

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

CHRISTIAN ACOSTA, et al.,

Plaintiffs,

v.

JAMES TOURNER, et al.,

Defendants.

NO. 1:09-CV-01560 AWI GSA

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

**ORDER FOR PLAINTIFFS TO SHOW
CAUSE WHY THIS ACTION
SHOULD NOT BE DISMISSED FOR
PLAINTIFFS' FAILURE TO SERVE
DEFENDANT TOURNER**

(Document #21)

BACKGROUND

On September 1, 2009, Plaintiffs filed a complaint for damages pursuant to 42 U.S.C. § 1983. Plaintiffs allege that Defendants unreasonably seized them in violation of the Fourth and Fourteenth Amendments of the United States Constitution.

Defendant City of Fresno was served with the complaint on April 5, 2010, 216 days after the complaint was filed. On May 18, 2010, Plaintiffs served Defendants Dyer, Medina, Ovalle, and the Fresno Police Department.¹

On April 26, 2010, Defendant City of Fresno filed a motion to dismiss pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure because the complaint was not served within the

¹ It appears Plaintiffs also attempted to served Defendant James Tourner at the Fresno Police Department. Defendant Tourner has not made an appearance in this action.

1 120 day time limit required by Rule 4(m) of the Federal Rules of Civil Procedure. On July 15,
2 2010, the court denied Defendant City of Fresno’s motion. The court retroactively extended Rule
3 4(m)’s service period as to Defendant City of Fresno to April 5, 2010.

4 On June 4, 2010, Defendants filed a motion to dismiss. Defendants contend the
5 complaint was not served on Defendants Dyer, Medina, Ovalle, and the Fresno Police
6 Department as required by Rule 4(m). Defendants also contend that the complaint fails to state
7 sufficient facts to sustain a Fourth Amendment claim for false arrest.

8 On July 1, 2010, Plaintiffs filed an opposition. Plaintiffs contend that Defendants’
9 motion ignores the fact that Plaintiffs, prior to being identified as the attackers, advised
10 Defendants they had not participated in the attack and were at another location. Plaintiffs argue
11 that had Defendants investigated, no arrest would have occurred. On July 8, 2010, Plaintiffs
12 filed a supplemental opposition in which they provide cases where courts have found a lack of
13 probable cause because an officer did not interview witnesses.

14 On July 12, 2010, Defendants filed a reply brief.

15 LEGAL STANDARDS

16 A. Rule 12(b)(5)

17 The court can dismiss a complaint for failure to comply with the service requirements of
18 Rule 4 of the Federal Rules of Civil Procedure under Rule 12(b)(5) of the Federal Rules of Civil
19 Procedure.

20 Rule 4(m) of the Federal Rules of Civil Procedure provides:

21 If a defendant is not served within 120 days after the complaint is filed, the
22 court--on motion or on its own after notice to the plaintiff--must dismiss the
23 action without prejudice against that defendant or order that service be made
24 within a specified time. But if the plaintiff shows good cause for the failure, the
court must extend the time for service for an appropriate period. This subdivision
(m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

25 Rule 4(m) permits a district court to grant an extension of time to serve the complaint. Mann v.
26 American Airlines, 324 F.3d 1088, 1090 (9th Cir. 2003). The court may even extend “time for
27

1 service retroactively after the 120 day service period has expired.” U.S. v. 2,164 Watches, More
2 or Less Bearing a Registered Trademark of Guess?, Inc., 366 F.3d 767, 772 (9th Cir. 2004);
3 Mann, 324 F.3d at 1090. If the plaintiff shows good cause for failing to service, the court is
4 required to extend the time period. Lemoge v. U.S., 587 F.3d 1188, 1198 (9th Cir. 2009); Efaw v.
5 Williams, 473 F.3d 1038, 1040 (9th Cir. 2007). If there is no good cause, the court has discretion
6 to either dismiss the complaint without prejudice or to extend the time period to serve the
7 complaint. Lemoge, 587 F.3d at 1198; Efaw, 473 F.3d at 1040. The court has broad discretion
8 under Rule 4(m) to extend time for service even without a showing of good cause. Efaw, 473
9 F.3d at 1040; 2,164 Watches, 366 F.3d at 772. In making extension decisions under Rule 4(m) a
10 district court may consider factors like a statute of limitations bar, prejudice to the defendant,
11 actual notice of a lawsuit, and eventual service. Scott v. Sebelius, 2010 WL 1972077, at *1 (9th
12 Cir. 2010); Efaw, 473 F.3d at 1041.

13 **B. Rule 12(b)(6)**

14 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure a claim may be dismissed
15 because of the plaintiff’s “failure to state a claim upon which relief can be granted.” Fed. R. Civ.
16 P. 12(b)(6). A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal
17 theory or on the absence of sufficient facts alleged under a cognizable legal theory. Johnson v.
18 Riverside Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008); Navarro v. Block, 250 F.3d 729,
19 732 (9th Cir. 2001). In reviewing a complaint under Rule 12(b)(6), all of the complaint’s
20 material allegations of fact are taken as true, and the facts are construed in the light most
21 favorable to the non-moving party. Marceau v. Balckfeet Hous. Auth., 540 F.3d 916, 919 (9th
22 Cir. 2008); Vignolo v. Miller, 120 F.3d 1075, 1077 (9th Cir. 1999). The court must also assume
23 that general allegations embrace the necessary, specific facts to support the claim. Smith v.
24 Pacific Prop. and Dev. Corp., 358 F.3d 1097, 1106 (9th Cir. 2004). However, the court is not
25 required “to accept as true allegations that are merely conclusory, unwarranted deductions of fact,
26 or unreasonable inferences.” In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1056-57 (9th Cir.

1 2008); Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Although they may
2 provide the framework of a complaint, legal conclusions are not accepted as true and
3 “[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory statements,
4 do not suffice.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009); Warren v. Fox Family
5 Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). As the Supreme Court has explained:

6 While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need
7 detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his
8 ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic
9 recitation of the elements of a cause of action will not do. Factual allegations must
be enough to raise a right to relief above the speculative level, on the assumption
that all the allegations in the complaint are true (even if doubtful in fact).

10 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Thus, “a complaint must contain
11 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”
12 Iqbal, 129 S.Ct. at 1949. “A claim has facial plausibility when the plaintiff pleads factual
13 content that allows the court draw the reasonable inference that the defendant is liable for the
14 misconduct alleged.” Iqbal, 129 S.Ct. at 1949.

15 The plausibility standard is not akin to a ‘probability requirement,’ but it asks
16 more than a sheer possibility that a defendant has acted unlawfully. Where a
17 complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it
stops short of the line between possibility and plausibility of ‘entitlement to
relief.’

18 . . .
19 Determining whether a complaint states a plausible claim for relief will . . . be a
20 context specific task that requires the reviewing court to draw on its judicial
experience and common sense. But where the well-pleaded facts do not permit
the court to infer more than the mere possibility of misconduct, the complaint has
alleged – but it has not shown – that the pleader is entitled to relief.

21
22 Iqbal, 129 S.Ct. at 1949-50. “In sum, for a complaint to survive a motion to dismiss, the non-
23 conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly
24 suggestive of a claim entitling the plaintiff to relief.” Moss v. United States Secret Service, 572
25 F.3d 962, 969 (9th Cir. 2009).

1 **FACTS**

2 **A. Facts Alleged in the Complaint**

3 The complaint alleges that Plaintiffs are residents of the County of Sacramento. The
4 complaint alleges that at the time of the incident they were employed by Environmental
5 Development Group, a company based out of Sacramento, California. The complaint alleges that
6 Plaintiffs were in Fresno as a work crew, and they were doing work at local Fresno Walmart
7 stores. The complaint alleges that Plaintiffs were staying at the Econo Lodge Motel while
8 working in Fresno.

9 The complaint alleges that on March 5, 2008, at approximately 11:30 p.m., Defendant
10 James Tourner was playing pool with his girlfriend at the Diamond Billiards, in Fresno,
11 California. The complaint alleges that Defendant Tourner was attacked by a Hispanic Male. The
12 Hispanic male was accompanied by four other Hispanic males. After the altercation, the Hispanic
13 males left Diamond Billiards. The complaint alleges that Defendant Police Officers Medina and
14 Ovalle responded to the scene at Diamond Billiards, and then they went looking for suspects.

15 The complaint alleges that on the night of March 5, 2008, Plaintiffs walked from the
16 Econo Lodge Motel to an establishment called “The Other Bar” to watch an NBA basketball
17 game. The complaint alleges that while Plaintiffs were walking back to the motel, Plaintiffs were
18 detained by Defendants Medina and Ovalle. Defendants Medina and Ovalle called Defendant
19 Tourner to the location. The complaint alleges that Defendant Tourner mis-identified Plaintiff
20 Sigala as the person who hit him and the other four Plaintiffs as the other four Hispanics who
21 were at the Diamond Billiards.

22 The complaint alleges Defendants Medina and Ovalle failed to investigate further as to
23 whether Plaintiffs had been at the Diamond Billiards. The complaint alleges Plaintiffs informed
24 Defendants Medina and Ovalle that they had been at “The Other Bar” watching the basketball
25 game. The complaint alleges Defendants Medina and Ovalle failed to investigate whether
26 Plaintiffs had been at “The Other Bar.” The complaint alleges that had Defendants Medina and

1 Ovalle properly investigated Plaintiffs' statements, they would have discovered that Plaintiffs
2 had an alibi. The complaint alleges that witnesses at Diamond Billiards stated the actual
3 attackers were younger than Plaintiffs and Plaintiff's clothing did not match the clothing worn by
4 the actual attackers.

5 The complaint alleges that because Defendants Medina and Ovalle failed to properly
6 investigate, Plaintiffs were wrongly arrested, taken into custody, and charged with Assault with a
7 Deadly Weapon. The complaint alleges that at the time Defendants arrested Plaintiffs, they had
8 no probable cause to believe that Plaintiffs had committed the assault and battery.

9 The complaint alleges that four Plaintiffs spent two weeks in custody at the Fresno
10 County Jail.

11 The complaint alleges that charges were filed by the Fresno District Attorney against all
12 Plaintiffs. The complaint alleges that on April 16, 2008, at the Plaintiffs' preliminary hearing,
13 the Fresno District Attorney's Office dismissed the charges.

14 The complaint alleges that all Plaintiffs lost their employment with the Environmental
15 Development Group as a consequence of their arrest. The complaint alleges that, because of the
16 lost wages, Plaintiffs suffered severe economic losses, ranging from eviction from their
17 dwellings and being late with their payments to their creditors, along suffering the stigma of
18 being arrested for a crime they did not commit.

19 The complaint alleges that the Fresno City Council makes policy for Defendant City of
20 Fresno on the use of reasonable and lawful arrests. The complaint alleges that the Fresno City
21 Counsel Members were aware of a pattern of unreasonable and unlawful arrests by police
22 officers and were aware that the city's policies regarding the discipline of officers accused of
23 unreasonable and unlawful arrests were so inadequate that it was obvious further incidents of
24 unreasonable and unlawful arrests would occur. The complaint alleges that the failure to correct
25 said policies caused the unreasonable and unlawful arrests of Plaintiffs as set forth above. The
26 complaint alleges that Defendants Medina and Ovalle were acting under the direction and control

1 of Defendants Dyer and Defendant City of Fresno. The complaint alleges Defendants Medina
2 and Ovalle were acting pursuant to the official policy, practice, or custom of Defendant City of
3 Fresno.

4 **B. Facts Pertaining to Service**

5 The incident underlying this action took place on March 5, 2008.

6 Daniel L. Harralson is the attorney of record for Plaintiffs. Attorney Harralson took
7 basic information about the underlying incident from Plaintiffs in 2008. Between the time
8 Attorney Harralson's Office signed Plaintiffs as clients and the filing of the complaint, Attorney
9 Harralson's Office lost contact with Plaintiffs.

10 On September 1, 2009, Attorney Harralson, on behalf of Plaintiffs, filed the complaint.
11 Attorney Harralson filed the complaint in order to protect Plaintiffs' statute of limitations.

12 Until February or March 2010, Attorney Harralson was uncertain whether Plaintiffs still
13 wanted Attorney Harralson to represent them in this action because his office had lost contact
14 with Plaintiffs.

15 Once Attorney Harralson made contact with Plaintiffs, Attorney Harralson instructed his
16 office to serve Defendants. Plaintiffs served Defendant City of Fresno with the complaint on
17 April 5, 2010. Plaintiffs served the remaining Defendants, except for Defendant Tourner, on
18 May 18, 2010.

