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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL ZIEHLKE,)	1:08-cv-1802-AWI-GSA
)	
Plaintiff,)	
)	ORDER GRANTING DEFENDANTS'
v.)	MOTION FOR LEAVE TO FILE AMENDED
)	FIRST ANSWERS
THE CITY OF ANGELS CAMP, and)	
CHRIS COMFORT, individually and as)	
employee of the CITY OF ANGELS)	(Document 31)
CAMP, TONY TACHEIRA, individually)	
and as the CHIEF OF POLICE OF THE)	
CITY OF ANGELS CAMP, and DOES)	
1 through 20, inclusive,)	
)	
Defendants.)	

INTRODUCTION

On September 17, 2009, Defendants, the City of Angels Camp, Chris Comfort, and Tony Tacheira (“Defendants”) filed a Motion to File a First Amended Answer. (Docs. 31, 32, 33). No opposition to the motion was filed. A hearing was scheduled for October 23, 2009, at 9:30 a.m. The court has reviewed the pleadings and has determined that this matter is suitable for decision without oral argument pursuant to Local Rule 78-230 (c) and (h). Having considered all written materials submitted, Defendants’ motion is GRANTED.

RELEVANT PROCEDURAL BACKGROUND

On November 24, 2008, Plaintiff filed a complaint alleging that on May 24, 2007, Plaintiff had a verbal confrontation with defendant, Chris Comfort, an employee of the City of

1 Angels Camp Police Department at Coppello Ballpark in Angels Camp, California. The
2 confrontation involved a parked Sonora Police vehicle which was allegedly blocking Plaintiff's
3 exit from the ballpark. Plaintiff alleges that during the confrontation, Defendant Comfort
4 insinuated that Plaintiff had been drinking and that he was on crack. Plaintiff further alleges that
5 Defendant Comfort attempted to instigate a fight and intimidate Plaintiff's family.

6 After the confrontation, Plaintiff alleges that Defendant Comfort falsely reported to a
7 Calaveras County Sheriff's Officer that Plaintiff had challenged Defendant Comfort to a fight.
8 As a result, Plaintiff alleges he was charged with a violation of [California Penal Code § 415](#) on
9 June 6, 2007, by the Calaveras County District Attorney's Office. Plaintiff was allegedly
10 arrested on December 1, 2007, at his home, and was released on his promise to appear for his
11 criminal proceedings. On August 28, 2008, after a court trial, Plaintiff was acquitted of the
12 charges. Based on the above, Plaintiff alleges the following causes of action : 1) violations of [42](#)
13 [U.S.C §1983](#) and [28 U.S.C. § 1343](#), (2) false arrest and imprisonment, and (3) malicious
14 prosecution. (Doc. 1.) Plaintiff is seeking general, incidental, and punitive damages; lost wages;
15 costs; attorney's fees; and other relief the court deems proper.

16 Defendants filed Answers to the complaint on February 9, 2009. (Docs. 6, 7, 8.)
17 Defendants now seek to file amended answers to assert an affirmative defense based on
18 [California Civil Code § 47\(b\)](#) which establishes a privilege for communication made in
19 "legislative, judicial, or other official proceedings." [California Civil Code § 47\(b\)](#). Defendants
20 argue that this section has been interpreted by the California Supreme Court to apply to
21 statements made when a citizen contacts law enforcement personnel to report suspected criminal
22 activity on the part of another person. [Mulder v. Pilot Air Freight, 32 Cal. 4th 384, 387, 81 P. 3d](#)
23 [264 \(2004\)](#). Defendants argue that information elicited from Plaintiff at his deposition on
24 September 4, 2009, revealed that Plaintiff believed that Defendant Comfort was an off duty
25 police officer on the date of the incident. Declaration of Philip Avila, Esq. dated September 17,
26 2009 at pg. 2 ("Avila Declaration"). Further, Plaintiff testified that Defendant Comfort was not
27 wearing a uniform, nor did Defendant Comfort identify himself as a police officer at any time
28 during the incident. [Id.](#) Finally, a recent review of the transcript of Plaintiff's court trial held on

1 August 28, 2009, indicates that Plaintiff found out shortly after the incident that the officers of
2 the Angels Camp Police Department were off duty to attend a fellow officer's funeral on the date
3 of the alleged confrontation. Avila Declaration at pg. 2.

4 Based on these facts, Defendants argue that Defendant Comfort was acting as a private
5 citizen during these course of events and that the privilege under California section 47(b) is
6 implicated. Defendants contend that this provision may result in a successful defense to several
7 of the casues of actions including, but not limited to, false arrest and imprisonment. Avila
8 Declaration at pg. 3. Plaintiff has not filed any opposition to the motion.

9 DISCUSSION

10 Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend the
11 party's pleading once as a matter of course at any time before a responsive pleading is served.
12 Otherwise, a party may amend only by leave of the court or by written consent of the adverse
13 party, and leave shall be freely given when justice so requires. Fed. R. Civ. P. 15(a). "Rule 15(a)
14 is very liberal and leave to amend 'shall be freely given when justice so requires.'"
15 [AmerisourceBergen Corp. v. Dialysis West, Inc., 445 F.3d 1132, 1136 \(9th Cir. 2006\)](#) (quoting
16 Fed. R. Civ. P. 15(a)). However, a court may deny leave to amend due to (1) undue delay; (2)
17 bad faith or dilatory motive on the part of the movant; (3) repeated failure to cure deficiencies by
18 amendment; (4) undue prejudice to the opponent; and (5) futility of amendment. [Zucco Partners,](#)
19 [LLC v. Digimarc, 552 F. 3d 981 \(9th Cir. 2009\)](#) citing [Forman v. Davis, 371 U.S. 178, 182](#)
20 [\(1962\)](#).

21 The Court has examined all of the factors listed above and finds that leave to amend the
22 Answers should be granted. Defendants seek to amend the Answerd to add the affirmative
23 defense described above based on information obtained after the filing of the Answers. There is
24 no evidence the motion is being brought in bad faith or with a dilatory motive. Similarly, there is
25 little prejudice to the Plaintiff given that the case is in the beginning stages of the proceedings.
26 Finally, no opposition to the motion has been filed indicating that the amendment would be
27 futile.

28 ///

1 CONCLUSION

2 Accordingly, for the above reasons, IT IS HEREBY ORDERED that Defendants' Motion
3 for Leave to File First Amended Answers is GRANTED. The First Amended Answers are
4 deemed filed and served as of the date of the signing of this Order.

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8 IT IS SO ORDERED.

9 Dated: October 21, 2009

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE