

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF )  
 )  
JAMES KENNETH ARBUTHNOT ) CASE NO. 14-32677 HCD  
 ) CHAPTER 13  
DEBTOR )

ORDER

At South Bend, Indiana, on October 22, 2014.

Before the court are two matters. The first is the debtor's request for a temporary waiver of the credit counseling requirement. The second is the debtor's request to pay filing fees in installments.

The debtor, James Kenneth Arbuthnot, commenced this chapter 13 bankruptcy case on October 17, 2014. The debtor filed this case pro se. The court notes this is not the first time this debtor has filed a case in this court. A review of court records shows the debtor has filed seven previous bankruptcy petitions over the past nine and one half years. This case marks the eighth. The debtor filed some cases with the assistance of counsel. Most were not. One case was under chapter 7. The remaining six were chapter 13 cases. Only the chapter 7 case ended in the granting of a discharge.<sup>1</sup>

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<sup>1</sup> These cases include the following:

- 05-32013, chapter 7 represented by counsel, filed on April 19, 2005. The court entered a discharge order on August 1, 2005.
- 07-32787, chapter 13 represented by counsel, filed on October 23, 2007. The court dismissed this case without prejudice on February 2, 2008, for the debtor's failure to make any payments to the chapter 13 trustee.
- 09-31919, pro se chapter 13 filed on April 4, 2009. The court dismissed this case without prejudice on April 30, 2009, due to the debtor's failure to obtain prepetition credit counseling or to provide a statement of exigent circumstances.
- 09-34010, pro se chapter 13 filed on August 21, 2009. The court dismissed this case without prejudice on August 25, 2009, due to the debtor's failure to obtain prepetition credit counseling or to provide a statement of exigent circumstances.
- 10-31880, pro se chapter 13, filed April 21, 2010. The court dismissed this case on April 27, 2010, due to the debtor's failure to obtain prepetition credit counseling or to provide a statement of incapacity or disability.
- 10-33600, pro se chapter 13, filed on July 26, 2010. The court dismissed this case on August 24, 2010, for the debtor's failure to pay the balance of the filing fees as ordered by the court. The dismissal order directed the clerk to refuse any future case submitted for filing without full payment of all past filing fees. Installment fee payments were completed on December 13, 2010.
- 14-31092, pro se chapter 13, filed April 29, 2014. The court dismissed this case without prejudice on June 27, 2014, due to the debtor's failure to file a plan.
- 14-32677, pro se chapter 13 case, filed on October 17, 2014. This is the current case.

The debtor here did not obtain a briefing from a credit counseling agency before filing his bankruptcy petition. See 11 U.S.C. § 109(h)(1). Instead, he checked box 3 on the “Individual Debtor’s Statement of Compliance with Credit Counseling Requirement” (Exhibit D) filed with his petition.<sup>2</sup> This part of Exhibit D states the debtor “requested credit counseling services from an approved agency but was unable to obtain the services during the five days<sup>3</sup> from which I made my request.” The section continues by stating “the following exigent circumstances merit a temporary waiver of the credit counseling requirement so I can file my bankruptcy case now.” The debtor did not attach any statement of exigent circumstances as this form requires. In fact, the debtor does not state any circumstances, exigent or otherwise, explaining his failure to obtain prepetition credit counseling.

To be entitled to that temporary waiver, a debtor must meet the requirements of 11 U.S.C. § 109(h)(3). The debtor must submit a certification that describes the debtor’s efforts to obtain prepetition credit counseling and the exigent circumstances meriting a temporary exemption of the requirement. See § 109(h)(3)(A); *In re Larsen*, 399 B.R. 634, 636 (Bankr. E.D. Wis. 2009); *In re Jones*, 2007 WL 4893512 at \*1 (Bankr. N.D. Ind. Oct. 1, 2007). Because of the debtor’s failure to provide any statement concerning exigent circumstances, the court must conclude no such circumstances exist and that the debtor has failed to satisfy the requirements of § 109(h)(3)(A). Therefore the court denies the debtor’s request for a temporary waiver of the credit counseling requirement of § 109(h)(1).

