



SO ORDERED,

A handwritten signature in blue ink that reads "Neil P. Olack".

**Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: July 19, 2016**

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

DONNA D. BURTON,

CASE NO. 16-02009-NPO

DEBTOR.

CHAPTER 13

**ORDER DENYING REQUEST FOR 30-DAY
TEMPORARY WAIVER OF CREDIT COUNSELING
REQUIREMENT AND DISMISSING BANKRUPTCY CASE**

This matter came before the Court for hearing on July 11, 2016 (the "Hearing"), on the request for a 30-day temporary waiver of the requirement to file a certificate of completion of credit counseling (the "Waiver Request") (Dkt. 1 at 8) contained in the voluntary petition for relief (the "Petition") (Dkt. 1) filed by the debtor, Donna D. Burton (the "Debtor"), in the above-styled chapter 13 bankruptcy case (the "Bankruptcy Case"). At the Hearing, Edmund J. Phillips, Jr. ("Phillips") represented the Debtor and Samuel J. Duncan appeared on behalf of J.C. Bell, the standing chapter 13 panel trustee. The Debtor failed to appear at the Hearing. After fully considering the matter, the Court finds as follows:

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

Facts

1. The Debtor filed the Petition at 4:31 p.m. on June 21, 2016 (Dkt. 1).¹
2. The Waiver Request was attached to the Petition. In the Waiver Request, the Debtor certified that she “asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.” (Waiver Request at 1). The Debtor filed an amended voluntary petition for relief (Dkt. 5) in which she further explained that “[a]n emergency filing was necessary at the time because [her] automobile was under threat of repossession.” (Dkt. 5 at 8).
3. The Debtor then filed the Certificate of Credit Counseling (the “Certificate”) (Dkt. 6) on June 21, 2016. The Certificate indicates that the Debtor obtained credit counseling at 5:41 p.m., which is approximately one (1) hour after filing her Petition.
4. At the Hearing, Phillips stated that the Debtor was not present at the Hearing to testify about her exigent circumstances. According to Phillips, a “repo agent and a policeman” had attempted to repossess the Debtor’s car, so she decided to file for bankruptcy to stop the repossession. She subsequently consulted Phillips, who filed the Petition on her behalf. Apparently, the Debtor claims she was unable to complete credit counseling prior to the filing of the Petition, but was able to complete it later that same day. At the Hearing, Phillips

¹ The Debtor subsequently filed an amended voluntary petition for relief (Dkt. 5) on the same date.

acknowledged that the creditor notified the Debtor that she was in default and that failure to pay could result in her vehicle being repossessed.

Discussion

The issue raised in the Bankruptcy Case is whether a debtor may complete credit counseling on the date of the petition but after the moment the petition is filed. The Court will first determine whether the Debtor was required to complete credit counseling prior to filing the Petition. If so, the Court will then determine whether the Debtor satisfied the exigent circumstances exception to the pre-petition credit counseling requirement.

I. Timeliness

An individual filing for bankruptcy is required to obtain credit counseling from an approved non-profit budget and credit counseling agency “during the 180-day period ending on the date of filing of the petition” 11 U.S.C. § 109(h)(1).² “[A] 2010 technical amendment has clarified that the credit counseling may occur on the same day as the bankruptcy petition is filed.” 2 COLLIER ON BANKRUPTCY ¶ 109.09[1] (16th ed. 2016). The question before the Court is whether a debtor is required to obtain credit counseling *before* filing the petition or whether a debtor may receive credit counseling at any time before midnight on the date of the filing of the petition.

“The date of filing of the petition” has been interpreted by a majority of courts that have addressed this issue “as referring to the moment of filing of the petition, not the entire calendar day on which the petition was filed.” *In re Koo*, No. 12-00121, 2012 WL 692578, at *1 (Bankr. D.C. Mar. 2, 2012) (citing *In re Francisco*, 390 B.R. 700, 703-704 (B.A.P. 10th Cir. 2008)). The bankruptcy court in *In re Koo* considered the rationale behind the credit counseling

² Hereinafter, all code sections refer to the Bankruptcy Code found at title 11 of the U.S. Code unless otherwise provided.

