UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TOBY WILSON,

Plaintiff,

v.

CITY OF VALLEJO; M. THOMPSON; D. JOSEPH; M. NICOL; J. JAKSCH; B. CLARK; ROBERT NICHELINI; and DOES 1-15, inclusive,

Defendants.

No. 2:12-cv-00547-JAM-CKD

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Presently before the Court is Defendants City of Vallejo ("the City"), Robert Nichelini, M. Thompson, D. Joseph, M. Nicol, J. Jaksch, and B. Clark's (collectively "Defendants") Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56 (Doc. #17).[1] Plaintiff Toby Wilson ("Plaintiff") failed to file a timely opposition and his request for a 30-day extension of time was denied (Doc. ##25, 28).

I. FACTUAL AND PROCEDURAL BACKGROUND

This action arises from Plaintiff's allegations that

[1] This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was originally scheduled for August 21, 2013.

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Defendants deprived him of his constitutional rights in violation of 42 U.S.C. § 1983. Plaintiff also brought state law claims against individual Defendant Officers M. Thompson, D. Joseph, M. Nichol, J. Jaksch, and B. Clark ("Defendant Officers"). Comp. at pp. 6-7. Plaintiff's claims all arise out of events that occurred on July 17, 2010. Complaint ¶¶ 8-9.

On July 17, 2010, Plaintiff resided at Redwood Garden Apartments in Vallejo, California ("Redwood"). Statement of Undisputed Facts (Doc. #19) Fact 1. At some point in the afternoon, Plaintiff became involved in a dispute with his neighbor on the second floor balcony between their apartments. SUF 6, 8. Plaintiff's balcony overlooked a courtyard in the middle of the Redwood complex where, on the date of the incident, residents were barbequing and swimming. SUF 2-3, 37. Plaintiff's girlfriend arrived and convinced Plaintiff to go back into his apartment. SUF 9. However, shortly thereafter, Plaintiff went back out onto the balcony, this time without his shirt. SUF 9-10. Plaintiff testified that as soon as he went back onto the balcony, he heard someone say, "He's got a gun." SUF 10.

The Redwood manager received calls from a maintenance man and another resident informing her that Plaintiff was on his balcony with a gun. SUF 4, 12-13. After identifying Plaintiff on his balcony, but without observing a gun, the manager called 9-1-1 and told the dispatcher that there was a tenant with a gun on her property. SUF 14-16. The manager informed the dispatcher that there were residents outside playing with their children. SUF 2-3, 18.

Plaintiff originally indicated in the Complaint that although officers saw him and requested that he come down, he instead went back inside his apartment, locked the door, and went to sleep. Comp. ¶ 8. However, in his deposition, Plaintiff indicated that he did not see any officers arrive before he went back inside his apartment and fell asleep in a back bedroom. SUF 19-21.

Officers arrived in full uniform and ordered people in the courtyard to get down or into their houses, and the residents scattered. SUF 23-25. Officers asked dispatch for a contact telephone number for Plaintiff's apartment, but one was not available. SUF 26. When officers pointed at Plaintiff's apartment door, Ms. Turner told them "Yes, yes, that's him." SUF 27. Officers organized a perimeter while their supervisor, Sergeant Brett Clark, gathered additional information on how to respond to the threat. SUF 29. Sergeant Clark spoke to witnesses who "said they saw the suspect at that location . . . with a gun, arguing with somebody at that particular apartment." SUF 30. Additionally, "multiple people [were] calling the police department" reporting a resident "armed with a firearm." SUF 31. Witnesses told Sergeant Clark that the armed man went back into his apartment. Cavanaugh Decl. Exh. H - Clark Depo. (Doc. #21-8) 36:5-8.

Officers learned that Plaintiff had a prior felony conviction. SUF 33. Sergeant Clark testified that the circumstances and the felony conviction indicated to him that Plaintiff was "a violent individual" who had barricaded himself inside his home. SUF 34-36. He determined that Plaintiff should

be taken into custody. He testified:

> Once we [had] established a relationship with the people inside the apartment complex we had an obligation, given the totality of the circumstances, a man with a weapon, potential for violence, the way the apartment complex is set up, you know - his apartment was looking out over a courtyard. You know, if he had a weapon, you know, he could have fired on innocent people.

SUF 37.

Sergeant Clark placed Corporal M. Nicol, an officer with SWAT experience, in charge of an entry team. SUF 38. Other members of the team included Sergeant Iacano, Officer Kent Tribble, Officer Shane Bower, Officer Dustin Joseph, and Officer M. Thompson and his K-9, Yago. SUF 39.

At approximately 8:00 p.m., the officers ordered Plaintiff to surrender from in front of his apartment; the manager witnessed the police "hollering, 'Police. Come out with your hands up.'" SUF 40-41. A 37 mm rubber round was fired through a rear window. SUF 43. Officers shouted commands to Plaintiff from outside his apartment, but Plaintiff did not respond to the shouts or the window being shot out. SUF 44-45. Officers then shot a 37 mm round through the window to the right of the front door. SUF 48. Officer Joseph deployed a flash bang grenade through the broken front window with the purpose of causing a distraction, and, at approximately 8:20 p.m., officers entered the apartment. SUF 47, 49. Officers then announced, multiple times, that they "would send in a K-9 to search" and that the dog "could possibly bite;" Plaintiff did not respond. SUF 51-52. Officers Thompson and Yago entered and searched the front portion of the apartment. SUF 53-54. The dog was then removed. SUF 55.

A second flash bang grenade was deployed at the end of the hallway near the back bedrooms. SUF 57. Officers moved deeper into the apartment where they observed Plaintiff lying on a bed in a back room. SUF 58. Officers testified that Plaintiff was lying face down with his arms covered by a sheet. SUF 58-59. Officer Joseph ordered Plaintiff to show his hands, but Plaintiff did not respond. SUF 60. At approximately 8:23 p.m., Officer Joseph deployed his taser, although he is unsure of whether he hit Plaintiff. SUF 62. Officer Thompson made one last dog announcement before releasing the dog. SUF 63-64. The dog bit into Plaintiff and held onto him. SUF 64.

Plaintiff testified that once he laid down in bed he "blacked out" and did not hear anything or know that officers were in his apartment until he was awoken by the dog bite. SUF 72-74. He testified that he was only wearing boxers when he laid down and was lying on top of the sheet and blanket, which were on the bed. Cavanaugh Decl. Exh. A – Wilson Depo. (Doc. #21-1) 68:5–69:4. Plaintiff testified that he remembers he was lying on his back because the dog bit him in the stomach. Id.

Plaintiff began hitting the dog. SUF 65, 74. Officer Thompson told Wilson to stop striking the dog while Officer Joseph was yelling "stop resisting." SUF 66-67. Officer Joseph grabbed Plaintiff's arm and punched him in the face, stunning Plaintiff. SUF 67-68. Officer Thompson put Plaintiff's right hand into a control hold and moved it into a bent wrist hold allowing the other officers to handcuff Plaintiff. SUF 69, 71. Corporal Nicol discharged his taser hitting Plaintiff. SUF 70. The taser wires broke off at some point after the tasing. SUF

70.

Plaintiff testified that he didn't realize who the officers were until "they just like choked" him. SUF 74. He testified that the officers tased him, and when he pulled it out of himself, they tased him two more times. SUF 74.

The estimated total time from the initial 9-1-1 call to Plaintiff's arrest was 57 minutes. SUF 75. Police Chief Robert Nichelini was not present at the scene of the events of this case. SUF 80.

Emergency vehicles transported Plaintiff to a hospital for medical treatment. SUF 76. Plaintiff had visible lacerations from the dog bite and was admitted to the hospital where he remained for "about three days." SUF 76.

Plaintiff filed his complaint in February 2012 asserting five causes of action. Defendants brought a Motion for Judgment on the Pleadings (Doc. #15), which was granted in part. Order on Def. Motion for Judgment on the Pleadings (Doc.#30). That order disposed of the claim against the City of Vallejo (Second Cause of Action) and any claims against Defendant Officers in their official capacities.

