

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE
HONORABLE ROBERT B. KUGLER

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

EQUITY FINANCIAL GROUP, LLC,
et al.,

Defendants.

Civil No. 04-1512-RBK-AMD

REPORT AND RECOMMENDATION

THIS MATTER comes before the Court upon the application of Jack Vernon Abernethy, who is currently proceeding *pro se* in this matter, to proceed *in forma pauperis* under 28 U.S.C. § 1915(a). The application to proceed *in forma pauperis* has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636. The application will be determined on a Report and Recommendation basis pursuant to 28 U.S.C. § 636(b)(1)(B) and (C). After careful consideration of the submissions, and for the reasons noted below, the Court recommends denying without prejudice Defendant Abernethy's application to proceed *in forma pauperis*.

In this matter, Defendant Abernethy is seeking *in forma pauperis* status, not as a plaintiff in order to file the action without costs, but rather as a defendant in connection with an

application for pro bono counsel. See Sears, Roebuck & Co. v. Charles W. Sears Real Estate Inc., 686 F. Supp. 385, 388 (D.N.Y. 1988) (denying *in forma pauperis* status of individual defendant in a civil action finding individual defendant not indigent), aff'd 865 F.2d. 22 (1988). By Order of even date, the Court has denied the application of appointment of counsel, noting that even if Defendant is financially unable to procure counsel, on balance, the factors that govern appointment of counsel do not warrant such appointment. The Court in this Report and Recommendation addresses Defendant's *in forma pauperis* application. A determination of eligibility for *in forma pauperis* status is governed by 28 U.S.C. § 1915(a) and rests on the applicant's ability to pay. Specifically, 28 U.S.C. § 1915(a)(1) provides in relevant part that the Court may authorize commencement, prosecution, or defense of a suit "without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses and that the person is unable to pay such fees or give security therefor." 28 U.S.C. § 1915(a)(1). Further, the affidavit must "state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress." Id. Under § 1915, the Court notes that a person does not have to be "absolutely destitute" in order to proceed *in forma pauperis*. Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 339-40 (1948).

In his application, Defendant Abernethy lists ownership of a personal residence with a value of \$175,000 and a loan payoff of \$174,255, and ownership of nine rental properties. See Application for *In Forma Pauperis* [240-2] dated August 16, 2005. He also states that he has an automobile with a value of \$3,000, and funds of \$2,621 in a checking account. Id. He further states that he has no dependents. Id. Defendant Abernethy alleges that his sources of income include rental income, income from accounting services, and income from home repairs. With respect to rental income, Defendant Abernethy asserts that only two of the nine rental properties generate income of gross monthly rents of \$475 each. Id. at attachment 2. His total income from these rentals over the last twelve months is alleged to be \$13,065. Id. at attachment 1. He further asserts that after mortgage payments, insurance, and taxes, the net income is "less than or equal to approximately \$100/month." See Application for Pro Bono Counsel [240-1] at 3. Also, Defendant alleges that the mortgage is past due by three periods on one of the rental houses and is "subject to go into foreclosure." Id. Defendant Abernethy also lists three other rental properties as "in foreclosure," while other properties are "condemned, vacant, or deserted because [he is] not financially able, nor physically able to maintain the properties in a rentable condition." Id. He lists three of the rental properties having loan amounts exceeding "expected sales value." See Application to

Proceed *In Forma Pauperis* at attachment 2. As to the properties that he asserts are not currently in foreclosure, he lists four with no loans and having expected sales values of \$6,250, \$6,250, \$12,500 and \$12,500. In addition, the one rental property Defendant asserts is subject to go into foreclosure has, according to Defendant, a sales value of \$35,000 with an approximate loan payoff of \$25,103.

Defendant Abernethy also alleges that he has been terminated from his insurance agency and lost the majority of his accounting practice. See Application for Pro Bono Counsel at 3. His total income from these sources over the last twelve months is alleged to be \$12,400; however, he has not specified what portion of this income was generated through his former employment with the insurance agency. See Application to Proceed *In Forma Pauperis* [240-2] at attachment 2. Further, Defendant Abernethy alleges that he has been unable to find permanent employment; however, he has earned \$3,000 in the past twelve months in part-time employment. See Application for Pro Bono Counsel [240-1] at 2. Defendant Abernethy also indicates that he expects to receive \$25,200 in income over the next year, including \$7,500 for accounting services, \$5,700 from rental properties and \$12,000 from part-time wages. See Application to Proceed *In Forma Pauperis* at attachment 2.

Having reviewed the submissions, the Court finds that

Defendant's earnings and the equity in the rental properties is sufficient to deny *in forma pauperis* status at this time. See Scherer v. City of Merriam, 2001 WL 395197, *1 (D. Kan. 2001) (affirming Magistrate Judge's decision denying applicant's application due to monthly benefits equaling \$372 more than monthly expenses combined with \$44,000 of equity in his home). Defendant's listed equity in four rental properties with no loan payoffs based on Defendant's submission is approximately \$37,000. Defendant further acknowledges that he expects to earn \$25,200 in income. Moreover, Defendant has not demonstrated his monthly expenses exceed his expected income. Consequently, the Court finds that Defendant's application does not demonstrate indigence. As one court noted in denying a defendant's application to proceed *in forma pauperis* in a civil action, access to the Court is not "blocked by [defendant's] financial condition; rather, the defendant is 'merely in the position of having to weigh the financial constraints posed if he pursues [his position] against the merits of his case.'" Sears, 686 F.Supp. at 388 (quoting Wrenn v. Secretary of Health and Human Services, No. 86-CV-916, slip op. at 2 (N.D.N.Y. 1987) [available on WESTLAW, 1987 WL 47383], aff'd 854 F.2d 1315 (2nd Cir. 1988)). Consequently, the Court recommends that the application to proceed *in forma pauperis* be denied at this time without prejudice.

I am filing this Report and Recommendation with the Clerk

of the Court and directing that a copy of same be served upon all parties. Any objections to this Report and Recommendation must be filed within ten (10) days of service pursuant to L. Civ. R. 72.1(c)(2) and FED. R. CIV. P. 72(b).

Dated: February 6, 2006

s/ Ann Marie Donio
ANN MARIE DONIO
United States Magistrate Judge

cc: Hon. Robert B. Kugler
All Parties

[Doc. No. 73]

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ORDER

This matter comes before the Court upon the application of Jack Vernon Abernethy, who is currently proceeding *pro se* in this matter, upon Defendant Abernethy's motion to proceed *in forma pauperis* under 28 U.S.C. § 1915(a); and the Court having considered the Report and Recommendation submitted by the Honorable Ann Marie Donio, United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(B) and (C); and the Court having considered the submissions; and the Court having made a *de novo* review; and for good cause shown;

IT IS on this _____ day of February, 2006, hereby

ORDERED that the Report and Recommendation is **ADOPTED**;

and

IT IS FURTHER ORDERED that Defendant Jack Vernon

Abernethy's motion to proceed *in forma pauperis* shall be, and hereby is, DENIED, without prejudice.

ROBERT B. KUGLER
United States District Judge