

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re:

Case No. 6:06-bk-01547-ABB
Chapter 7

JON M. KNIGHT,

Debtor.

ORDER

This matter came before the Court on the Motion to Strike Involuntary Petition and the supporting Affidavit (Doc. Nos. 73, 74) (collectively, the “Motion to Strike”) filed by Jon M. Knight, the Debtor herein (the “Debtor”), seeking dismissal of the involuntary petition filed against him on the basis he is ineligible to be a debtor because he did not obtain prepetition credit counseling. An evidentiary hearing was held on February 22, 2007 at which the Debtor, his counsel, R.W. Cuthill, Jr. as the President of Evergreen Security, Ltd. (“Cuthill”), counsel for Cuthill, and Leigh R. Meininger, the Chapter 7 Trustee, appeared.

Cuthill, as the petitioning creditor, filed an Involuntary Petition (Doc. No. 1) (“Petition”) against the Debtor on June 28, 2006 (“Petition Date”) pursuant to 11 U.S.C. Section 303. The Debtor contends the Petition must be dismissed because he did not obtain credit counseling within 180 days of the Petition Date pursuant to 11 U.S.C. Section 109(h)(1) and, as a result, is ineligible to be a debtor in bankruptcy.

Section 109(h)(1), a provision created by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), provides:

(h)(1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of *filing of the petition by such individual*, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit

counseling and assisted such individual in performing a related budget analysis.¹

The BAPCPA legislative history explains the purpose of the prepetition credit counseling requirement:

[BAPCPA] requires debtors to receive credit counseling before they can be eligible for bankruptcy relief *so that they will make an informed choice* about bankruptcy, its alternatives, and consequences.²

Most importantly, S. 256 requires debtors to participate in credit counseling programs before filing for bankruptcy relief (unless special circumstances do not permit such participation). The legislation’s credit counseling provisions are intended to give consumers in financial distress an opportunity to learn about the consequences of bankruptcy—such as the potentially devastating effect it can have on their credit rating—before *they decide* to file for bankruptcy relief.³

The language of Section 109(h)(1) is plain and unambiguous. The phrase “filing of the petition by such individual” means the prepetition credit counseling requirement applies only to debtors who file for bankruptcy protection voluntarily.⁴ The

¹ 11 U.S.C. § 109(h)(1) (2005) (*emphasis added*).

² H.R. REP. NO. 109-31, pt. 1, at 2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89 (*emphasis added*).

³ H.R. REP. NO. 109-31, pt. 1, at 18 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 104 (*emphasis added*).

⁴ 11 U.S.C. § 109(h)(1); *In re Oberle*, Case No. 06-41515, 2006 WL 3949174, slip op. at *1 (Bankr. N.D. Cal. December 21, 2006) (rejecting involuntary debtor’s contention § 109(h) applies to involuntary debtors and explaining: “To hold otherwise would totally obliterate the provisions of the Bankruptcy Code providing for involuntary bankruptcy relief against individual debtors . . . The court must construe § 109(h) so that § 303 is preserved rather than destroyed.”); *In re Willis A. Sadler*, Case No. 06-10091-FRM, slip op. at 2 (Bankr. W.D. Tex. Oct. 18, 2006) (determining, based upon the plain language of 11 U.S.C. § 109(h)(1), the prepetition credit counseling requirement does not apply to an involuntary petition filed by petitioning creditors pursuant to 11 U.S.C. § 303). There appear to be no reported cases addressing the applicability of Section 109(h)(1) in involuntary cases. The case law cited by the Debtor in support of striking the Petition (*In re Chimento*, Case No. 6:06-bk-00592-ABB, 2006 WL 2346470 (Bankr. M.D. Fla. June 19, 2006) and *In re Carey*, 341 B.R. 798 (Bankr. M.D. Fla. 2006)) is inapplicable as it relates to voluntary cases.

legislative history of BAPCPA confirms Section 109(h)(1) applies only to voluntary debtors, not involuntary debtors. The filing of an involuntary petition against an individual debtor does not involve “an informed choice” or a decision to file by that debtor.

The credit counseling requirement of Section 109(h)(1) does not apply to the Debtor. He was not required to obtain credit counseling within 180 days of the Petition Date. The Motion to Strike is due to be denied.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Debtor’s Motion to Strike is hereby **DENIED**.

Dated this 20th day of March, 2007.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge