UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE: Willie MacArthur Cleveland, Debtor(s).	CASE NO: 14-00595-HB Chapter 13 **ORDER GRANTING TRUSTEE'S PETITION TO DISMISS CASE FOR FAILURE TO COMPLETE CREDIT COUNSELING BEFORE FILING PURSUANT TO 11 U.S.C. § 109(h)**

THIS MATTER comes before the Court pursuant to the request of Chapter 13 Trustee Gretchen D. Holland to dismiss this case due to Debtor Willie MacArthur Cleveland's failure to complete credit counseling as required under 11 U.S.C. § 109(h) within the 180 day period preceding the date of filing. Maureen Z. White of South Carolina Legal Services filed an objection on behalf of Cleveland. A hearing was held on August 21, 2014. After careful consideration of the facts set forth below and applicable law, the Court finds that Cleveland did not qualify to be a debtor under § 109(h) when the case was filed and therefore, the case must be dismissed.

Facts

1. Cleveland filed minimal paperwork to initiate a Chapter 13 bankruptcy petition *pro se*. The documents filed included: (1) Official Form 1, the three page Voluntary Petition (2) Official Form 1, Exhibit D, the two page Individual Debtor's Statement of Compliance with Credit Counseling Requirement; and (3) Official Form 21 Statement of Social Security Number(s). The filing also included a List of Creditors that listed only the name and address of a mortgage creditor. Except for the signatures, the information in the documents had been typed. The documents were filed on Friday, January 31, 2014, and

stamped "received" by the Court at 2:02 p.m. Cleveland paid the filing fee the same day. Court records and statements of counsel indicate that Cleveland hand delivered the documents to the Court in Columbia.

2. Exhibit D referenced above explains the requirement of pre-petition credit counseling and the consequences of failing to complete the counseling. Exhibit D indicates in bold: **"Warning: You must be able to check truthfully one of the five statements regarding credit counseling listed below. If you cannot do so, you are not eligible to file a bankruptcy case, and the court can dismiss any case you do file."** Cleveland did not check the box next to any of the five statements indicating that they were applicable to him. Box three asks the filing party to check the box if the following statement is applicable at the time of filing: "I certify that I requested credit counseling services from an approved agency but was unable to obtain the services during the seven days from the time I made my request[.]" Although that box was not checked indicating that this statement was applicable to Cleveland, the following was typed in after the box "I was sick and was not able to obtain the credit counseling. Now my health is stable and will be able to obtain credit counseling at the earliest opportunity." Cleveland signed the incomplete document under penalty of perjury.[1]
3. The Court's docket indicates that Clerk's office staff, after briefly reviewing Cleveland's income, as a courtesy advised him to contact Legal Services at the time he filed.
4. On the day the petition was filed, the Clerk issued and served Cleveland with written notice that he must submit schedules and statements on or before February 14, 2014,

[1] At the top of each page of the filed documents the following appears "From: Eric Benson Fax: (888) 297-7639 To: 864-681-0598@rcfax.com Fax: +18646810598" then the page # of each page and "1/31/2014 5:32". The record does not include any comment on or explanation for the source of this extraneous information on the documents.

pursuant to 11 U.S.C. § 521(b) and SC LBR 1007 and that if he failed to do so, his bankruptcy case would be dismissed.

5. On February 3, 2014, the Clerk as a courtesy served written notice on Cleveland of the location of relevant forms and resources, and noted again that his case could be dismissed for failure to timely file documents.
6. On the same date, the Court served Cleveland with written notice that his filing was not accompanied by a Certificate of Credit Counseling as required by § 521(b) and SC LBR 1017-2 (Fed. R. Bankr. P. 1007). The notice advised Cleveland that as a result his case may be subject to dismissal at any time.
7. Both the Court's operating schedule and travel within the state of South Carolina were affected by inclement winter weather for several days between January 31 and the date Cleveland's schedules and statements were due on February 14, 2014.
8. The Court routinely grants requests to extend the time to file schedules and statements *ex parte*, but no extension was requested.
9. On February 18, 2014, an employee of the Clerk's office phoned Cleveland as a courtesy to remind him that he had failed to complete his filing by timely submitting schedules and statements.
10. No additional filings were received and no request for an extension was made as of February 20, 2014 and on that date the Court issued an Order of Dismissal for Failure to File Timely Lists, Schedules, Statements and Other Documents. That dismissal was not based on a failure to complete credit counseling as that matter had not yet been presented to the Court for consideration.

11. On February 26, 2014, White made her first appearance in the case on Cleveland's behalf by filing a Motion to Reconsider Dismissal. She self-scheduled the hearing for April 3, 2014. White attached completed schedules and statements and a Chapter 13 plan prepared by Cleveland in consultation with Legal Services on a no fee basis. The Motion to Reconsider stated that Cleveland had completed credit counseling and was prepared to file the documents and to proceed.

12. At the brief hearing on the Motion to Reconsider, Cleveland was present and he and White proffered testimony that Cleveland filed bankruptcy on January 31, 2014, after reading in a local newspaper that his home was going to be sold at a public sale. He was overwhelmed by this discovery and unprepared for it because for eight months he sent payments to an organization that he said was run by someone named Sandy Isher after being informed that he was accepted for a HAMP Modification. He subsequently realized that those funds were not being used as intended as foreclosure was imminent. He stated that he had no time to prepare before filing and thereafter was not able to complete his schedules and statements in time to meet applicable deadlines. Bad weather further hampered his efforts. Cleveland was eventually able to prepare the necessary documents with the help of Legal Services, but his case had already been dismissed. There was no mention of illness as cause for any delay or difficulty.

13. The Chapter 13 Trustee, appearing at the hearing through counsel Christine Loftis, did not oppose the Motion to Reconsider given Cleveland's circumstances. Initially, in the responsive pleading and at the hearing, the Trustee requested a requirement that should the case be dismissed for any reason dismissal shall be with prejudice for a period of one year. In this District, the Court upon reconsideration usually imposes this condition

because reinstatement of a case after dismissal is an extraordinary remedy that gives a debtor a second chance without the need for the filing of a second bankruptcy case.

14. At the hearing White, on behalf of Cleveland, objected to the imposition of any prejudice period. After hearing the facts, Trustee's counsel stated that Trustee did not oppose the omission of the prejudice period from any order granting reconsideration.

15. After the parties stated their positions, the undersigned judge noticed that the record did not include evidence of pre-petition credit counseling and no exception to the pre-petition credit counseling requirement had been requested or granted. The Court noted on the record that this may be an impediment to the success of the case should the request to reinstate be granted. Trustee's counsel echoed the Court's concern that the credit counseling issue must be addressed.

16. On April 3, 2014, the Court entered an Order Granting the Motion to Reconsider, without objection, thereby reinstating the Chapter 13 case. The combination of the inclement weather, the fact that Cleveland was misled pre-petition and given the efforts of Cleveland and Legal Services to complete the bankruptcy process without further delay (all necessary schedules and statements were filed as an attachment to the Motion), motived the Court to grant the reconsideration without imposing the one year prejudice period to prevent a subsequent filing.

17. On April 4, 2014, White filed all necessary schedules and statements and the Certificate of Credit Counseling that had previously been filed as exhibits to the Motion to Reconsider.

18. The filed Certificate of Credit Counseling indicated that Cleveland completed his counseling post-petition on February 25, 2014.

19. Cleveland has progressed in the case toward confirmation and the Chapter 13 Trustee reported that the plan is otherwise confirmable. However, her notes to Cleveland dated May 29, 2014, the date of the confirmation hearing, again raised the issue of credit counseling, stating:

> Debtor did not obtain credit counseling until after the case was filed (in fact, while the case was dismissed). Per statute, the counseling must be received during the 180-day period preceding the date of filing of the VP in order to be eligible to be a debtor. Debtor needs to take some action to have the court approve the late counseling.

20. Following no effort by Cleveland to seek relief from the Court regarding the credit counseling issue for over three months after reconsideration, the Chapter 13 Trustee requested dismissal of the case by Motion filed on July 9, 2014. She scheduled a hearing for August 21, 2014, to bring the question of Cleveland's eligibility to continue in his bankruptcy case to the Court's attention before making a final recommendation to the Court regarding confirmation.

21. White filed a response on behalf of Cleveland and both appeared at the hearing, along with the Chapter 13 Trustee. At the hearing White and Cleveland proffered testimony consistent with the statements in paragraph 12 above.

22. There is no dispute in this case that Cleveland failed to complete credit counseling within the 180 days pre-petition as required by § 109(h)(1).

23. There is no evidence in the record indicating that Cleveland requested credit counseling at any time prior to the filing of his petition.

24. When the petition was filed Cleveland did not correctly complete the paperwork to request either a waiver of credit counseling or an extension of time to complete counseling.[2]

25. Although Cleveland's incomplete Exhibit D stated that his health prevented him from timely completing credit counseling, subsequent pleadings supporting reconsideration and submitted in opposition to dismissal did not include any reference to Cleveland's pre-petition health as justification for failure to obtain or request credit counseling before filing. There is no additional information in the record to support the statement found on Exhibit D.

26. Cleveland received credit counseling within thirty days after his petition was filed, but not until his case was dismissed for failure to file schedules, and no extension had been requested or granted at that time.

27. Given that Cleveland completed credit counseling post-petition, the facts do not support exemption from this requirement due to "incapacity, disability, or active military duty in a military combat zone." 11 U.S.C. § 109(h)(4).

28. At the August 21 hearing on this matter, White confirmed that Cleveland would not qualify for an exemption (by way of extension of time) or waiver pursuant to § 109(h). She argued instead that the Court should use its equitable powers to salvage the case.

Discussion and Conclusions of Law

Initially, White asserts that by failing to object to the reinstatement of Cleveland's case and accepting the Court's ruling reinstating the case, the Chapter 13 Trustee waived any challenge to Cleveland's eligibility and is estopped from seeking dismissal of this case. White

[2] In addition to the required Exhibit D, this Court provides a local form to assist with this type of request, the Certification of Noncompliance with 11 U.S.C. § 109(h)(1) and Request for Exemption. This form was not used and exemption was not requested in any other fashion at or near the time the case was filed.

did not point to any specific case law to support this position. However, judicial estoppel is an equitable doctrine that "protect[s] the integrity of the judicial process." *New Hampshire v. Maine,* 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (citations omitted); *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 28–29 (4th Cir.1995) ("The purpose of the doctrine is to prevent a party from playing fast and loose with the courts, and to protect the essential integrity of the judicial process."). When a party assumes a certain position in a legal proceeding and succeeds in convincing the Court to accept that position, that party may not thereafter assume a contrary position, "especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. at 749. Thus, the purpose of judicial estoppel is, like that of § 105(a) of the Bankruptcy Code, largely "to prevent an abuse of process." 11 U.S.C. § 105(a).

The Court cannot find that the Chapter 13 Trustee assumed a contrary position prior to reinstatement. At the brief hearing on reconsideration the lack of evidence of pre-petition credit counseling was noted and the Court and Trustee informed Cleveland and his counsel that this may be an impediment to the continuation of the case. Later the Trustee again provided notification in writing that this issue would need to be resolved. Lacking a resolution, she called the continuing problem to the Court's attention. Trustee has not changed positions or abused the bankruptcy process. This Court previously held that "…eligibility, or lack thereof, to be a debtor under 11 U.S.C. § 109(h) does not bear on whether this Court has jurisdiction over a debtor or the debtor's property." *In re Lee-Beam*, Case No. 07-06773-jw, slip op. at *7-8 (February 26, 2008). A case may continue, as this case did, even if the Court has not ruled on all eligibility issues.

Turning to the requirements of § 109(h)(1), that section provides that to qualify as a debtor in a bankruptcy case an individual must obtain credit counseling in the 180 days prior to filing a bankruptcy petition[3] and file a certificate to that effect unless one of three exceptions is present. In this case, two exceptions are inapplicable.[4] The third found in § 109(h)(3)(A), relieves from compliance at filing:

> [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 . . . but was unable to obtain the services referred to in paragraph (1) during the 7-day period beginning on the date on which the debtor made that request; and
> (iii) is satisfactory to the court.

If a debtor faces exigent circumstances, under § 109(h)(3)(A) a debtor may request and obtain an extension of time to receive such counseling of up to thirty days after filing if all three elements above are present. However, ". . . 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." 11 U.S.C. § 109(h)(3)(B).

Cleveland has not complied with the requirements of § 109(h)(3)(A)(ii). Courts disagree regarding the interpretation of the seven day timing requirement of that section; however, this Court has previously agreed with the majority of courts that "the better view is that the request must be made at least five[5] days before the petition date, absent extraordinary circumstances satisfactory to the Court." *In re Dansby*, 340 B.R. 564, 568 (Bankr. D.S.C. 2006) ("Congress' goal appears to be to eliminate bankruptcy petitions filed by individuals who have not allowed

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[3] Section 109 provides in relevant part: "[A]n 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."

[4] *See* 11 U.S.C. § 109(h)(2)(A) and § 109(h)(4).

[5] The Court notes that this timing requirement found in §109 has since been amended to seven (7) days.

themselves adequate time . . . to consider a bankruptcy alternative before they file. This Court should not substitute its judgment for that of Congress.") (citations omitted); *see also In re Holsinger*, 465 B.R. 775 (Bankr. W.D. Va. 2012); *In re Carey*, 341 B.R. 798 (Bankr. M.D. Fla. 2006); *In re Cleaver*, 333 B.R. 430, 435 (Bankr. S.D. Ohio 2005); *cf. In re DiPinto*, 336 B.R. 693 (Bankr. E.D. Pa. 2006); *In re Rodriguez*, 336 B.R. 462 (Bankr. D. Idaho 2005). A potential exception to the five (now seven) day rule was noted in *In re Dansby*, but here the Court cannot find "extraordinary circumstances satisfactory to the Court" that would justify Cleveland's complete failure to request pre-petition credit counseling at any time. *In re Dansby*, 340 B.R. at 568. The plain language of § 109(h)(3)(A)(ii) requires this effort **and** requires the filing of a certification regarding the effort. Section 109(h)(3)(A)(iii) requires that the information so certified be satisfactory to the Court. Here it is not.

Although Cleveland did not make a request for an exemption at filing, his Exhibit D received on January 31 with the petition mentions illness, apparently as an attempt to satisfy the exigent circumstance requirement of § 109(h)(3)(A)(i). However, subsequent pleadings and evidence did not provide details. Rather, the evidence was of bad weather, misdirected payments, surprise and a pending foreclosure. If the Court considers the circumstances explained more recently, the record does not contain evidence of any effort whatsoever by Cleveland to obtain counseling before filing the petition or details that satisfy the Court that it was not possible to make a request within whatever time was available to him after he learned of the foreclosure.[6] Cleveland has not certified to the Court's satisfaction that within the days and hours leading up to his filing sufficient exigent circumstances were present preventing him from requesting and receiving credit counseling as required by §§ 109(h)(3)(A)(ii) and (iii). His situation was no

[6] The exact date and time of any foreclosure sale that was scheduled is not in the record and the Court cannot tell exactly when Cleveland learned that foreclosure was imminent or was a possibility.

more difficult than challenges faced by prior debtors that failed to prove circumstances warranting an exception from the requirement to receive or request credit counseling before filing. *See e.g. In re Dansby*, 340 B.R. at 567 (finding that in this case pending foreclosure did not constitute an exigent circumstance and that debtor otherwise failed to meet the requirements for an extension of time); *In re McBride*, 354 B.R. 95 (denying an extension of time for an incarcerated debtor to complete credit counseling due to failure to comply with the timing requirements of § 109 thereby requiring dismissal of debtor's case); *In re Coard*, C/A No. 07-00903-dd, slip op. (Bankr. D.S.C. May 15, 2007) (dismissing debtor's case for completing the required credit counseling 198 days pre-petition as not in compliance with the 180 day requirement of §109(h)); *In re Ellis*, slip op. 07-1255-dd (Bankr. D.S.C. May 21, 2007) (finding that when debtors admitted they did not timely complete credit counseling and fit none of the exceptions under § 109 "[e]quity, . . . may not be exercised contrary to the unambiguous language of § 109").

