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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERT MORRIS and MICHELLE MORRIS,
Plaintiffs,
v.
FRESNO POLICE DEPARTMENT, OFFICERS
CHRISTOPHER LONG, JEREMY DEMOSS,
Defendants.

08-CV-01422-OWW-GSA

MEMORANDUM DECISION
REGARDING DEFENDANTS'
MOTION TO DISMISS
PLAINTIFFS' SIXTH AMENDED
COMPLAINT (Doc. 83)

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I. INTRODUCTION

Plaintiffs Robert Morris and Michelle Morris ("Plaintiffs") are proceeding *pro se* with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiffs filed a sixth amended complaint ("SAC") on June 24, 2010. (Doc. 82).

Defendants filed a motion to dismiss the SAC on June 28, 2010. (Doc 83). Plaintiffs filed opposition to Defendants' motion to dismiss on August 25, 2010. (Doc. 86).

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II. FACTUAL BACKGROUND

Plaintiffs' SAC contains allegations regarding two Defendants: Fresno Police Department Officers Christopher Long ("Long") and Jeremy DeMoss ("DeMoss"). Although the caption of the complaint lists the City of Fresno as a defendant, the SAC is devoid of allegations pertaining to the City.

Mrs. Morris asserts a Fourth Amendment excessive force claim against DeMoss. Mr. Morris asserts a Fourth Amendment claim for excessive force against officer Long.

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1 **Mrs. Morris's Allegations**

2 Mrs. Morris asserts a claim for "Excessive Force" against
3 officer DeMoss stemming from an incident on "10/28/07." (SAC at
4 1). According to the SAC, Mrs. Morris was "a victim of an assault
5 and robbery," presumably by some third party. (SAC at 1). It
6 appears that DeMoss was the first officer to arrive at the scene of
7 the assault and robbery, which occurred at 2904 E. Austin Way in
8 Fresno, California. (SAC at 1). Defendant Long stopped Plaintiffs
9 a few blocks away from Austin Way at the intersection of Holland
10 Avenue and Fresno Street. (SAC at 1). At some point, a police
11 officer identified in the SAC as "Alexander" placed Mrs. Morris in
12 handcuffs. (SAC at 2). As Mrs. Morris sat on the curb handcuffed,
13 she demanded that her "rights be observed," prompting officers to
14 laugh. (SAC at 2). DeMoss walked over to Mrs. Morris and, without
15 warning, "snatched Plaintiff up" by "quickly and
16 unexpectedly...grabbing [Mrs. Morris'] right elbow from behind and
17 lifting her up." (SAC at 2). The force used by DeMoss caused
18 large bruises approximately three to four inches in diameter on the
19 inside of Mrs. Morris' right forearm and bicep. (SAC at 2). Mrs.
20 Morris alleges that she was not under arrest and had not broken any
21 laws at the time DeMoss exercised force against her. (SAC at 2).
22 DeMoss placed Mrs. Morris in his patrol car, drove her to her
23 residence, and "dropped [Mrs. Morris] off." (SAC at 2).

24 **Mr. Morris's Allegations**

25 Mr. Morris contends that Defendant Long "committed excessive
26 force" against him on October 28, 2007 by conducting a "forced
27 blood draw" and employing unreasonable force during the blood draw.
28 (SAC at 3-4). Morris contends that Long drove him to a Fresno

1 Police Department substation and forced him to submit to a blood
2 draw, denying him the "right" to have either a breath test or urine
3 test. (SAC at 4). Plaintiff contends he asked for a field
4 sobriety test, but was told he was being taken for a blood draw.
5 (SAC at 4). Plaintiff contends he was never told of alternative
6 testing procedures, to which he would have consented.

7 Mr. Morris also alleges that during the blood draw, Long
8 turned Mr. Morris' wrist backwards and twisted his arm into an arm-
9 bar lock. (SAC at 3). While he held Mr. Morris in the arm-bar
10 lock, Long threatened him by saying "move so I can break your arm."
11 (SAC at 3). Mr. Morris alleges that Long used so much force that
12 he dislocated Mr. Morris' shoulder caused Mr. Morris to suffer a
13 torn ligament. (SAC at 3).

14 **III. LEGAL STANDARD**

15 Dismissal under Rule 12(b)(6) is appropriate where the
16 complaint lacks sufficient facts to support a cognizable legal
17 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th
18 Cir.1990). To sufficiently state a claim to relief and survive a
19 12(b)(6) motion, the pleading "does not need detailed factual
20 allegations" but the "[f]actual allegations must be enough to raise
21 a right to relief above the speculative level." *Bell Atl. Corp. v.*
22 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).
23 Mere "labels and conclusions" or a "formulaic recitation of the
24 elements of a cause of action will not do." *Id.* Rather, there must
25 be "enough facts to state a claim to relief that is plausible on
26 its face." *Id.* at 570. In other words, the "complaint must contain
27 sufficient factual matter, accepted as true, to state a claim to
28 relief that is plausible on its face." *Ashcroft v. Iqbal*, --- U.S.

1 ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal
2 quotation marks omitted).

3 The Ninth Circuit has summarized the governing standard, in
4 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint to
5 survive a motion to dismiss, the nonconclusory factual content, and
6 reasonable inferences from that content, must be plausibly
7 suggestive of a claim entitling the plaintiff to relief." *Moss v.*
8 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.2009) (internal
9 quotation marks omitted). Apart from factual insufficiency, a
10 complaint is also subject to dismissal under Rule 12(b)(6) where it
11 lacks a cognizable legal theory, *Balistreri*, 901 F.2d at 699, or
12 where the allegations on their face "show that relief is barred"
13 for some legal reason, *Jones v. Bock*, 549 U.S. 199, 215, 127 S.Ct.
14 910, 166 L.Ed.2d 798 (2007).

15 In deciding whether to grant a motion to dismiss, the court
16 must accept as true all "well-pleaded factual allegations" in the
17 pleading under attack. *Iqbal*, 129 S.Ct. at 1950. A court is not,
18 however, "required to accept as true allegations that are merely
19 conclusory, unwarranted deductions of fact, or unreasonable
20 inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
21 (9th Cir.2001). "When ruling on a Rule 12(b)(6) motion to dismiss,
22 if a district court considers evidence outside the pleadings, it
23 must normally convert the 12(b)(6) motion into a Rule 56 motion for
24 summary judgment, and it must give the nonmoving party an
25 opportunity to respond." *United States v. Ritchie*, 342 F.3d 903,
26 907 (9th Cir.2003). "A court may, however, consider certain
27 materials—documents attached to the complaint, documents
28 incorporated by reference in the complaint, or matters of judicial

1 notice-without converting the motion to dismiss into a motion for
2 summary judgment." *Id.* at 908.

3 **IV. DISCUSSION**

4 **A. Municipal Liability**

5 Municipalities such as the City of Fresno, "are 'persons'
6 under 42 U.S.C. § 1983 and thus may be liable for causing a
7 constitutional deprivation." *Long v. County of Los Angeles*, 442
8 F.3d 1178, 1185 (9th Cir. 2006). In a § 1983 case, a municipality
9 cannot be liable for a constitutional violation on the basis of
10 respondeat superior. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658,
11 691 (1978). Rather, a municipality is "liable only when 'action
12 pursuant to official municipal policy of some nature caused a
13 constitutional tort.'" *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th
14 Cir. 1999) (quoting *Monell*, 436 U.S. at 691). The "official
15 municipal policy" can be an expressly adopted policy or "a
16 longstanding practice or custom." *Id.* (internal quotation marks
17 omitted).

18 The SAC is devoid of allegations pertaining to any such
19 practices or policies of the City. Plaintiff's opposition to the
20 motion to dismiss provides:

21 as to the City of Fresno being listed as a defendant, the
22 defense are correct with respect to the Plaintiffs not
23 amending the complaint....after a long discussion between
24 both Plaintiff's the [sic] still feel that the City of
Fresno should be held accountable for the allegation
listed in the [complaint]. The police departments [sic]
policies are one of the City of Fresno [sic].

25 (Opposition at 1). Plaintiffs' concession that they failed to
26 amend the complaint to properly assert any facts against the City
27 of Fresno requires granting of Defendants' motion to dismiss.
28 Plaintiffs have been given opportunities to amend their complaint

1 and have been provided with an explanation of the law and specific
2 reasons why previous versions of the complaint were insufficient to
3 state a claim for municipal liability. Defendants' motion to
4 dismiss Plaintiffs' claims against the City of Fresno is GRANTED,
5 with prejudice. See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th
6 Cir. 1992) (where a court instructs a party regarding a specific
7 pleading deficiency, the party's failure to remedy the deficiency
8 may warrant dismissal of a claim with prejudice).

9 **B. Mr. Morris' Blood Draw Claim**

10 "The Fourth Amendment is not violated by ...failure to advise
11 [an arrestee], who did not request or consent to a urine or breath
12 test, of their right to choose among the alternative tests."
13 *Nelson v. City of Irvine*, 143 F.3d 1196, 1203-1204 (9th Cir. 1998).
14 Although the SAC does allege that Mr. Morris requested a field
15 sobriety test, it fails to allege that he consented to alternative
16 chemical testing procedures or even that he objected to a blood
17 draw. At oral argument, however, Mr. Morris stated that the
18 physical coercion he was subjected to before and during his blood
19 draw prevented him from consenting to an alternative chemical test.

20 Defendants' motion to dismiss Plaintiff's blood draw claim is
21 GRANTED, without prejudice, except as to the excessive force claim
22 arising out of the force employed during the blood draw. Mr.
23 Morris will be given one more opportunity to plead his blood draw
24 claim.

25 **ORDER**

26 For the reasons stated, IT IS ORDERED:

- 27 1) Defendants' motion to dismiss Plaintiffs' claims against
28 the City of Fresno is GRANTED with prejudice;

1 2) Defendants' motion to dismiss Mr. Morris' Fourth Amendment
2 claim based on Mr. Morris' blood draw is GRANTED, without
3 prejudice, except as to excessive force;

4 3) Plaintiffs shall file an amended complaint within fourteen
5 (14) days of service of the Memorandum Decision. Defendants
6 shall file a response within ten (10) days of service of the
7 amended complaint; and

8 4) Defendants shall submit a form of order consistent with
9 this Memorandum Decision within five (5) days following
10 electronic service of this decision.

11 IT IS SO ORDERED.

12 Dated: September 21, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE