

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:)
) CASE NO. 05-37586 (LMW)
)
 EDWARD JOSEPH CORRIGAN,) CHAPTER 7
)
)
 DEBTOR.) DOC. I.D. NOS. 15, 20, 27

APPEARANCES

Edward Joseph Corrigan
841 Pendleton Hill Road
North Stonington, CT 06359

Debtor, *Pro Se*

Patricia Beary, Esq.
Assistant U.S. Trustee
265 Church Street, Suite 1103
New Haven, CT 06510

Counsel for the United States Trustee

Barbara H. Katz, Esq.
57 Trumbull Street
New Haven, CT 06510

Chapter 7 Trustee

MEMORANDUM AND ORDER RE: COURT’S MOTION TO DISMISS

Lorraine Murphy Weil, United States Bankruptcy Judge

Before the court are the Court’s Motion To Dismiss Case for Failure To File Means Test, Credit Counseling Certificate or Exigent Certificate and Payment Advices (Doc. I.D. No. 15, the “Court’s Second Motion”)¹ and the above-referenced debtor’s (the “Debtor”) first objection (Doc.

¹ References herein to the docket for this case appear in the following form: “Doc. I.D. No. ____.”

I.D. No. 20, the “First Objection”) and the Debtor’s second objection (Doc. I.D. No. 27, the “Second Objection”) thereto. This court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 157(b) and 1334 and that certain Order dated September 21, 1984 of the District Court (Daly, C.J.).²

I. BACKGROUND

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub.L.109-8, 119 Stat. 23 (2005),the “Act”) became effective on October 17, 2005 (the “Effective Date”). *See Act* § 1501. The voluntary petition (Doc. I.D. No. 4, the “Petition”) in this case was filed in conventional (paper) form by the Debtor *pro se* and docketed by the Clerk’s Office as filed on October 17, 2005. The Debtor claimed that he had previously telephonically inquired of the Clerk’s Office whether a conventionally-filed petition postmarked on October 14, 2005 would be deemed filed prior to the Effective Date even if received by the Clerk’s Office on or after the Effective Date and further claims that he was advised by an employee of the Clerk’s Office that such was the case. The Petition was mailed on (Friday) October 14, 2005 but was not received by the Clerk’s Office until the Effective Date (a Monday). The Debtor was telephonically notified by the Clerk’s Office that the Petition would be deemed to have been filed on the Effective Date. On October 19, 2005, the Debtor filed a pleading captioned “Notice of Motion for Hearing” (Doc. I.D. No. 2) seeking entry of an order deeming the Petition to have been filed prior to the Effective Date. That motion was amended (without any relevant change) on October 20, 2005. (*See Doc. I.D. No. 3, the “Amended Motion.”*)

² That order referred to the “Bankruptcy Judges for this District” *inter alia* “all proceedings ... arising in...a case under Title 11, U.S.C....”

On October 25, 2005, the Clerk's Office issued a certain "Deficiency Notice" (Doc. I.D. No. 5) which advised the Debtor of the following deficiencies (collectively, the "Deficiencies") in respect of the Petition: lack of "Means Test" statement; lack of "Credit Counseling Certificate" or "Exigent Certificate"; and lack of "Payment Advices".³ On October 25, 2005, the Clerk's Office issued that certain Court's Motion To Dismiss for failure to pay filing fee (the "Filing Fee") in full. (See Doc. I.D. No. 7, the "Court's First Motion".)⁴ The Amended Motion and the Court's First Motion were scheduled for a hearing on November 16, 2005. On November 1, 2005 the Clerk's Office issued the Court's Second Motion on account of the Deficiencies. The Court's Second Motion was scheduled for a hearing on November 23, 2005. The hearing on the Amended Motion and the Court's First Motion was continued (at the request of the Debtor) to the same date.

On November 23, 2005 the Debtor filed: a legal memorandum captioned "Hearing on Motion To Change Date of Filing Petition" (Doc. I.D. No. 21); and the First Objection with respect to the Court's First Motion and the Court's Second Motion. The hearing (the "Hearing") on the Amended Motion, the Court's First Motion, the Court's Second Motion and the First Objection was held as scheduled on November 23, 2005. The Debtor appeared at the Hearing. After hearing the Debtor's arguments, the court took the matters under advisement further to consider them. On December 2, 2005, the court issued that certain Brief Memorandum and Order and Notice To Creditors Re: Motion To Change Date of Filing Petition and Court's Motions To Dismiss (Doc. I.D. No. 23, the "Decision"). For reasons discussed more fully in the Decision, the Amended Motion was denied

³ The Deficiencies refer to filing requirements required by the Act but not required under prior law.

⁴ The Petition was accompanied by payment of the lower filing fee in effect prior to the Effective Date.

and the Petition was deemed filed on the Effective Date. (Decision at 5.) The Hearing was continued to December 14, 2005 to give the Debtor the opportunity “to cure the Deficiencies and to pay the unpaid portion of the filing fee . . .” (*id.*).