Counsel for Cleveland acknowledges that he is not entitled to an exemption or waiver under § 109(h), but instead asserts that the Court should utilize § 105 to grant relief here. *See e.g. In re Manalad*, 360 B.R. 288 (Bankr. C.D.Ca. 2007) (finding the Court possessed the jurisdiction and discretion to assess debtor's eligibility and using a three-part analysis to determine whether a deficiency under § 109(h) had been cured); *In re Hess*, 347 B.R. 489 (Bankr. D.Vt. 2006) (applying a totality of the circumstances test to determine whether dismissal was appropriate for non-compliance with § 109(h)); *In re John*, 479 B.R. 643, 648-49 (Bankr. M.D. Pa. 2012) (using § 105 to excuse non-technical compliance with § 109(h) when failure to comply was not brought to the Court's attention until the closing of the case, several years later). However, the majority of Courts that have addressed this issue, including this District, have found that § 109(h) requires

strict compliance and that § 105 cannot be used to excuse compliance. *See Law v. Siegel*, 134 S. Ct. 1188, 1194, 188 L. Ed. 2d 146 (2014) ("It is hornbook law that § 105(a) 'does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code.'") (citing 2 Collier on Bankruptcy ¶ 105.01[2], p. 105–6 (16th ed. 2013)); *see also In re Coard*, C/A No. 07-00903-dd, slip op. (Bankr. D.S.C. May 15, 2007) (finding in response to debtor's § 105 argument that "[t]he Court cannot grant some sort of equitable exception to this debtor as equity may not be exercised contrary to the unambiguous language of § 109 in the total absence of any evidence which would bring the debtor within one of the statutory exceptions."); *Duncan v. LaBarge (In re Duncan)*, 418 B.R. 278, 280–81 (8th Cir.BAP2009) (finding that § 109(h) "is utterly clear" and a debtor must complete credit counseling or fit within one of the exceptions to be a eligible to be a debtor, otherwise dismissal is appropriate); *In re Ruckdaschel*, 364 B.R. 724, 729 (Bankr. D. Idaho 2007) ("This Court declines to read § 105(a) so broadly as to modify the time limit in § 109(h)(1), nor to craft an additional equitable exception to that provision, where Congress has not seen fit to do so expressly."); *In re Dyer*, 381 B.R. 200, 206 (Bankr. W.D.N.C. 2007); *In re Mingueta*, 338 B.R. 833, 838–39 (Bankr. C.D. Cal. 2006); *In re Carey*, 341 B.R. 798, 803–04 (Bankr. M.D. Fla. 2006).

The requirements of § 109(h) are clear and must be evenly applied. Even if the Court could accept that some set of extraordinary circumstances may warrant use of § 105 to circumvent the specific requirements of § 109(h), such circumstances were not presented here. The Court has already exercised its discretion and shown leniency to Cleveland by declining to impose a prejudice period to bar a second filing when granting the Motion to Reconsider. However, on the facts of this case, the determination of who may be a debtor was removed from

the Court's discretion by Congress. Cleveland has not met the eligibility requirements of § 109(h) and the Trustee's request for dismissal must be granted.

IT IS THEREFORE, ORDERED: That due to Cleveland's failure to complete credit counseling within the 180 days pre-petition or to make a sufficient showing of the applicability of one of the three exceptions found in 11 U.S.C. § 109(h), he is not eligible to be a debtor. The Chapter 13 Trustee's request to dismiss the case is hereby granted and the case is dismissed.

FILED BY THE COURT
09/02/2014

Entered: 09/02/2014

US Bankruptcy Judge
District of South Carolina