

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

EOD
05/27/2008

IN RE: §
§
KENNETH MARSTON GOOD, § Case No. 08-40955
§ (Chapter 11)
Debtor. §

AMENDED ORDER DENYING MOTION TO DISMISS

On April 28, 2008, Hilliard Crews and Crews Yukatan Properties, L.L.C. (collectively, “Crews”) filed a motion to dismiss this case on the grounds that Kenneth Marston Good (the “Debtor”) is ineligible for bankruptcy relief pursuant to 11 U.S.C. §109(h)(1) and, therefore, cause exists to dismiss his bankruptcy petition pursuant to 11 U.S.C. §707(a). The Court heard Crews’ motion and the Debtor’s opposition on May 13, 2008 and, at the conclusion of the hearing, denied Crews’ motion for the reasons stated on the record. The Court entered a brief Order Denying Motion to Dismiss on May 15, 2008. The Court hereby amends its Order Denying Motion to Dismiss in order to provide the parties with a more complete, written explanation of the Court’s decision.

RELEVANT BACKGROUND

The Debtor in this case is an individual. The Debtor is a real estate developer with interests in properties in Collin and Denton County, Texas and Tulum, Mexico. The Debtor’s assets and liabilities are in the hundreds of millions of dollars.

The Debtor filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) at 3:26 p.m. on April 15, 2008. At 10:54 a.m. on the morning of his bankruptcy petition, the Debtor completed a credit counseling course with Consumer Credit Counseling Service of North Texas, an approved credit

counseling agency, via the internet. The Debtor received an electronic message from the agency prior to filing for bankruptcy which stated in large, bold font: “You have now successfully completed the Bankruptcy Counseling Course.” The message further stated (in much smaller, plain font): “A certified counselor will be contacting you within 72 hrs. regarding your information and to answer any questions. In the meantime if you have any questions don’t hesitate to call us” The Debtor attached a copy of this electronic message to his bankruptcy petition as proof that he had received credit counseling prior to filing his bankruptcy petition.

The next day, April 16, 2008, the Debtor called the agency. A representative of the agency asked if the Debtor had any questions, which he did not, and verified the Debtor’s identity. The agency then issued a Certificate of Counseling dated April 16, 2008. Although the Debtor had received all of the required information on April 15, 2008 via the internet, the certificate stated in pertinent part that “on April 16, 2008, at 2:10 o’clock PM CTD, Kenneth M Good received ... an individual [or group] briefing that complied with the provisions of 11 U.S.C. §§ 109(h)....”

At the request of the Debtor’s counsel, the agency subsequently issued an Amended Certificate of Counseling dated April 28, 2008. The Amended Certificate of Counseling corrected the agency’s prior statement of the date on which the Debtor received his credit counseling. In particular, the Amended Certificate of Counseling stated in pertinent part that “on April 15, 2008, at 10:54 o’clock AM CTD, Kenneth M Good received ... an individual [or group] briefing that complied with the provisions of 11 U.S.C. §§ 109(h)” The Debtor filed the Amended Certificate of Counseling on May 7, 2008.

ANALYSIS

Congress has made credit counseling a requirement for an individual to be eligible for bankruptcy relief. *See In re Salazar*, 339 B.R. 622, 630 (Bankr. S.D. Tex. 2006) (discussing legislative history of 11 U.S.C. §109(h)). In pertinent part, §109(h)(1) of the Bankruptcy Code states that in order for an individual to be a debtor, (i) the individual must receive a “briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis” and (ii) the individual must receive this briefing “during the 180-day period preceding the date of filing of the petition.” The issue before the Court is whether the Debtor has complied with §109(h)(1).

First, with respect to the date upon which the Debtor received credit counseling, Crews argued at the hearing on the motion to dismiss that the Court should find the date on the original Certificate of Counseling to be the date on which the required briefing was completed by the Debtor. Since the original Certificate of Counseling stated that the Debtor had received credit counseling on April 16, 2008 – the day after the Debtor filed his bankruptcy petition – Crews argued that the Court should conclude that the Debtor is ineligible for bankruptcy relief. *See, e.g., In re Elmendorf*, 345 B.R. 486, 500 (Bankr. S.D. N.Y. 2006) (holding that ineligibility for bankruptcy relief under §109(h) is incurable); *In re Wallert*, 332 B.R. 884, 891 (Bankr. D. Minn. 2005) (same). The Court disagrees. While a credit counseling agency may very well have internal rules for the conditions precedent to the issuance of a certificate, those internal rules and procedures do not control this Court’s interpretation of §109(h)(1) or the determination of whether a debtor is eligible for bankruptcy relief.

Section 109(h)(1) speaks in terms of a debtor's receipt of certain information. In this case, all such information was received by the Debtor via the internet on the morning of April 15, 2008 – before the Debtor's bankruptcy petition was filed. Notably, both certificates issued by the credit counseling agency state that the “counseling session was conducted by internet,” and it is undisputed that the internet session was concluded by 10:54 a.m. on April 15, 2008. The credit counseling agency apparently required the Debtor to call in so that the agency could verify his identity and so that the Debtor could ask any questions before it would issue a certificate. The Debtor, however, did not receive any additional information during this call. Inasmuch as the Debtor received all information prior to 10:54 a.m. on April 15, 2008, this Court finds and holds that the Debtor received a briefing that complied with §109(h)(1) of the Bankruptcy Code prior to 10:54 a.m. on April 15, 2008.

Notably, Interim Federal Rule of Bankruptcy Procedure §1007(b)(3)(B)¹ recognizes that a debtor who has received credit counseling may not yet have received a certificate from the counseling agency. In lieu of a certificate of counseling, Interim Federal Rule of Bankruptcy Procedure §1007(b)(3)(B) allows a debtor to file a statement that he has received the credit counseling briefing required by §109(h)(1). The debtor then has 15 days to file a certificate from the credit counseling agency which describes the services provided to the debtor. *See* 11 U.S.C. §521(b)(2); FED. R. BANKR. P. 1007(c). Thus, for purposes of §109(h)(1), this Court concludes that the critical date is the date the debtor received the required briefing, which, in this case, is not the same date

¹ This Court has adopted Interim Federal Rule of Bankruptcy Procedure 1007 pursuant to General Order 06-2 entered on October 5, 2006. By order dated April 23, 2008, the Supreme Court of the United States approved the Interim Federal Rule of Bankruptcy Procedure Rule 1007, effective December 1, 2008, and authorized its transmission to Congress in accordance with 28 U.S.C. §2075.

that the original certificate of credit counseling was issued by the credit counseling agency. *See In re Gaddis*, 2007 WL 1610783 (Bankr. D. Kan. June 4, 2007) (unpublished) (rejecting debtor's argument that the date the credit counseling certificate was issued should control eligibility under §109(h)).

At the hearing on the motion to dismiss, Crews argued that, even if the Court determined that the Debtor completed his briefing on the morning of petition date, the Debtor had nonetheless failed to satisfy §109(h)(1). Crews argued at the hearing and in his pre-hearing briefs that §109(h)(1) requires a debtor to receive the required briefing sometime in the 180 days prior to, but not including, the date of filing a bankruptcy petition. However, courts are divided in their interpretation of §109(h)(1) and that there is no controlling authority from the Fifth Circuit or the District Court for the Eastern District of Texas. In calculating the time for obtaining pre-petition credit counseling required under §109(h), which specifically refers to “the 180-day period preceding the date of the filing of the petition,” some courts have interpreted that phrase to mean the precise point in time that the action takes place and, therefore, have held that credit counseling must be received within the 180-day period prior to the day and hour that the petition is filed. *See, e.g., In re Warren*, 339 B.R. 475, 479-80 (Bankr. E.D. Ark. 2006); *In re Spears*, 355 B.R. 116 (Bankr. E.D. Wis. 2006); *In re Hudson*, 352 B.R. 391, 393-94 (Bankr. D. Md. 2006); *In re Moore*, 359 B.R. 665, 673-674 (Bankr. E.D. Tenn. 2006). Other courts have adopted Crews' interpretation of §109(h)(1), holding that §109(h)(1) requires the debtor to receive credit counseling sometime in the 180 days prior to, but not including, the date of filing. *See, e.g., In re Murphy*, 342 B.R. 671 (Bankr. D. D.C. 2006); *In re Mills*, 341 B.R. 106 (Bankr. D. D.C. 2006); *In re Cole*, 347 B.R. 70 (Bankr.

E.D. Tenn. 2006); *In re Gossett*, 369 B.R. 361 (Bankr. N.D. Ill. 2007); *In re Francisco*, -- B.R. --, 2008 WL 244172 (Bankr. D. N.M. 2008).

Although the conclusions reached by the courts in these two lines of cases are diametrically opposed, the various courts have found some persuasive support for either side of the argument. *See Moore*, 359 B.R. at 667-71 (reviewing the cases analyzing this issue). This Court has reviewed the different analyses and, after careful consideration, concludes that the first line of cases is better reasoned inasmuch as §109(h)(1) does not expressly require a one-day moratorium between the completion of a credit counseling course and the filing of a bankruptcy petition. *See In re Moore*, 359 B.R. at 673 (“[I]f Congress had intended a waiting period in order to give a prospective filer a day’s contemplation regarding the counseling before eligibility to file arrives, the language chosen does not produce this result in this electronic age....”). *Cf: In re Afolabi*, 343 B.R. 195, 199-200 (Bankr. S.D. Ind. 2006) (holding that §109(h)(3)(A)(ii) requires a debtor to delay a bankruptcy filing for up to five days); *In re Giambrone*, 365 B.R. 386, 390-92 (Bankr. W.D. N.Y. 2007) (holding that §109(h)(3)(A)(ii) does not require a debtor to delay a bankruptcy filing for up to five days). Hence, a debtor who finds an approved agency, pays the fee charged by the agency, if any, and obtains credit counseling (by telephone, internet or in person) on the same day but prior to the time the petition is filed has complied with §109(h)(1)’s requirement that the credit counseling be obtained during “the 180-day period preceding the date of filing of the petition.” The Debtor in this case did so.

CONCLUSION

For these reasons as well as those stated on the record at the conclusion of the hearing on May 13, 2008,

IT IS ORDERED that Crews' Motion to Dismiss shall be, and is hereby, **DENIED.**

Signed on 5/27/2008

Brenda T. Rhoades SR

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE