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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUIS FERNANDO TORRES,
et al.,

Plaintiffs,

v.

S. RODRIGUEZ, Badge No. 349,
et al.,

Defendants.

CASE NO. 1:10-cv-00670-LJO-SKO

**ORDER GRANTING PLAINTIFFS'
MOTION TO FILE SECOND
AMENDED COMPLAINT**

(Docket No. 33)

I. PROCEDURAL BACKGROUND

On December 24, 2009, Plaintiffs Luis Fernando Torres, Alejandro Torres, Aurora Torres, and Armando Hernandez ("Plaintiffs") filed a complaint in Madera County Superior Court against the State of California,¹ the County of Madera, the City of Madera, and Does 1 through 100. (Doc. 1.)

On April 15, 2010, the County of Madera removed the complaint to this Court. Subsequently, pursuant to a motion to dismiss, the claims against the County and City of Madera were dismissed, but Plaintiffs were given an opportunity to amend their complaint. (Doc. 15.)

¹ It appears that the State of California was never served with the original complaint.

1 On June 30, 2010, Plaintiffs filed a First Amended Complaint ("FAC") asserting that, *inter*
2 *alia*, Defendants S. Rodriguez, Jesus Hernandez, Nick Rojas, Brian Esteves, and Felix Gonzalez
3 (collectively "Defendants") entered Plaintiffs' home without consent, probable cause, or a warrant.
4 Plaintiffs state a claim under 42 U.S.C. § 1983 as well as claims for assault, battery, false arrest, and
5 trespass. (Doc. 17.)²

6 In a joint scheduling report filed on November 10, 2010, Plaintiffs represented that they
7 anticipated amending their complaint to add James Ellenberger as a Defendant, and Plaintiffs stated
8 they had agreed to dismiss Defendants Brian Esteves and Felix Gonzalez as they were not involved
9 in the alleged events. (Doc. 30, 4:20-27.) The Court issued a scheduling order on November 19,
10 2010, permitting the parties until February 28, 2010, to file a motion or a stipulation seeking any
11 amendment to the pleadings.

12 II. DISCUSSION

13 On February 28, 2011, Plaintiffs Luis Fernando Torres, Alejandro Torres, Aurora Torres, and
14 Armando Hernandez ("Plaintiffs") filed a motion to amend their complaint. (Doc. 33.) Plaintiffs
15 assert that, during the course of discovery, they determined the identities of others involved in the
16 events underlying this action that Plaintiffs wish to add as defendants. (Doc. 33, 2-3.) Plaintiffs also
17 state that Defendants Brian Esteves and Felix Gonzalez should be dismissed. Therefore, Plaintiffs
18 request that they be permitted to file a Second Amended Complaint ("SAC") that adds certain
19 defendants and removes others; a proposed copy of the SAC is attached to Plaintiffs' motion. (Doc.
20 33-2.)

21 On April 6, 2011, Defendants Brian Esteves and Felix Gonzalez filed a statement of non-
22 opposition to Plaintiffs' motion to amend the complaint in the manner proposed. Defendants S.
23 Rodriguez filed neither an opposition nor a statement of non-opposition to Plaintiffs' motion.
24 According to Plaintiffs' counsel, as of November 10, 2010, Defendants Jesus Hernandez and Nick
25 Rojas have not yet been served with the FAC. (Doc. 30, 4:25.)

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28 ² The City and County of Madera were not named in the FAC, and are no longer parties to this action.

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2 The Court has reviewed Plaintiffs' proposed SAC. Plaintiffs' SAC makes reference to
3 paragraphs and allegations contained in the **First Amended Complaint**. (See Doc. 33-2, ¶¶ 12, 16,
4 20, 25.) Whether this is a typographical error or whether Plaintiffs are attempting to reference the
5 prior pleading in their proposed amended pleading, this is impermissible. Any amended pleading
6 must be complete in itself without reference to prior pleadings. Local Rule 220 ("[E]very pleading
7 to which an amended or supplement is permitted . . . shall be retyped and filed so that it is complete
8 in itself without reference to the prior or superseded pleading."). The Court will not permit the
9 proposed SAC to be filed until this deficiency is corrected.

10 Moreover, it appears that Defendants Jesus Hernandez and Nick Rojas have not been served
11 with the FAC even though the FAC was filed on June 30, 2010. (Doc. 17.) The proposed SAC
12 names them as Defendants. Pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, where
13 a defendant is not served within 120 days of the complaint being filed, the court *must* dismiss the
14 action without prejudice as to that defendant or order that service of the complaint be completed
15 within a specified time. Accordingly, service of the FAC must be effected on or before April 18,
16 2011, with respect to these Defendants, or the Court will recommend dismissal of Defendants Jesus
17 Hernandez and Nick Rojas. Any renewed motion to amend the complaint shall address the status
18 of service with regard to Defendants Hernandez and Rojas.

19 III. CONCLUSION

20 Accordingly, IT IS HEREBY ORDERED THAT:

- 21 1. Plaintiffs' motion to amend the complaint is DENIED WITHOUT PREJUDICE;
- 22 2. The April 20, 2011, hearing on Plaintiffs' motion is VACATED;
- 23 3. Plaintiffs may renew their motion to amend the complaint on or before April 20,
24 2011;
- 25 4. As Plaintiffs represent that they have agreed to dismiss Defendants Brian Esteves and
26 Felix Gonzalez, Plaintiffs and Defendants shall file a stipulation for dismissal of said
27 Defendants pursuant to Fed. R. Civ. P. 41 and shall submit a proposed order to
28 Judge O'Neill via email at ljoorders@caed.uscourts.gov; and

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4. Plaintiffs shall complete service of process with respect to Defendants Jesus Hernandez and Nick Rojas on or before April 18, 2011, or the Court will recommend that the claims against these Defendants be dismissed.

IT IS SO ORDERED.

Dated: April 7, 2011

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE