



SO ORDERED.

SIGNED this 14 day of March, 2006.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:)	
)	
DANIEL RAYMOND THOMAS,)	Case No. 06-10242
)	Chapter 13
Debtors.)	
_____)	

**ORDER DENYING TEMPORARY WAIVER
OF PREPETITION CREDIT COUNSELING AND DISMISSING CASE**

Proceeding *pro se*, debtor filed his Chapter 13 petition on March 8, 2006.¹ With his petition, debtor requested a temporary waiver of the pre-filing credit counseling requirement due to exigent circumstances.² The debtor cites to a “foreclosure date” on his home scheduled on March 9, 2006 as the exigent circumstance. The Court has reviewed debtor’s “certificate” of exigent circumstances and for the reasons set forth below denies debtor’s requested waiver.

Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA),

¹ Debtor reported his previous chapter 7 bankruptcy, Case No. 03-16001, filed October 30, 2003 in this Court. Debtor received a discharge on March 26, 2004 in his previous case.

² Dkt. 2.

individual debtors are required to obtain pre-filing credit counseling or obtain a temporary waiver of prepetition credit counseling. 11 U.S.C. § 109(h)(1) states that “. . . 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 . . . that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.”³

11 U.S.C. § 109(h)(3) provides for a temporary waiver of the pre-filing credit counseling requirement based upon exigent circumstances. Section 109(h)(3) states:

- (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 that request; and
 - (iii) is satisfactory to the court.

Subparagraph (B) makes clear that the waiver or exemption permitted by subparagraph (A) is temporary and that the debtor must still obtain the credit counseling post-petition.

- (B) With respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements of paragraph (1), but in no case may the exemption apply to that debtor after the date that is 30 days after the debtor files a petition, except that the court, for cause, may order an additional 15 days.

The courts (including this Court) that have examined the sufficiency of a certificate of exigent circumstances under section 109(h)(3) impose three requirements. One, the certificate must

³ 11 U.S.C. §521(b)(1) requires a debtor to file with the petition, a certificate from an approved nonprofit budget and credit counseling agency that provided the pre-filing credit counseling. *See also*, Interim Bankr. Rule 1007(b)(3).

sufficiently describe and detail the “exigent circumstances” that preclude debtor from obtaining the credit counseling before filing the bankruptcy petition. Two, the certificate must state that the debtor requested credit counseling before filing the bankruptcy petition but was unable to obtain the credit counseling within 5 days of the request. Third, the certificate must be satisfactory to the court.⁴

Although “exigent circumstances” is not defined in the BAPCPA, the Courts have generally recognized that an imminent foreclosure sale of debtor’s home qualifies as an exigent circumstance.⁵ The Court here would find that a foreclosure sale scheduled on March 9 constitutes an exigent circumstance under § 109(h)(3)(A)(I).

The problem with debtor’s certificate lies with the second requirement. Because of its brevity the entirety of debtor’s “certification” dated March 8, 2006 is set forth here.

I request a waiver of the requirement of budget and credit counseling prior to filing based on exigent circumstances. My home has a foreclosure date of Thursday, March 9, 2006. I tried to stop this process with a workout plan with my mortgage company as late as Wednesday 3/8/06 but was unsuccessful. I was unable to get an appointment with a credit and budget counseling service. I will contact a credit and budget counseling firm and have the proper documents submitted within 10 days. I have a list of approved counseling firms for my area.

Debtor’s certificate is deficient because it fails to state that he requested credit counseling before filing and was unable to obtain the credit counseling within five days of the request. Because debtor does not state the date on which he requested credit counseling nor the date on which credit

⁴ See *In re Talib*, 335 B.R. 424 (Bankr. W.D. Mo. 2005) (Noting that § 109(h)(3)’s three requirements are written in the conjunctive meaning each must be satisfied for the debtor to qualify for the temporary waiver); *In re Graham*, 336 B.R. 292 (Bankr. W.D. Ky. 2005); *In re Childs*, 335 B.R. 623 (Bankr. D. Md. 2005); *In re Davenport*, 335 B.R. 218 (Bankr. M.D. Fla. 2005) (Bankruptcy court cannot disregard any of the three requirements for a waiver of prepetition credit counseling requirement).

⁵ See *In re Childs*, 335 B.R. 623 (Bankr. D. Md. 2005); *In re Wallert*, 332 B.R. 884 (Bankr. D. Minn. 2005); *In re Hubbard*, 333 B.R. 377 (Bankr. S.D. Tex. 2005).

counseling was available, the Court is unable to determine whether debtor was unable to obtain the credit counseling within 5 days of the request.⁶ Indeed, it is not at all clear that debtor has requested credit counseling, given his statement that he “will contact” a credit counseling agency. If as the Court suspects the request was made on March 8, the date debtor filed his bankruptcy, the debtor has neither demonstrated nor represented that he was unable to obtain prepetition counseling within 5 days of the request.⁷ It appears to the Court that the clear import of the statute is that the request must be made at least 5 days prior to the bankruptcy filing in order to satisfy the requirement that prepetition counseling could not be obtained within 5 days of the request.⁸

The Court finds that debtor’s certificate of exigent circumstances does not comply with §

⁶ See *In re Graham*, 336 B.R. 292 (Bankr. W.D. Ky. 2005); *In re Childs*, 335 B.R. 623 (Bankr. D. Md. 2005) (certification that stated conclusorily that debtors were unable to obtain credit counseling were insufficient to grant a waiver); *In re Davenport*, 335 B.R. 218 (Bankr. M.D. Fla. 2005) (failure to make prepetition request for credit counseling barred debtor from receiving a waiver of the credit counseling requirement, even if debtor received the counseling two days after filing the petition); *In re Cleaver*, 333 B.R. 430 (Bankr. S.D. Ohio 2005) (debtor’s promise to obtain the counseling post-petition is insufficient); *In re Wallert*, 332 B.R. 884 (Bankr. D. Minn. 2005) (debtor’s certification that she attempted to contact credit counseling agency but was informed that she could not obtain counseling services on such short notice was insufficient).

⁷ The Court suspects this to be the case because the bankruptcy filing can be described as a “quick file.” Debtor did not have the assistance of a bankruptcy petition preparer. At filing, debtor did not remit the filing fee. Nor did debtor file the Statement of Financial Affairs, any of the required schedules, or his chapter 13 plan. The Court has issued an Order to Correct to debtor, detailing all of the filing deficiencies.

⁸ See *In re Talib*, 335 B.R. 417 (Bankr. W.D. Mo. 2005), *motion for recon. denied*, 335 B.R. 424 (Bankr. W.D. Mo. 2005) (Requirement that debtor was unable to obtain credit counseling within 5 days of request was not satisfied where certificate stated that debtor requested counseling the day prior to foreclosure sale and could obtain the counseling within two days, but after the foreclosure sale); *In re Wallert*, 332 B.R. 884 (Bankr. D. Minn. 2005) (debtor not entitled to waiver if counseling services can be obtained within 5 days of request though subsequent to the impending creditor collection action); *In re Hubbard*, 333 B.R. 377 (Bankr. S.D. Tex. 2005) (Fact that because of pending foreclosure the chapter 13 debtor could not wait to file his bankruptcy petition did not eviscerate the requirement of prepetition credit counseling or qualifying for a temporary waiver).

109(h)(3)(A)(ii) and his request for a waiver of the pre-filing credit counseling requirement must therefore be DENIED. Because debtor has failed to obtain pre-filing credit counseling as required by § 109(h)(1) he is ineligible to be a debtor.

IT IS THEREFORE ORDERED that this case is DISMISSED WITHOUT PREJUDICE for debtor's failure to comply with 11 U.S.C. § 109(h)(3) and (h)(1).

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