was unable to obtain the services during the 7-day period beginning on the date she made her request as required under 11 U.S.C. §109(h)(3)(A)(ii). See In re Talib, 335 B.R. at 421 (The certification must set forth “the date(s) on which the debtor requested credit counseling, which agencies were contacted to render the services, why the debtor believes that the services could not be obtained before the filing, and when the services are reasonably likely to be obtained.”). Finally, Debtor has provided no explanation that is satisfactory to the Court for a temporary waiver. See In re Dixon, 338 B.R. at 387.

In Hedquist v. Fokkena (In re Hedquist), 342 B.R. 295, 300 (B.A.P. 8th Cir. 2006), the Bankruptcy Appellate Panel noted, “the requirements under section 109(h) are plain and mandatory.” “With certain limited exceptions, failure to

complete the credit counseling briefing within the 180-day period ending on the date the petition is filed is a 'fatal flaw' rendering debtors ineligible for bankruptcy relief." In re Urbanec, 2014 WL 5449651, at *1; In re Hedquist 342 B.R. at 297-98; Duncan v. LaBarge, Jr. (In re Duncan), 418 B.R. 278, 281 (B.A.P. 8th Cir. 2009).

Since Debtor is not eligible as stated above, the only remaining issue is the remedy.

"[B]ankruptcy courts have no discretion but to dismiss the case when the debtor fails to file a certification in compliance with its provisions." In re Hedquist, 342 B.R. at 300; see also In re Dixon, 338 B.R. at 389 (noting that once a bankruptcy court determines that an individual is not eligible to be a "debtor" under section 109(h), dismissal of the bankruptcy case is appropriate); In re Giles, 361 B.R. 212, 215 (Bankr. D.Utah 2007) (dismissing a bankruptcy case in which debtors obtained credit counseling 182 days before filing for bankruptcy because debtors did not comply with the technical requirements of section 109(h)); In re Ruckdaschel, 364 B.R. 724, 734 (Bankr. D.Idaho 2007) (dismissing a bankruptcy case because Debtors received credit counseling 187 days prior to filing their petition and were, therefore, not eligible for bankruptcy relief). The Court recognizes that dismissal is a harsh remedy, but this Court has no authority to waive or overlook noncompliance with clear and unambiguous Bankruptcy Code provisions that set forth the eligibility requirements for being a bankruptcy debtor. In re Giles, 361 B.R. at 214-15; In re Ruckdaschel, 364 B.R. at 733.

In re Urbanec, 2014 WL 5449651, at *2.

Debtor is outside of the 180-day requirement under 11 U.S.C. §109(h)(1) to be an eligible debtor and she failed to file a certification to justify a waiver of the credit counseling requirement. Therefore, pursuant to 11 U.S.C. §109(h), Debtor is not eligible to be a debtor in bankruptcy, and her case must be dismissed.

A separate order will be entered.

So ordered: January 25, 2024.

BY THE COURT:



Laura L. Kulm Ask
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:) Bankr. No. 23-40410
) Chapter 7
KRISTIE LYNN HUET)
SSN/ITIN xxx-xx-1312) ORDER DISMISSING CASE
)
Debtor.)

In recognition of and compliance with the decision entered this day; and for cause shown; now, therefore,

IT IS HEREBY ORDERED this case is dismissed. Said dismissal is without prejudice to Debtor's rights under the Bankruptcy Code to file another petition for relief. If Debtor files a new bankruptcy petition within 30 days of this Order, the Court will consider waiving the filing fee for the new case.

So ordered: January 25, 2024.

BY THE COURT:



Laura L. Kulm Ask
Bankruptcy Judge