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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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12 Allan Kenneth Morgal, )

13 ) Plaintiff, )

No. CIV 07-0670-PHX-RCB

14 ) vs. )

O R D E R

15 Maricopa County Board of )

16 Supervisors, )

17 ) Defendant. )

18 Currently pending before the court is plaintiff *pro se*,  
19 Allan Morgal's, fourth motion for appointment of counsel (doc.  
20 155), to which no opposition has been filed. Despite repeated  
21 attempts, still, plaintiff has not made the predicate showing of  
22 "exceptional circumstances" which the Ninth Circuit requires to  
23 warrant appointment of counsel pursuant to 28 U.S.C. §  
24 1915(e)(1). See Agyeman v. Corr. Corp. of Am., 390 F.3d 1101,  
25 1103 (9<sup>th</sup> Cir. 2004) (quoting Franklin v. Murphy, 745 F.2d 1221,  
26 1236 (9<sup>th</sup> Cir. 1984))<sup>1</sup> (District courts have discretion pursuant

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28 <sup>1</sup> In three of his four motions to appoint counsel, including the pending one, plaintiff maintains that he is entitled to counsel because he "has satisfied at least 6 of the Tabron issues. 6 F.3d at 155-57." Mot. (Doc. 155) at 3. Tabron v. Grace, 6 F.3d 147 (3<sup>rd</sup> Cir. 1993), is a decision from the Third Circuit Court of Appeals, and hence is not binding upon this

1 to section 1915(e)(1) to appoint counsel for indigent civil  
2 litigants "'only in exceptional circumstances.'" Therefore,  
3 for the reasons set forth below, the court denies plaintiff's  
4 motion for appointment of counsel.

### 5 Background

6 Plaintiff first sought appointment of counsel on January  
7 14, 2008. United States Magistrate Judge Edward C. Voss ("the  
8 Magistrate Judge") denied that motion because plaintiff did not  
9 show exceptional circumstances. Ord. (Doc. 32) at 3. On  
10 September 15, 2011, and after plaintiff partially prevailed on  
11 his *pro se* appeal to the Ninth Circuit Court of Appeals, he  
12 filed a second motion for appointment of counsel. Although  
13 plaintiff expanded upon his reasons for seeking such  
14 appointment, the Magistrate Judge declined to "reconsider its  
15 prior order" because, again, plaintiff did not establish  
16 exceptional circumstances. Ord. (Doc. 133) at 2:26.

17 On January 20, 2012, plaintiff filed another motion to  
18 appoint counsel, asking the court to "revisit" his September  
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20 district court sitting in the Ninth Circuit Court of Appeals. Thus, even  
21 assuming for the sake of argument that plaintiff has met the Tabron  
22 standard, that is irrelevant because Tabron does not provide the governing  
23 legal standard here. Moreover, the Third Circuit's view that the district  
24 court erred in requiring "exceptional circumstances" to justify appointment  
25 of counsel to an indigent prisoner is not in keeping with the "exceptional  
26 circumstances" requirement recognized by this Circuit and others. See,  
27 e.g., Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9<sup>th</sup> Cir. 1980) (citations  
28 omitted) (The Ninth Circuit "has limited the exercise of that power [under  
section 1915] to exceptional circumstances."); Lavado v. Keohane, 992 F.2d  
601, 606 (6<sup>th</sup> Cir. 1993) (appointment of counsel in civil case is justified  
only upon a showing of exceptional circumstances); Fowler v. Jones, 899  
F.2d 1088, 1096 (11<sup>th</sup> Cir. 1990) (same); Cookish v. Cunningham, 787 F.2d 1,  
2 (1<sup>st</sup> Cir. 1986) ( same); Cook v. Bounds, 518 F.2d 779, 780 (4<sup>th</sup> Cir. 1975)  
(same); and Ehrlich v. Van Epps, 428 F.2d 363, 364 (7<sup>th</sup> Cir. 1970) (same).  
Thus, to the extent plaintiff Morgal is suggesting, based upon Tabron, that  
he need not show exceptional circumstances, he is mistaken.

1 2011 motion. Mot. (Doc. 136) at 1. In that motion, plaintiff  
2 requested appointment of counsel on the sole basis that he "can  
3 not navigate the complex misleading statement [sic] presented  
4 by Counsel to the Courts." Id. Finding that was an  
5 "insufficient basis" for "satisfy[ing] the legal standard for  
6 the appointment of counsel[,] " the Magistrate Judge denied this  
7 motion as well. The Magistrate Judge noted that plaintiff had  
8 not "show[n] an inability to articulate his claims in light of  
9 the complexity of the issues." Ord. (Doc. 138) at 2:2-3.  
10 Likewise, plaintiff also failed to present anything  
11 "demonstrat[ing] a likelihood of success on the merits." Id.  
12 at 2:3-4. So, again, plaintiff "failed to show" the requisite  
13 "exceptional circumstances[.]" Id. at 2:4-5.

14 On June 18, 2012, plaintiff filed the pending motion to  
15 appoint counsel. A substantial portion of the present motion  
16 is taken verbatim from plaintiff's second motion. Namely,  
17 plaintiff is seeking appointment of counsel because allegedly  
18 defendant repeatedly has made false and misleading statements,  
19 and it has not met its discovery obligations. Also, as before,  
20 plaintiff asserts a need for counsel due to his "inability to  
21 navigate . . . complex discovery rules[;]" the existence of  
22 complex legal and medical issues and the necessity of expert  
23 testimony; his belief that "[t]his case will most likely turn  
24 on cred[i]bility issues[;]" and the "need for factual  
25 investigation beyond that which" plaintiff can conduct as an  
26 inmate. Mot. (Doc. 155) at 3 and 2. He also once again claims  
27 that he has tried to obtain "at least 6 attorneys" to represent  
28 him, but all have declined. Id. at 3.



1 (quoting Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9<sup>th</sup> Cir.  
2 1986)). “Neither of these factors is dispositive and both must  
3 be viewed together before reaching a decision.” Terrell v.  
4 Brewer, 935 F.2d 1015, 1017 (9<sup>th</sup> Cir. 1991) (quoting Wilborn, 789  
5 F.2d at 1331). In the end, the burden remains upon plaintiff  
6 to establish exceptional circumstances. See Thornton v.  
7 Schwarzenegger, 2010 WL 3910446, at \*5 (S.D.Cal. 2010) (denying  
8 motion for appointment of counsel pursuant to 28 U.S.C. §  
9 1915(e)(1) because plaintiff “failed to demonstrate either a  
10 likelihood of success on the merits or an inability to represent  
11 himself (beyond the ordinary burdens encountered by prisoners  
12 representing themselves pro se)[ ]”).

13 Before addressing these two factors, because plaintiff  
14 claims to have contacted “at least 6 attorneys to represent  
15 him,” the court will, likewise, consider this factor. See Mot.  
16 (Doc. 155) at 3. The correspondence attached to plaintiff’s  
17 motion shows that his case has been declined by only two  
18 attorneys, not by “at least [six].” See id. at 6-8.  
19 Regardless, under all of the circumstances, “[a]lthough  
20 unsuccessful, Plaintiff’s action demonstrates ‘a reasonably  
21 diligent effort to secure counsel,’ thereby satisfying a  
22 prerequisite some courts have required prior to appointing  
23 indigent plaintiffs an attorney.” See Cota v. Scribner, 2012  
24 WL 540542, at \*1 (S.D.Cal. 2012) (quoting Bailey v. Lawford, 835  
25 F.Supp. 550, 552 (S.D.Cal. 1993)).

26 **A. Likelihood of Success on the Merits**

27 Plaintiff offers no argument at all as to his likelihood of  
28 success on the merits. Moreover, arguably “it is too early to

1 determine the likelihood of success on the merits" given that  
2 "it is not certain whether" plaintiff's complaint "will survive  
3 [defendant's pending motion for] summary judgment." See Garcia  
4 v. Smith, 2012 WL 2499003, at \*3 (S.D.Cal. 2012) (citations  
5 omitted). Therefore, the first "exceptional circumstances"  
6 factor does not support plaintiff's request for appointment of  
7 counsel.

8 **B. Ability to Articulate Claims**

9 Plaintiff Morgal fares no better with the second factor in  
10 that he has not shown "that because of the complexity of the  
11 claims he [has been] unable to articulate his positions." See  
12 Rand, 113 F.3d at 1525. Indeed, the record demonstrates just  
13 the opposite. This is a single count complaint with one  
14 defendant remaining. And, so far, plaintiff "has been able to  
15 articulate his claims against the relative complexity of the  
16 case, as the Court found that [his] complaint contained  
17 allegations sufficient to survive the sua sponte screening"  
18 which 28 U.S.C. § 1915A requires. See Miller v. LaMontagne,  
19 2012 WL 1666735, at \*2 (S.D.Cal. 2012). Additionally, during  
20 the five year pendency of this lawsuit, plaintiff has filed  
21 numerous motions and was, in fact, partially successful in  
22 representing himself on appeal in the Ninth Circuit. Thus,  
23 despite plaintiff's protestations to the contrary, he is capable  
24 of navigating the legal process.

25 Further, although plaintiff "may well have fared  
26 better-particularly in the realms of discovery and the securing  
27 of expert testimony- . . . this is not the test." See Rand, 113  
28 F.3d at 1525. Moreover, despite plaintiff's claimed inability

1 to secure certain discovery, ultimately he did obtain the  
2 February 24, 2006 "'Revised Accreditation Report on the Health  
3 Care Services at Maricopa County Sheriffs [sic] Office-Detention  
4 Bureau,'" which seemingly he views as critical. See Doc. 122-1  
5 at 3, n.1.

6 Likewise, undoubtedly plaintiff's confinement has hampered  
7 his ability to conduct further factual investigation, but that  
8 does not establish the complexity of the issues or otherwise  
9 show exceptional circumstances. See Wilborn, 789 F.2d at 1331  
10 (noting that "[i]f all that was required to establish  
11 successfully the complexity of the relevant issues was a  
12 demonstration of the need for development of further facts,  
13 practically all cases would involve complex legal issues."); see  
14 also Garcia v. Smith, 2012 WL 2499003, at \*4 (S.D.Cal. 2012)  
15 ("[a]lthough the investigation may be difficult" for a prisoner,  
16 "it does not rise to the level of an 'exceptional circumstances'  
17 that would entitle [plaintiff] to appointed counsel[]").  
18 "Indeed, most lawsuits require the development of facts over the  
19 course of the litigation, and pro se plaintiff[s] are typically  
20 not in the position to easily investigate facts." Id. (citation  
21 omitted); see also Wilborn, 789 F.2d at 1331 ("[A] pro se  
22 litigant will seldom be in a position to investigate easily the  
23 facts necessary to support the case.")

24 As to plaintiff's newly raised concerns regarding cross-  
25 examination, his claimed inability to adequately represent  
26 himself at trial, and his belief that credibility issues are at  
27 the core of this lawsuit, none of these demonstrate exceptional  
28 circumstances warranting the appointment of counsel at this time

1 given that defendant's summary judgment motion is pending. See  
2 Montagne, 2012 WL 1666735, at \*2; see also Thornton, 2010 WL  
3 3910446, at \*5 (citing Rand, 113 F.3d at 1525) ("factual  
4 disputes and anticipated cross-examination of witnesses do not  
5 indicate a presence of complex legal issues warranting a finding  
6 of exceptional circumstances").

7 Turning to plaintiff's assertion that he is handicapped  
8 under the ADA, he has not identified or in any way explained  
9 his purported handicap. Nor has plaintiff shown, and the court  
10 fails to see how, such a handicap factors into this court's  
11 analysis of whether he is entitled to the appointment of counsel  
12 under 28 U.S.C. § 1915(e)(1).

13 In sum, plaintiff Morgal has not demonstrated the requisite  
14 exceptional circumstances for appointment of counsel under  
15 section 1915(e)(1) in that he has shown neither a likelihood of  
16 success on the merits nor an inability "to articulate his claims  
17 in light of the complexities of the legal issues involved." See  
18 Agyeman, 390 F.3d at 1103 (internal quotation marks and citation  
19 omitted). Although, "any pro se litigant certainly would be  
20 better served with the assistance of counsel[,]" Rand, 113 F.3d  
21 at 1525, the difficulties set forth in plaintiff's motion are  
22 "difficulties which any litigant would have proceeding pro se;  
23 they do not indicate exceptional factors." See Wood, 900 F.2d  
24 at 1335-1336. Consequently, the court DENIES plaintiff Morgal's  
25 fourth motion for appointment of counsel (Doc. 155).

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DATED this 23rd day of July, 2012.



Robert C. Broomfield  
Senior United States District Judge

Copies to counsel of record and plaintiff pro se