

1  
2  
3  
4  
5  
6  
7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
9

10 ELLA M. PHILLIPS,  
11 Plaintiff,  
12 v.  
13 DEPARTMENT OF THE NAVY,  
14 Defendant.

Case No.: 18-CV-289 JLS (KSC)

**ORDER (1) DENYING MOTION TO  
PROCEED *IN FORMA PAUPERIS*;  
(2) DENYING MOTION FOR  
APPOINTMENT OF COUNSEL**

(ECF Nos. 2, 3)

15  
16  
17  
18 Presently before the Court are Plaintiff Ella M. Phillips’s Motion to Proceed *In*  
19 *Forma Pauperis* (“IFP”), (“IFP Mot.,” ECF No. 2), and Motion for Appointment of  
20 Counsel, (“Counsel Mot.,” ECF No. 3).

21 **IFP MOTION**

22 All parties instituting any civil action, suit, or proceeding in a district court of the  
23 United States, except an application for writ of habeas corpus, must pay a filing fee of  
24 \$400. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to  
25 prepay the entire fee only if he is granted leave to proceed *in forma pauperis* pursuant to  
26 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). A  
27 federal court may authorize the commencement of an action without the prepayment of  
28

1 fees if the party submits an affidavit, including a statement of assets, showing that he is  
2 unable to pay the required filing fee. 28 U.S.C. § 1915(a).

3 In the present case, Plaintiff has submitted an affidavit indicating her average  
4 monthly income is \$3,612.80, and she expects to earn \$3,689.60 next month. (IFP Mot.  
5 1.) Plaintiff’s monthly expenses are \$3,575.50, and she owns a home with a value of  
6 \$400,000. (*Id.* at 3–5.) In sum, Plaintiff’s income exceeds her expenses and she is not  
7 without assets. Plaintiff has not demonstrated she is unable to pay the requisite filing fee.  
8 Thus, the Court **DENIES** Plaintiff’s Motion to Proceed IFP.

### 9 **MOTION FOR APPOINTMENT OF COUNSEL**

10 Plaintiff requests appointment of counsel because she can no longer afford to pay  
11 the attorney she retained to assist her in this case. (Counsel Mot. 3.)

12 The Constitution provides no right to appointment of counsel in a civil case unless  
13 an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept.*  
14 *of Soc. Servs.*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district  
15 courts have the discretion to appoint counsel for indigent persons. This discretion, however,  
16 may be exercised only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d  
17 1015, 1017 (9th Cir. 1991). “A finding of exceptional circumstances requires an evaluation  
18 of both the ‘likelihood of success on the merits and the ability of the plaintiff to articulate  
19 his claims pro se in light of the complexity of the legal issues involved.’ Neither of these  
20 issues is dispositive and both must be viewed together before reaching a decision.” *Id.*  
21 (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

22 The Court finds Plaintiff has not satisfied the standards for appointment of counsel  
23 under 28 U.S.C. § 1915(e)(1). First, Plaintiff’s Complaint has not yet been served or  
24 answered, so the likelihood of Plaintiff’s success on the merits in this case is therefore not  
25 yet clear at the early stage of the litigation. Second, Plaintiff has not demonstrated an  
26 inability to articulate her claims thus far. She states she was assisted by an attorney when  
27 attempting to settle with Defendant, and has only recently filed her Complaint. Plaintiff  
28 has successfully filed a Complaint against Defendant, along with the two present Motions.

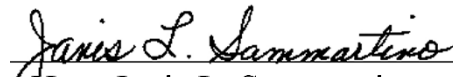
1 Therefore, the Court finds that neither the interests of justice nor any exceptional  
2 circumstances warrant appointment of counsel at this time and **DENIES** Plaintiff's motion,  
3 (ECF No. 3). This denial is **WITHOUT PREJUDICE** should Plaintiff later be able to  
4 make the requisite showing of exceptional circumstances.

5 **CONCLUSION**

6 In sum, the Court **DENIES** Plaintiff's Motion to Proceed IFP, (ECF No. 2). To  
7 proceed with his case, Plaintiff may, within thirty days of the date on which this Order is  
8 electronically docketed, either (1) pay the \$400 filing fee for civil cases, or (2) file a new  
9 motion to proceed *in forma pauperis*. The Court also **DENIES** Plaintiff's Motion for  
10 Counsel, (ECF No. 3). Should circumstances change, Plaintiff may be permitted to file  
11 another Motion for Appointment of Counsel.

12 **IT IS SO ORDERED.**

13 Dated: February 12, 2018

14   
15 Hon. Janis L. Sammartino  
16 United States District Judge  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28