

Not Intended for Publication or Citation

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
RACHEL ELLEN SOUTER) CASE NO. 10-11012
KYLE WAYNE SOUTER)
)
Debtors)

and

IN THE MATTER OF:)
)
ROBERT SPRINKLE, SR.) CASE NO. 10-11309
BARBARA ELLEN SPRINKLE)
)
Debtors)

DECISION

At Fort Wayne, Indiana, on June 8, 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 suspended or temporarily waived 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. 11 U.S.C. § 109(h)(3)(A)(i-iii). If the certification is satisfactory to the court, the debtor must obtain credit counseling within the 30 days following the date of the petition. 11 U.S.C. § 109(h)(3)(B). The credit counseling requirement may also be completely waived if the debtor is incapacitated or disabled, as those terms are defined in the statute, or on active military duty in a combat zone. 11 U.S.C. § 109(h)(4).

These two cases are being decided together because they present a common question: Whether, through the use of a power of attorney, a debtor may satisfy the credit counseling requirement of § 109(h)(1) by having someone else receive the required briefing for them? The court scheduled a separate hearing in each case for the purpose of considering that issue, “to receive evidence and arguments concerning” debtor’s eligibility for relief under title 11, and, absent eligibility, whether the case should be dismissed. Before the court can consider the power of attorney question, however, it needs to address a threshold argument that has been made in each case. That is whether the debtors who have attempted to use a power of attorney to satisfy the credit counseling requirement – Mr. Souter and Mr. Sprinkle – qualify for a waiver of that requirement under §109(h)(4).¹

To qualify for a permanent waiver of the credit counseling requirement a debtor must be unable to complete the required briefing because of either “incapacity” or “disability.”² 11 U.S.C. 109(h)(4). Both of those terms are specifically defined in § 109(h)(4).

[I]ncapacity 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

¹Counsel has actually argued that her clients satisfy the “exigent circumstances” portion of §109(h) – §109(h)(3). Yet, doing so would not avoid the main issue. Even if the debtors’ individual situations qualified as exigent circumstances – something the court doubts because there was nothing confronting them that necessitated the immediate filing of bankruptcy or which would have made bankruptcy unavailing had the filing been delayed, see e.g., In re Catoe-Emerson, 2009 WL 47330 *1 (Bankr. D. Dist. Col. 2009); In re Palacios, 2008 WL 700968 *1 (Bankr. E.D. Va. 2008); Matter of Hayes, 2010 Bankr. LEXIS 681 (Bankr. N.D. Ind. 2010) – that would only give them a temporary waiver of the credit counseling requirement. They would still be required to complete that counseling within thirty days of the petition, and that is something they have not done. So, to avoid receiving the credit counseling briefing required by § 109(h)(1), unless they can receive that briefing via a power of attorney, the debtors must qualify for a permanent waiver under § 109(h)(4).

²The third exception – that the debtor is “on active military duty in a military combat zone” – does not apply here.

respect to his financial responsibilities.

[D]isability 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 [§ 109(h)(1)].

The standard set by these definitions is rigorous, and proving that the debtor satisfies one of them requires some kind of competent evidence. See, In re Rendler, 368 B.R. 1, 3 n.2 (Bankr. D. Minn. 2007); In re Hall, 347 B.R. 532, 535 (Bankr. N.D. W.Va. 2006) (“whether or not a debtor suffers from a severe physical impairment is a matter of proof.”); In re Tulper, 345 B.R. 322, 326 n.8 (Bankr. D. Colo. 2006) (“Testimony of health care professionals or others qualified in the field may be need[ed] . . . to demonstrate the validity of the incapacity or disability.”). See also, In re Urbanek, 2007 WL 4893484 (Bankr. N.D. Ind. 2007) (Klingeberger, J.) (recommending that a statement from the physician should accompany the request to waive credit counseling). Although given the opportunity,³ no evidence worthy of the name was offered to prove that either Mr. Souter or Mr. Sprinkle is incapacitated or disabled within the meaning of the statute. Instead of testimony or affidavits from someone with personal knowledge of the situation, and competent to testify to the issue, the court received only second and third hand reports from debtors’ counsel, based upon what counsel been told by others.

We are told that Mr. Souter is incarcerated and, although the facility where he is held allows visitors, it does not give him access to a telephone, a computer, or any other means by which he could complete the required counseling. Motion for Determination, filed April 12, 2010, ¶ 1. But,

³The notice of hearing in each case specifically indicated that the purpose of the hearing was “to receive evidence and arguments concerning [debtor’s] eligibility for relief under title 11” Notice of Hearing, Case No. 10-11012, dated March 18, 2010 and Notice of Hearing, Case No. 10-11309, dated April 2, 2010 (emphasis original).

