IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

IN RE: ESTEPHEN & ANGELA COBB, Debtors. CASE NO. 2:06-bk-10814 CHAPTER 13

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ORDER

On March 10, 2006, Estephen and Angela Cobb ("Debtors") filed a voluntary petition for relief under the provisions of Chapter 13 of the United States Bankruptcy Code. The petition was filed pro se. Accompanying the face sheet of the petition, which was filled out by hand, was a typewritten matrix that listed twelve creditors. Also filed on March 10 was a typed statement alleging the following facts:

> We Angela and Estephen Cobb, request a waiver of the requirement to obtain debt and credit counseling due to the March 13th sale date on our home. We are filing an emergency petition to save our home. We have an appointment with Credit Counseling of America (1-800-889-4916) on Thursday, March 16th at 4:15 but were unable to get anything sooner from any of the approved agencies. We will provide the certificate to the court at that time.

(Debtor's Ex. 1.)

This statement, dated March 9, 2006, was signed by the Debtors, although not under oath. The statement was entered on the docket as a request for a waiver of the requirement dictated by 11 U.S.C. § 109(h)(1) that a debtor must obtain credit counseling prior to filing a petition in bankruptcy.

The request for waiver was set for hearing on March 24, 2006, at Little Rock, Arkansas. By the date of the hearing, Debtors had employed counsel. The certificate of credit counseling

was filed March 24, 2006, which reflected that the credit counseling occurred on March 16, 2006, six days after the case was filed. At the hearing, the U.S. Trustee appeared and orally objected to the waiver, but no creditor objected. Ms. Mary Jane Pruniski, who represented the Chapter 13 Standing Trustee, was present in the courtroom on other business and stated that she had no objection.

The Debtor Angela Cobb testified in support of her request for waiver. She stated that her husband had lost his job and had received a letter from the attorney for their mortgage lender advising them of a pending foreclosure sale.[1] She said she and her husband tried to find a lender to refinance or restructure their loan, and when they were unsuccessful they filed the Chapter 13 petition pro se.

Ms. Cobb at first testified that she and her husband prepared the statement requesting the waiver of credit counseling; she even stated that she had no help in preparing the statement. (Tr. at 12.) However, on questioning by the Court, Ms. Cobb stated that after the foreclosure action was commenced, she and her husband received a letter from a business called Happy Home Consulting, an entity offering to help in dealing with the mortgage company. Ms. Cobb, who is very unsophisticated, was not certain exactly what services Happy Home was providing on their behalf. She testified that she thought Happy Home was a mortgage company "who was to get us the information we needed to retain our home." (Tr. at 13.) She stated that she paid Happy Home a fee of $700 to negotiate with the mortgage company. She further testified that about a week before the petition was filed, "Miss Kathy" from Happy Home called and said there was

[1] The holder of the mortgage on the Debtors' home was listed on their schedules as HSBC Mortgage Service of Carol Stream, Illinois.

nothing more they could do and assisted the Debtors in preparing the waiver of pre-bankruptcy credit counseling. She said that the person named Kathy filled out the request for a waiver while they talked on the phone.

DISCUSSION

The Bankruptcy Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 now provides the following:

> (h)(1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group 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.

11 U.S.C.A. § 109(h)(1) (West, Westlaw through Oct. 17, 2005).

The Bankruptcy Code also provides the following exception to the requirement to obtain credit counseling prior to filing a bankruptcy petition:

> (3)(A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that –
>
> (i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);
>
> (ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made the request; and
>
> (iii) is satisfactory to the court.

11 U.S.C. § 109(h)(3)(A) (West, Westlaw through Oct. 17, 2005).

In order to waive the pre-bankruptcy credit counseling requirement, the Debtor must satisfy each of the three requirements of 11 U.S.C. § 109(h)(3)(A). Further, the requirements in (i) and (ii) must be submitted to the court by a "certification."

The threshold issue to consider is whether the Debtors have filed a "certification" at all. The term "certification" is not defined by the Bankruptcy Code. This issue was discussed in the case of In re Curington, where the court stated:

> According to the relevant definition in Black's Law Dictionary, a certification is "1. The act of attesting. 2. The state of having been attested. 3. An attested statement." Black's Law Dictionary 220 (7th ed.1999). The same source defines "attest" as "1. To bear witness; testify <attest to the defendant's innocence>. 2. To affirm to be true or genuine; to authenticate by signing as a witness <attest the will>." *Id.* at 124. Similarly, Webster's Third New International Dictionary defines "certify" as "to attest esp. authoritatively or formally." Webster's Third New International Dictionary 362 (2002). Based on these definitions, a certification is, at a minimum, a written statement that the signer affirms or attests to be true.

In re Curington, No. 05-28188, 2005 WL 3752229, at *4 (Bankr. E.D. Tenn. Dec. 19, 2005)(citing In re Cleaver, 333 B.R. 430, 433-34 (Bankr. S.D. Ohio 2005)).

