

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Waycross Division

IN RE:) Chapter 13 Case
) Number 05-51262
Everett Tobias Wilcox)
)
Debtor.)
)

**REPORT AND RECOMMENDATION TO THE UNITED STATES DISTRICT COURT
TO DENY IN FORMA PAUPERIS TO MOVANT**

Everett Tobias Wilcox, pro se, by application pursuant to 28 U.S.C. § 1915, seeks to proceed in forma pauperis on appeal of this Court's order denying a request for reconsideration of the dismissal of his Chapter 13 case. After review of the relevant authority, I recommend that the United States District Court for the Southern District of Georgia deny the in forma pauperis application for any or all of the following reasons. First, the in forma pauperis application submitted by Debtor fails to state the nature of the appeal and therefore does not comply with the statutory requirements set out in 28 U.S.C. § 1915. Second, I find that Debtor has made statements regarding his financial condition in his IFP Application that conflict with the statements made in his bankruptcy petition, calling into question the credibility of Debtor's claims regarding his

inability to pay the filing fee. Third, the Debtor's appeal is frivolous because Debtor is not eligible for Chapter 13 relief pursuant to 11 U.S.C. § 109(e).

Facts

On August 10, 2005, Everett Tobias Wilcox ("Debtor") filed this Chapter 13 case.¹ The Confirmation Order was signed on February 23, 2006, and directed Debtor to pay the Chapter 13 Trustee eight hundred eighty-three dollars (\$883.00) monthly. On August 18, 2006, the Chapter 13 Trustee filed a Motion to Dismiss based on Debtor's failure to make the required payments.² Debtor did not respond and his Chapter 13 case was dismissed on September 19, 2006.

Debtor, now pro se, filed a Motion to Reconsider Order Dismissing Case on September 28, 2006. An Order denying Debtor's motion was entered and subsequently Debtor filed a

¹ Debtor's original bankruptcy petition was filed pro se. Debtor hired an attorney on August 25, 2005, and filed an amended petition.

²

The Chapter 13 Trustee's Motion to Dismiss reflects that Debtor's last payment was made on February 24, 2006, the day after his plan was confirmed. As of the date the Motion to Dismiss was filed, Debtor was in default in the amount of four thousand eight hundred sixty dollars (\$4,860.00).

Notice of Appeal.³ In connection with Debtor's Notice of Appeal, he filed an Application to Proceed without Prepayment of Fees ("IFP Application") on November 8, 2006.

Conclusions of Law

28 U.S.C. § 1915(a) permits "any court of the United States" to authorize the advance of an appeal without the prepayment of fees for a debtor who submits an affidavit establishing certain statutory requirements.⁴ Id. Pursuant to

3

Debtor's original Notice of Appeal requested a direct appeal to the Eleventh Circuit Court of Appeals. However, Debtor filed an Amended Notice of Appeal on November 20, 2006, pursuant to 28 U.S.C. § 158 (a) or (b), seeking to appeal to the District Court.

4

President Clinton signed the Prison Litigation Reform Act ("PLRA") on April 26, 1996. The PLRA included substantial changes to 28 U.S.C. § 1915 which included the addition of "such prisoner" in section (a) with respect to the required statement of assets. Most courts have held that the phrase "such prisoner" was inserted erroneously and that, based on a fair reading of the entire statute section, the purpose of the statute and its history, the statute is not limited to prisoner suits. See Martinez v. Kristi Kleaners, Inc., 364 F.3d 1305 (11th Cir. 2004) (noting "[d]espite the statute's use of the phrase 'prisoner possesses,' the affidavit requirement applies to all persons requesting leave to proceed [in forma pauperis]" and citing to Haynes v. Scott, 116 F.3d 137 (5th Cir. 1997) and Floyd v. U.S. Postal Service, 105 F.3d 274 (6th Cir. 1997) (concluding that "Congress did not intend to prevent a non-prisoner from being able to proceed in forma pauperis in federal court")); Powell v. Hoover, 956 F. Supp. 564 (M.D. Penn. 1997) (holding that "a fair reading of the statute [28 U.S.C. § 1915(a)(1)] is that is not limited to prisoner suits").

28 U.S.C. § 1915 in pertinent part provides:

28 U.S.C. § 151 the bankruptcy court, as a "unit of the district court," must submit proposed findings of fact and conclusions of law on the in forma pauperis issue to the district court for de novo review and entry of a final order. Hardy v. Hardy (In re Hardy), Civ. Action No. 496-274, slip op. at 4 (S.D. Ga. January 30, 1997).

I. Legal Eligibility

When applying to proceed in forma pauperis on appeal under 28 U.S.C. § 1915(a), a debtor must file an affidavit that establishes he is legally and financially eligible to proceed. See 28 U.S.C. § 1915. To demonstrate legal eligibility, the statute explicitly requires that the affidavit "state the nature of the . . . appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1). Failure to include in the affidavit an allegation of error or errors on the part of the court

[A]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress...

decision from which petitioner complains makes the affidavit "insufficient to support an application to proceed in forma pauperis." Yager v. Raison, 211 F. Supp. 551, 553 (S.D. Ind. 1962) (holding that when an affidavit submitted in support of an in forma pauperis application states grounds for appeal that are so broad and conclusory "as to preclude a determination whether the appeal is frivolous or meritorious, the appeal must be dismissed for failure to comply with the statute"). "A petitioner is not entitled to appeal in forma pauperis unless it appears from the application that there is merit in his cause." Yager, 211 F. Supp. at 553 (citing to Application of Taylor, 139 F.2d 1018 (7th Cir. 1944)).

In the present case, Debtor's IFP Application fails to allege any error or errors on the part of the bankruptcy court order denying reconsideration of the dismissal of his Chapter 13 case.⁵ Consequently, Debtor's affidavit is insufficient to provide an adequate basis for a court to make a determination about whether his appeal is meritorious.

5

Debtor did not file an affidavit. However, a sworn affidavit is not necessary. See Hardy v. Hardy (In re Hardy), Civ. Action No. 496-274, slip op. at 4 (S.D. Ga. January 30, 1997) (holding that an unnotarized affidavit is not fatal to applicant's in forma pauperis request when the affidavit submitted was signed under penalty of perjury satisfying the requirements of 28 U.S.C. § 1746).

Therefore, Debtor has failed to comply with the requirements of 28 U.S.C. § 1915(a), and his IFP Application to proceed on appeal should be denied.

II. Conflicting Statements

28 U.S.C. § 1915(e)(2)(A) "authorizes a court to dismiss actions brought on affidavit of poverty" if the court determines that the allegation of poverty is untrue. Adkins v. E.I. Du Pont De Nemourts & Co., 335 U.S. 331, 338 (1948). The Eleventh Circuit Court of Appeals has interpreted the language of § 1915(e)(2)(A) to allow a court to dismiss a case when there is a flagrant misrepresentation of assets in bad faith. See Martinez v. Kristi Kleeners, Inc., 364 F.3d 1305 (11th Cir. 2004). "The purpose of this provision is to 'weed out the litigants who falsely understate their net worth in order to obtain in forma pauperis status when they are not entitled to that status based on their true net worth.'" Attwood v. Singletary, 105 F.3d 610 (11th Cir. 1997) (citing to Matthews v. Gaither, 902 F.2d 877 (11th Cir. 1990)). A court must consider the facts as a whole to determine whether an inaccuracy made in an affidavit of poverty forecloses in forma pauperis eligibility. See Camp v. Oliver, 798 F.2d 434 (11th Cir. 1986). A review of the record reflects certain averments made in Debtor's IFP Application directly conflict

with the financial statements submitted in his bankruptcy case.

1. Debtor indicated on his Chapter 13 Amended Petition that he was currently employed, on August 25, 2005, as a Pastor by New Covenant Ministries and had been employed in that position for seven years.⁶ (Voluntary Petition Schedule I.) Debtor's plan was confirmed on February 23, 2006. Eight months, one week and five days after confirmation, Debtor stated in his IFP Application that he had not been employed since 1998. (IFP Application 1.)

2. On his Chapter 13 petition, Debtor listed his "current monthly gross wages, salary, and commissions" to be \$1,723.67. (Voluntary Petition Schedule I.) Yet, in his IFP Application Debtor states that as of the date of last employment, in 1998, he only received "about \$500.00 mo" in salary and wages. (IFP Application 1.)

3. Debtor's Chapter 13 petition lists "Food Stamps" in the amount of \$149.00 per month as income. (Voluntary Petition Schedule I.) Debtor indicated on his IFP

6

Debtor's original petition, filed on August 10, 2005, was incomplete and did not include any schedules or list any creditors. Debtor filed an amended petition, with the aid of an attorney, which included all necessary documents on August 25, 2005.