19 **DISCUSSION**

20 **A. Motion to Dismiss for Late Service - Rule 12(b)(5)**

21 Defendants contend this action should be dismissed because Defendants Dyer, Medina,
22 Ovalle, and the Fresno Police Department were not served with the complaint within 120 days.
23 Plaintiffs contend their late service should be excused.

24 Even if there is an absence of good cause in this action, the court will not dismiss for late
25 service. In this case, Plaintiffs' Attorney has provided evidence that he lost contact with his
26 clients and filed the action in an attempt to preserve Plaintiffs' statute of limitations. The fact
27

1 Plaintiffs cannot re-file this action is a ground to excuse the late service. See Lemoge, 587 F.3d
2 at 1198 (holding relief was appropriate under Rule 4(m) in light of the plaintiffs being
3 time-barred from re-filing their action). In addition, the delay is not extensive. While 259 days
4 to serve Defendants is lengthy, it is not so long that Defendants' ability to defend this case has
5 been compromised by a lengthy passage of time. There is no argument or evidence that pertinent
6 records have been destroyed or relevant witnesses can no longer remember the events underlying
7 this action. Thus, the court sees little prejudice to Defendant City of Fresno based on Plaintiffs'
8 service delay. See Efav, 473 F.3d at 1041 (finding district court abused its discretion in
9 extending service after a seven year delay). Therefore, the court concludes that relief under Rule
10 4(m) is appropriate. Thus, this action will not be dismissed for late service.

11 **B. Motion to Dismiss for Failure to State a Claim - Rule 12(b)(6)**

12 In this action, Plaintiffs contend that they were denied their right to freedom from seizure
13 without a warrant and without probable cause as guaranteed by the Fourth and Fourteenth
14 Amendments to the United States Constitution. Defendants contend that Defendants Medina and
15 Ovalle had probable cause to arrest Plaintiffs because Defendant Tournier identified Plaintiffs as
16 the subjects who had assaulted him.

17 The Fourth Amendment requires police officers to have probable cause before making a
18 warrantless arrest. Beck v. Ohio, 379 U.S. 89, 91 (1964); Ramirez v. City of Buena Park, 560
19 F.3d 1012, 1023 (9th Cir.2009). "Probable cause to arrest exists when officers have knowledge
20 or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe
21 that an offense has been or is being committed by the person being arrested." Rodis v. City &
22 County of San Francisco, 558 F.3d 964, 969 (9th Cir.2009); John v. City of El Monte, 515 F.3d
23 936, 940 (9th Cir. 2008). Courts look to the totality of the circumstances known to the arresting
24 officers, to determine if a prudent person would have concluded there was a fair probability that
25 the defendant had committed a crime. Crowe v. County of San Diego, 608 F.3d 406, 432 (9th
26 Cir. 2010); John, 515 F.3d at 940; Hart v. Parks, 450 F.3d 1059, 1066 (9th Cir. 2006).

1 Defendants Medina and Ovalle at the time of the arrest. The court concludes that a reasonable
2 officer confronted with the facts and circumstances known to Defendants at the time of
3 Plaintiffs' arrest would have determined that probable cause existed for the arrest. Although
4 later alibi evidence cleared Plaintiffs, the alleged facts show that the arresting officers acted
5 reasonably and in good faith. "[A] law enforcement officer is not required by the Constitution to
6 investigate independently every claim of innocence, whether the claim is based on mistaken
7 identity or a defense such as lack of requisite intent." Broam v. Bogan, 320 F.3d 1023, 1032 (9th
8 Cir. 2003).

9 Case law supports the court's conclusion. For example, in Romero v. Fay, 45 F.3d 1472
10 (10th Cir. 1995), witnesses implicated the plaintiff as a murder suspect. Id. at 1474. After
11 murder charges were dropped against the plaintiff, he filed a Section 1983 case in which he
12 alleged the police offer lacked probable cause to arrest him. The plaintiff contended that
13 regardless of whether the statements provided by the witnesses supplied probable cause for the
14 police officer to arrest the plaintiff, a reasonable police officer should have investigated the
15 plaintiff's alibi witnesses before arresting him because the exculpatory information would have
16 negated any probable cause to arrest. Id. at 1476. The Tenth Circuit disagreed, stating:

17 . . . the cases cited by Plaintiff do not support his broad proposition that a police
18 officer who interviews witnesses and concludes probable cause exists to arrest
19 violates the Fourth Amendment by failing to investigate the defendant's alleged
20 alibi witnesses. Instead, the cases state that the probable cause standard of the
21 Fourth Amendment requires officers to reasonably interview witnesses readily
22 available at the scene, investigate basic evidence, or otherwise inquire if a crime
23 has been committed at all before invoking the power of warrantless arrest and
24 detention.

