

IT IS ORDERED as set forth below:



Date: December 11, 2012

James R. Sacca
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	}	CASE No.: 12-77990-JRS
DARLENE JACKSON,	}	
	}	Chapter 13
Debtor.	}	

ORDER

Debtor Darlene Jackson's home was scheduled for foreclosure on Tuesday, November 6, 2012 at 10:00 a.m. ("Foreclosure Tuesday"). According to her testimony, she hired a third party to negotiate a loan modification and believed—as do so many debtors—that the modification was going to happen. She was surprised to be notified by that third party on the Thursday before Foreclosure Tuesday that her house was being advertised for foreclosure.¹ The third party recommended that she contact Clark & Washington, P.C. ("C&W") to discuss filing bankruptcy. She did not go to see counsel the next day because she had multiple appointments with doctors. The following Monday, the day before Foreclosure Tuesday, she traveled to C&W's satellite

¹ She claims that she did not receive notice of the foreclosure from the lender.

office in Marietta, Georgia—nearest to where she lived and worked—only to find that this particular office is closed on Mondays.

The next morning—on Foreclosure Tuesday—Jackson traveled to C&W’s main office and arrived there before the office opened at 7:00 a.m. At this point, she had three hours left before her mortgage lender was scheduled to foreclose on her home. C&W personnel began preparing her bankruptcy petition and other papers and directed her to a computer so she could complete her pre-petition credit counseling online. Unfortunately, internet service was temporarily unavailable for about forty-five minutes, so her attempt to complete the credit counseling was delayed. In the meantime, C&W personnel filed her bankruptcy petition, which was time-stamped 8:52 a.m. Shortly thereafter, after internet service was restored and C&W personnel were able to get her started, she was able to commence her online credit counseling. According to her certificate of credit counseling, she completed the course at 10:45 a.m. on the day of the foreclosure, but shortly after she filed for bankruptcy.

A few minutes after filing Jackson’s petition, a “Certificate of Exigent Circumstances,” (the “Certification”) was filed which explained that Jackson was unable to complete her credit counseling before it was necessary to file her petition and prevent foreclosure on her home and which requested waiver of the requirement that credit counseling be obtained before filing her petition. As filed, the Certification was styled a “Motion for Exemption from Credit Counseling.” [Doc. 3]. This motion is now before the Court, which held a hearing on this matter and took it under advisement.

The Credit Counseling Requirement

Section 109(h)(1)² of the Bankruptcy Code provides that—with a few exceptions—an individual “may not be a debtor” in a bankruptcy case unless the individual “has . . . received” credit counseling from an approved nonprofit budget and credit counseling agency. 11 U.S.C. § 109(h)(1). To qualify as a debtor in bankruptcy, the individual must have received this credit counseling “during the 180-day period *ending on* the date of filing of the petition.” *Id.* (emphasis added). The Bankruptcy Technical Corrections Act of 2010³ inserted the words “ending on” in place of the word “preceding” to make clear that a debtor may receive credit counseling on the same day the petition is filed. 2 COLLIER ON BANKRUPTCY ¶ 109.LH[8] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Prior to this technical correction in the statutory language, courts were split over whether the deadline for an individual to receive credit counseling was the day *before* or the *moment of* filing for bankruptcy. *In re Lane*, 12-10718-M, 2012 WL 1865448 at *3 (Bankr. N.D. Okla. May 22, 2012). By replacing the word “preceding” with the words “ending on,” the statutory drafters clearly rejected the line of authority suggesting that the credit counseling deadline is the day before filing.

This new language may have resolved the former split, but it is not unambiguous. As the authors of *Collier on Bankruptcy* have pointed out, this new language could be interpreted to mean that a debtor could actually receive credit counseling *after* filing a petition and still satisfy § 109(h)(1), as long as both happen the same day. 2 COLLIER ON BANKRUPTCY ¶ 109.09[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). But this treatise does not cite any cases in support of this interpretation, and several courts have rejected it. *See, e.g., In re Lane*, 2012 WL 1865448 at *4; *In re Koo*, No. 12-00121, 2012 WL 692578, at *1 (Bankr. D.D.C. March 2,

² Unless otherwise specified, all code references are to the United States Bankruptcy Code, 11 U.S.C. ¶¶ 101 *et seq.*

³ Pub. L. No. 111-327 (2010).

2012). These cases espouse what in this Court’s view is the better interpretation: that to qualify as a debtor in bankruptcy, an individual may receive credit counseling the same day as filing a petition, but the credit counseling still must be completed *before* filing. It seems clear from other language in § 109(h)(1) that the credit counseling must occur pre-petition and is a precondition for an individual to qualify as a debtor eligible for bankruptcy protection. Specifically, this subsection provides that “an individual may not be a debtor” unless he “has . . . received” credit counseling. 11 U.S.C. § 109(h)(1). This language indicates that the individual must have already received credit counseling at the time of filing in order to qualify as an eligible debtor. Therefore, Jackson—having not yet completed credit counseling at the time of filing—is not eligible to be a debtor unless an exception to the credit counseling requirement applies.

Exigent Circumstances Exception to Credit Counseling Requirement

Section 109(h)(3)(A) provides an exception to the pre-petition credit counseling requirement. The requirement does not apply if the debtor submits to the court a certification that (1) “describes exigent circumstances that merit a waiver” of the requirement, (2) “states that the debtor requested credit counseling services . . . but was unable to obtain” them, and (3) “is satisfactory to the court.” 11 U.S.C. § 109(h)(3)(A). For analytical purposes, the Court discusses these elements in reverse order.

