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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PATRICK WAYNE SOLOMON, an individual,

Plaintiff,

v.

CITY OF SOUTH LAKE TAHOE;
CITY OF SOUTH LAKE TAHOE POLICE DEPARTMENT; OFFICER J. HERMINGHAUS, individually and in his official capacity;
COUNTY OF EL DORADO SHERIFF'S DEPARTMENT; OFFICER BRANDON PINA, individually and in his official capacity; and DOES 1-10, inclusive,

Defendants.

No. 2:13-cv-00115-GEB-CKD

ORDER GRANTING DEFENDANTS CITY OF SOUTH LAKE TAHOE'S AND CITY OF SOUTH LAKE TAHOE POLICE DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART DEFENDANT JAKE HERMINGHAUS'S MOTION FOR SUMMARY JUDGMENT

Defendants City of South Lake Tahoe, the City of South Lake Tahoe Police Department (the "City") and Officer Jake Herminghaus ("Herminghaus") (collectively the "Defendants") move for summary judgment, or in the alternative, for summary adjudication of the issues, under Federal Rule of Civil Procedure ("Rule") 56(c). (Mot. Summary Judgment ("Mot."), ECF No. 43.)

Plaintiff's Complaint is comprised of the following federal claims: (1) use of excessive force; (2) false arrest; (3) malicious prosecution; (4) fabrication of false evidence; (5) conspiracy; and (6) failure to implement appropriate policies, customs and practices; and failure to train. (Compl., ECF No. 1.)

1 **I. Legal Standard**

2 The movant for summary judgment must establish "that
3 there is no genuine dispute as to any material fact and the
4 movant is entitled to judgment as a matter of law." Rule 56(a).
5 An issue of material fact is "genuine" when "'the evidence is
6 such that a reasonable jury could return a verdict for the
7 nonmoving party.'" Thrifty Oil Co. v. Bank of Am. Nat'l Trust &
8 Sav. Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003) (quoting Anderson
9 v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

10 If the movant satisfies its "initial burden," "the
11 nonmoving party must set forth, by affidavit or as otherwise
12 provided in Rule 56, 'specific facts showing that there is a
13 genuine issue for trial.'" T.W. Elec. Serv., Inc. v. Pac. Elec.
14 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quoting
15 former Fed. R. Civ. P. 56(e)). If the burden shifts to the
16 nonmovant, the nonmovant "cannot 'rest upon. . . mere
17 allegations' but must instead produce evidence that 'set[s] forth
18 specific facts showing that there is a genuine issue for trial.'" Tucker ex rel. v. Interscope Records, Inc., 515 F.3d 1019, 1030
19 (9th Cir. 2003) (citing Anderson, 477 U.S. at 248) (alterations
20 in original).
21

22 Further, Local Rule 260(b) prescribes:

23 Any party opposing a motion for summary
24 judgment or summary adjudication [must]
25 reproduce the itemized facts in the [moving
26 party's] Statement of Undisputed Facts and
27 admit those facts that are undisputed and
28 deny those that are disputed, including with
each denial a citation to the particular
portions of any pleading, affidavit,
deposition, interrogatory answer, admission,
or other document relied upon in support of
that denial.

1 Pina subsequently phoned the South Lake Tahoe Police Department
2 and told the police dispatch, "Hey, this is. . . Officer Pina
3 from the jail. I'm over at. . . the Raley's [grocery store]. . .
4 I just had an inmate, Patrick Solomon, come up and start pushing
5 me. I was wondering maybe you could send a car over." (9-1-1
6 Recording ("911 Tr.") 1:3-7, ECF No. 45-4; Pina Dep. Tr. 40:22-
7 25, 41:10-42:2; Pina Trial Tr. 41:15-17.) The dispatcher then
8 spoke with Herminghaus, an officer with the City of South Lake
9 Tahoe Police Department, and told him, in pertinent part, "RP
10 works at the jail and an ex-inmate came up and started pushing
11 him." (Police Dispatch Recording ("Dispatch Tr.") 1:2-4, ECF No.
12 45-6.) Dispatch also provided Herminghaus a description of the
13 suspect: "It's Patrick Solomon. . . WMA, gray hair wearing a
14 green long-sleeved shirt and . . . black pants and he went back
15 inside the store." (Dispatch Tr. 1:6-8.)

