

Motion for Recusal
Credit counseling requirement

Ivan and Joan Cermak, Case No. 605-75084-fra13

2/2/2006 FRA

Unpublished

Debtors filed their bankruptcy petition on 12/27/05, after the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The Act requires at Code § 109(h) that a debtor, as a requirement to being a debtor, receive approved credit counseling in the 180 day period prior to the petition date. An exception is where the debtor requested credit counseling from an approved agency, but was unable to obtain counseling within five days of the request.

With Debtors' petition, they filed a motion for extension of time to obtain credit counseling. They also filed a motion seeking the recusal of the bankruptcy judge due to an alleged bias against debtor Ivan Cermak. The motion indicated that rulings made in a bankruptcy case in which the debtor was an interested party indicated the judge "may have a substantial bias" against the debtor and other similarly situated interested parties.

The motion for recusal was denied on the basis of the "extrajudicial source" doctrine. It requires that a party seeking recusal for bias based on facts obtained in the current or prior proceedings show that the judge "display a deep-seated favoritism or antagonism that would make fair judgment impossible." Debtors had failed to present evidence so showing.

The motion for extension of time to obtain credit counseling was also denied. Debtors had not obtained credit counseling in the 180 day pre-petition period, nor had they sought credit counseling during that period. As they did not seek credit counseling prior to the petition date, they did not qualify for the exception stated above. An order of dismissal was entered.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 605-75084-fra13
IVAN CERMAK and JOAN CERMAK,)
) MEMORANDUM OPINION
Debtors.)

BACKGROUND

Debtors filed a chapter 13 bankruptcy petition on December 27, 2005, after the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Along with the bankruptcy petition, Debtors filed a motion to extend time for credit counseling. They also filed a "Motion/Request for Change of Judge, 28 U.S.C. §455." A hearing was held on January 19, 2006, at the conclusion of which the court denied both motions and stated that the court would prepare written orders of its rulings and an order of dismissal. This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law.

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1 Mr. Cermak was an interested party in Fountainhead Global
2 Trust and argues that this court's rulings in that case, in denying
3 the involuntary petition and in awarding attorney's fees to the
4 involuntary debtor under 11 U.S.C. § 303(i), show that "Judge Alley
5 may have a substantial bias against me or other claimants in this
6 matter." Debtor has not provided evidence to show that this evinces
7 a "deep-seated favoritism or antagonism that would make fair
8 judgment impossible." Liteky at 555.

9 B. Motion for Extension to Obtain Credit Counseling

10 11 U.S.C. § 109(h) provides in part:

11 (1) [A]n individual may not be a debtor under this
12 title unless such individual has, during the 180 day
13 period preceding the [petition date], received from an
approved nonprofit budget and credit counseling agency
. . . an individual or group briefing

14 * * *

15 (3) (A) [T]he requirements of paragraph (1) shall not
16 apply with respect to a debtor who submits to the
court a certification that -

17 (i) describes exigent circumstances that merit a
18 waiver of the requirements of paragraph (1);

19 (ii) states that the debtor requested credit
20 counseling services from an approved nonprofit
21 budget and credit counseling agency, but was
unable to obtain the services referred to in
22 paragraph (1) during the 5-day period beginning
on the date on which the debtor made that
request; and

23 (iii) is satisfactory to the court.

24 It is clear that a debtor must have received approved credit
25 counseling during the 180 day period before the petition date. The
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1 relevant exception in this case is when the debtor attempted to
2 obtain credit counseling, but was unable to obtain those services
3 within five days. However, the attempt to obtain credit counseling
4 must have been made prior to the petition date for the exception to
5 apply.

6 At the Court's hearing on Debtors' motion, the Debtor
7 indicated that he had filed his bankruptcy petition in the hope of
8 forestalling the sale on foreclosure of property in a related
9 bankruptcy and that he had not sought the required credit counseling
10 prior to the date he filed his bankruptcy petition. Since the
11 Bankruptcy Code's requirement of a pre-filing inquiry into the
12 availability of credit counseling was not satisfied, the Court must
13 find that the Debtors are ineligible to be debtors under Code § 109.

14 CONCLUSION

15 This Memorandum Opinion constitutes the Court's findings of
16 fact and conclusions of law, along with those findings and
17 conclusions made from the bench. Orders denying the Debtors'
18 motions will be entered and the bankruptcy case dismissed.

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22 FRANK R. ALLEY, III
23 Bankruptcy Judge
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