

**FILED**

Samuel L. Kay, Clerk  
United States Bankruptcy Court  
Augusta, Georgia  
By bgary at 1:27 pm, Oct 09, 2008

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Statesboro Division

IN RE: VELMA JEAN MIKELL                    )  
  )  
Debtor    )                    CHAPTER 13 CASE  
  )                    NUMBER 08-60473

**ORDER OF DISMISSAL**

"O, what a tangled web we weave,  
When first we practise to deceive!"<sup>1</sup>

This matter is before me on the Debtor's Motion for Exemption from Credit Counseling, which was made moot before it could be heard, and the Debtor's Motion to Extend Time for Credit Counseling, both of which motions were set at the same time as the hearing on confirmation of the chapter 13 case of Debtor Velma Jean Mikell. The case is dismissed because Mikell is not eligible to be a debtor under the Bankruptcy Code. Further, the dismissal is with prejudice, because Mikell submitted two false certifications regarding credit counseling when Mikell neither requested nor received credit counseling until after her case was filed.

<sup>1</sup> Sir Walter Scott, Marmion, cto. 6, st. 17 (1808).

## BACKGROUND

On July 29, 2008, the lawyer representing Velma Jean Mikell in this bankruptcy case ("Lawyer") filed his client's petition, along with a form Motion for Exemption from the Pre-Bankruptcy Credit Counseling Requirement of Section 109(h)(1) of the Bankruptcy Code. The Motion for Exemption was signed by Mikell three days earlier and did not indicate with a check mark either incapacity, disability, or active military duty under § 109(h)(4).<sup>2</sup> The Motion did state that "Debtor is filing a [sic] emergency chapter 13 bankruptcy to stop foreclosure on home and repossession of vehicle. Debtor is in process of taking the consumer credit counseling course" (Debtor's Mot. for Exemption, Dkt. #3).

In fact, Mikell was not at that time "in process" of taking a credit counseling course; she did not take a credit counseling course until seven days after her bankruptcy case was filed. (Amended Cert. of Couns., Dkt. #40; Cert. of Couns., Dkt. #25.)

On the same day that Mikell's petition was filed, the Clerk's office issued a deficiency notice, informing the Lawyer

---

<sup>2</sup> Section 109(h)(4) exempts a debtor from the requirement of having received pre-petition credit counseling as described in § 109(h)(1) when the court determines that the debtor "is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone." 11 U.S.C. § 109(h)(4).

that a proposed order was required with the Motion for Exemption and setting August 13, 2008, as the deadline to cure the deficiency. (Not. of Def., Dkt. #5.) On August 15, 2008, the Clerk's office issued a second deficiency notice, informing the Lawyer that the applicable box, either incapacity/disability or military duty, must be checked on the Motion for Exemption and setting August 25, 2008, as the deadline to cure this deficiency. (Not. of Def., Dkt. #13.) The Lawyer did not respond to either of these deficiency notices.

On the morning of August 5, 2008, Mikell completed a credit counseling course by telephone. (Amended Cert. of Couns., Dkt. #40; Cert. of Couns., Dkt. #25.) Approximately two weeks later, the Lawyer filed a Certificate of Counseling on which Mikell's first name was misspelled. (Dkt. #25.)

On August 25, 2008, the Lawyer filed a Motion for Extension of Time to File Certificate of Credit Counseling, noting the misspelling and requesting an extension of time until September 9, 2008, to file a corrected certificate. (Dkt. #30.) On September 10, 2008, the Lawyer filed a "Corrected" Certificate of Counseling that certified the same counseling date and corrected the misspelling of Mikell's name. (Dkt. #40.)

Mikell's bankruptcy case suffered from multiple other deficiencies besides those detailed above, however. On July 30, 2008, the day after Mikell's petition was filed, the Clerk's office issued a Deficiency Notice Requiring Debtor to file Necessary Papers that listed twelve documents required to be filed on or before August 13, 2008 (Dkt. #6), a deadline extended on Mikell's motion to August 28, 2008 (Order Extending Time to File Plan and Supporting Schedules, Dkt. #18). The list of missing documents included Exhibit D - Individual Debtor's Statement of Compliance with Credit Counseling Requirement.