II. OPINION

A. Legal Standard

The Federal Rules of Civil Procedure provide that "a court shall grant summary judgment if the movant shows there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party asserting that a fact cannot be disputed must support the

assertion by citing to particular parts in the record, or by showing that the materials cited do not establish the presence of a genuine dispute. Fed. R. Civ. P. 56(c)(1)(A)-(B). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

The moving party bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp., 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)). That burden may be met by "'showing'- that is, pointing out to the district court- that there is an absence of evidence to support the non moving party's case." Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 531 (9th Cir. 2000) (quoting Celotex Corp., 477 U.S. at 325). If the moving party meets its burden with a properly supported motion, the burden shifts to the opposing party. Id. The opposition "may not rest upon the mere allegations or denials of the adverse party's pleading," but must provide affidavits or other sources of evidence that "set forth specific facts showing that there is a genuine issue for trial." Devereaux v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001)(quoting Fed. R. Civ. P. 56(e)). The adverse party must show that the fact in contention is material and the issue is genuine. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A "material" fact is a fact that might affect the outcome of the suit under governing law. Id. A

fact issue is "genuine" when the evidence is such that a reasonable jury could return a verdict for the non-moving party. Villiarmo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002). However, uncorroborated and self-serving testimony alone does not create a genuine issue of fact. Id. The Court must view the facts and draw inferences in the manner most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient: "There must be evidence on which the jury could reasonably find for [the non-moving party]." Anderson, 477 U.S. at 252. This Court thus applies to either a defendant's or plaintiff's motion for summary judgment the same standard as for a motion for directed verdict, which is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id.

Here, the Motion for Summary Judgment is unopposed. A district court may not grant a motion for summary judgment solely because the opposing party has failed to file an opposition. Cristobal v. Siegel, 26 F.3d 1488, 1494–95 & n. 4 (9th Cir. 1994) (unopposed motion may be granted only after court determines that there are no material issues of fact). The court may, however, grant an unopposed motion for summary judgment if the movant's papers are themselves sufficient to support the motion and do not on their face reveal a genuine issue of material fact. Henry v. Gill Industries, Inc., 983 F.2d 943, 950 (9th Cir. 1993).

B. Chief Robert Nichelini

As stated, Plaintiff's claims against Chief Nichelini in his official capacity have already been dismissed by this Court. In their Motion for Summary Judgment, Defendants seek to dismiss all claims asserted against Chief Nichelini. MSJ at p. 20. Although it is unclear from the face of the Complaint exactly what claims are being made against Chief Nichelini, for the purposes of this motion, the Court will consider Plaintiff's second cause of action as stating a claim against Chief Nichelini in his individual, supervisorial capacity. Supervisors can be held liable for:

> "1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous indifference to the rights of others."

Edgerly v. City & Cnty. of San Francisco, 599 F.3d 946, 961 (9th Cir. 2010) (quoting Cunningham v. Gates, 229 F.3d 1271, 1292 (9th Cir. 2000). The Ninth Circuit has found supervisorial liability pursuant to § 1983 where the defendant "'was personally involved in the constitutional deprivation or a sufficient causal connection exists between the supervisor's unlawful conduct and the constitutional violation.'" Id. (quoting Lolli v. County of Orange, 351 F.3d 410, 418 (9th Cir. 2003).

There is no evidence before the Court of any personal involvement by Chief Nichelini in the conduct underlying Plaintiff's claims. In fact, Plaintiff has submitted no evidence regarding any action or inaction on the part of Chief Nichelini. To the extent that Plaintiff is attempting to hold him responsible in a supervisorial capacity, Plaintiff's allegations

and supporting evidence are insufficient to support such claims. See Edgerly, 599 F.3d at 961-62; Brasure v. Ayers, C 08-01943 JF (PR), 2008 WL 2949276, at *1 (N.D. Cal. 2008); Crane v. Evans, C 08-4454 JF (PR), 2008 WL 5102461, at *1 (N.D. Cal. 2008). Accordingly, the Court dismisses any remaining claims against Chief Nichelini.

C. First Cause of Action: Violation of § 1983

In the Complaint, Plaintiff alleges that Defendant Officers acted under color of law to deprive Plaintiff of certain constitutionally protected rights, including the rights (1) to not be deprived of liberty without due process of law, (2) to be free from the use of excessive force, and (3) to be free from unlawful seizure. Comp. ¶ 13. Defendants contend the undisputed facts establish that Defendant Officers did not violate Plaintiff's constitutional rights.