Section 109(h)(1) states that “an individual may not be a debtor” unless the debtor has received a credit counseling briefing within 180 days before filing the petition, or qualifies for a waiver. Here, the debtor has failed this requirement and is not eligible to be a debtor under the Bankruptcy Code. See

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<sup>2</sup> Exhibit D includes the debtor’s certification under penalty of perjury that the information provided on the form is true and correct.

<sup>3</sup> The court notes a discrepancy in the wording of Exhibit D, Official Form B 1D filed by the debtor and 11 U.S.C. § 109(h)(3)(A)(ii). Section 109 refers to the seven-day period beginning on the date the debtor made the request. Exhibit D references five days. As pertinent to this matter, this difference is of no consequence.

*In re Fortman*, 456 B.R. 370, 374; *In re Mason*, 412 B.R. 1, 7 (Bankr. D. Dist. Col. 2009); *In re Larson*, 399 B.R. at 637.

Also before the court is the debtor's "Application to Pay Filing Fee in Installments." The court notes the debtor has not paid any of the \$310.00 filing fee required for this case. A debtor who has sought the protection of the Bankruptcy Code has a statutory duty to pay the filing fee and to abide by the other procedural requirements. The statute and rules require a petitioner in bankruptcy to pay a filing fee upon the commencement of the case, and such payment is a condition precedent to a discharge in a voluntary bankruptcy. *See* 28 U.S.C. § 1930(a); Fed. R. Bankr. P. 1006(a); *U.S. v. Kras*, 409 U.S. 434, 435-36 (1973); *In re Sekendur*, 144 Fed. Appx. 553, 554 (7<sup>th</sup> Cir. 2005). The failure to pay the filing fee is a ground for dismissal of the case. *See In re Clark*, 2013 WL 3849610 at \*2 (E.D. Mich. July 24, 2013).

The court recognizes the debtor here is acting pro se. Overall, courts hold pro se litigants to a more lenient standard than professional counsel. *See Samak v. Warden, FCC Coleman-Medium*, 766 F.3d 1271, 1273 (11<sup>th</sup> Cir. 2014). However, the leniency afforded pro se litigants does not remove the obligation to comply with statutory and procedural requirements. *Albra v. Advan, Inc.*, 490 F.3d 826, 829 (11<sup>th</sup> Cir. 2007). The totality of the circumstances concerning this debtor displays a troubling picture that weights against leniency. In less than 10 years the debtor has filed eight cases. The court dismissed all but one of these cases due to the debtor's failure to fulfill his obligations under the Bankruptcy Code. In particular, three of the debtor's prior cases were dismissed due to his failure to obtain prepetition credit counseling.<sup>4</sup> Other cases failed because the debtor did not make required installment filing fee payments,<sup>5</sup> failed to make

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<sup>4</sup> Prior dismissals due to the debtor's failure to obtain prepetition credit counseling, or to present any statement of exigent circumstances to justify this failure include 09-31919 (R. 4), 09-34010 (R. 5), and 10-31880 (R. 6).

<sup>5</sup> 10-33600 – Prior case dismissed due to the debtor's failure to make filing fee installment payments. See R. 16.

payments to the chapter 13 trustee,<sup>6</sup> or failed to file a chapter 13 plan.<sup>7</sup> The court cannot characterize this debtor as unsophisticated and ignorant of his responsibilities as a debtor. In an abundance of caution, however, the court will grant the debtor an opportunity to justify his failure to obtain prepetition credit counseling and pay the required filing fee.

The court denies the debtor's request for a temporary waiver of the credit counseling requirement. The court also denies the debtor's application to pay filing fees in installments. Based upon the present record the debtor is not eligible for relief under Title 11. The debtor shall file a certification showing eligibility for relief under Title 11, which must fully comply with *all* of the requirements of § 109(h)(3), within fourteen (14) days. The court also orders the debtor to pay in full within 14 days the \$310.00 filing fee for this case. The debtor's failure to do both within 14 days will result in the dismissal of this case without further notice or hearing.

SO ORDERED.

/s/ HARRY C. DEES, JR.  
HARRY C. DEES, JR., JUDGE  
UNITED STATES BANKRUPTCY COURT

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<sup>6</sup> 07-32787 – Prior case dismissed due to the debtor's failure to make any payments to the chapter 13 trustee. See R. 27, 30.

<sup>7</sup> 14-31092 – Prior case dismissed due to the debtor's failure to file a chapter 13 plan. See R. 10, 20.