The Decision also stated as follows:

The court notes that certain of the Deficiencies were required to be cured within 45 days (the “Cure Period”) of the bankruptcy filing (*i.e.*, December 1, 2005) (11 U.S.C. § 521(i)(1) (as amended by the Act)). However, the court docket does not reflect any curing by the Debtor of any of the Deficiencies or any motion to extend the Cure Period (*see* Section 521(i)(3)). However, if the Deficiencies are cured and the full filing fee is paid prior to the Continued Hearing, at the Continued Hearing the court will consider an argument that the Cure Period was tolled during the pendency of the Amended Motion. **NOTICE IS HEREBY GIVEN TO CREDITORS OF THE FOREGOING AND AN OPPORTUNITY TO FILE WRITTEN OBJECTIONS TO THE SAME PRIOR TO THE CONTINUED HEARING.**

(Decision at 5 n.5.) The Second Objection (which raised the tolling issue) was filed on December 13, 2005.

The continued Hearing was convened as scheduled. The Debtor (*pro se*), the chapter 7 trustee (the “Trustee”) and the United States Trustee (the “UST”) appeared. The UST objected to the proposed tolling of the Cure Period. The Hearing was further continued to December 21, 2005 to permit the Debtor to provide confirmation that the Deficiencies had been cured (the Filing Fee having been paid in full).⁵ At the December 21, 2005 hearing, the UST conceded that (reserving the issue of timeliness of cure) all the Deficiencies had been cured. However, the UST renewed her

⁵ As part of his “cure”, the Debtor filed the certificate of Money Management International that stated (in relevant part): “[O]n December 7, 2005, Edward Corrigan received from Money Management International, an agency approved pursuant to 11 U.S.C. § 111 to provide credit counseling in the CT [sic] an individual briefing that complied with the provisions of 11 U.S.C. §§ 109(h) and 111.” (Doc. I.D. No. 30). That certificate was filed on December 13, 2005.

objection to the proposed tolling of the Cure Period. The court took the matter under advisement and now issues this memorandum and order.

II. ANALYSIS

Bankruptcy Code § 109(h) (as amended by the Act) provides in relevant part as follows:

(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.

...

(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 that request; and

(iii) is satisfactory to the court.

...

(4) The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and “disability” means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).

11 U.S.C.A. § 109(h) (West 2006).

Under Section 109(h)(1), eligibility for title 11 relief depends upon the doing of an act (*i.e.*, obtaining the requisite prepetition briefing) unless the court waives the requirement on a showing of “exigent circumstances” or pursuant to Section 109(h)(4). It is undisputed that the Debtor did not receive the requisite prepetition briefing and he does not allege that he attempted to do so.⁶ With apologies to all, the court concludes that the Deficiencies are irrelevant and the Cure Period is irrelevant. The Debtor’s problem is not his late filing of documents but, rather, the Debtor’s failure to perform the requisite prepetition act. As a result, the Debtor is not eligible for title 11 relief with respect to the Petition.

Having determined the Debtor’s ineligibility for title 11 relief with respect to the Petition, the question of the appropriate remedy remains. If this case is dismissed, there may be adverse consequences for the Debtor. *See* 11 U.S.C. § 362(c)(3).⁷ The court concludes that the foregoing

⁶ In fact, given his previous position that the Petition was filed under the Bankruptcy Code as it existed prior to the Effective Date, it is clear that the Debtor did not intend to seek the prepetition briefing required under the Act. It is undisputed that Section 109(h)(4) does not apply here.

⁷ Section 362(c) of the Bankruptcy Code (as amended by the Act) provides, in relevant part, as follows:

(3) [I]f a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the proceeding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)--

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

would be an unduly harsh result given the facts here. In some instances, the appropriate remedy

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary) –

(i) as to all creditors, if –

. . .

(II) a previous case under any of chapters 7, 11 and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to –

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

. . .

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded–

(aa) if a case under chapter 7, with a discharge,

or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed

when the debtor is ineligible for title 11 relief under Section 109(h) is to strike the petition rather than to dismiss the case as is customary. *See In re Hubbard*, 333 B.R. 377, 388 (Bankr. S.D. Tex. 2005). Although the remedy of “striking” (rather than dismissing) the petition may not be appropriate in all cases where the debtor has failed to obtain the requisite prepetition briefing, on the facts presented here the court concludes that striking the Petition is the appropriate remedy.

III. CONCLUSION

For the reasons set forth above, the First Objection and the Second Objection are overruled and an order will enter striking the Petition.⁸

It is **SO ORDERED**

Dated: January 5, 2006

BY THE COURT


Lorraine Murphy Weil
United States Bankruptcy Judge

⁸ The Second Court’s Motion is granted to the extent of striking the Petition. Because of the administrative burden this case already has placed upon the court and the Trustee, the court declines to order refund of the Filing Fee.