



IT IS ORDERED as set forth below:

Date: November 02, 2007

A handwritten signature in black ink, reading "Paul W. Bonapfel", is written over a horizontal line.

**Paul W. Bonapfel
U.S. Bankruptcy Court Judge**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:	:	
	:	Chapter 13
ISMAEL RIOS,	:	
Debtor.	:	Case No. 07-66047-PWB
	:	

**ORDER ON DEBTOR'S MOTION UNDER § 109(h)(3) AND
TRUSTEE'S OBJECTION TO CONFIRMATION
AND MOTION TO DISMISS CASE**

The Debtor's chapter 13 plan, as amended, meets all the requirements for confirmation under 11 U.S.C. § 1325, but the Trustee has objected to its confirmation, and seeks dismissal of the case, on the sole ground that the Debtor is ineligible to be a debtor in a bankruptcy case because he did not receive the credit briefing required by 11 U.S.C. § 109(h) until three days after the filing of his petition. Because the Trustee did not timely pursue dismissal of the case due to the Debtor's ineligibility, the Court declines to dismiss the case and will confirm the plan.

I. FACTS

The Debtor filed this case on April 16, 2007. The credit counseling agency's certificate with regard to the credit briefing, filed on April 30 [12], shows that the credit briefing occurred three days after the filing, on April 19, 2007, and that a debt repayment plan was not prepared. The Debtor's "Exhibit D – Individual Debtor's Statement of Compliance With Credit Counseling Requirement" [13], also filed on April 30, however, states that he received the briefing before the filing of his bankruptcy case. At the confirmation hearing on September 12, the 2007, Debtor testified that he did not recall when he requested or received the credit briefing. The Court finds as a matter of fact that the Debtor did not request the credit briefing prior to filing the petition and that he received the briefing on April 19. The Court does not attribute the Debtor's erroneous statement in Exhibit D, made under penalty of perjury, to intentional misconduct on the part of the Debtor but, rather, to his reliance on inadequate legal counsel provided by his attorney who had the Debtor sign, and then filed, a false statement.

The § 341(a) meeting of creditors was concluded on May 17, 2007, and the Trustee promptly filed objections to confirmation, including the Debtor's lack of eligibility under § 109(h). [14]. The Trustee's objection also sought dismissal of the case or, alternatively, conversion to chapter 7. A creditor holding a claim secured by a car also objected to confirmation on the ground that the plan improperly treated its claim, but did not object on the ground of ineligibility. [9]. Two other secured creditors filed notices of appearance in the case but did not file objections to confirmation. [10, 11].

The confirmation hearing was originally scheduled for June 20, 2007. On that day, the Debtor filed an amended plan [17], and the confirmation hearing was rescheduled without

objection for July 11. A week later, the Trustee filed a supplemental objection raising questions about the treatment of a secured creditor. [22]. The Debtor filed an additional amendment to the plan on July 6 [23]; the July 11 confirmation hearing was again rescheduled, without objection, to August 15.

On August 15, the Debtor filed a motion seeking an exception under § 109(h)(3) to the requirement of a prepetition credit briefing on the ground of “exigent circumstances.” [25]. The motion identified, as the exigent circumstance requiring the chapter 13 filing prior to the receipt of credit counseling, the imminent foreclosure of the Debtor’s home. Once again, the hearing on confirmation was postponed, without objection, and a hearing on confirmation and the Debtor’s motion was scheduled for September 12.

At the September 12 hearing, the Trustee’s counsel reported that all her objections to confirmation had been resolved except for the Debtor’s ineligibility under § 109(h). Prior to this hearing, the Court had not heard any argument concerning any issue in the Debtor’s case. The car creditor did not pursue its objection, and no other creditor asserted any objections, or appeared at, the hearing.

II. DISCUSSION

The Debtor did not obtain a credit briefing prior to the filing of his case as § 109(h)(1) requires. The only exception available to the Debtor is § 109(h)(3), which permits the filing of a case without the required credit briefing if the Debtor requested a credit briefing prior to the filing of the case; the Debtor could not receive it within five days of the request; and “exigent circumstances” required an immediate filing. The Debtor does not qualify for this exception because he did not request a credit briefing prior to the filing. Moreover, even if he had, the

Debtor has not identified an exigent circumstance requiring an immediate filing. The foreclosure of his residence could not have occurred until May 1, the first Tuesday in May, under Georgia foreclosure law. Thus, filing after the April 19 credit briefing would have been timely enough to stop the foreclosure.

Because the Debtor has not complied with § 109(h), the Debtor's motion for an exception from its operation must be denied.

This determination does not end the inquiry, however. The eligibility requirement of § 109(h) is not jurisdictional. *In re Ross*, 338 B.R. 134 (Bankr. N.D. Ga. 2006). Because the requirement is not jurisdictional, it may be waived. *See In re Parker*, 351 B.R. 790, 797 (Bankr. N.D. Ga. 2006); 2 COLLIER ON BANKRUPTCY ¶109.09[3] at 109-60.

This court in *In re Ross* stated, “[U]pon *timely* determination that an individual ineligible to be a debtor under § 109(h) has filed a petition, the proper remedy is dismissal of the case.” 338 B.R. at 136 (emphasis added). *Ross* does not, however, determine the proper remedy if timely determination of ineligibility is not possible because a party has not timely pursued dismissal on that ground. For the following reasons, the Court concludes that it is not required to dismiss a case or to deny confirmation of a plan that otherwise meets applicable confirmation standards under such circumstances and that, under the circumstances of this case, confirmation of the plan, rather than dismissal of the case, is the proper result.

A debtor's eligibility for bankruptcy relief is the foundation upon which a case rests. It is, therefore, imperative that eligibility be determined early in the case. A debtor, of course, must establish eligibility under § 109(h) at the outset of the case. Interim Bankruptcy Rule 1007(c) requires the filing with the petition of a statement of compliance with the credit briefing

requirement or a certification of exigent circumstances under § 109(h)(3). The rule thus confirms a debtor's responsibility to establish § 109(h) eligibility and requires information in the record from which the trustee and creditors can readily determine if a debtor has shown that eligibility.

If compliance with § 109(h) and Interim Bankruptcy Rule 1007(c) appears to be lacking, the proper administration of a case requires that a party concerned about the issue must assert the debtor's ineligibility and pursue dismissal of the case as soon as practicable. Otherwise, the absence of a determination of eligibility under § 109(h) until the hearing on confirmation (in this case, almost five months after filing) has the unintended consequence of wasting resources of the debtor, the trustee, creditors, their attorneys, and the court. This case illustrates the problem.

The Trustee raised the ineligibility issue in an objection filed in May but declined to pursue dismissal of the case on this ground at three confirmation hearings scheduled in June, July, and August. Moreover, the Trustee did not schedule a separate hearing in accordance with the Court's self-calendaring procedures to promptly invoke an earlier ruling on eligibility.

By the time of the hearing on September 12, almost five months after the case was commenced, the Debtor had satisfied the Trustee's eleven other objections to confirmation, had amended its plan in response to a secured creditor's objection such that the creditor did not pursue the objection, and had made all payments required by the Plan. Two other secured creditors have appeared in the case and a number of other creditors have filed proofs of claim, but no one else objected to confirmation. No creditor seeks dismissal of the case.

The parties have thus expended significant time and effort resolving substantive objections to confirmation, presumably on the theory that, if objections are resolved,

amendments are filed, and plan payments are made, the Debtor's plan will be in a confirmable posture. If a case remains subject to dismissal on the ground of noncompliance with the credit briefing requirement almost five months after its filing, one would think that the parties would not have gone to the trouble of resolving the substantive contested issues in the case.

Five months after the case was filed, no one has identified any substantive reason not to confirm the plan that is now before the Court. If the Court confirms the Plan, payments to creditors will begin.

On the other hand, if the Court dismisses the case, the predictable result will be the filing of another case. The Debtor's ability to present a confirmable plan in this case quite clearly shows that, if this case were dismissed, the Debtor in a re-filed case would be able to show the good faith required to obtain an extension of the automatic stay under § 362(c)(3) and to obtain confirmation of a plan with the same terms as the current one. Payments to creditors would thus begin about two months from now.

Dismissal of this case followed by an inevitable re-filing will have two obviously foreseeable results. First, payments to creditors will be delayed. Second, the Debtor, the Trustee, creditors, and their attorneys will have to repeat all of the work they have done in this case. The Debtor will have to receive another credit briefing to be told, again, that he needs bankruptcy relief, because the second filing will necessarily occur more than 180 days after the April 19 briefing such that it does not now satisfy the requirements of § 109(h)(1) in a later case. The Debtor will have to file another set of papers and another plan, attend another § 341(a) meeting of creditors, and prosecute a §362(c)(3) motion to extend the automatic stay. Creditors will have to process additional papers relating to the dismissal of his case and the filing of the second one,

review the plan in the second case, and file new notices of appearance and new proofs of claim. The Trustee, having received no compensation in this case, will have to administer another one.