22 Id. at 1476-77. Once an officer concludes that there is probable cause to arrest, an officer is not
23 required to reassess his probable conclusion at every turn, whether faced with the discovery of
24 some new evidence or a suspect's self-exonerating explanation from the back of the squad car.
25 Thompson v. Olson, 798 F.2d 552, 556 (1st Cir. 1986); accord Baker v. McCollan, 443 U.S. 137,
26 145-46 (1979) ("we do not think a sheriff executing an arrest warrant is required by the
27

1 Constitution to investigate independently every claim of innocence”); Olinger v. Larson,
2 134 F.3d 1362, 1367 (8th Cir. 1998) (detective had “no obligation to immediately investigate
3 [plaintiff’s] asserted alibi evidence prior to the probable cause hearing”). Here, the court finds
4 that Defendants Medina and Ovalle had probable cause to arrest Plaintiffs. There are no facts
5 showing that the initial determination of probable cause was unreasonable. This finding negates
6 Plaintiff’s Fourth and Fourteenth Amendment cause of action against Defendants Medina and
7 Ovalle, and the causes of action against Defendants Medina and Ovalle must be dismissed.

8 Because Defendants Medina and Ovalle did not violate Plaintiffs’ constitutional rights,
9 Plaintiffs’ claims against the remaining Defendants also fail. The remaining Defendants liability
10 is based on allegations that policy making Defendants were aware of a pattern of unreasonable
11 and unlawful arrests by police officers and were aware that the Defendant City of Fresno’s
12 policies regarding the discipline of officers accused of unreasonable and unlawful arrests were so
13 inadequate that it was obvious further incidents of unreasonable and unlawful arrests would
14 occur. The complaint alleges Defendants Medina and Ovalle were acting pursuant to this
15 official policy, practice, or custom. Because Plaintiffs cannot show a constitutional violation by
16 Defendants Medina and Ovalle, Plaintiffs cannot show that the remaining Defendants’ policy,
17 practice, or custom was the moving force behind the constitutional violation. See McSherry v.
18 City of Long Beach, 584 F.3d 1129, 1147 (9th Cir. 2009). “If a person has suffered no
19 constitutional injury at the hands of the individual police officer, the fact that the departmental
20 regulations might have authorized the [constitutionally violation] is quite beside the point.” City
21 of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (per curiam). Thus, the cause of action
22 against Defendants City of Fresno, Dyer, and Fresno Police Department must be dismissed.

23 This court is not without sympathy for Plaintiffs and the drastic consequences that arose
24 from Plaintiffs’ arrest. Unfortunately, “it is inevitable that law enforcement officials will in
25 some cases reasonably but mistakenly conclude that probable cause is present.” Anderson v.
26 Creighton, 483 U.S. 635, 641 (1987). “The Constitution does not guarantee that only the guilty
27
28

1 will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted –
2 indeed, for every suspect released.” Baker, 443 U.S. at 145 (1979). The issue in this action is
3 not whether Defendants were inattentive or could have conducted a faster investigation.
4 Because the court has no choice but to find Defendants Medina and Ovalle had probable cause to
5 arrest Plaintiffs, Plaintiffs’ Fourth and Fourteenth Amendment claims fail.

6 **ORDER**

7 Accordingly, the court ORDERS that:

- 8 1. Defendants’ motion to dismiss is GRANTED;
- 9 2. Defendants City of Fresno, Medina, Ovalle, Dyer, and Fresno Police Department
10 are DISMISSED;
- 11 3. By September 20, 2010, Plaintiffs are ordered to show cause why Defendant
12 Tourner should not be dismissed from this action pursuant to Rule 4(m) and this
13 action closed; and
- 14 4. Plaintiffs are forewarned that failure to respond tot he court’s order to show cause
15 and show service upon Defendant Tourner will result in this action being closed.

16
17 IT IS SO ORDERED.

18 Dated: August 30, 2010

19 
20 _____
21 CHIEF UNITED STATES DISTRICT JUDGE