

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CAROL ADRIANNE SMITH,

Plaintiff,

V.

ANDY COOK,

Defendant.

Case No.: 17cv00961-AJB-WVG

AMENDED ORDER:

**(1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS;
(Doc. No. 2)**

**(2) SUA SPONTE DISMISSING FOR
FAILURE TO STATE A CLAIM;
AND
(Doc. No. 1)**

**(3) DENYING AS MOOT MOTION
TO APPOINT COUNSEL
(Doc. No. 3)**

On May 9, 2017, Plaintiff Carol Smith (“Plaintiff”), a non-prisoner proceeding pro se, commenced this action against Defendant Andy Cook (“Defendant”). (Doc. No. 1.) On the same day, Plaintiff also moved to proceed in forma pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a), and filed a motion to appoint counsel. (Doc. Nos. 2, 3.) For the following reasons, the Court **GRANTS** Plaintiff’s motion to proceed IFP, *sua sponte* **DISMISSES**

1 Plaintiff's Complaint for failure to state a claim, and **DENIES AS MOOT** Plaintiff's
2 motion to appoint counsel.

3 **I. Motion to Proceed In Forma Pauperis**

4 All parties instituting any civil action, suit, or proceeding in a district court of the
5 United States, except an application for writ of habeas corpus, must pay a filing fee of
6 \$350. See 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay
7 the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. §
8 1915(a). See Rodriguez v. Cook, 169 F.3d 1176, 1177 (9th Cir. 1999). All actions sought
9 to be filed IFP pursuant to § 1915 must be accompanied by an affidavit, signed by the
10 applicant under penalty of perjury, that includes a statement of all assets which show
11 inability to pay initial fees or give security. S.D. CivLR 3.2.a. Here, Plaintiff states that she
12 has two children ages twenty-one and thirteen that depend on her for support. (Doc. No. 2
13 at 3.) The affidavit submitted by Plaintiff also indicates that she is employed, she receives
14 approximately \$900 per month in salary and \$1732 in child support, and has two checking
15 accounts with a total amount of \$1000. (Id. at 1-2.) However, Plaintiff has monthly
16 expenses amounting to \$3733, falling short of her monthly income by over a thousand
17 dollars. Accordingly, the Court finds that Plaintiff meets the § 1915(a) requirements and
18 **GRANTS** Plaintiff's motion to proceed IFP.

19 **II. Sua Sponte Dismissal for Failure to State a Claim**

20 Pursuant to 28 U.S.C. § 1915(e)(2), a court may dismiss a case at any time if it
21 determines the plaintiff has failed to state a claim on which relief may be granted. 28 U.S.C.
22 § 1915(e)(2)(B)(ii). Here, Plaintiff's fifty-four page Complaint alleges a variety of causes
23 of action including but not limited to: (1) irrelevant evidence; (2) willful suppression of
24 evidence; (3) failure to explain or deny; (4) conclusive presumption; (5) statute of frauds;
25 (6) breach of fiduciary duty; and (7) racial discrimination. (Doc. No. 1 at 27-34.) Though
26 the Court believes that Plaintiff's underlying complaint stems from Defendant's alleged
27 failure to successfully represent Plaintiff in a family court case, Plaintiff's vague and
28 unclear pleading fails to state facts to support a cognizable constitutional or statutory cause

1 of action. Moreover, the majority of Plaintiff's causes of action depend on the California
2 Evidence Code, which are inapplicable to Plaintiff's instant federal case.

3 As a result, Plaintiff has not presented a sufficient basis for a cognizable claim on
4 which relief may be granted. Pursuant to § 1915(e)(2), the Court **DISMISSES** the
5 Complaint **WITHOUT PREJUDICE** for failure to state a claim.

6 **III. Motion to Appoint Counsel**

7 Under 28 U.S.C. § 1915(e)(1), courts are granted discretion to appoint counsel for
8 indigent persons under "exceptional circumstances." *Agyeman v. Corr. Corp. of Am.*, 390
9 F.3d 1101, 1103 (9th Cir. 2004). As Plaintiff has yet to pay the filing fee, and her Complaint
10 has been dismissed without prejudice, the motion for counsel is **DENIED AS MOOT**. The
11 Court notes, however, that the Constitution provides no right of appointment of counsel in
12 a civil case unless an indigent litigant may lose his physical liberty if he loses the litigation.
13 *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981).

14 **IV. Conclusion**

15 For the reasons set forth above, the Court:

16 (1) **GRANTS** Plaintiff's motion to proceed IFP;

17 (2) sua sponte **DISMISSES** Plaintiff's Complaint **WITHOUT PREJUDICE** for
18 failure to state a claim; and

19 (3) **DENIES AS MOOT** Plaintiff's motion to appoint counsel.

20 Pursuant to this Order, Plaintiff is granted thirty (30) days from the date of this Amended
21 Order to file a new motion to proceed IFP. If Plaintiff chooses to file a new motion to
22 proceed IFP, she must also file her proposed first amended complaint with said motion. If
23 Plaintiff does not file a new motion to proceed IFP and proposed first amended complaint,
24 this action will be dismissed.

25 **IT IS SO ORDERED.**

26 Dated: May 16, 2017


27 Hon. Anthony J. Battaglia
28 United States District Judge

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