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

STEPHEN GARCIA, individually and on
behalf of all others similarly situated,
Plaintiff,

v.

SYLVIA MARTINEZ, JOHN DOE, SHERIFF
MARGARET MIMS, and Does 1 through 10,
inclusive,
Defendants.

1:11-CV-01612 AWI SMS

**ORDER RE: DEFENDANT’S MOTION TO
DISMISS**
(DOCS. 17, 18)

I. History¹

Plaintiff Stephen Garcia (“Plaintiff”) was arrested on November 3, 2008 by Defendant Sylvia Martinez (“Defendant”) who is an officer with the Fresno Police Department. Plaintiff claims that during the arrest, Defendant assaulted Plaintiff by punching him in the face, and “body slamming” him into an area with broken glass. Booking pictures show Plaintiff with a bruised and swollen face and cut hands. Plaintiff was arrested for assault and battery on a police officer, and making threats against a police officer’s life. On March 12, 2009, Plaintiff was

¹ The factual history is provided for background only and does not form the basis of the court’s decision; the assertions contained therein are not necessarily taken as adjudged to be true. The legally relevant facts relied upon by the court are discussed within the analysis.

1 convicted of making criminal threats to a police officer, battery on a police officer, and resisting
2 arrest.

3 Proceeding without legal representation, Plaintiff filed a claim in the United States
4 District Court for the Central District of California on September 15, 2011. Plaintiff's claims in
5 the Second Amended Complaint ("SAC"), filed on June 25, 2012, arise out of contact made
6 during Plaintiff's arrest on November 3, 2008. Plaintiff's surviving cause of action from the SAC
7 claims that he was subjected to excessive force and physical brutality by Defendant, which is a
8 violation of Plaintiff's Fourth Amendment right against unreasonable search and seizure. U.S.
9 Const. amend. IV. Plaintiff's claim arises under 42 U.S.C. §1983.

10 Defendant has filed a motion to dismiss pursuant to Fed. Rule Civ. Proc. 12(b)(6).
11 Plaintiff has filed no response. The matter was taken under submission without oral argument.

12 13 **II. Legal Standard**

14 Under Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed because of the
15 Plaintiff's "failure to state a claim upon which relief can be granted." A dismissal under Rule
16 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient
17 facts alleged under a cognizable legal theory. Navarro v. Block, 250 F.3d 729, 732 (9th Cir.
18 2001). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed
19 factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief'
20 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
21 of action will not do. Factual allegations must be enough to raise a right to relief above the
22 speculative level, on the assumption that all the allegations in the complaint are true (even if
23 doubtful in fact)." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007), citations
24 omitted. The court is not required "to accept as true allegations that are merely conclusory,
25 unwarranted deductions of fact, or unreasonable inferences." Sprewell v. Golden State Warriors,
26 266 F.3d 979, 988 (9th Cir. 2001). The court must also assume that "general allegations embrace
27 those specific facts that are necessary to support the claim." Lujan v. Nat'l Wildlife Fed'n, 497
28 U.S. 871, 889 (1990), citing Conley v. Gibson, 355 U.S. 41, 47 (1957), overruled on other

1 grounds at 127 S. Ct. 1955, 1969. Thus, the determinative question is whether there is any set of
2 “facts that could be proved consistent with the allegations of the complaint” that would entitle
3 plaintiff to some relief. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002). At the other
4 bound, courts will not assume that plaintiffs “can prove facts which [they have] not alleged, or
5 that the defendants have violated...laws in ways that have not been alleged.” Associated General
6 Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526
7 (1983).

8 In deciding whether to dismiss a claim under Rule 12(b)(6), the Court is generally limited
9 to reviewing only the complaint. “There are, however, two exceptions....First, a court may
10 consider material which is properly submitted as part of the complaint on a motion to dismiss...If
11 the documents are not physically attached to the complaint, they may be considered if the
12 documents’ authenticity is not contested and the plaintiff’s complaint necessarily relies on them.
13 Second, under Fed. R. Evid. 201, a court may take judicial notice of matters of public record.”
14 Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001), citations omitted. The Ninth
15 Circuit later gave a separate definition of “the ‘incorporation by reference’ doctrine, which
16 permits us to take into account documents whose contents are alleged in a complaint and whose
17 authenticity no party questions, but which are not physically attached to the plaintiff’s pleading.”
18 Kniewel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005), citations omitted. “[A] court may not
19 look beyond the complaint to a plaintiff’s moving papers, such as a memorandum in opposition
20 to a defendant’s motion to dismiss. Facts raised for the first time in opposition papers should be
21 considered by the court in determining whether to grant leave to amend or to dismiss the
22 complaint with or without prejudice.” Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003),
23 citations omitted.

24 If a Rule 12(b)(6) motion to dismiss is granted, claims may be dismissed with or without
25 prejudice, and with or without leave to amend. “[A] district court should grant leave to amend
26 even if no request to amend the pleading was made, unless it determines that the pleading could
27 not possibly be cured by the allegation of other facts.” Lopez v. Smith, 203 F.3d 1122, 1127 (9th
28 Cir. 2000) (en banc), quoting Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995). In other

1 words, leave to amend need not be granted when amendment would be futile. Gompper v. VISX,
2 Inc., 298 F.3d 893, 898 (9th Cir. 2002).

3 4 **III. Discussion**

5 Defendant moves for dismissal of Plaintiff's 42 U.S.C. §1983 claim for a violation of
6 Plaintiff's civil rights on several grounds. Defendant argues the claim is barred by the doctrine of
7 res judicata, the statute of limitations, Plaintiff's prior criminal convictions, Plaintiff's failure to
8 comply with the California Governmental Claims Requirement, Plaintiff has not alleged a
9 Constitutional or Due Process Violation, and Defendant has immunity from litigation of this suit.
10 The case can be resolved on the merits of the Plaintiff's prior criminal convictions argument, and
11 the statute of limitations argument.

12 13 **A. Past Criminal Convictions**

14 Defendant argues that Plaintiff's §1983 claim for monetary damages is barred by Heck v.
15 Humphrey, as granting monetary damages for excessive force would necessarily imply that
16 Plaintiff's prior criminal conviction of resisting arrest should be overturned. Heck held that
17 allowing claims for tort damages based on conduct that a plaintiff was previously convicted of
18 would render those convictions invalid. Heck v. Humphrey, 512 U.S. 477, 487 (1994). Thus, in
19 order to proceed with a claim for damages under §1983, the plaintiff must first show that the
20 criminal conviction has been reversed on direct appeal, expunged, declared invalid by a state
21 tribunal authorized to make that determination, or called into question by a federal court's
22 issuance of a writ of habeas corpus. Id. at 487.

23 In this case, Plaintiff has brought a §1983 claim for use of excessive force in his arrest.
24 This claim arises out of conduct during Plaintiff's arrest on November 3, 2008. The court may
25 take judicial notice of state court dockets. Porter v. Ollison, 620 F. 3d 952, 954-955 (9th Cir.
26 2010). The court takes judicial notice of the docket of the Superior Court of California and finds
27 that Plaintiff was charged with a violation of California Penal Code §148 on December 12, 2008
28 as count four (Defendant's Request for Judicial Notice 3). The court also notices that the Plaintiff

1 plead “nolo contendere” to count four and the court entered judgment and sentenced upon the
2 plea. (Defendant’s Request for Judicial Notice 7). A plea of “nolo contendere” in a California
3 criminal action has been held to have the same effect of a guilty plea or a jury verdict of guilty
4 for the purposes of a Heck analysis. Nuno v. County of San Bernardino, 58 F. Supp. 2d 1127,
5 1135 (C.D. Cal. 1999). Section 148(a)(1) states:

6 “Every person who willfully resists, delays, or obstructs any public officer,
7 peace officer, or an emergency medical technician, as defined in Division 2.5
8 of the Health and Safety Code, in the discharge or attempt to discharge any
9 duty of his or her office or employment, when no other punishment is
10 prescribed, shall be punished by a fine not exceeding one thousand dollars, or
by imprisonment in a county jail not to exceed one year, or by both that fine
and imprisonment.”

11 The court in People v. Simmons held that the elements of a conviction under §148
12 include (1) that the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when
13 the officer was engaged in the performance of his or her duties, and (3) the defendant knew or
14 reasonably should have known that the other person was a peace officer engaged in the
15 performance of his or her duties. People v. Simmons, 42 Cal. App. 4th 1100, 1108-09 (1st Dist.
16 1996). In addition, Simmons states that the lawfulness of an arrest is an essential element of the
17 conviction. Id. at 1110. A lawfulness analysis includes consideration of whether the officer was
18 performing his or her duties at the time of the arrest. The court in People v. Olguin stated that an
19 arrest made with excessive force is not within the performance of a police officer’s duties and is
20 therefore unlawful. People v. Olguin, 119 Cal. App. 3d 39, 44-45 (6th Dist. 2011).

21 The Plaintiff has not presented any evidence of his §148 conviction to be invalid or
22 reversed, so Plaintiff cannot bring a §1983 claim for use of excessive force during his arrest. If
23 the Defendant had used excessive force during Plaintiff’s arrest, as Plaintiff is alleging in his
24 §1983 claim, then Plaintiff’s conviction of the crime of resisting arrest must be called into
25 question. Without an overturned or invalid conviction, Plaintiff’s §1983 claim must fail under
26 the Heck standard. Based on the forgoing, Defendant’s motion to dismiss is granted. However,
27 even if Heck does not apply, Plaintiff faces a statute of limitations that bars his claim.

1 **B. Statute of Limitations**

2 Assuming , arguendo, that Defendant’s motion to dismiss will not be granted under Heck,
3 Defendant argues that Plaintiff cannot bring a §1983 claim because the claim is barred by the
4 California Civil Procedure Code §335.1 statute of limitations. To determine if the claim is barred
5 by the statute of limitations, the Defendant must show which statute of limitation applies, when
6 the cause of action accrued, and apply the statute of limitations to the date the cause accrued.

7 The court in Wilson v. Garcia stated that because 42 U.S.C. §1983 has no express statute
8 of limitations, federal courts should use state statutes of limitation that govern personal injury
9 claims. Wilson v. Garcia, 471 U.S. 261, 266-268 (1985). The Ninth Circuit has held that the state
10 statute of limitations period of a §1983 action is governed by California’s general personal injury
11 statute. McDougal v. City of Imperial, 942 F. 2d 668, 672 (9th Cir. 1991). Section 335.1 states
12 that there is a two year statute of limitation for personal injury claims arising from a wrongful act
13 or neglect. Cal. Civ. Proc. Code §335.1.

14 Plaintiff alleges his injury to have occurred on or around November 3, 2008. Plaintiff first
15 filed a claim on September 15, 2011, almost three years after the cause of action accrued. Based
16 on the forgoing, Plaintiff’s §1983 claim is barred by California’s two year statute of limitation
17 and the motion to dismiss Plaintiff’s claim is granted.

18
19 **IV. Order**

20 Defendant’s motion to dismiss for failure to state a claim is GRANTED. Plaintiff’s
21 complaint is DISMISSED with prejudice.

22
23 IT IS SO ORDERED.

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25 Dated: June 12, 2013

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SENIOR DISTRICT JUDGE