Several courts have concluded that the certification required by Congress must be signed by the debtor, who must attest or affirm that the statements contained in the request for a waiver are true. In re Rodriguez, 336 B.R. 462, 469-70 (Bankr. D. Idaho 2005) (stating that the certification must be sworn to personally by the debtor; a simple motion by the debtor's attorney will not meet the requirements of 11 U.S.C. § 109(h)(1)); In re La Porta, 332 B.R. 879, 882 (Bankr. D. Minn. 2005) ("Because they [two unsigned written statements] are not subscribed under penalty of perjury . . . they do not constitute a 'certification' as 11 U.S.C. § 109(h)(1) expressly requires."); In re Wallert, 332 B.R. 884, 887 n.3 (Bankr. D. Minn. 2005) (determining certification complied with the statute because "it is subscribed by [the debtor], with a declaration that the content is true and correct and that she is under penalty of perjury in making the statements in it.")(citing 28 U.S.C. § 1746 (2000)).

Other courts have taken a less literal approach and allowed certifications that are not

actually sworn to under penalty of perjury. In re Henderson, 339 B.R. 34, 38 (Bankr. E.D.N.Y. 2006)(determining certification need not be made under penalty of perjury); In re Graham, 336 B.R. 292, 296 (Bankr. W.D. Ky. 2005)(interpreting "certification" to mean simply that a debtor must sign his or her motion for extension); In re Talib 335 B.R. 417, 421 (Bankr. W.D. Mo. 2005) (observing that certification is not required to be signed under penalty of perjury), reconsideration denied, 335 B.R. 424; In re Cleaver, 333 B.R. at 434 (stating that at a minimum a certification is a written statement that the signer affirms or attests to be true; certification held marginally valid because attorney and debtor both signed it).

Make no mistake about Congress' intention: individual debtors must have credit counseling before they are eligible for relief under any chapter of the Bankruptcy Code. The narrow section 109(h)(3)(A) exception to the requirement for pre-bankruptcy credit counseling actually contains four separate elements to be satisfied, including a proper certification. In almost all of the reported cases on the issue of the exception under section 109(h)(3)(A), the debtors' cases have been dismissed because they failed to satisfy at least one element. See In re Seaman, No. 05-40032, 2006 WL 988271, at *11 n.3 (Bankr. E.D. N.Y., March 30, 2006) (noting that "of the thirty-four decisions addressing ineligibility under Section 109(h) to date, thirty-one have resulted in dismissal.").

This Court interprets "Certification" to mean that the facts contained in the statement must be sworn to under oath. In this case, the Court cannot find that the document signed by the Debtors constitutes a certification, i.e., an affirmation under oath that the statements contained in the writing are true. The document in question has no heading and is only signed by each of the debtors and dated; it is not a certification. See In re LaPorta, 332 B.R. at 882. Yet an

unambiguous requirement of the statute is that the request be made by certification, which means that the facts contained in the certification must be sworn to under oath. 11 U.S.C. § 109(h)(3)(A).

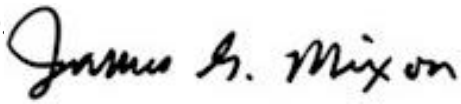
Having determined that the Debtors failed to file a proper certification for a temporary waiver, the Court finds that it is unnecessary to discuss whether the document would meet the other requirements of 11 U.S.C. § 109(h)(3)(A). However, the Court notes that the Eighth Circuit Bankruptcy Appellate Panel has taken a fairly cold-hearted position on the issue of whether a pending foreclosure is an exigent circumstance. See Hedquist v. Fokkena (In re Hedquist), No. 6007MN, 2006 WL 1042429, at *4 (B.A.P. 8th Cir. April 21, 2006) (affirming bankruptcy court which found impending foreclosure not exigent circumstance); In re Dixon, 338 B.R. 383, 388 (B.A.P. 8th Cir. 2006) (stating that bankruptcy court did not abuse its discretion in holding that an impending foreclosure was not an exigent circumstance because debtor had ample notice under state law).

Other cases espouse a broader view on whether an imminent foreclosure constitutes an exigency. See In re Henderson, 339 B.R. 34, 38-39 (Bankr. S.D.N.Y. 2006) (stating standard for exigent circumstances is not one of excusable neglect that would require the court to delve into the reasons for the exigency; therefore, impending foreclosure would qualify). Accord In re Calderon, No. 06-10561, 2006 WL 871477, at *1 (Bankr. S.D. Fla., Feb. 21, 2006)(dismissing case but stating that imminent foreclosure qualifies as exigent circumstance); In re Childs, 335 B.R. 623, 630 (Bankr. D. Md. 2005)(per curiam) (finding that imminent foreclosure is an exigent circumstance). However, it is not necessary to reach this issue because the Debtors failed to meet the threshold requirement that the statement of exigent circumstances be made by a

certification.

Therefore, for the reasons stated, this case is dismissed.

IT IS SO ORDERED.



JAMES G. MIXON
UNITED STATES BANKRUPTCY JUDGE

DATE: 05/22/06

cc: Jim Hollis, Esq., U.S. Trustee
Debtor
Brian Wilson, Esq.