this information has not been presented to the court in an affidavit, or something similar, from the warden or another individual in charge of the facility where Mr. Souter is being detained, i.e. an individual who would have accurate, personal knowledge of the facility's rules, regulations and policies on such issues. See, In re Anderson, 397 B.R. 363, 367 (6th Cir. BAP 2008) (document from prison official regarding prison policy); In re Latovljevic, 343 B.R. 817, 821-22 (Bankr. N.D. W.Va. 2006) (testimony from prison counselor regarding access to telephone). Instead, it comes from Mr. Souter, who told it to his wife, who told counsel, who then uncritically conveyed it to the court without any further investigation. Most of the courts that have considered the question have concluded that incarceration is not a disability or incapacity for the purposes of § 109(h)(4), see e.g., Anderson, 397 B.R. 363; In re Hubel, 395 B.R. 823 (N.D. N.Y. 2008); In re Patasnik, 425 B.R. 916 (Bankr. S.D. Fla. 2010); In re Larsen, 399 B.R. 634 (Bankr. E.D. Wis. 2009); Rendler, 361 B.R. 1; In re McBride, 354 B.R. 95 (Bankr. D. S.C. 2006); but see, In re Vollmer, 361 B.R. 811 (Bankr. E.D. Va. 2007), and this court agrees. Yet, even if we were to accept the proposition that some level of confinement might satisfy that standard, the debtor has failed to come forward with such evidence.

There is a similar lack of evidence when it comes to Mr. Sprinkle. He is in a nursing home. We are told that he cannot receive credit counseling because he is terminally ill, exhausted and cannot stay awake for any length of time. Yet, rather than coming from a physician or other caregiver, who could give an accurate assessment of the debtor's physical and mental condition and, if necessary, its cause, see, Tulper, 345 B.R. at 326 n.8, the report is based upon what his wife and son told debtors' counsel who, once again, uncritically conveyed it to the court without any further investigation. As a result, the court is not certain if it should consider whether the debtor is

incapacitated or disabled or both.⁴ It is clear, however, that the debtor has failed to give the court the information it needs to make that determination and so has failed to prove that he qualifies for a waiver under § 109(h)(4).

Since neither Mr. Souter nor Mr. Sprinkle qualify for a waiver of the credit counseling requirement of § 109(h)(1), the court must consider whether they can satisfy that requirement by having someone else receive the required briefing for them, using a power of attorney. The court concludes that they cannot.

To begin with, the credit counseling briefing of § 109(h)(1) is not the kind of activity to which a power of attorney might apply. A power of attorney gives one person the authority to act for another, see e.g., I.C. 30-5-5-2 et. seq. (listing the powers granted to one through a power of attorney); yet the briefing § 109(h)(1) requires is a much more passive endeavor. It requires the debtor to receive certain information, not to perform a particular act. More importantly, even though a power of attorney can be very broad and can authorize its holder to do a great many things, there are some things that simply cannot be done via a power of attorney. Sometimes an individual is required to demonstrate that they themselves possess a certain proficiency or have attained a particular level of knowledge, and someone else will not be allowed to do that for them. For example, no one would suggest that a person should be given a driver's license or allowed to practice law because someone else successfully took the driving test or passed the bar exam for them, via a power of attorney. The credit counseling briefing of § 109(h)(1) falls into this same category. Although the proficiency/knowledge level it calls for is relatively low, it still measures the debtor's

⁴Remember, counsel argued for only the temporary waiver of §109(h)(3) where those issues do not apply.

own individual accomplishments, not the vicarious accomplishments of someone else.

More fundamental than any limitation upon the scope or use of a power of attorney is the language of the statute. See, Hartford Underwriters Ins. Co. v. Union Planters, 530 U.S. 1, 7, 120 S.Ct. 1942, 1947 (2000) (where the statute's language is plain, court's should enforce it according to its terms). In § 109(h)(4), Congress created very specific, limited, and rigorous exceptions to the credit counseling requirement of § 109(h)(1). Those exceptions make it quite clear that, where credit counseling is available, 11 U.S.C. § 109(h)(2)(A), so long as a debtor is physically able to participate in it and mentally capable of understanding it, they must receive it to be eligible for relief under title 11. In re Mitrano, 409 B.R. 812, 818 (E.D. Va. 2009). Unless one of the statutory exceptions applies, Congress expects debtors to complete the counseling requirements of § 109(h)(1) and the court should not credit additional exceptions. See, U.S. v. Johnson, 529 U.S. 57, 58, 120 S.Ct. 1114 (2000). The limited exceptions allowed by the statute would be meaningless if debtors could have someone else take credit counseling for them. The court concludes that debtors cannot satisfy that requirement by having someone else do so on their behalf, using a power of attorney. See, In re Estep, 2008 WL 4367841 (Bankr. N.D. Ohio 2008). Cf., In re Pagaduan, ___ B.R. ___, 2010 WL 1453071 (Bankr. D. Nev. 2010) (sanctions imposed where counsel's staff completed counseling for the debtors).

Mr. Souter and Mr. Sprinkle were not eligible for relief under the United States Bankruptcy Code when their cases were filed and those cases should be dismissed.⁵ See e.g., In re Hedquist, 342 B.R. 295, 300 (8th Cir. BAP 2006); In re Mitrano, 409 B.R. 812, 818 (E.D. Va. 2009); In re

⁵At the hearings, the court asked counsel whether, should Mr. Souter and/or Mr. Sprinkle be ineligible for relief, it should dismiss the entire case or only the ineligible individuals. Debtors' counsel expressed a preference for dismissal of the entire case.

Crawford, 420 B.R. 833, 837-38 (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). Orders doing so will be entered.

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