1. Warrantless Entry and Arrest

Defendants argue the claims asserting deprivation of liberty without due process and unlawful seizure fail because (1) the Officers warrantless entry into Plaintiff's home was reasonable based on the exigencies of the situation; and (2) the arrest of Plaintiff was supported by probable cause. MSJ at pp. 9-10.

a. Warrantless Entry

Even when officers have probable cause to arrest a suspect, seizures inside a home without a warrant are presumptively unreasonable under the Fourth Amendment. Groh v. Ramirez, 540 U.S. 551, 559 (2004). "Nevertheless, because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." Brigham

City, Utah v. Stuart, 547 U.S. 398, 403 (2006). One such exception exists where the exigencies of the situation facing officers makes the needs of law enforcement so compelling that the warrantless entry and seizure is objectively reasonable under the Fourth Amendment. Id. "Exigent circumstances are defined to include 'those circumstances that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.'" Fisher v. City of San Jose, 558 F.3d 1069, 1075 (9th Cir. 2009) (quoting United States v. Lindsey, 877 F.2d 777, 780 (9th Cir. 1989)).

Here, Defendant Officers were faced with a suspect whom they had cause to believe was armed. Witnesses told Defendant Officers that Plaintiff was carrying a gun and had just retreated back into his apartment shortly before they arrived. Plaintiff's apartment looked directly over a courtyard where innocent people could be targeted and in a building with many children. After announcing their presence multiple times and demanding that Plaintiff open his door to no avail, they entered his apartment to affect his arrest.

The Supreme Court recently reiterated that "reasonableness 'must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight' and that '[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and

rapidly evolving.'" Ryburn v. Huff, --- U.S. ----, 132 S.Ct. 987, 991-92 (2012) (quoting Graham v. Connor, 490 U.S. 386, 396-397 (1989)). The Court finds that exigent circumstances existed at the time of the Defendant Officers' warrantless entry into Plaintiff's apartment and their decision to enter was objectively reasonable under those circumstances. No violation of Plaintiff's Fourth Amendment rights occurred as a result. See Fisher, 558 F.3d at 1077; Pryor v. City of Clearlake, 877 F. Supp. 2d 929, 945 (N.D. Cal. 2012).

Defendants further argue that even if the warrantless entry were a violation, the Defendant Officers are entitled to qualified immunity because the circumstances would lead a reasonable officer to believe that the entry was permissible under the Fourth Amendment. Because the Court finds the entry was not a violation of Plaintiff's constitutional rights, any further qualified immunity analysis is unnecessary. See Jackson v. City of Bremerton, 268 F.3d 646, 651 (9th Cir. 2001)

Accordingly, the Court grants Defendants' Motion for Summary Judgment as to those claims arising from Defendant Officers' warrantless entry into Plaintiff's home and their subsequent arrest of Plaintiff.

b. Arrest

The Fourth Amendment requires that an arrest be supported by probable cause. Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001). An arrest is supported by probable cause if, under the totality of the circumstances known to the arresting officer, a prudent person would have concluded that there was a fair probability that a criminal offense had been or was being

committed. Devenpeck v. Alford, 543 U.S. 146, 152 (2004); see also Luchtel v. Hagemann, 623 F.3d 975, 980 (9th Cir. 2010); Ramirez v. City of Buena Park, 560 F.3d 1012, 1023 (9th Cir. 2009). "The inquiry is not whether the suspect actually committed the offense, but rather whether a reasonable officer, based on information known to him/her at the time, had probable cause to think that the suspect could have committed the offense." Cannon v. City of Petaluma, C 11-0651 PJH, 2012 WL 1183732, *8 (N.D. Cal. 2012); see also Blankenhorn v. City of Orange, 485 F.3d 463, 475 (9th Cir. 2007).

Here, Defendant Officers responded to reports that an armed man was arguing with neighbors. Upon arriving, the reports were corroborated by a number of witnesses. Defendant Officers then learned that Plaintiff had a previous felony conviction. Under California law, it is a felony for any person who has been previously convicted of a felony to possess any firearm. Cal. Penal Code § 29800 (a)(1) (continuing former § 12021(a) without substantive change). The Court finds that based on the information known to the Officers at the time of the arrest, a reasonable person would have concluded that there was a fair probability that a criminal offense had been committed. See Devenpeck, 543 U.S. at 152. Therefore, Defendant Officers' arrest of Plaintiff was supported by probable cause.

2. Excessive Force

Defendants contend the force used in affecting Plaintiff's arrest was reasonably necessary under the circumstances. They argue Plaintiff's constitutional excessive force claim should therefore be dismissed.

