

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE:

Case No. 8:13-bk-05850-MGW
Chapter 13

Althea Smith England,

Debtor.

**ORDER DENYING
DEBTOR'S MOTION FOR
EXTENSION OF TIME
TO RECEIVE CREDIT COUNSELING**

Section 109(h)(3)(A) of the Bankruptcy Code sets out limited circumstances where a court may waive the pre-petition credit counseling requirement.¹ Exceptions to the requirement are narrow and must involve exigent circumstances. In this case, the Debtor claims that an imminent tax auction of her home constitutes exigent circumstances. Because the Debtor had knowledge of the tax auction for several years, the Court finds a lack of exigent circumstances, and therefore, must deny her motion.

BACKGROUND

The Debtor initiated this case on May 1, 2013, by filing a chapter 13 petition in an attempt to save property that was scheduled for tax deed auction on May 2, 2013. Section 109(h)(1) of the Bankruptcy Code, which governs who may be a debtor, requires a debtor to receive credit counseling within "the 180-day period ending on the date of filing of the petition" in bankruptcy.² Here, the Debtor did not obtain the requisite pre-petition credit counseling prior to initiating this case. Instead,

¹ 11 U.S.C. § 109(h)(3)(A) (2010).

² 11 U.S.C. § 109(h)(1) (2010).

the Debtor filed a motion requesting an extension of time to receive credit counseling after she filed her petition.³

DISCUSSION

To obtain a waiver of the pre-petition credit counseling requirement, a debtor must submit a certification that: (i) describes exigent circumstances that merit a waiver of the counseling requirement; (ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, and that the debtor was unable to obtain the requested services within seven days from the date the debtor requested such services; and (iii) is satisfactory with the court.⁴ All three requirements set forth in § 109(h)(3)(A) must be met.⁵

Under the first statutory requirement, the Court must determine whether the Debtor's certificate describes exigent circumstances that merit the waiver of the counseling requirement.⁶ Section 109(h)(3)(A) does not define "exigent circumstances." Whether exigent circumstances exist is an issue that courts determine on a case-by-case basis by looking at the surrounding facts.⁷

The Debtor's certification states that the imminent tax deed auction of her property constitutes exigent circumstances that merit the waiver of the counseling requirement. On this point, the Court notes that the Debtor filed four bankruptcy cases prior to filing this bankruptcy case.⁸ In two of those cases, the Debtor filed a

³ Doc. No. 7.

⁴ 11 U.S.C. § 109(h)(3)(A) (2010).

⁵ *In re Davenport*, 335 B.R. 218, 221 (Bankr. M.D. Fla. 2005) (May, J.).

⁶ 11 U.S.C. § 109(h)(3)(A) (2010).

⁷ 1 *Norton Bankr. L. & Prac. 3d* § 17:17 (2013); *In re Graham*, 336 B.R. 292, 297 (Bankr. W.D. Ky. 2005).

⁸ 8:06-bk-01932-MGW; 8:06-bk-03280-MGW; 8:07-bk-00939-MGW; 8:08-bk-04377-MGW.

motion requesting an extension of time to obtain credit counseling due to exigent circumstances.⁹ In the Debtor's 2008 chapter 13 case, the Debtor's motion for extension of time stated that she filed her bankruptcy petition in order to protect her only remaining property from foreclosure and tax deed auction.¹⁰

Given that the possibility of a tax deed auction has existed for several years, the Court finds that the impending tax deed auction does not qualify as an exigent circumstance that merits the waiver of the pre-petition credit counseling requirement. The Debtor had ample time to obtain credit counseling before filing this bankruptcy case. Additionally, the Debtor had personal knowledge of the pre-petition credit counseling requirement on account of her previous bankruptcy cases. Accordingly, "it is highly unlikely that if Debtor had prioritized obtaining counseling that she would have been unable to fulfill the requirement."¹¹ For this reason, the Debtor does not meet the first requirement under § 109(h)(3)(A).

Under the second statutory requirement of § 109(h)(3)(A), the Court must determine whether the Debtor's certification states that the Debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, and that the Debtor was unable to obtain the services during the seven-day period beginning on the date the debtor requested such services.¹²

In the Debtor's Motion, the Debtor states that she contacted a debt counseling agency on the evening of April 30, 2013, the day before she filed a voluntary petition. Without internet access at her place of residence, the Debtor asserts that she was unable to complete the

counseling course before the 4:00 p.m. filing deadline on May 1, 2013. More important to the Court's analysis of the statutory requirement, however, is the fact that the Debtor did *not* state that she was unable to complete her credit counseling within seven days after she requested credit counseling services. For this reason, the Debtor fails to meet the second requirement under § 109(h)(3)(A).

Turning to the third statutory requirement, the Debtor's certificate cannot be "satisfactory to the court" since it does not meet the requirements of § 109(h)(3)(A)(i) and (ii). Because the Debtor did not meet all three requirements, her Motion will be denied.

Section 109 of the Bankruptcy Code is silent as to the consequence of ineligibility to be a debtor for failure to obtain credit counseling prepetition. Some courts have held that if a debtor is ineligible for failure to obtain credit counseling, the debtor's case must be dismissed.¹³ Other courts have held that if a debtor is ineligible, the petition must be stricken.¹⁴ This Court, however, is of the opinion that "[b]ecause eligibility requirements are not jurisdictional, they may be waivable by the court ... and certainly should not apply if no entity moves to dismiss the case."¹⁵ At the time, the record shows that no party has filed a motion seeking the dismissal of this case on account of the Debtor's failure to obtain credit counseling. If a party in interest does file such a motion, the Court will rule on it as appropriate.

CONCLUSION

Based on the foregoing, the Court concludes that the Debtor did not satisfy the requirements necessary for waiver of the pre-petition credit counseling requirement, as set forth in section

⁹ 8:06-bk-01932-MGW, Doc. No. 3; 8:08-bk-04377-MGW, Doc. No. 15.

¹⁰ Case 8:08-bk-04377-MGW, Doc. No. 15.

¹¹ *In re Randolph*, 342 B.R. 633, 634 (Bankr. M.D. Fla. 2005) (Proctor, J.).

¹² 11 U.S.C. § 109(h)(3)(A)(ii) (2010).

¹³ *In re Davenport*, 335 B.R. at 221.

¹⁴ *In re Carey*, 341 B.R. 798, 804 (Bankr. M.D. Fla. 2006) (Briskman, J.).

¹⁵ *In re Parker*, 351 B.R. 790, 797 (Bankr. N.D. Ga. 2006) (quoting 2 *Collier on Bankruptcy* ¶ 109.09[3] at 109-60 (15th ed. 2006)).

109(h)(3)(A), for the following reasons: (i) the Debtor did not describe exigent circumstances that would merit the waiver of the pre-petition credit counseling requirement, (ii) the Debtor did not state that she was unable to obtain credit counseling services during the seven-day period beginning on the date the Debtor requested such services, and (iii) the Debtor's certification is not satisfactory to the Court since it does not meet the requirements of § 109(h)(3)(A)(i) and (ii).

Accordingly, it is

ORDERED that the Debtor's Motion is DENIED.

DONE and ORDERED in Chambers at Tampa, Florida, on June 10, 2013.

/s/ Michael G. Williamson

Michael G. Williamson
United States Bankruptcy Judge