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

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Unpublished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 <u>sought</u> 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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8	UNITED STATES BANKRUPTCY COURT
9	FOR THE DISTRICT OF OREGON
10	In Re:) Bankruptcy Case No.) 605-75084-fra13
11	IVAN CERMAK and JOAN CERMAK,) MEMORANDUM OPINION
12	Debtors.)
13	BACKGROUND
14	Debtors filed a chapter 13 bankruptcy petition on December
15	27, 2005, after the effective date of the Bankruptcy Abuse
16	Prevention and Consumer Protection Act of 2005. Along with the
17	bankruptcy petition, Debtors filed a motion to extend time for
18	credit counseling. They also filed a "Motion/Request for Change of
19	Judge, 28 U.S.C. §455." A hearing was held on January 19, 2006, at
20	the conclusion of which the court denied both motions and stated
21	that the court would prepare written orders of its rulings and an
22	order of dismissal. This Memorandum Opinion constitutes the Court's
23	findings of fact and conclusions of law.
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1	DISCUSSION
2	A. Motion for Change of Judge
3	Debtors ask that this judge recuse himself from Debtors'
4	bankruptcy case due to an alleged bias. The motion is based solely
5	on prior rulings of the Court, including denial of the involuntary
6	petition and an award of attorney's fees in Fountainhead Global
7	Trust, 604-69908-fra7. Copies of those two rulings are appended to
8	this Memorandum Opinion.
9	28 U.S.C. § 455 provides in pertinent part:
10	(a) Any justice, judge, or magistrate of the United
11	States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
12	circumstances:
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14 15	(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
16	In <u>Liteky v. U.S.</u> , 510 U.S. 540, 554 (1994), the Supreme Court held
17	that the "extrajudicial source" doctrine applies to section 455. In
18	explaining the doctrine, the Ninth Circuit Court of Appeals stated:
19	First, judicial rulings alone almost never constitute
20	a valid basis for a bias or partiality motion Second, opinions formed by a judge on the basis of
21	facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do
22	not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or
23	antagonism that would make a fair judgment impossible.
24	<u>Smith v. Hale et al. (In re Smith)</u> , 317 F.3d 918, 932-33 (9 th Cir.
25	2002)(italics in original).
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Mr. Cermak was an interested party in Fountainhead Global
Trust and argues that this court's rulings in that case, in denying
the involuntary petition and in awarding attorney's fees to the
involuntary debtor under 11 U.S.C. § 303(i), show that "Judge Alley
may have a substantial bias against me or other claimants in this
matter." Debtor has not provided evidence to show that this evinces
a "deep-seated favoritism or antagonism that would make fair
judgment impossible." <u>Liteky</u> at 555.
B. <u>Motion for Extension to Obtain Credit Counseling</u>
11 U.S.C. § 109(h) provides in part:
(1) [A]n individual may not be a debtor under this title unless such individual has, during the 180 day
period preceding the [petition date], received from an approved nonprofit budget and credit counseling agency
an individual or group briefing
* * *
(3) (A) [T]he 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.
It is clear that a debtor must have received approved credit
counseling during the 180 day period <u>before</u> the petition date. The

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relevant exception in this case is when the debtor attempted to 1 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 bankruptcy and that he had not sought the required credit counseling 9 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 fact and conclusions of law, along with those findings and 16 conclusions made from the bench. Orders denying the Debtors' 17 18 motions will be entered and the bankruptcy case dismissed.

> FRANK R. ALLEY, III Bankruptcy Judge

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