The third element—that the certification be satisfactory to the court—appears to be a statutory grant of discretion to the bankruptcy court. At least one appellate court has held that “the fairest reading of the statute is that Congress wanted the court to exercise its discretion in making the determinations under” the first two requirements and that it would review a bankruptcy court’s determinations under an “abuse of discretion” standard. *Dixon v. LaBarge (In re Dixon)*, 338 B.R. 383, 387 (B.A.P. 8th Cir. 2006). It appears that Congress anticipated and

provided for judicial discretion in recognition of the fact that this exception rests entirely on the facts of each individual case and that judges should have discretion to do justice when warranted.

The second element—that the debtor requested credit counseling services but could not obtain them—seems objective and straightforward. Here, Jackson’s Certification states that she “requested pre-filing credit counseling services but, because of the 45-minute length of time that is required to complete the briefing, [she] was unable to complete the counseling before it was necessary to file [her] voluntary petition to prevent the foreclosure of [her] real estate.” (Certification ¶ 3). Jackson’s testimony before the Court is consistent with this statement. She testified that she attempted to complete the credit counseling before her petition was filed, but she was unable to do so because internet service at the law firm was temporarily unavailable. Based on the Certification and her testimony, the Court is satisfied that the second requirement has been met.

The first element is the crux of the exception. Courts have pointed out that this element has “two substantive components: first there must be exigent circumstances, and second, those circumstances must merit a waiver of the briefing requirements.”⁴ *In re Dixon*, 338 B.R. at 388 (citations omitted). Although many courts blend these components together, this Court recognizes the logic in analyzing them separately.

The Bankruptcy Code does not define the term “exigent circumstances.” *Black’s Law Dictionary* defines the phrase as a “situation that demands unusual or immediate action and that may allow people to circumvent usual procedures.” BLACK’S LAW DICTIONARY 276 (9th ed. 2009) (emphasis added). Courts appear to be split over whether an imminent home foreclosure constitutes exigent circumstances. Some courts, including some in this district, say it can—

⁴ Although the statutory language refers to a “waiver” of the credit counseling requirement, more accurate language would refer to a “deferral” of the requirement, considering that the debtor still must participate in credit counseling at some point. *In re Dixon*, 338 B.R. at 388 n.4.

provided debtor attempted to obtain the counseling pre-petition. *See, e.g., In re Shannon*, 12-78081-MGD (Bankr. N.D. Ga. Nov. 8, 2012); *In re Dye*, 06-71024-MHM, 2007 WL 5324553 (Bankr. N.D. Ga. Dec. 5, 2007) (denying request to dismiss chapter 7 case filed more than one year after petition date because delay amounted to waiver); *In re Giambrone*, 365 B.R. 386 (Bankr. W.D.N.Y. 2007); *In re Childs*, 335 B.R. 623 (Bankr. D. Md. 2005); *In re Cleaver*, 333 B.R. 430 (Bankr. S.D. Ohio 2005); *In re Hubbard*, 333 B.R. 377 (Bankr. S.D. Tex. 2005). Other courts have concluded that foreclosure does not constitute exigent circumstances because homeowners typically receive sufficient notice of foreclosure. *See, e.g., In re Dixon*, 338 B.R. 383, 388 (B.A.P. 8th Cir. 2006) (affirming bankruptcy court's determination that exigent circumstances did not merit a waiver where state law required 20 days notice of foreclosure); *In re Afolabi*, 343 B.R. 195 (Bankr. S.D. Ind. 2006) (holding that no exigent circumstances existed because imminent foreclosure did not prevent the debtor from obtaining credit counseling before filing because state law provides for 21 days notice of foreclosure).

In most cases, a homeowner has at least several weeks' notice prior to foreclosure. If these homeowners act with reasonable diligence, they should in most cases have little trouble completing the credit counseling requirement prior to filing bankruptcy. If the facts of this case were such that this Debtor sought a waiver solely because her house was being foreclosed and she made no attempt to obtain counseling pre-petition, this Court could not grant such a waiver. The granting of a waiver in such a circumstance would violate § 109(h)(3)(A) and enable every debtor who files bankruptcy on the eve of foreclosure to circumvent the pre-petition credit counseling requirement, a result that Congress did not intend.

Instead, a case-by-case approach seems more appropriate, with the focus being on the particular circumstances that prevented the homeowner from participating in credit counseling

before filing. This is where the second component of the analysis comes into play. Even if one were to accept that an imminent foreclosure amounts to exigent circumstances, those circumstances still must merit a waiver of the briefing requirements. In the opinion of this Court, a waiver is merited only in those situations where the debtor made a credible, good-faith effort to obtain pre-petition credit counseling.

Here, several factors prevented Jackson from participating in credit counseling before she needed to file her petition and prevent foreclosure on her home. She testified that she had hired a company to negotiate a loan modification and that she did not receive notice that foreclosure would proceed on her home until just a few days before Foreclosure Tuesday. She attempted to meet with bankruptcy counsel on the day prior to the foreclosure, but unbeknownst to her, the firm's satellite office where she went was not open that day. When Jackson was ready and willing to participate in the pre-petition credit counseling at her counsel's office first thing on the morning of the scheduled foreclosure, an interruption in internet service prevented her from doing so. Then she completed the credit counseling less than two hours after her petition was filed. This Court found Jackson's testimony to be credible and her account plausible. After considering all the facts and circumstances here, this Court finds that Jackson made a good-faith effort to obtain pre-petition credit counseling, but factors outside her control prevented her from doing so. Accordingly, a waiver of the pre-petition credit counseling requirement is warranted.

Conclusion

For these reasons, Jackson's Motion for Exemption from Credit Counseling is GRANTED.

[END OF ORDER]