In Graham, the Supreme Court held that claims of excessive force in the context of arrests should be analyzed under the Fourth Amendment's "objective reasonableness standard," not under substantive due process principles. 490 U.S. at 388, 394-95. Pursuant to that standard, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them without regard to their underlying intent or motivation." Id. at 397. Because "police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation," the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective. Id. at 396-97.

Assessing the reasonableness of force under the Fourth Amendment ultimately requires a balancing of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. Graham, 490 U.S. at 396-97. When determining the governmental interests at stake, courts must pay "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. at 396. In addition, "[i]n evaluating the nature and quality of the intrusion, [a court] must consider the type and amount of force inflicted" upon a plaintiff by officers during the arrest. Jackson, 268 F.3d at 651-52 (internal quotation omitted).

If the evidence, reviewed in the light most favorable to Plaintiff, could support a finding of excessive force, then Defendants are not entitled to summary judgment. Smith v. City of Hemet, 394 F.3d 689, 701 (9th Cir. 2005).

a. Governmental Interests

i. Severity of the Crime

The crime at issue, felon in possession of a firearm, is a felony and therefore a serious crime. Cal. Penal Code § 29800 (a)(1); see also Miller v. Clark County, 340 F.3d 959, 964 (9th Cir. 2003) (a felony "is by definition a crime deemed serious by the state"). On the other hand, it did not involve violence or force and is not a crime considered a "serious felony" under state law. People v. Prieto, 30 Cal. 4th 226, 276 (2003). In addition, the Ninth Circuit has noted the distinction between felonies and misdemeanors is often minor and arbitrary, and assumptions that one suspected of committing a felony is more dangerous than one suspected of a misdemeanor is untenable. Chew v. Gates, 27 F.3d 1432, 1442. It should also be noted that there is no evidence a gun was found in Plaintiff's possession or that he was charged with the crime. The Court does not find this factor weighs heavily in favor of either party.

ii. Threat Posed by Plaintiff

As discussed above, the evidence indicates that upon arriving on the scene Plaintiff was believed to have been armed, was arguing with neighbors, and had only recently retreated into his apartment. The apartment complex was situated in such a way that Plaintiff had clear access to a courtyard where other residents congregated. Thus, there was a substantial

governmental interest in ensuring the safety of the officers, Plaintiff, and the other residents that necessitated the initial entry and cautious approach by Defendant Officers. However, there remains an issue of fact as to what threat Plaintiff posed when Defendant Officers first encountered him and before any force was applied to Plaintiff's person. Defendant Officers testified that when they first saw Plaintiff he was lying underneath the sheets and on his stomach. They contend this presented the fear that Plaintiff was lying in wait and could harm the officers if they tried to approach him directly. In contrast, Plaintiff's testimony indicates that he was stripped down to his boxers and was lying on top of the sheet on his back. Whether Plaintiff could have been concealing a weapon is a major issue in assessing the level of threat Plaintiff posed. Therefore, the dispute of exactly how the officers found Plaintiff is material to that determination and a genuine issue still remains.

In addition, the threat posed by Plaintiff must be assessed with regard at each stage of the force applied. For example, the threat posed by Plaintiff before they could assess what was happening inside the apartment was certainly higher than after they had applied a control hold or handcuffed Plaintiff. There remain genuine issues as to what threat was initially posed by Plaintiff and what new threat his resistance to the dog created, but the factor weighs against the reasonableness of the force applied after Plaintiff was found without a gun and certainly after he had already been placed into a control hold by Defendant Officers.

iii. Active Resistance to Arrest

Plaintiff did not attempt to evade arrest by flight. Plaintiff did fail to respond to Defendant Officers' commands and therefore may have been passively resisting arrest to a certain extent. However, Defendants' testimony concedes that Plaintiff was simply lying on his bed when the group of officers first confronted him. It may be inferred that Plaintiff was willfully avoiding the officers' commands from the sheer volume of their entry into the apartment and their proximity when the final warnings were given, but Plaintiff testified that he was "blacked out," did not hear anything, and was not even aware officers were present until shortly after he woke up. There is also evidence that Plaintiff was attempting to fight the dog off when he awoke, however the exact details of his resistance is unknown. Taken together, there remains a genuine issue as to the nature of Plaintiff's resistance to his arrest.

