

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ENTERED ON DOCKET
DEC 05 2007

IN RE:) CHAPTER 7
)
STEVEN LODEN DYE,) CASE NO.06-71024-MHM
)
Debtor.)

**ORDER DENYING MOTIONS TO DISMISS
OF FXM, P.C. AND RIVERWOOD PARTNERS**

This case commenced September 5, 2006, when Debtor filed his Chapter 13 bankruptcy petition *pro se*. By order entered January 5, 2007, with Debtor's consent, this case was converted to a Chapter 7 case. Since conversion, multiple and extensive hearings have taken place involving *inter alia* the Chapter 7 Trustee's motions to compel Debtor to turn over property of the estate, motion for approval of compromise and notice of abandonment. As a result of the undersigned's familiarity with the facts and circumstances relevant to the motions to dismiss filed by FXM, P.C. ("FXM") and Riverwood Partners¹ ("Riverwood") (collectively, "Movants"), together with a review of the record, under §102, no further notice or hearing is necessary.

FXM's motions seek dismissal on the grounds that, under §109(h), Debtor is ineligible to be a debtor because he failed to obtain the required prepetition credit briefing certificate. FXM also asserts Debtor failed to fully comply with §521. Riverwood adopts the grounds for dismissal set forth in FXM's motion and asserted as additional grounds for

¹ Riverwood is owned by Debtor's father-in-law. FXM filed a motion to dismiss November 12, 2007; Riverwood filed a motion to dismiss November 18, 2007, and FXM filed an amended and restated motion to dismiss December 3, 2007.

dismissal Riverwood's alleged offer to pay Trustee \$85,000, for the benefit of the estate, to pay administrative expenses and the unsecured creditors, excepting FXM and Riverwood.

As to Debtor's eligibility under §109(h), the docket shows that Debtor filed with the petition a request to waive the prepetition credit briefing requirement because of exigent circumstances that precipitated the filing. Then, on October 18, 2006, Debtor filed a certificate that he had received the required credit briefing September 13, 2006. Imminent foreclosure is generally accepted by the undersigned as the type of exigent circumstance that excuses receiving the credit briefing prepetition, as long as the debtor obtains the credit briefing within the 45 day deadline in §109(h)(3)(B). *See In re Cleaver*, 333 B.R. 430 (Bankr. S.D. Ohio 2005); *In re Giambrone*, 365 B.R. 386 (Bankr. W.D. N.Y. 2006); *In re Hess*, 347 B.R. 489 (Bankr. D. Vt. 2006). Movants have failed to show any prejudice to any party resulting from Debtor's failure to obtain the credit briefing prepetition. The United States Trustee takes the position that in the absence of a timely² motion to dismiss or objection to confirmation by the United States Trustee or a party in interest, the Court is not required to dismiss or deny confirmation based on Debtor's failure to comply with section 109(h). The court agrees. Arguably, as Debtor obtained the required credit briefing within eight days of the petition, any objection under §109(h) is moot.

Additionally, accepting as true the allegation that Debtor failed to comply with §109(h), this court is not required to dismiss this case. Courts have routinely held that ineligibility under 11 U.S.C. § 109 does not deprive the bankruptcy court of jurisdiction

² Neither the Bankruptcy Code nor the Rules provide a deadline for filing a motion to dismiss for failure to comply with §109(h). FXM's motion was filed more than a year after the petition was filed, more than a year after the credit briefing certificate was filed and seven to eight months after Movant received notice of the case.

but is “an affirmative defense” that is waived if not timely raised by a party. *See In re McCloy*, 296 F.3d 370, 375 (5th Cir.2002), citing *In The Matter Of: Phillips*, 844 F.2d 230, 235 n. 2 (5th Cir.1988) and *In re: William J. Frusher*, 124 B.R. 331, 333 (D.Kan. 1991); *In re Ross*, 338 B.R.134 (Bankr. N.D. Ga., Feb. 8, 2006) (J. Bonapfel). *See also In re Montgomery*, 37 F.3d 413, 415 n.5 (8th Cir. 1994) (holding that “11 U.S.C. § 109 is not meant to restrict the jurisdiction of the federal courts”); *In re Luna*, 122 B.R. 575, 576 (9th Cir. BAP1991); *In re Parker*, 351 B.R. 790 (Bankr. N.D. Ga. 2006)(J. Diehl). *But see In re Denson*, 56 B.R. 543 (Bankr. N.D.Ala. 1986); *In re Keziah*, 46 B.R. 551 (Bankr. W.D.N.C. 1985); *In re Racette*, 343 B.R. 200 (Bcy.E.D.Wis. 2006). Bankruptcy courts have discretion to deny dismissal, notwithstanding the debtor’s failure to comply with prepetition credit briefing requirement. *In re Hess*, 347 B.R. 489 (Bankr. D. Vt. 2006); *In re Parker*, 351 B.R. 790 (Bankr. N.D. Ga., Sept. 13, 2006) (J. Diehl, Case # 06-61224); *In re Ross*, 338 B.R.134 (Bankr. N.D. Ga., Feb. 8, 2006) (J. Bonapfel).

Movants’ motions to dismiss under §109(h) are largely, if not entirely, a pretext to wrest control of the estate and its assets away from Trustee so that Debtor³ may pursue litigation against a judgment creditor, BEP Creditor’s Trust. That litigation was investigated by Trustee, who determined that it would drain resources of the estate and ultimately be unsuccessful. Even if Debtor completely failed to comply with §109(h), that failure is a technical violation of a statutory provision that has no measurable or substantive impact upon primary purposes of the Bankruptcy Code: equality of distribution for

³ The judgment held by BEP Creditor’s Trust was entered as a result of Debtor’s failure to timely file an answer. In Debtor’s litigation from which the judgment resulted, Debtor was represented by FXM.

creditors and a fresh start for the debtor. Dismissal at this stage of the case would not foster those purposes.

Movants also assert Debtor failed to file documents required by §521. One of the asserted violations of §521 appears to be that Debtor failed to list all his creditors. Although failure to fully, accurately and honestly disclose financial information may present grounds for dismissal, other remedies exist that can adequately address Debtor's omission of information. For example, any creditor who has not received adequate notice of this case is protected by §523(a)(3). Especially in the instant case, dismissal is not an appropriate remedy for omission of a creditor.

FXM also shows Debtor has failed to file pay advices. The Bankruptcy Code does not require the performance of an impossible act. Debtor has reported that he had no income during the nine months prior to the filing of his bankruptcy petition. Debtor cannot file pay advices that do not exist.

FXM also asserts this case must be dismissed because Debtor has failed to file a Certificate of Completion of Instructional Course Concerning Financial Management (the "Certificate"). The appropriate remedy for the failure to file the Certificate, however, is that no discharge will be entered until it is filed. Dismissal is unnecessary and could be detrimental to creditors, especially in an asset case such as this one, where Trustee has negotiated a carve-out from the proceeds of the sale of fully secured property, so that unsecured creditors will receive a distribution they would not otherwise receive.


Finally, Riverwood's offer is no more acceptable now than it was when it was first made. Riverwood's attempt to "buy off" the court so that Debtor can proceed with his fruitless litigation is an offer the court must reject, as it would constitute an abuse of the

legal system and would not, in the judgment of Trustee and the undersigned, be in the best interest of creditors. Accordingly, it is hereby

ORDERED that Movants' motions to dismiss are *denied*.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtor, the Chapter 7 Trustee, the U. S. Trustee, and all creditors and parties in interest.

IT IS SO ORDERED, this the 4th day of December, 2007.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE