

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re: Case No. 9:17-bk-06512-FMD
Chapter 7

Martin J. McCarthy and
Laura McCarthy,

Debtors.

**ORDER DENYING DEBTORS'
MOTION TO WAIVE THE FEE FOR
THE TRANSCRIPT OF THE BANKRUPTCY
TRIAL HELD ON MARCH 29, 2019**

THIS CASE came before the Court without a hearing to consider Debtors' *Motion to Waive the Fee for the Transcript of the Bankruptcy Trial Held on March 29, 2019, Between the McCarthys and Ravenwood Homes for the District Court of Florida* (the "Transcript Fee Motion").¹ Ravenwood Homes, LLC ("Ravenwood") filed an Objection to the Motion.²

On August 30, 2019, after a trial (the "Trial"), this Court entered its *Order Overruling Debtors' Objection to Claim No. 5-3 [of Ravenwood Homes, LLC] and Allowing Claim in Reduced Amount*.³ Debtor timely filed a notice of appeal that is now pending in the United States District Court for the Middle District of Florida, Case No. 2:19-cv-664-FtM-28. On March 2, 2020, the District Court entered an order that addresses various issues relating to the record on appeal (the "District Court Order").⁴

In the District Court Order, the District Court advised Debtors of the importance of their including the transcript of the Trial in the record on appeal. It appears that Debtors had requested the District Court to direct the Bankruptcy Court to waive the trial transcript fees and to send the

transcript to the District Court.⁵ The District Court denied Debtors' request because Debtors had not sought to proceed *in forma pauperis* and had not asked the Bankruptcy Court to certify that the appeal is not frivolous. The District Court Order provides that "if there is a way for [Debtors] to get the fee waived, [they] must file a proper motion with the Bankruptcy Court first."⁶ Debtors promptly filed the Transcript Fee Motion.

In considering the Transcript Fee Motion, the Court notes that courts generally lack discretion to waive the cost of obtaining a transcript because court reporters must be paid for their transcription services.⁷ However, three separate statutes bear on this issue.

First, although it does not address transcript fees, 28 U.S.C. § 1930(f)(1) authorizes a bankruptcy court to waive fees for debtors if the court determines the debtor has income less than 150 percent of the "income official poverty line" and is unable to pay the fee in installments. Second, also not addressing transcript fees, 28 U.S.C. § 1915(a)(3) provides that an appeal may not be taken *in forma pauperis* if the trial court certifies that it is not taken in good faith. And, third, under 28 U.S.C. § 753(f), fees for transcripts furnished to persons permitted to appeal *in forma pauperis* may be paid by the United States "if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question)."⁸

Debtors' Transcript Fee Motion thus raises three issues: (1) may they proceed *in forma pauperis* (i.e., is their income less than 150% of the income official poverty line); (2) is the appeal filed in good faith; and (3) is the appeal "not frivolous" and does it present a "substantial question." The Court will address each in turn.

Debtors Are Not Eligible to Proceed in Forma Pauperis.

The United States District Court for the Middle District of Florida has delegated the determination

¹ Doc. No. 168.

² Doc. No. 170.

³ Doc. No. 98.

⁴ Doc. No. 166.

⁵ *Id.*, p. 4.

⁶ *Id.*

⁷ *In re Price*, 410 B.R. 51, 55 (Bankr. E.D. Cal. 2009).

⁸ *Id.*, p. 59.

of motions to proceed on appeal *in forma pauperis* to the Bankruptcy Court,⁹ and the District Court Order implicitly directs the Bankruptcy Court to make this determination.¹⁰

Here, Debtors initially filed their bankruptcy petition under Chapter 13 on July 26, 2017, and paid their filing fee in full. On September 6, 2019, Debtors paid the filing fee due in connection with their notice of appeal. And on November 13, 2019, Debtors paid the filing fee due for converting their case to a Chapter 7 case. In their Schedule I – Income, filed early in the case, Debtors stated that they are both retired and they receive \$3,971.00 per month in Social Security and pension benefits.¹¹

The poverty guideline issued by the Department of Health and Human Services in the forty-eight contiguous states for a two-person family is \$17,240 year.¹² 150% of this amount is \$25,860. Debtors’ annual Social Security and pension income, based upon the information listed in their Schedule I (and without adjustment for increases in their Social Security Benefits since 2017) is \$47,652.00. This far exceeds 150% of the HHS poverty guideline.

Debtors have not submitted the information required by Official Form 103B in connection with a fee waiver request, nor have they submitted an affidavit or declaration showing that they are indigent. However, on the evidence before it, including Debtors’ ability to pay required filing fees and their apparently stable income as reflected in their Schedule I, Debtors are not eligible to proceed *in forma pauperis*. The Court will deny the Transcript Fee Motion on that basis.

Notwithstanding this ruling, the Court finds it appropriate to address the other two issues presented in the Transcript Fee Motion.

⁹ See General Order Establishing Protocol for Processing Bankruptcy Appeals Without Payment of Filing Fees, No. 96-119-MISC, available on the Court’s website, www.flmb.uscourts.gov under The Source.

¹⁰ Doc. No. 166, p. 4 (“Even so, if there is a way for [Debtors] to get the fee waived, [they] must file a proper motion with the Bankruptcy Court first.”).

¹¹ Doc. No. 11, pp. 20-21.

¹² See the Court’s website at www.flmb.uscourts.gov at “Filing without an attorney – References/Resources.”

No Certification that Debtors’ Appeal is Not Taken in Good Faith

The Court finds that Debtors believe in good faith that an incorrect result was achieved at Trial. Accordingly, the Court will not certify that the appeal is “not taken in good faith.” Therefore, relief under 28 U.S.C. § 1915(a)(3) is not prohibited.

Debtors’ Appeal Is Not Frivolous and Raises a Substantial Question

The determination of whether an appeal is frivolous and raises a substantial question is within the discretion of the Court.¹³ When the bankruptcy judge is the trial judge, the determination is to be made by the bankruptcy judge.¹⁴

As set forth in the Court’s *Order Overruling Debtors’ Objection to Claim No. 5-3 [of Ravenwood Homes, LLC] and Allowing Claim in Reduced Amount*,¹⁵ Ravenwood, the builder of Debtors’ homestead residence, filed a claim in the amount of \$98,636.57 and asserted that the claim is secured by Debtors’ homestead. Debtors objected to the claim, contending that the claim is not secured and should be disallowed because the work performed by Ravenwood was substandard.

At Trial, Debtors testified on their own behalf and did not call an expert witness on the issue of the quality of the construction.¹⁶ After a day of Trial, and post-trial briefing by the parties, the Court ruled that Ravenwood is not entitled to a construction lien under § 713.08 of the Florida Statutes. However, the Court ruled that under Florida law, Ravenwood is entitled to an equitable lien.¹⁷ As to the amount of the claim, the Court found that Debtors had not met their burden of proof on the issue of Ravenwood’s allegedly substandard work,¹⁸ and that Ravenwood was not

¹³ *Thomas v. Computax Corp.*, 631 F.2d 139, 143 (9th Cir. 1980).

¹⁴ *Allen v W. Sierra Bank (In re Allen)*, 2009 WL 1187957 at *4 (Bankr. D. Idaho Apr. 28, 2009).

¹⁵ Doc. No. 98.

¹⁶ See Doc. No. 90.

¹⁷ Doc. No. 98, pp. 7-9.

¹⁸ Doc. No. 98, pp. 9-10.

entitled to statutory prevailing party attorney's fees under § 713.29 of the Florida Statutes.

The Court concluded by allowing Ravenwood's claim in the reduced amount of \$73,875.04, secured by an equitable lien on Debtors' homestead. The Court finds that the imposition of an equitable lien on Debtors' homestead is sufficiently serious to warrant appellate review, and the appeal is not frivolous.

To determine whether Debtors' appeal raises a substantial question, the Court has reviewed Debtors' statement of the issues on appeal.¹⁹ For the most part, Debtors appear to have listed a rehash of their contentions at Trial—on which the Court found that Debtors did not meet their burden of proof at Trial—and facts or arguments that were not presented to the Court during the Trial. However, Debtors' statement of the issues on appeal includes "No Equitable Lien," and states ". . . so I am just appealing the equitable lien."

The Court finds that the imposition of an equitable lien on Debtors' homestead raises a substantial question.

Accordingly, because Debtors are not eligible to proceed *in forma pauperis*, it is

ORDERED that the *Motion to Waive the Fee for the Transcript of the Bankruptcy Trial Held on March 29, 2019, Between the McCarthys and Ravenwood Homes for the District Court of Florida* is DENIED.

DATED: June 8, 2020.

/s/ Caryl E. Delano

Caryl E. Delano
Chief United States Bankruptcy Judge

¹⁹ Doc. No. 118, pp. 3-4.