b. Intrusion on Fourth Amendment Interests

Next, the Court must evaluate the intrusion on Plaintiff's Fourth Amendment rights, including the type and amount of force inflicted by Defendant Officers. See Jackson, 268 F.3d at 651-52. After giving several verbal warnings, the evidence indicates that the first force applied was Officer Joseph's deployment of a taser, although it is unclear whether it even made contact with Plaintiff. Next, instead of approaching Plaintiff directly, Officer Thompson released his dog, resulting in the dog biting into Plaintiff's stomach. Plaintiff testified that he was blacked out until this point and, amid his confusion and pain, started to resist the dog's efforts. Officer Joseph then grabbed

Plaintiff's arm and punched him in the face. Next, Officer Thompson came forward and placed Plaintiff into a control hold, all while the dog maintained its hold on Plaintiff. Defendant Officers were then able to quickly handcuff Plaintiff.

Defendants' evidence indicates that during this encounter, Corporal Nicol deployed his taser, striking Plaintiff, but to unknown effect. It is also unclear whether the tasering occurred before or after Officer Thompson placed Plaintiff into the control hold or whether Defendant Officers had already successfully handcuffed Plaintiff. In addition to this uncertainty, Plaintiff's testimony indicates a slightly different sequence of events following the dog initially biting him. He testified that he remembers officers choking him and then tasing him three times after the dog bit him, rather than only once as Defendants contend. As a result of the force used by Defendant Officers, it is undisputed that Plaintiff was hospitalized for three days, suffering visible lacerations.

Courts have held that use of police dogs and tasers constitutes a significant use of force. Smith, 394 F.3d at 701-04; Bryan v. MacPherson, 630 F.3d 805, 832 (9th Cir. 2010). However, there remain genuine issues of exactly how much force was applied in the course of Plaintiff's arrest.

c. Balancing Test

It has been "repeatedly held that the reasonableness of force used is ordinarily a question of fact for the jury." Liston v. Cnty. Of Riverside, 120 F.3d 965, 976 n.10 (9th Cir. 1997); see also Jackson, 268 F.3d at 651 & n.1 ("the test for reasonableness is often a question for the jury"). Because the

Fourth Amendment balancing of reasonableness "nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, [the Ninth Circuit has] held on many occasions that summary judgment . . . in excessive force cases should be granted sparingly." Santos v. Gates, 287 F.3d 846, 853 (9th Cir. 2002).

Disputes of material fact still exist that bear directly on most of the factors to be weighed in the assessment of whether the force used by Defendant Officers was objectively reasonable. The Court finds that a reasonable fact-finder could conclude, taking the evidence in the light most favorable to Plaintiff, that Defendant Officers' use of force was objectively unreasonable and therefore constitutionally excessive. See Bryan v. MacPherson, 630 F.3d 805, 832 (9th Cir. 2010); Mattos v. Agarano, 661 F.3d 433, 446 (9th Cir. 2011) Therefore, summary judgment in favor of Defendants' is inappropriate at this time, and the issue is best left for the jury. Accordingly, the Court hereby denies Defendants' motion as to the excessive force claim.

D. State Law Claims

Defendants argue that because Plaintiff's § 1983 claims must fail, his state law claims must fail as well. Because the Court has found that the excessive force claim withstands the motion for summary judgment, Plaintiff's state law claims in the third, fourth and fifth causes of action remain viable. Accordingly, the Court denies summary judgment as to those causes of action.

III. ORDER

Defendants' Motion for Summary Judgment is granted as to any

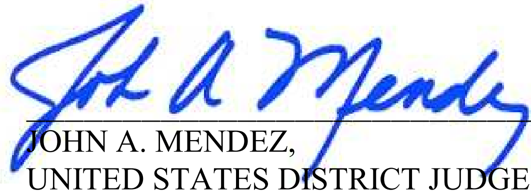
remaining claims against Chief Nichelini.

Defendants’ motion is granted as to any claims arising from Defendant Officers’ warrantless entry into Plaintiff’s apartment and their seizure of Plaintiff.

The motion is denied as to Plaintiff’s excessive force claim and his state law claims in the third, fourth and fifth causes of action.

IT IS SO ORDERED.

Dated: September 5, 2013



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE