

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
BRIAN EUGENE HAYES) CASE NO. 09-15723
ROBIN RENEE HAYES)
)
Debtors)

DECISION

At Fort Wayne, Indiana, on January 26, 2010.

As a result of the bankruptcy reforms of 2005, to be eligible for relief under Title 11, an individual must have received credit counseling from an approved agency during the 180 days prior to filing the petition. 11 U.S.C. § 109(h)(1). This requirement may be temporarily waived, however, if the debtor files “a certification,” which “is satisfactory to the court,” describing “exigent circumstances” necessitating the immediate filing of a bankruptcy petition without waiting for the completion of credit counseling, and which “states that the debtor requested credit counseling . . . but was unable to obtain [it]” within seven days.¹ 11 U.S.C. § 109(h)(3)(A)(i-iii). If the certification is satisfactory to the court, the debtors are required to obtain credit counseling within the 30 days following the date of the petition. 11 U.S.C. § 109(h)(3)(B).

The debtors in this case asked the court to temporarily waive the pre-petition credit counseling requirement, but the information on their Exhibit D was not adequate to allow the court

¹This information is to be provided on exhibit D to the petition, although the form suggests that only the exigent circumstances are to be described in any detail. The statement as to unsuccessful attempts to obtain credit counseling is pre-printed boilerplate and the form asks for no further details concerning the effort. While the pre-printed statement is all the statute literally requires, see, 11 U.S.C. § 109(h)(3)(A)(ii), some decisions have suggested that more information is advisable. See e.g., In re Mitchell, 2009 WL 2877859 (Bankr. N.D. Ohio 2009); In re Jackson, 2009 WL 150628 *1, n.2 (Bankr. D. Dist. Col. 2009) (unless reasonable efforts are made a court may not find the statement satisfactory); In re Vian, 2007 WL 1788995 *2 (Bankr. D. Minn. 2007); In re Graham, 336 B.R. 292, 295 (Bankr. W.D. Ky. 2006).

to determine the issue. The court wanted more information concerning their exigent circumstances, which they had summarized as: “The debtors need the waiver to protect assets in a lawsuit which may be dismissed if the bankruptcy is not filed immediately.” Case No. 09-15723, Voluntary Petition, Docket No. 1. It also wanted more specific information (such as who and when) concerning debtors’ efforts at getting the required counseling before filing. A hearing was held to receive evidence and arguments on these issues and the matter is now before the court to consider whether debtors qualify for a temporary waiver of the credit counseling requirement.

Determining whether debtors have made a sufficient demonstration of exigent circumstances meriting a temporary waiver or suspension of the credit counseling requirement is a matter committed to the court’s discretion. In re Duncan, 418 B.R. 278, 280 (8th Cir. BAP 2009); In re Dixon, 338 B.R. 383, 387 (8th Cir. BAP 2006). “The word ‘exigent’ refers to something that is ‘urgent’ or that requires ‘immediate action or aid.’” In re Catoe-Emerson, 2009 WL 47330 *1 (Bankr. D. Dist. Col. 2009). “Exigent circumstances” in this context is often taken to mean “an urgent or emergency situation that makes it necessary to file a bankruptcy case immediately because bankruptcy relief would be unavailing if the filing of the petition had to be delayed to obtain credit counseling first.” In re Palacios, 2008 WL 700968 *1 (Bankr. E.D. Va. 2008). See also, In re Rodriguez, 336 B.R. 462, 471 (Bankr. D. Idaho 2005) (exigent circumstances require “something sufficiently different from or more pressing than the usual or typical motivations to file bankruptcy”); In re Anderson, 2006 WL 314539 *2 (Bankr. N.D. Iowa, 2006) (“a situation that demands unusual or immediate action”). This is a fact-sensitive inquiry, In re Rodriguez, 336 B.R. 462, 471 (Bankr. D. Idaho 2005); In re Curington, 2005 WL 3752229 (Bankr. E.D. Tenn. 2005); it is also an objective one. In re Vian, 2007 WL 1788995 *1 (Bankr. D. Minn. 2007). Circumstances which have been found to present sufficient immediacy have involved things such as an impending foreclosure sale,

see, In re Murray, 2008 WL 732730 (E.D. Va. 2008); In re Mason, 412 B.R. 1 (Bankr. D. Dist. Col. 2009); In re Gee, 332 B.R. 602 (Bankr. W.D. Mo. 2005); In re Childs, 335 B.R. 623 (Bankr. D. Md. 2005); In re Burrell, 339 B.R. 664 (Bankr. W.D. Mich. 2006), In re Cleaver, 333 B.R. 430, 435 (Bankr. S.D. Ohio, 2005), but see, In re Dixon, 338 B.R. 383 (8th Cir. BAP 2006) (debtor had ample notice of foreclosure sale and any exigent circumstances were of the debtor's own making), imminent wage garnishment, see, In re Manaland, 360 B.R. 288, 293 fn.12 (Bankr. C.D. Cal. 2007); Rodriguez, 336 B.R. 462, but see, In re Anderson, 2006 WL 314539 (Bankr. N.D. Iowa 2006) (not all wage garnishments constitute exigent circumstances), repossession of the debtor's only vehicle, see, In re Davenport, 335 B.R. 218 (Bankr. M.D. Fla. 2005, and ("arguably") the termination of utilities. In re Graham, 336 B.R. 292 (Bankr. W.D. Ken. 2006). The circumstances confronting these debtors did not rise to that level.²

The debtors are defendants and counter-claimants in litigation pending in the District Court for the Northern District of Indiana as case number 1:08-cv-00029. At the hearing in this matter debtors' bankruptcy counsel (not the same attorney or firm representing debtors in the district court) explained that debtors' depositions had been scheduled in that litigation for December 23, 2009, and their counsel had told them he would not attend those depositions unless something was paid toward his fees. Debtors were not able to meet their attorney's demands but did not want to be deposed without the aid counsel. They also believed their counter-claim would be dismissed if they did not attend the depositions and so, rather than appear for their depositions without counsel, they filed a petition for relief under chapter 7 on December 21, 2009.

The court is not certain that it has been given a clear picture of the district court litigation.

²Absent sufficient exigent circumstances, there is no need to address the debtors' efforts at getting credit counseling.

To begin with, it does not understand why the failure to appear for a deposition on December 23 would lead to such an immediate dismissal of the debtors' claims that filing bankruptcy could not wait. A review of the district court's docket shows no motion for sanctions or dismissal or to compel discovery pending at the time this case was filed and no scheduled hearings or conferences at which those things could be discussed. The last entry on the docket refers to a status conference that was held and concluded on December 17, 2009, without setting a date or making provisions for further proceedings or events. Under these circumstances, it appears that bankruptcy could wait and debtors faced no immediate need to file. See, Vian, 2007 WL 1788995 *1 ("waiting several days . . . would have placed the Debtor in no jeopardy whatsoever.").

Yet, even if we accept the reality of debtors' fears – that their failure to attend the scheduled deposition would lead to the immediate dismissal of their counter-claim, without even the possibility that the district court would entertain an explanation for their absence – the court is not persuaded that such a scenario rises to the level of exigent circumstances meriting a waiver of the pre-petition credit counseling requirement. To begin with, the court is not satisfied that the desire to avoid an unwanted decision in pending litigation – here the dismissal of a counter-claim – is the type of threat that justifies filing bankruptcy without delay. See, In re Reyes, 2006 WL 4488596 (Bankr. E.D. Tenn. 2006) (information regarding pending litigation did not demonstrate exigent circumstances). That would seem to accomplish little more than delay the inevitable. See, In re LaPorta, 332 B.R. 879, 882 (Bankr. D. Minn. 2005) (filing now must allow debtor to gain some permanent benefit in the dispute). The debtors were not facing the immediate loss of something they needed in order to survive, such as a place to live, money for food, or their only means of transportation. Furthermore, the court does not see how, from the debtors' perspective, the loss of their counter-claim through a dismissal of the district court action is much different from losing it to a Chapter 7 trustee. The

counter-claim becomes property of the estate. 11 U.S.C. § 541(a). If it has value, the trustee will administer it for the benefit of creditors, if not, it will be abandoned; but, either way, the debtors stand to gain very little from their attempt to preserve it by filing bankruptcy before getting credit counseling. See, In re Karim, 2009 WL 2044694 *3 (Bankr. E.D. Va. 2009) (foreclosure on nephew's residence not exigent circumstances).

Finally, we should remember that the debtors had the ability to avoid the dismissal they so feared without filing bankruptcy, by appearing for their depositions, albeit without an attorney. While this may not have been their preferred course of action, it certainly was an available alternative and one they could adopt without making a subsequent bankruptcy unavailing. To be truly exigent, the circumstances must leave the debtor without an available alternative – between a rock and a hard place, so to speak – either file bankruptcy or face the loss of something vital to daily life; a loss that cannot be easily undone or reversed.

The debtors do not satisfy the requirements of § 109(h), were not eligible for relief under the United States Bankruptcy Code when this case was filed and it should be dismissed. See e.g., In re Hedquist, 342 B.R. 295, 300 (8th Cir. BAP 2006); In re Crawford, ___ B.R. ___, 2009 WL 4938215 (Bankr. D. N.M. 2009); In re Ruckdaschel, 364 B.R. 724, 734 (Bankr. D. Idaho 2007); In re Wallace, 338 B.R. 399, 408 (Bankr. E.D. Ark. 2006). An order doing so will be entered.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court