

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ENTERED
JUN 18 2003
U.S. BANKRUPTCY COURT
MDNC - AHH

IN RE:

Gary Ivan Terry,
Debtor.

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Case No. 01-12750C-7G

ORDER

This case is before the court for consideration of a motion to proceed in forma pauperis which was filed by the Debtor on June 16, 2003. In the motion, the Debtor seeks to proceed in forma pauperis with respect to an appeal filed by the Debtor on June 16, 2003, in which the Debtor apparently is appealing from an order entered by the court on June 12, 2003, denying Debtor's motion for an order pursuant to 28 U.S.C. § 1651 staying all payments by the Chapter 7 Trustee.

There is some disagreement as to whether a bankruptcy court has authority under 28 U.S.C. § 1915 to authorize a debtor to proceed in forma pauperis in a bankruptcy case. Compare In re Perroton, 958 F.2d 889, 896 (9th Cir. 1992) (bankruptcy court cannot waive filing fees), with In re Fitzgerald, 192 B.R. 861 (Bankr. E.D. Va. 1996) (collecting cases and concluding that bankruptcy court cannot waive filing fee for bankruptcy petition but can waive fees for other proceedings within a bankruptcy case). However, having considered the Debtor's motion and the affidavit submitted by the Debtor in support of the motion, the court has concluded that even if there is authority for this court to waive fees

pursuant to 28 U.S.C. § 1915, this is not a case in which the court should do so.

Section 1915 was intended to provide indigent parties with the opportunity for meaningful access to the federal courts. However, even if a party is indigent, 28 U.S.C. § 1915 does not provide an unfettered, unlimited right to relief. Thus, relief under 28 U.S.C. § 1915 may be denied "if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." See In re Reed, 178 B.R. 817, 822 (Bankr. D. Ariz. 1995) (quoting from Neitzke v. Williams, 490 U.S. 319, 324, 109 S.Ct. 1827, 1831, 104 L.Ed.2d 338 (1989)).

In the present case, it is doubtful that the Debtor is indigent and unable to pay the modest costs related to an appeal to the District Court.¹ However, even if the indigency issue is resolved in his favor, the Debtor nonetheless is not entitled to relief under 28 U.S.C. § 1915 because Debtor's appeal lacks an arguable basis in either law or fact and is frivolous as a matter of law.

The affidavit required under § 1915 must "state the nature of the action, defense or appeal and affiant's belief that the person is entitled to relief." The affidavit filed by the Debtor states the issue which he wishes to raise on appeal as to the order

¹The Debtor's affidavit reflects that the Debtor is gainfully employed but does not reflect the expenses of the Debtor. The affidavit also states that the Debtor owns personal property other than ordinary household furnishings and clothing but does not disclose the nature and value of such property.

denying the motion to stay payments as follows:

the Bankruptcy Judge (Stock, William L.) Order fails as a matter of law and logic because, the Debtor's substantive right to due process has been unconstitutionally injured or harmed by this Bankruptcy's Court reliance upon the arbitrary, the irrational and the naked abuse of executed power employed here as an instrument of oppression by the government as is present in the case at bar. The "Due Process Clause of the Fifth and Fourteenth Amendments was intended to prevent government 'from abusing its power, or employing it as an instrument of oppression.'" See Deshanev v. Winnebago County Dept. of Social Services, 480 U.S. 189, 196 (1989) (citation omitted). See also Collins v. Harker Heights, 503 U.S. 115, 126 (1992); County of Sacramento v. Lewis, 523 U.S. 833, 645-47 (1988).

How the above-described "issue" is related to an appeal from the order denying Debtor's motion to stay all payments by the Trustee is unexplained and unclear. However, to the extent the foregoing language can be said to state an issue or matter for review in an appeal from such order, there is no rational argument in law or fact which would entitle the Debtor to relief with respect to such issue. Debtor's appeal presents no legal points that are arguable on the merits and is without merit and frivolous as a matter of law. Accordingly, Debtor's motion to proceed in forma pauperis will be denied. Moreover, given the frivolousness of the appeal, the court certifies pursuant to 28 U.S.C. § 1915(a) (3) that such appeal has not been taken in good faith. See Meadows v. Trotter, 855 F. Supp. 217, 219 (W.D. Tenn. 1994) ("An appeal is not taken in good faith if the issue presented is frivolous.").

Now, therefore, Debtor's June 16, 2003 motion pursuant to 28 U.S.C. § 1915 to proceed in forma pauperis with respect to an appeal from the order denying Debtor's motion for an order staying all payments by the Trustee is DENIED. To the extent that Debtor's June 16, 2003 motion seeks to proceed in forma pauperis with respect to an appeal from the June 12, 2003 order denying Debtor's earlier motion to proceed in forma pauperis, the motion is DENIED for the same reasons stated in the order entered on June 12, 2003, denying the earlier motion to proceed in forma pauperis.

This 18th day of June, 2003.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge