

~~OCT 31 2005~~

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:) CASE NO. 05-85018
)
TRACEY MONTEIRO,) CHAPTER 7
)
Debtor.)

ORDER

On October 19, 2005, Tracey Simone Monteiro (hereinafter "Debtor") filed a Chapter 7 case *pro se*. In her voluntary petition, under the section labeled "Certification Concerning Debt Counseling by Individual/Joint Debtor(s)", Debtor checked the box that states as follows: "I/we request a waiver of the requirement to obtain budget and credit counseling prior to filing based on exigent circumstances." She also filed a document which she titled "Request For Waiver For Credit Counseling." The request reads as follows:

Petitioner is requesting a waiver of the requirement under §109(h) for the reason that her case is too complicated for someone who is not an attorney or a very sophisticated financial professional. For the most part, the petitioner in the past has sought the advice of credit counselors and their recommendations reflected a lack of understanding of the petitioner's particular situation. This is a very complicated case and the petitioner needs someone who has a solid understanding of §523 and §707. Once the case is filed the petitioner will attending [sic] a financial management instructional course.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) imposes many new requirements on individual debtors.¹ Some of these requirements must be fulfilled to avoid dismissal of the bankruptcy case, some are requirements for obtaining a discharge, and some are eligibility requirements for filing for bankruptcy relief.

The new requirement at issue in this case is the credit counseling briefing under 11 U.S.C. §109(h)(1). It applies to individual debtors in cases filed on or after October 17, 2005, and requires that an individual debtor receive some basic information from an approved nonprofit credit counseling agency outlining the opportunities for available credit counseling and assisting the individual with a “budget related analysis” before seeking relief under the bankruptcy laws. If the debtor has not received such a briefing within 180 days before filing bankruptcy, the debtor is not eligible to file a bankruptcy case unless the debtor seeks and qualifies for an exemption under §109(h)(4) or submits a certification under §109(h)(3) which is satisfactory to the Court. Sections 109(h)(3) and (4) provide as follows²:

¹ See S. 256, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005). President Bush signed this legislation into law on April 20, 2005, and the effective date for most provisions was October 17, 2005.

² Section 109(h)(2) provides another exception not relevant in the Northern District of Georgia at this time. Under this subsection, the United States Trustee may determine “that the approved nonprofit budget and credit counseling agencies for such district are not reasonably able to provide adequate services...” In this district, the United States Trustee has identified and approved a number of agencies and has not made any determination under §109(h)(2)(A) that these agencies are unable to provide adequate

(3)(A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that--

(i) describes exigent circumstances that merit a waiver of the requirements of paragraph(1);

(ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and

(iii) is satisfactory to the court.

(B) With respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements of paragraph (1), but in no case may the exemption apply to that debtor after the date that is 30 days after the debtor files a petition, except that the court, for cause, may order an additional 15 days.

(4) The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and "disability" means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).

Again, under §109(h)(1), an individual must have received the credit briefing within the 180-day period before filing bankruptcy or come within one of the statutory exceptions. The consequence of failing to meet the requirement or to fit within one of the exceptions is that the filer is ineligible to be a debtor under §109. The provisions of §109(h)(3) allow the debtor to receive the credit briefing after filing a bankruptcy case, but only if the debtor submits a certification that (1) describes exigent circumstances for filing

services.

the case before obtaining the briefing and (2) states that debtor had requested such counseling services but was unable to obtain them during the five-day period from when the request was made. If debtor's certification under § 109(h)(3) is satisfactory to the court, then the debtor still must receive the credit briefing described in § 109(h)(1) within 30 days of filing the petition, but the court may give the debtor an additional 15 days for cause. Section 109(h)(4) allows the court to, in effect, waive the requirement of a credit briefing altogether if the court determines after notice and hearing that the debtor is incapacitated, disabled, or on active military duty in a military combat zone.

From the papers filed in this case, it is difficult to see how Debtor qualifies for an exception. The request for a waiver submitted by Ms. Monteiro cannot be construed as a request under § 109(h)(4), as she does not certify that she is incapacitated, disabled, or in active military duty in a military combat zone. Similarly, Debtor's request for a waiver of the credit counseling requirement does not allege on its face any of the grounds for the statutory exception under § 109(h)(3). Debtor has not described any exigent circumstances that would indicate the necessity for filing the bankruptcy case before obtaining the required credit briefing. The word "exigent" is used to denote a state of pressing need "requiring immediate action or aid." *See Oxford English Dictionary*, (2nd ed. 1989). Blacks Law Dictionary defines "exigent circumstances" as "a situation that demands unusual or immediate action and that may allow people to circumvent usual procedures, as when a neighbor breaks through a window of a burning house to save someone inside."

Blacks Law Dictionary, 260 (8th ed. 2004). Nor does Debtor's request contain any statement that she requested the credit briefing but was unable to obtain it during the five-day period from when the request was made.

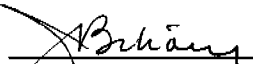
Debtor states that her case is too complicated for someone who is not an attorney and that she has not had success with credit counselors in the past. But Congress has not created any exception for individuals with complicated cases, nor has Congress given courts the authority to waive the credit briefing requirement if the individual believes the briefing would be of no utility. Rather, Congress has determined that individuals in financial distress must receive the credit briefing described in §109(h)(1) prior to filing, with only limited exceptions.

If Debtor believes that the facts and circumstances of her case would justify an exception under §109(h)(3), then Debtor should (1) file a supplement to her request with a statement of the specific grounds under §109(h)(3), and (2) obtain a credit briefing within 30 days of having filed this petition, which would be on or before November 21, 2005.³ If Debtor files the supplement and proof of having obtained the credit briefing, then the Court will have a hearing to determine whether Debtor qualifies for the §109(h)(3) exception on **November 22, 2005, at 9:30 A.M.**, in Courtroom 1402, Richard Russell Federal Building, 75 Spring Street, Atlanta, Georgia. If Debtor fails to file either proof of having completed the credit briefing by November 21, 2005, or the supplement

³ The Clerk of Court has a list of approved credit counseling agencies in this District, a copy of which is attached for the debtor's reference.

with respect to §109 (h)(3), then Debtor will be deemed ineligible for filing, and the Court will have no choice but to dismiss this case.

IT IS SO ORDERED, this 28th day of October, 2005.

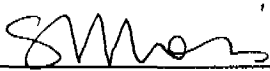


JOYCE BIHARY
UNITED STATES BANKRUPTCY JUDGE

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Relief Courtroom Deputy to Judge Bihary

Served on this 28th day of October, 2005