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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-10-1399-PaHki
)	
IMAN GIBSON,)	Bk. No. LA 10-45200-EC
)	
Debtor.)	
_____)	
IMAN GIBSON,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
KATHY DOCKERY, Chapter 13)	
Trustee,)	
)	
Appellee.)	
_____)	

Argued and Submitted on November 17, 2011
at Pasadena, California

Filed - December 1, 2011

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Ellen A. Carroll, Bankruptcy Judge, Presiding

Appearances: Appellant Iman Gibson argued pro se.

Before: PAPPAS, HOLLOWELL and KIRSCHER, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Iman Gibson ("Debtor") appeals the bankruptcy court's order
2 dismissing her chapter 13² case because she did not comply with
3 § 109(h). Because Debtor had adequate notice of a potential
4 dismissal, and because she indeed did not comply with § 109(h), we
5 AFFIRM.

6 **FACTS³**

7 Debtor filed a chapter 13 bankruptcy petition, Official
8 Form 1, on August 20, 2010.⁴ Official Form 1 includes several

9
10 ² Unless otherwise indicated, all chapter, section and rule
11 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
12 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

13 ³ No excerpts of record were supplied by Debtor. In
14 reaching our decision, the Panel has reviewed and relied on the
15 bankruptcy court docket. See Clinton v. Deutsche Bank Nat'l Trust
Co. (In re Clinton), 449 B.R. 79, 82-83 & n.5 (9th Cir. BAP 2011)
16 (citing O'Rourke v. Seaboard Surety Co. (In re E.R. Fegert, Inc.),
17 887 F.2d 955, 957-58 (9th Cir. 1989) and indicating that an
18 appellate court may take judicial notice of underlying bankruptcy
19 court records).

20 ⁴ Debtor contended throughout her opening brief, and at oral
21 argument, that the petition filing date was August 23, 2010, the
22 date she paid the filing fee in full. However, full payment is
23 not required to file a bankruptcy petition and it may be filed
24 with an application to pay the filing fee in installments. See
25 § 301(a) (indicating a chapter 13 case is commenced when a
26 petition is filed); Rule 1006(b)(1) ("A voluntary petition by an
27 individual shall be accepted for filing if accompanied by the
28 debtor's signed application . . . stating that the debtor is
unable to pay the filing fee except in installments.").

The docket and Debtor's opening brief indicate that Debtor
submitted her application to pay the filing fee in installments on
August 20. Debtor's Br. at 36 ("[The clerk's staff] gave me the
[installment application on August 20,] and I filled it out and
gave it to him."); Dkt. No. 1 (docket notation indicating Debtor's
petition "Filed & Entered" August 20); Dkt. No. 4 (August 22
notice to Debtor's creditors, providing "[D]ebtor . . . filed a
Chapter 13 bankruptcy case on August 20, 2010"); Dkt. No. 7
(installment application with signature date of August 20). For
some reason, though, the installment application was not stamped
as filed or docketed until August 23, the same day the court
entered its Order denying that application. Dkt. Nos. 7, 8.

Debtor asserts the clerk's staff represented to her that the
denial of her installment application on August 23, was tantamount
(continued...)

1 exhibits, and a debtor must acknowledge attachment of those
2 exhibits within the petition.⁵ Among the petition's exhibits is
3 Exhibit D, which documents an individual debtor's compliance with
4 § 109(h) of the Bankruptcy Code, and provides:

5 (h)(1) Subject to paragraphs (2) and (3), and
6 notwithstanding any other provision of this
7 section, an individual may not be a debtor
8 under this title unless such individual has,
9 during the 180-day period preceding the date
10 of filing of the petition by such individual,
11 received from an approved nonprofit budget and
12 credit counseling agency described in section
13 111(a) an individual or group briefing
14 (including briefing conducted by telephone or
15 on the Internet) that outlined the
16 opportunities for available credit counseling
17 and assisted such individual in performing a
18 related budget analysis.

19 § 109(h)(1). Exhibit D also warns the debtor of the consequences
20 of not complying with § 109(h), stating, in bold font:

21 **Warning: You must be able to check truthfully
22 one of the five statements regarding credit
23 counseling listed below. If you cannot do so,
24 you are not eligible to file a bankruptcy
25 case, and the court can dismiss any case you
26 do file. If that happens, you will lose
27 whatever filing fee you paid, and your
28 creditors will be able to resume collection
activities against you.**

Dkt. No. 14 at 25. Each of the five statements referred to in
that warning corresponds to a statement of compliance with the

⁴(...continued)

to a denial of the petition's filing. Debtor's Br. at 36. It is
clear from the docket, however, and from notices sent by the clerk
prior to August 23, that the court considered Debtor's petition as
filed on August 20. Regardless, even if the petition filing date
was August 23, the analysis of the legal issues in this decision
would not change.

⁵ For example, on the second page of the petition, debtors
are required to mark, "Exhibit D [has been] completed and signed
by the debtor [and] is attached and made a part of this petition."
Official Form 1 at 2. "[E]very individual debtor" is to check a
box acknowledging such. Id.

1 § 109(h) credit counseling requirement.⁶ Rather than
2 acknowledging completion of Exhibit D in her petition, Debtor
3 crossed the acknowledgment out, and noted, “[t]his does not
4 pertain to me.” Dkt. No. 1 at 2.

5 Debtor did not submit an Exhibit D on August 20, 2010.

6 When she presented her petition for filing on August 20, the
7 bankruptcy clerk’s staff informed Debtor that credit counseling
8 needed to be completed prior to filing, that such counseling is
9 “mandatory,” and that there can be no waiver for the requirement.
10 Debtor’s Opening Brief at 35–36. However, Debtor insisted that
11 the staff accept her petition, which they did. See id. at 36 (“I
12 told [the clerk’s staff] my house is in second default and they
13 evicted us August 11, 2010. I want to file ch.13 now [on August
14 20, 2010]. Then after saying this over and over again. [The
15 clerk’s staff] tells me that I can do an installment plan to pay
16 the filing fee. He gave me the form and I filled it out and gave
17 it to him.” (emphasis added, punctuation in original)).

18 While Debtor filed a petition and thereby commenced a
19 bankruptcy case on August 20, she did not submit all of the
20 documents required to complete her filing on that date. See
21 C.D. Cal. Local Bankruptcy Rule 1002-1. As a result, the
22 bankruptcy court generated a Case Commencement Deficiency Notice
23 on August 22. Dkt. No. 5. The bankruptcy clerk’s staff provided

24 ⁶ The first two statements are for debtors who have
25 completed the required credit counseling. If a debtor currently
26 has a certificate documenting completion of the counseling, she
27 checks the first statement and attaches the certificate; she
28 checks the second statement if she does not yet have the
certificate, but will file it within fourteen days of her petition
date. The remaining three statements refer to narrow exceptions
to the credit counseling requirement provided in §§ 109(h)(2), (3)
and (4).

1 Debtor with a copy of that notice when she visited the clerk on
2 August 23. Debtor's Opening Brief at 37. Among the deficiencies
3 listed in that notice was that there were no "Certificate of
4 Credit Counseling as required by § 521(b)(1), § 109(h)(1), and
5 Rule F.R.B.P. 1007(b)(3), or a Certification of Exigent
6 Circumstances under § 109(h)(3), or a request for determination by
7 the court under § 109(h)(4)," and no "Exhibit D." Id. The notice
8 provided that Debtor had fourteen days from the filing of her
9 petition to cure the deficiencies. Id.

10 On September 3, 2010, Debtor submitted the deficient
11 information. Among the documents she filed was a Certificate of
12 Counseling, issued by Black Hills Children's Ranch, Inc., an
13 approved credit counseling provider in the Central District of
14 California.⁷ Dkt. No. 13. The certificate indicates that Debtor
15 completed credit counseling on August 24, 2010.⁸ Id.

16 _____
17 ⁷ Debtor also submitted to the court a printout from an
18 Internet site, indicating she was, at some point in time, "one
19 step away from completing [her] certification" with a different
20 credit counseling agency, Pioneer Credit Counseling. Dkt. No. 14
21 at 27. That printout, however, is not dated, and there is no
22 indication that Debtor ever completed the last "step" of calling
23 the credit counseling agency. Id.

24 ⁸ The Certificate of Counseling provides:

25 I CERTIFY that on August 24, 2010, at 5:59
26 o'clock PM MDT, Iman Gibson received from
27 Black Hills Children's Ranch, Inc., an agency
28 approved pursuant to 11 U.S.C. § 111 to
provide credit counseling in the Central
District of California, an individual [or
group] briefing that complied with the
provisions of 11 U.S.C. §§ 109(h) and 111.

This counseling session was conducted by
internet and telephone.

Dkt. No. 13 (emphasis and uppercase in original). Despite the
(continued...)

1 Debtor also submitted an Exhibit D at that time. Dkt. No. 14
2 at 25-26. Rather than check one of the five options provided by
3 the exhibit, however, Debtor crossed out the exhibit's text, and
4 wrote in large letters, "None."⁹ Id. At the bottom of the second
5 page of the exhibit, Debtor handwrote, "I have obtained the
6 Certificate on Aug[ust] 24, 2010[,] after the filing of the
7 Bankruptcy. It is attached with the petition." Id. at 26.

8 On October 8, 2010, the bankruptcy court entered an "Order
9 Dismissing [Debtor's] Case." Dkt. No. 20. The Order indicated
10 that Debtor's case was dismissed because she had not complied with
11 the requirements of § 109(h). Id.

12 Debtor filed this timely appeal.

13 JURISDICTION

14 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
15 and 157(b)(2)(A). The Panel has jurisdiction under 28 U.S.C.
16 § 158.

17 ISSUES

18 Whether the bankruptcy court erred in dismissing Debtor's
19 case due to her failure to comply with the requirements of
20 § 109(h).

21 Whether the bankruptcy court erred in dismissing Debtor's
22 case without prior notice to Debtor or an opportunity for a
23

24 ⁸(...continued)

25 date in the certificate, Debtor asserts that the counseling was
26 actually provided to her prior to August 24. There is nothing in
the record to support this assertion. Id.

27 ⁹ The Case Commencement Deficiency Notice instructed,
28 "[e]ven if the indicated documents are not applicable to your
particular situation, they must still be filed with the notation
'None' marked thereon." Dkt. No. 5.

1 hearing.¹⁰

2 **STANDARDS OF REVIEW**

3 We review interpretations of provisions of the Bankruptcy
4 Code de novo. Smith v. Rojas (In re Smith), 435 B.R. 637, 642-43
5 (9th Cir. BAP 2010) (citing Mendez v. Salven (In re Mendez),
6 367 B.R. 109, 113 (9th Cir. BAP 2007)). Also, due process
7 challenges are reviewed de novo. In re Nguyen, 447 B.R. 268, 276
8 (9th Cir. BAP 2011) (en banc) (citing Miller v. Cardinale
9 (In re DeVille), 280 B.R. 483, 492 (9th Cir. BAP 2002)).

10 We review a bankruptcy court's decision to dismiss a chapter
11 13 case for abuse of discretion. Ellsworth v. Lifescape Med.
12 Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 914 (9th Cir. BAP
13 2011). A bankruptcy court abuses its discretion if it bases a
14 decision on an incorrect legal rule, or if its application of the
15 law was illogical, implausible, or without support in inferences
16 that may be drawn from the facts in the record. United States v.
17 Hinkson, 585 F.3d 1247, 1261-63 (9th Cir. 2009) (en banc);
18 In re Ellsworth, 455 B.R. at 914.

19 **DISCUSSION**

20 **I. Debtor did not comply with the requirements of § 109(h).**

21 Section 109 of the Bankruptcy Code identifies who may be a
22 debtor. To qualify as a bankruptcy debtor, an individual must
23 first participate in a credit counseling session within 180-days
24

25 ¹⁰ While this issue is not clearly identified in Debtor's
26 opening brief, if we read the brief liberally, Debtor alleges she
27 lacked adequate notice and opportunity to be heard before her case
28 was dismissed. We will therefore consider the issue. See Haines
v. Kerner, 404 U.S. 519, 520 (1972) (indicating that pro se
pleadings are held to a less stringent standard than lawyer-
drafted pleadings).

1 before filing a petition. § 109(h)(1).¹¹ Completion of that
2 counseling is properly documented by filing a certificate with the
3 bankruptcy court from the counseling provider. § 521(b)(1);
4 Rule 1007(b)(3).

5 The exceptions to the pre-petition credit counseling
6 requirement, which are identified in § 109(h), are few and narrow.
7 In re Crawford, 420 B.R. 833, 839 (Bankr. D.N.M. 2009). First, a
8 debtor is excused from compliance if she resides in a district
9 where the U.S. trustee or bankruptcy administrator has determined
10 credit counseling agencies would be overburdened if the
11 requirement were enforced. § 109(h)(2)(A). Second, an individual
12 may receive a temporary deferral of the counseling requirement due
13 to exigent circumstances. § 109(h)(3)(A). To qualify for a
14 deferral, an individual must submit a certification to the
15 bankruptcy court that: (1) describes the exigent circumstances;
16 (2) states that credit counseling was requested from an approved
17 provider, but that she was unable to obtain those services within
18 seven days of making that request; and (3) is satisfactory to the
19 court. Id. Finally, an individual can receive a permanent
20 exemption from the counseling requirement if, after notice and a
21 hearing, the bankruptcy court determines the individual cannot
22 complete the requirement due to incapacity, disability, or active

23 ¹¹ "Subject to paragraphs (2) and (3), and notwithstanding
24 any other provision of this section other than paragraph (4) of
25 this subsection, an individual may not be a debtor under this
26 title unless such individual has, during the 180-day period ending
27 on the date of filing of the petition by such individual, received
28 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." § 109(h)(1).

1 military duty in a combat zone. § 109(h)(4).

2 The majority of courts to address § 109(h) have strictly
3 applied the credit counseling requirement, and have dismissed
4 cases where debtors have not complied. See, e.g., Duncan v.
5 LaBarge (In re Duncan), 418 B.R. 278, 280-81 (8th Cir. BAP 2009);
6 Hedquist v. Fokkena (In re Hedquist), 342 B.R. 295, 298 (8th Cir.
7 BAP 2006); In re Borges, 440 B.R. 551, 556 (Bankr. D.N.M. 2010);
8 In re Ruckdaschel, 364 B.R. 724, 734 (Bankr. D. Idaho 2007);
9 In re Dyer, 381 B.R. 200, 206 (Bankr. W.D.N.C. 2007);
10 In re Williams, 359 B.R. 590, 590-91 (Bankr. E.D.N.C. 2007);
11 In re Mingueta, 338 B.R. 833, 838-39 (Bankr. C.D. Cal. 2006);
12 In re Carey, 341 B.R. 798, 803-04 (Bankr. M.D. Fla. 2006). Most
13 often, these courts relied on the plain language of § 109(h),
14 which includes that "an individual may not be a debtor under this
15 title unless such individual has" complied with the credit
16 counseling requirement. See, e.g., In re Ruckdaschel, 364 B.R. at
17 733.

18 On the other hand, a small number of courts have purported to
19 exercise judicial discretion to alter the strict requirements of
20 § 109(h) in those cases where debtors have complied with the
21 "spirit" of § 109(h), or where dismissal would, in the courts'
22 view, result in manifest injustice. See, e.g., In re Nichols,
23 362 B.R. 88, 93 (Bankr. S.D.N.Y. 2007); In re Bricksin, 346 B.R.
24 497, 501-03 (Bankr. N.D. Cal. 2006); In re Hess, 347 B.R. 489,
25 495-96 (Bankr. D. Vt. 2006). However, in our opinion, there is no
26 basis for that interpretation of § 109(h). See Blausey v. U.S.
27 Trustee, 552 F.3d 1124, 1132 (9th Cir. 2009) (citing Lamie v. U.S.
28 Trustee, 540 U.S. 526, 534 (2004) and indicating that

1 interpretation of the Bankruptcy Code is to be based on its plain
2 language).

3 To us, the command of § 109(h) is clear, and, unless one of
4 the stated exceptions applies, an individual “may not be a debtor”
5 unless she has received credit counseling prior to filing her
6 bankruptcy petition. § 109(h)(1).

7 Debtor did not obtain credit counseling during the 180 days
8 prior to filing her petition. While she completed counseling a
9 few days later, she did not request nor secure bankruptcy court
10 approval to do so post-petition due to any exigent circumstances,
11 nor did she seek an exemption from the counseling requirement
12 under one of the other § 109(h) exceptions. Because Debtor did
13 not comply with the § 109(h) pre-bankruptcy credit counseling
14 requirement, Congress has decreed that she was not eligible to be
15 a chapter 13 debtor,¹² and dismissal of her case by the bankruptcy
16 court was appropriate. See § 301(a);¹³ In re Crawford, 420 B.R. at
17 839.

20 ¹² Compliance with § 109(h) is an eligibility requirement,
21 not a jurisdictional requirement; a bankruptcy court retains
22 authority to determine a debtor’s eligibility, and has
23 jurisdiction over a case commenced by an ineligible debtor.
Mendez v. Salven (In re Mendez), 367 B.R. 109, 116-17 (9th Cir.
BAP 2007) (quoting In re Parker, 351 B.R. 790, 796 (Bankr. N.D.
Ga. 2006)).

24 ¹³ Section 301(a) provides:

25 A voluntary case under a chapter of this title
26 is commenced by the filing with the bankruptcy
27 court of a petition under such chapter by an
entity that may be a debtor under such
chapter.

28 (emphasis added).

1 **II. The bankruptcy court's sua sponte order dismissing Debtor's**
2 **bankruptcy case without prior notice or an opportunity to**
3 **be heard was appropriate.**

4 The Panel's case law makes it clear that a bankruptcy court
5 may dismiss a chapter 13 case sua sponte pursuant to § 105(a).¹⁴
6 Tennant v. Rojas (In re Tennant), 318 B.R. 860, 869 (9th Cir. BAP
7 2004) (approving dismissal of debtor's case, sua sponte, for
8 failure to timely file schedules required by Rule 1007). Even
9 though dismissal on the bankruptcy court's own motion is allowed,
10 procedural due process requires that the debtor first be afforded
11 notice and an opportunity to be heard. Id. at 870 (citing Muessel
12 v. Pappalardo (In re Muessel), 292 B.R. 712, 717 (1st Cir. BAP
13 2003)).

14 The requirement of adequate notice and an opportunity to be
15 heard before dismissal is a flexible standard, and depends on the
16 particular circumstances of a case. Id. (citing § 102(1)¹⁵).

17 ¹⁴ Section 105(a) provides:

18 The court may issue any order, process, or
19 judgment that is necessary or appropriate to
20 carry out the provisions of this title. No
21 provision of this title providing for the
22 raising of an issue by a party in interest
23 shall be construed to preclude the court from,
24 sua sponte, taking any action or making any
25 determination necessary or appropriate to
26 enforce or implement court orders or rules, or
27 to prevent an abuse of process.

28 ¹⁵ Section 102(1) provides:

29 In this title—
30 (1) "after notice and a hearing", or a
31 similar phrase—
32 (A) means after such notice as
33 is appropriate in the particular
34 circumstances, and such
35 opportunity for a hearing as is
36 appropriate in the particular
37 circumstances[.]

1 Where the basis for dismissal is limited to "very narrow
2 procedural aspects, a court can dismiss a Chapter 13 case without
3 further notice or opportunity for a hearing if the debtor was
4 provided with notice of the requirements to be met." Id. (quoting
5 In re Meints, 222 B.R. 870, 872 (D. Neb. 1998)) (internal
6 quotations omitted).

7 Such an approach makes particular sense here where, unlike
8 the typical dismissal scenario in a case where a debtor has
9 rightly qualified to file her bankruptcy, i.e., where she fails to
10 comply with some other aspect of the Code or Rules, see § 1307(c),
11 the issue raised in § 109(h) dismissal cases is whether debtor is
12 eligible to be a bankruptcy debtor at all. In re Mendez, 367 B.R.
13 at 117-18 (noting that § 109(h) implicates a "matter of
14 eligibility"). Simply put, if an individual has not complied with
15 the requirements of § 109(h) as of her petition date, she may not
16 be a "debtor." See § 109(h) (1); Scovis v. Henrichsen (In re
17 Scovis), 249 F.3d 975, 984 (9th Cir. 2001) (indicating that
18 eligibility is determined as of a debtor's petition date). In
19 other words, the basis for dismissal for failure to comply with
20 § 109(h) arises simultaneously with the filing of a petition;
21 based upon the language of the statute, a debtor enjoys no
22 opportunity to cure a § 109(h) deficiency post-petition.
23 Therefore, pre-filing notice to the debtor of the requirements of
24 § 109(h) must be sufficient to satisfy due process. But cf.
25 Dinova v. Harris (In re Dinova), 212 B.R. 437, 443-46 (2d Cir. BAP
26 1997) (finding notice and an opportunity for a hearing to be
27 adequate only when provided after a debtor's deficiency).

28 In this case, it is undisputed that Debtor received several

1 notices and warnings concerning the consequences of her non-
2 compliance with § 109(h) prior to filing her petition. First,
3 Debtor's petition indicated that Exhibit D was to be completed,
4 signed, and attached to her petition. In turn, Exhibit D
5 contained a conspicuous warning to Debtor that, if she did not
6 comply with the credit counseling requirement, the bankruptcy
7 court could dismiss her case. If Debtor's notation on her
8 petition that Exhibit D "does not pertain to [her]" is to be
9 believed, it evidences that she reviewed and considered the
10 information contained in the exhibit before the petition was
11 filed. See Dkt. No. 1 at 2.

12 Moreover, in this case, even if Debtor did not read Exhibit D
13 before filing, it is undisputed that she was told by court staff
14 that pre-bankruptcy credit counseling was mandatory when she
15 attempted to file her petition. In spite of that actual warning,
16 which she admits receiving, Debtor insisted on filing her petition
17 on August 20, 2010, even though she knew she had not received
18 credit counseling, and was not requesting a deferral or exemption
19 from the credit counseling requirement on that date.

20 All things considered, it should have come as no surprise to
21 Debtor when, upon review of her petition and the certificate
22 showing Debtor completed counseling on August 24, the bankruptcy
23 court dismissed her case. Considering the nature of a dismissal
24 for non-compliance with § 109(h), and the particular circumstances
25 of the dismissal in this case, the bankruptcy court's dismissal of
26 Debtor's case without prior notice or opportunity for a hearing
27 did not violate Debtor's procedural rights.

28

CONCLUSION

The bankruptcy court did not abuse its discretion in dismissing Debtor's chapter 13 case due to non-compliance with § 109(h). In addition, the court's sua sponte dismissal was appropriate because Debtor had sufficient notice of the possible dismissal for failure to obtain pre-bankruptcy credit counseling to satisfy due process requirements. We AFFIRM.

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