

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DARSHAWN WITHERSPOON,)	
)	
Plaintiff,)	
)	
v.)	Case No. 10-2043-JWL
)	
AARON T. ROBERTS,)	
)	
Defendant.)	

REPORT AND RECOMMENDATION

This matter is before the court on the motion of the pro se plaintiff, Darshawn Witherspoon, to proceed with this action without payment of fees or security (**doc. 3**). Section 1915 of Title 28 of the United States Code allows the court to authorize the commencement of a civil action “without prepayment of fees or security therefor, by a person who submits an affidavit that . . . the person is unable to pay such fees or give security therefor.” However, “[p]roceeding *in forma pauperis* in a civil case ‘is a privilege, not a right—fundamental or otherwise.’”¹ The decision to grant or deny *in forma pauperis* status under section 1915 lies within the sound discretion of the trial court.²

Plaintiff’s affidavit of financial status indicates that he is currently employed and making \$1000 a month. Plaintiff has also indicated that he owns a car and has considerable

¹*Barnett ex rel. Barnett v. Nw. Sch.*, No. 00-2499, 2000 WL 1909625, at *1 (D. Kan. Dec. 26, 2000) (quoting *White v. Colorado*, 157 F.3d 1226, 1233 (10th Cir. 1998)).

² *Id.* (citing *Cabrera v. Horgas*, No. 98-4231, 1999 WL 241783, at *1 (10th Cir. Apr. 23, 1999)).

equity in real property that provides him with some annual income. Plaintiff's affidavit also states that he has received nearly \$70,000 in the last year from other sources of income in addition to his property and salary. Plaintiff has no dependents; he does cite a considerable amount of monthly expenses, but some of those expenses appear discretionary.

Based on this information, the undersigned concludes that plaintiff has sufficient financial resources to pay the court's filing fees. Accordingly, pursuant to *Lister v. Dept. of Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005), the undersigned magistrate judge hereby issues this report and recommendation to the presiding U.S. District Judge, Hon. John W. Lungstrum, that plaintiff's motion to proceed in forma pauperis be denied and that the district judge enter an order allowing plaintiff 14 days to pay the requisite filing fee. If plaintiff does not pay the fee, the undersigned recommends that this case be dismissed without prejudice.

Within 14 days after being served with a copy of this report and recommendation, plaintiff may, pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72, file written objections. Plaintiff must file any objections within the 14-day period allowed if he wants to have appellate review of the proposed findings of fact, conclusions of law, or the recommended disposition. If plaintiff does not timely file his objections, no court will allow appellate review. Copies of this report and recommendation shall be mailed to plaintiff by certified and regular mail.

Dated January 26, 2010, at Kansas City, Kansas.

s/ James P. O'Hara
James P. O'Hara
U.S. Magistrate Judge