On August 15, 2008, the Lawyer filed an Amended Exhibit D--although there was no previously-filed Exhibit D to amend--that was signed by Mikell on August 14. (Dkt. #17.) The Amended Exhibit D certified that Mikell requested credit counseling services pre-petition, but was unable to obtain the services during the statutory time period due to the existence of exigent circumstances. (Id.) The Amended Exhibit D summarized the exigent circumstances word-for-word as in the Motion for Exemption: "Debtor is filing a emergency chapter 13 bankruptcy to stop foreclosure on home and repossession of vehicle." (Id.)

Then, obscuring in the record the actual sequence of events, the Lawyer on August 22, 2008, one week after the filing

of the Amended Exhibit D, filed an Amended Petition that included an Exhibit D signed by Mikell one week before she signed the Amended Exhibit D. (Dkt. #20.) This later-filed Exhibit D certified that Mikell did receive pre-petition credit counseling.

The Lawyer acknowledged when I questioned him at the hearing that Mikell did not request credit counseling services until after her petition had been filed. It follows that Mikell's certifications on both her Exhibit D and her Amended Exhibit D were false. Mikell not only failed to request credit counseling services pre-petition, she also did not receive such services pre-petition, as documented by the post-petition date on her certificate of credit counseling and her amended certificate of credit counseling. Mikell thus submitted not just one, but two false certifications related to the pre-petition credit counseling requirement.

#### **DISCUSSION**

Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, commonly known as BAPCPA, "an individual may not be a debtor" unless that individual has received a briefing on opportunities for credit counseling and help with budget analysis from an approved nonprofit budget and credit

counseling agency during the 180 days preceding the filing of the bankruptcy case. 11 U.S.C. § 109(h)(1). As I have previously held, compliance with § 109(h)(1) is thus a condition of eligibility to be an individual debtor under Title 11. In re Lyons, No. 08-50088 (Bankr. S.D. Ga. Sept. 4, 2008); In re Jones, No. 08-20314 (Bankr. S.D. Ga. Apr. 28, 2008); Clay v. Baxter (In re Clay), No. 05-13977 (Bankr. S.D. Ga. Nov. 9, 2005).

The court may grant a 30-day waiver of the credit counseling requirement if the debtor certifies that the debtor was unable to obtain pre-petition counseling due to exigent circumstances; and that the debtor requested pre-petition credit counseling, but was unable to obtain it within five days of the request. 11 U.S.C. § 109(h)(3)(A)-(B). "Exigent circumstances" exist when "the debtor finds himself in a situation in which adverse events are imminent and will occur before the debtor is able to avail himself of the statutory briefing." Dixon v. LaBarge (In re Dixon), 338 B.R. 383, 388 (B.A.P. 8th Cir. 2006). I have previously held that the imminent repossession of the debtor's vehicle meets the definition of exigent circumstances. In re Wilcher, No. 06-20513 (Bankr. S.D. Ga. Aug. 15, 2008).

Here, Mikell certified under penalty of perjury that she requested credit counseling but was unable to obtain it pre-

petition and also certified that she obtained pre-petition credit counseling, when in fact she neither requested nor received credit counseling until after her case had been filed. Thus Mikell not only failed to receive pre-petition credit counseling, making her ineligible to be a debtor under the Bankruptcy Code, she also falsely certified to two mutually exclusive conditions under which she either could have been eligible to be a debtor or could have qualified for a waiver of the pre-petition credit counseling requirement.

The Lawyer knew that Mikell did not request credit counseling before her petition was filed, having acknowledged in open court the true sequence of events, albeit nearly eight weeks after he filed Mikell's petition. He also knew at the time he filed her petition that exigent circumstances existed--the imminent repossession of Mikell's vehicle--that would have qualified his client for a waiver of the pre-petition credit counseling requirement. But instead of insisting that Mikell meet the requirements of the Bankruptcy Code by requesting pre-petition credit counseling, the Lawyer opted to file her petition either knowing she had not requested credit counseling or failing to ask whether she had. Unfortunately, it is Mikell who will pay the price for the Lawyer's mistakes, as well as for her own.

It is therefore **ORDERED** that the chapter 13 case of Velma Jean Mikell is **DISMISSED WITH PREJUDICE**, barring her re-filing of a petition within 180 days of the date of this order.



---

JOHN S. DALIS  
United States Bankruptcy Judge

Dated at Brunswick, Georgia,  
this 9<sup>th</sup> day of October, 2008.