requirement in determining that a debtor must complete credit counseling before filing a bankruptcy petition. *Id.* “[W]hen the statute was originally enacted, the House Report indicated an intention ‘to require an individual—as a **condition of eligibility for bankruptcy relief**—to receive credit counseling within the 180 day period **preceding** the filing of a bankruptcy case by such individual.’” *Id.*, at *2 (citing H.R. REP. NO. 109-31, at 54 (2005)). The bankruptcy court also noted that § 109(h)(1) uses the past tense, “which contemplates credit counseling obtained *before* the moment at which eligibility generally is tested, the moment of filing of the petition.” *Id.* The bankruptcy court therefore held that § 109(h)(1) imposes a pre-filing requirement that debtors obtain credit counseling. *Id.* Accordingly, a debtor may obtain credit counseling up until the moment he or she files a bankruptcy petition, but not after that moment. *Id.*

The district court in *In re Arkuszewski* also held that even though debtors are permitted to obtain credit counseling the day of filing, they must complete credit counseling before actually filing a petition. 550 B.R. 374 (N.D. Ill. 2015). Like the bankruptcy court in *In re Koo*, the district court found persuasive the fact that the time limitation is contained in § 109, which governs “Who May Be A Debtor.” *Id.* at 377. “Section 109(h)(1) specifically discusses eligibility, stating ‘an individual may not be a debtor under this title unless such individual has, during the 180-day period ending on the date of filing of the petition, received credit counseling.’” *Id.* According to the district court, the language used in § 109 “reminds us that this is an eligibility provision, just like other eligibility requirements in § 109 of the Bankruptcy Code, defining who is eligible for bankruptcy relief.” *Id.* (citing *In re Moore*, 359 B.R. 665, 671 (Bankr. E.D. Tenn. 2006)).

In *In re Arkuszewski*, the district court also noted that determining eligibility at the moment of filing avoids a “gap period” issue “of when exactly on the day the requirement must

be met.” *Id.* at 380. Based on this rationale, the district court found that “[p]egging the credit counseling requirement to the moment of filing certainly gives clarity to petitions ‘and avoids creating a post-petition gap or window period on the day the petition is filed when debtors might scramble to receive the required credit counseling.’” *Id.* (quoting *In re Lane*, No. 12-10718-M, 2012 WL 1865448, at *4 (Bankr. N.D. Okla. May 22, 2012)). Finally, like the bankruptcy court in *In re Koo*, the district court reasoned that Congress intended to require credit counseling to “assist the individual in making an ‘informed choice’ about filing for bankruptcy, in the hopes that some cases would be resolved outside the court system.” *Id.* (citing H.R. REP. NO. 109-31, at 2) (“[T]he Bankruptcy Abuse Prevention and Consumer Protection Act of 2005] 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”). Based on the foregoing rationale, the district court found that a debtor has until the time he or she files a petition to obtain credit counseling, or he or she will not be an eligible debtor under § 109(h)(1). *Id.* at 383.

In consideration of the purpose behind the credit counseling requirement, the Court agrees with the majority of courts and finds that credit counseling must be completed prior to the filing of a petition. Credit counseling is a prerequisite to filing for bankruptcy, and, in order for a person to be eligible as a debtor under the Bankruptcy Code, credit counseling must be obtained prior to the time of filing. In the Bankruptcy Case, the Debtor completed credit counseling a little over one (1) hour after filing the Petition. Although debtors are permitted to complete credit counseling the day of filing, they must do so prior to the moment of filing. Accordingly, the Debtor did not obtain credit counseling in a timely manner and, therefore, she fails to meet

the eligibility requirements of § 109. Unless an exception applies, the Debtor's failure to obtain credit counseling prior to filing the Petition will result in the dismissal of the Bankruptcy Case.

II. Exigent Circumstances

Section 109(h)(3)(A) provides a limited exception to the pre-petition counseling requirement “for a debtor who must file a bankruptcy case very quickly to forestall imminent harm.” 2 COLLIER ON BANKRUPTCY ¶ 109.09[3]. If a debtor wishes to seek an exception pursuant to § 109(h)(3), known as the exigent circumstances exception, he or she “must submit to the court a certification that describes the exigent circumstances that merit a waiver of the requirement” *Id.* A debtor seeking an exigent circumstances exception must also certify that they requested credit counseling services from an approved agency but were unable to obtain those services during the seven (7)-day period beginning on the date the debtor made the request. *Id.* “[I]f services are available over the Internet and by telephone, there will rarely be a situation in which a debtor cannot obtain the necessary briefing within hours of seeking it” *Id.* Although § 109(h)(3) does not define exigent circumstances, “[c]ertainly, any serious and imminent harm, such as foreclosure, repossession or wage garnishment, should qualify.” *Id.* The mere fact that a debtor had knowledge that the harm could occur does not preclude a finding that § 109(h)(3) should apply because “[m]any debtors attempt to avoid bankruptcy and do not realize that it will be necessary until the impending harm is imminent.” *Id.*

The Debtor claimed in the Waiver Request that she asked for credit counseling but was unable to obtain it during the seven (7) days after she made the request. (Waiver Request at 1). The Debtor further argued that “exigent circumstances merit a 30-day temporary waiver of the requirement.” (*Id.*). According to the Debtor, she had to file the Petition because her car was under threat of repossession. (*Id.*). The Debtor did not attend the Hearing, and, therefore, could

not offer any additional evidence of the exigent circumstances that allegedly warrant a temporary waiver of the credit counseling requirement. Phillips attempted to explain at the Hearing that he filed the Petition for the Debtor because a police officer had come to her home and would not cease repossession unless the Debtor filed a bankruptcy petition. According to Phillips, the Debtor attempted to complete credit counseling prior to filing the Petition, but was unable to do so. She was, however, able to complete credit counseling the same day, according to Phillips.

Although an individual should not be penalized for attempting to avoid filing for bankruptcy and, therefore, for failing to file a petition until impending harm is imminent, the Debtor did not appear at the Hearing to provide testimony as to why she was unable to obtain credit counseling online or via the telephone prior to filing the Petition. Further, Phillips acknowledged at the Hearing that the Debtor knew she was in default and was on notice that her vehicle could be repossessed if she failed to pay. Based on the limited evidence before it,³ the Court is unable to find that the Debtor has satisfied the requirements of § 109(h)(3) so that she may be exempt from the pre-petition credit counseling requirement. Therefore, the Waiver Request should be denied.

III. Dismissal

As the district court found in *In re Arkuszewski*, because eligibility is determined at the time the petition is filed, a petition may be dismissed if the eligibility requirements are not met. 550 B.R. at 377. Similarly, the bankruptcy court in *In re Castro* found that dismissal of a bankruptcy case “is a permissible remedy for the failure of a debtor to take pre-petition credit counseling as required by section 109(h).” *In re Castro*, No. 15-34107-H3-13, 2016 WL 520305, at *4 (Bankr. S.D. Tex. Feb. 9, 2016). The district court in *In re Wyttenbach* also

³ Phillips’ statements at the Hearing do not constitute evidence and are not a sufficient substitute for the testimony of the absent Debtor.

reasoned that because the requirements provided by § 109(h) determine whether a person is eligible to be a debtor under the Bankruptcy Code, failure to meet those requirements, including obtaining pre-petition credit counseling, may result in a dismissal. *Wytttenbach v. C.I.R. (In re Wytttenbach)*, 382 B.R. 726, 728-30 (S.D. Tex. 2008). The Court finds that the appropriate course of action when a debtor fails to satisfy § 109(h) may be to dismiss the bankruptcy case. As a result, the Bankruptcy Case should be dismissed.

Conclusion

The Court finds that debtors are required to obtain pre-petition credit counseling before a bankruptcy petition is filed. Because the Debtor completed credit counseling a little over one (1) hour *after* filing the Petition, she does not satisfy this requirement. Additionally, because the Debtor did not testify at the Hearing regarding her alleged exigent circumstances and attempt to obtain credit counseling, the Court is unable to determine that the exigent circumstances exception is satisfied, and, as a result, the Waiver Request should be denied. Accordingly, the Debtor fails to qualify as a debtor under § 109 because she does not satisfy the credit counseling requirement of § 109(h). The Court, therefore, finds that the Bankruptcy Case should be dismissed.

IT IS, THEREFORE, ORDERED that the Waiver Request is hereby denied.

IT IS FURTHER ORDERED that the Bankruptcy Case is hereby dismissed.

##END OF ORDER##