Dismissal of this case serves the interest of no one. To the contrary, dismissal will create additional delays, trouble, and expense for everyone. It makes no sense to impose such delays and expenses on the parties five months or more into a case when no one earlier invoked a ruling on ineligibility.

The same adverse consequences occur if dismissal due to ineligibility happens early in a case, but they are minimized in that instance because the parties have not devoted as much time and effort to the case and there is not as much of a delay. The clear requirement of § 109(h)(1) may mandate dismissal when it is promptly sought, notwithstanding the difficulties dismissal and refiling create. And the Court does not suggest that timely pursuit of dismissal based on ineligibility is inappropriate. But once the parties have devoted significant time to the case, and after the Debtor has satisfactorily responded to all other substantive objections to confirmation such that payments to creditors may begin under a confirmable plan, it is too late to insist on dismissal due to ineligibility.

The Trustee did not pursue dismissal based on ineligibility at the first confirmation hearing on June 20, or at the two rescheduled hearings in July and August. By the time the eligibility issue was presented to the Court for ruling on September 12, a timely determination of ineligibility of the Debtor was not possible. Accordingly, the Court concludes that, under the circumstances of this case, the eligibility requirement of § 109(h) has been waived. The Debtor's ineligibility, therefore, does not provide a basis for dismissal of this case or for denial of confirmation of the plan.

The Trustee has identified six other cases in which the attorney in this case filed a chapter 13 petition on behalf of a debtor who had not received the required credit briefing prior to the filing.¹ The Court does not condone such practice. The attorney's filing of a case on behalf of an ineligible debtor clearly subjects a debtor to legal jeopardy because of the prospect that the case should be and will be dismissed if a party promptly pursues dismissal based on ineligibility. In addition to subjecting the attorney to liability to the client for failure to provide competent representation, the practice may subject the attorney to sanctions or discipline.

But issues of the lawyer's professional responsibilities have not been raised and are not before the Court. And the Court declines, in the circumstances of this case, to impose on the Debtor and creditors (and the Trustee, for that matter) the consequences of any error or misconduct by his lawyer with regard to eligibility. The Court is satisfied, based on the Debtor's testimony and demeanor at the confirmation hearing and the record in this case, that the Debtor has fully relied on his lawyer with regard to his eligibility.

Moreover, a review of the six cases identified by the Trustee reveals that confirmation occurred in five of them,² the other one was dismissed without the express statement of any specific reasons after objections on numerous other grounds were asserted.³ Thus, although the cases reflect a troubling disregard on the part of counsel of the requirements of § 109(h), they also show that ineligibility need not result in denial of confirmation if the issue is not timely

¹Case Nos. 06-61271-JB; 06-61277-JB; 06-75243-MGD; 06-75645-CRM; 07-65232-JEM; 07-66592-CRM.

²Case Nos. 06-61271-JB; 06-61277-JB; 06-75243-MGD; 07-65232-JEM; 07-66592-CRM. Indeed, the Debtor received a discharge in 06-61277-JB.

³Case No. 06-75645-CRM.

pursued. The Court sees no reason to adopt a different rule in this case.

III. ORDER

Based on the foregoing, it is hereby **ORDERED and ADJUDGED** as follows:

1. The Debtor's Motion for an exception under § 109(h)(3) [25] is **DENIED**;
2. The objections to confirmation filed by Nuvel Credit Company [9] and by the Trustee [14, 22], other than the Trustee's objection based on the Debtor's ineligibility under § 109(h), have been satisfied and, to the extent not withdrawn, are **OVERRULED**;
3. The Trustee's objection to confirmation based on the Debtor's ineligibility under § 109(h) is **OVERRULED** and the Trustee's alternative motion to dismiss this case or convert it to chapter 7 is **DENIED**; and
4. The Debtor's plan, as modified, shall be **CONFIRMED**. A separate order confirming the plan in the Court's usual form will be entered.

The Clerk is directed to mail copies of this Order to all parties in this case.

END OF ORDER