Application that he had not received any money from any "[b]usiness, profession, or form of self-employment" nor had he received any money from "[a]ny other sources." (IFP Application 1.)

Debtor has supplied no other evidence in support of his IFP request other than his IFP Application. If Debtor's Amended Chapter 13 petition is true, then Debtor's IFP Application misrepresents his financial condition calling into question his ability to pay the filing fee.

III. Frivolous Appeal

If the statements made in Debtor's IFP Application are correct, Debtor's appeal is frivolous because he is not eligible to be a Chapter 13 debtor. Therefore, his IFP Application should be denied and his appeal should be dismissed.

Relief under 28 U.S.C. § 1915 may be denied if the court certifies in writing that the appeal is not taken in good faith or makes a finding that the appeal is frivolous or malicious. See 28 U.S.C. §§ 1915(a)(3) & (e)(2). The authority of the court to dismiss a case pursuant to § 1915 was "designed largely to discourage the filing of, and waste of judicial and private resources upon baseless lawsuits." Neitzke v. Williams, 490 U.S. 319, 327 (1989). "An appeal on a matter of law is frivolous where none of the legal points are arguable on their

merits." Neitzke v. Williams, 490 U.S. 319, 325 (1989) (internal citation and punctuation omitted). Furthermore, an appeal is frivolous under § 1915(e)(2)(B)(I) if the plaintiff appears to have 'little or no chance of success.'" Schwindler v. Screen, 2004 WL 2201248 at *2 (Bankr. S.D. Ga. 2004) (quoting Carroll v. Gross, 984 F.2d 392 (11th Cir. 1993)).

Debtor's appeal is frivolous because Debtor's IFP Application indicates that Debtor does not have "regular income" and is therefore not eligible for relief under Chapter 13 of the Bankruptcy Code. See 11 U.S.C. § 109(e). Only an "individual with regular income" may be a "debtor" under Chapter 13. 11 U.S.C. § 109(e). The Bankruptcy Code defines an "individual with regular income" as an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title." 11 U.S.C. § 101(33). "The test for availability of Chapter 13 as a procedure for debtor relief is the stability and regularity of the debtor's income." Georgia Fed. Sav. & Loan Assoc. v. Anderson (In the Matter of Anderson), 21 B.R. 443, 446 (Bankr. N.D. Ga. 1981). "The regular income requirement of 11 U.S.C. § 109 (e) anticipates that the income is sufficient to fund the debtor's living expenses and the plan payments." In re Smith, 234 B.R. 852, 855 (Bankr. M.D. Ga. 1999). To be eligible for

Chapter 13 relief an individual "must establish his ability to make such payments as are proposed under the plan." Georgia Fed. Sav. & Loan Assoc. v. Anderson (In the Matter of Anderson), 21 B.R. at 446 (Bankr. N.D. Ga. 1981).

Debtor's appeal is frivolous because Debtor has no chance of successfully having his Chapter 13 case reinstated due to the fact that Debtor is not eligible for Chapter 13 relief. In applying to proceed with his appeal in forma pauperis, Debtor indicates that he (1) currently does not receive any income, (2) has not been employed in eight years, and (3) has not received money from any source in the last twelve months.⁷ (IFP Application 1.) Debtor's IFP Application thus indicates that Debtor is not an individual whose income is sufficiently stable or regular to enable him to make payments under a Chapter 13 plan.

7

Debtor filled in blanks of his IFP Application with the following answers regarding his financial condition: (1) not currently employed, last employed in 1998 earning about \$500.00 monthly salary; (2) Debtor checked "No," stating that he had not in the last twelve months received money from any of the listed sources. Debtor wrote "N/A" in response to questions three and four, representing to the court that he had no cash or money in any account. Debtor checked "No," indicating that he had no real estate, stocks, bonds, notes, automobiles, or other valuable property. And Debtor wrote in "None" when asked to list any dependents that relied on him for support. (Debtor's IFP Application 1-2.)

Recommendation

For the foregoing reasons, I recommend that the United States District Court for the Southern District of Georgia deny the Debtor's request to pursue an appeal without prepayment of fees.



JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Brunswick, Georgia
this 1st day of May, 2007.