

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
* CASE NUMBER 06-40078
ERIC E. RICHARD and *
* CHAPTER 7
ESSIE D. RICHARD, *
*
Debtors. * HONORABLE KAY WOODS
*

ORDER GRANTING MOTION OF UNITED STATES TRUSTEE TO DISMISS

The matter before the Court is the Motion to Dismiss filed by the United States Trustee for Region 9. The Motion to Dismiss is based on the failure of Debtors Eric Richard and Essie Richard ("Debtors") to comply with the requirement to obtain credit counseling services during the 180-day period preceding the date of filing the petition, as required by 11 U.S.C. § 109(h)(1). In response to the Motion to Dismiss, Debtors filed Debtor's [sic] Objection to Trustee's Motion to Dismiss Under 11 U.S.C. Section 109(h)(1)(3) [sic] ("Debtors' Objection"), urging the Court to strike rather than dismiss their bankruptcy case. The Court held a hearing on March 15, 2006, at which the United States Trustee was represented by Derrick Rippy and the Debtors represented themselves *pro se*. For the following reasons, this Court grants the Motion to Dismiss.

FACTS

Debtors filed a voluntary petition pursuant to Chapter 7 of Title 11 of the United States Code (the "Bankruptcy Code") on January 31, 2006. Their petition indicates that they utilized a petition preparer, Joseph-Mario Spates ("Spates"), to help prepare

the petition and schedules. Debtors filed their schedules and statement of financial affairs on February 14, 2006. On that same date, they each filed a Certificate of Counseling dated 02-10-2006 and signed by Tonya Emerson, Counselor for Consumer Credit Counseling Service. At no time did Debtors file a certificate "describ[ing] exigent circumstances that merit a waiver of the requirements of [11 U.S.C. § 109(h)] paragraph 1. . . ." (11 U.S.C. § 109(h) (3).)

Spates failed to file Disclosure of Compensation to Bankruptcy Preparer ("Petition Preparer Disclosure") until February 14, 2006, which was subsequent to issuance by the Court of an Order to Appear and Show Cause ("Show Cause Order") directed to Spates for the failure to file the disclosure statement. The hearing on the Show Cause Order was originally scheduled for February 16, 2006, but was continued, at the request of Spates, until February 23, 2006. The compensation disclosed by Spates exceeded the presumptive maximum allowable fee, as set forth in General Order 05-03. Accordingly, the Court ordered Spates to disgorge Fifty Dollars (\$50.00), which amount exceeded the presumptive maximum allowable fee, to the Chapter 7 trustee, as required by 11 U.S.C. § 110(h) (3) (A).

On January 31, 2006, along with their petition, Debtors filed Application to Pay Filing Fee in Installments ("Application"). Because Spates failed to timely file the Petition Preparer Disclosure, the Application was not immediately addressed. The Court denied the Application on February 27, 2006 and ordered Debtors to pay the filing fee in full by March 13, 2006. The Trustee filed the Motion to Dismiss on February 23, 2006, which was set for hearing on March 15, 2006. After the Motion to Dismiss was filed, but

before filing the Objection, Debtors filed Debtor's [sic] Motion for Extension of Time in Which to Pay Entire Installment [sic] Fee ("Motion for Extension of Time"). Debtors' Motion for Extension of Time requested an additional four days (*i.e.*, until March 17, 2006) to pay the filing fee because "Debtor, Eric E. Richard does not receive his bi-monthly paycheck until that date." The Court granted the extension of time until March 17, 2006.

To date, Debtors have not paid any amount of the filing fee, but have had the protection of the Bankruptcy Code for almost two months. Because the Court granted Debtors' Motion for Extension of Time, Debtors have until two days after the hearing on the Motion to Dismiss before they are required to pay the filing fee.

Debtors' Objection is quite well done and did not appear to have been prepared by the Debtors. The Objection cites recent case law, includes footnotes and even includes a Latin phrase. As a consequence, the Court inquired of Debtors regarding who prepared the Objection. Debtors informed the Court that Spates had prepared the Objection, as well as the Motion for Extension of Time.

The cases cited by and relied upon by Debtors are distinguishable from the instant case. In each of the cases cited by Debtors, the debtors had filed or attempted to file certificates of exigent circumstances to obtain a waiver of the requirement for such debtors to obtain credit counseling services within the 180-day period immediately preceding the filing of their petitions. In this case, Debtors did not request a waiver of the requirement to obtain credit counseling services within the 180-day period prior to January 31, 2006. Debtors have not described any exigent circumstances and have not filed any certificate except the Certificate

of Credit Counseling, which shows that credit counseling was not timely obtained. Debtors acknowledge that they investigated obtaining credit counseling in early January 2006, but Debtors said they failed to obtain such counseling at that time because there was a Fifty Dollar (\$50.00) charge for such counseling. Debtors also stated that Spates informed them of the requirement to obtain credit counseling on January 30, 2006, the day before they filed the petition.

Debtors urge this Court to strike their petition instead of dismissing the case on the basis that they were ineligible to be debtors under 11 U.S.C. § 109 and, thus, no bankruptcy case was commenced by filing their petition. The Court is well aware of the cases Debtors cite and generally agrees with the reasoning of those decisions. It is true that prior to enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), dismissal of a petition and striking a petition had the same effect, but that is not necessarily the case in the post-BAPCPA era. However, in the present case, Debtors did not seek a waiver of the credit counseling requirement; they simply did not comply. Debtors stated at the hearing that they knew about the requirement for credit counseling before filing their petition. They failed to obtain credit counseling prior to filing the petition. Debtors have not asserted that there were any exigent circumstances that prevented them from obtaining credit counseling in the time frame specified in Section 109(h). Moreover, Debtors have not paid any part of the filing fee, but because of their actions and the actions of Spates, this Court has had to expend time and resources in conducting two hearings. Debtors have availed themselves of the protection of the Bankruptcy

Code and the Bankruptcy Court without fulfilling any of the commensurate obligations imposed upon them by the Bankruptcy Code. If this Court strikes Debtors' petition, they will be free to re-file without any consequences even though they have availed themselves of the automatic stay and other protections in the Bankruptcy Code without having paid the filing fee. This Court will not sanction the conduct of Debtors, which, in essence, gives them a "do-over" without any consequences. *Pro se* debtors are responsible for making the appropriate filings and for otherwise complying with the requirements of the Bankruptcy Code. In this case, Debtors have failed to do what the Bankruptcy Code requires.

As a consequence, this Court finds that Debtors have failed to comply with 11 U.S.C. § 109(h)(1). Despite the caption of Debtors' Objection, 11 U.S.C. § 109(h)(3) is not applicable because Debtors never filed a certificate of exigent circumstances and never requested a waiver of the requirement for pre-petition credit counsel services. Accordingly, the Motion to Dismiss is well taken and is hereby granted.

The Fifty Dollars (\$50.00) being held by the Chapter 7 Trustee should be paid to the Clerk's Office and credited against the unpaid filing fee.

IT IS SO ORDERED.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**