16 After arriving at the Raley's grocery store,
17 Herminghaus spoke with Pina. (Dep. Jake Herminghaus ("Herminghaus
18 Dep. Tr.") 11:12-15, 15:2-4, ECF Nos. 43-4 & 45-5; Pina Dep. Tr.
19 63:12-64:23.) Pina identified Plaintiff to Herminghaus and then
20 Herminghaus told Plaintiff he was under arrest. (Solomon Dep. Tr.
21 32:4-9; Pina Dep. Tr. 71:1-15; 73:14-16; Herminghaus Dep. Tr.
22 31:18-22.) When Herminghaus approached Plaintiff, Plaintiff was
23 standing in one of the grocery aisles wearing a long-sleeved
24 green shirt and black pants. (DVD Videos of Incident ("Video 2")
25 15:51:10.20, ECF No. 43-5².)

26 ² Defendants submitted three Windows Media Player files containing
27 video of the incident as Exhibit 5, ECF No. 45-3: Vpd_RALEYS127-
28 4_MM_2011_01_21_23_41_03 ("Video 1"), Vpd_RALEYS127-1_MM_2011_01_21_23_50_55
("Video 2"), and Vpd_RALEYS127-1_MM_2011_01_21_23_51_01 ("Video 3.")

1 While Herminghaus was placing Plaintiff under arrest,
2 Plaintiff turned toward Herminghaus. (Solomon Dep. Tr. 35:5-9;
3 Video 2 15:51:16.87-15:51:42.24.) Herminghaus applied force to
4 Plaintiff's backside and Plaintiff came into contact with store
5 shelving, hitting shelving on both sides of the aisle. (Solomon
6 Dep. Tr. 41:1-2; 41:23-25-42:1; 42:16-22; Pina Trial Tr. 21:10-
7 24; Herminghaus Dep. Tr. 36:15-37:10; Video 2 15:51:42.24-
8 15:51:49.44.) When Herminghaus was moving with Plaintiff towards
9 a store exit, Herminghaus took Plaintiff to the ground, face
10 down. (Solomon Dep. Tr. 56:5-10; Herminghaus Dep. Tr. 37:18-25;
11 Video 3 15:51:53.66-15:52:20.89.)

12 Plaintiff was taken to the hospital where he received
13 care for "2 lac[erations] to [the] forehead." (Solomon Emergency
14 Room Records ("ER Records"), ECF No. 45-7.)

15 Subsequently, Herminghaus gave deposition testimony
16 that to the best of his knowledge, no one at the South Lake Tahoe
17 Police Department ever alleged he used excessive force in
18 connection with the incident. (Herminghaus Dep. Tr. 45:8-12.)
19 Herminghaus also testified that he is not aware of any internal
20 investigation regarding the arrest "other than the reports that
21 have been filed"; and he has not been disciplined for the
22 incident. (Herminghaus Dep. Tr. 45:13-46:3.) Plaintiff was
23 subsequently prosecuted and Herminghaus spoke to the prosecution
24 and Pina regarding the grocery store incident. (Herminghaus Dep.
25 Tr. 51:13-52:1.)

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1 to make an arrest for battery, the issue is whether the "facts
2 and circumstances within the officer's knowledge . . . [were]
3 sufficient to warrant a prudent person, or one of reasonable
4 caution, in believing, in the circumstances shown, that the
5 suspect . . . committed. . . an offense." Michigan v. DeFillippo,
6 443 U.S. 31, 37 (1979). When making this probable cause
7 determination, "[i]t is essential to avoid hindsight analysis,
8 i.e., to consider additional facts that became known only after
9 the arrest was made." John v. City of El Monte, 515 F.3d 936, 940
10 (9th Cir. 2007).

11 Because probable cause must be evaluated from
12 the perspective of 'prudent [people]', not
13 legal technicians,' an officer need not have
14 probable cause for every element of the
15 offense. However, when specific intent is a
required element of the offense, the
arresting officer must have probable cause
for that element in order to reasonably
believe that a crime has occurred.

16 Blankenhorn, 485 F.3d at 472 (quoting Gasho v. United States, 39
17 F.3d 1420, 1428 (9th Cir. 1994)). The California Supreme Court
18 had stated battery "requires general criminal intent." People v.
19 Sargent, 19 Cal. 4th 1206, 1220 (1999).

20 Plaintiff has not controverted Defendants' evidence
21 evincing that Herminghaus had probable cause to arrest Plaintiff
22 for battery. The evidentiary record shows Herminghaus went to the
23 grocery store after receiving information from dispatch that
24 "[Pina] works at the jail and an ex-inmate came up and started
25 pushing him." (Dispatch Tr. 1:2-3.) Herminghaus spoke to Pina and
26 Pina identified Plaintiff. (Herminghaus Dep. Tr. 18:16-18, 31:18-
27 22; Pina Dep. Tr. 71:1-15.) Plaintiff also visually matched the
28 description of the suspect that dispatch gave Herminghaus.

1 (Dispatch Tr. 1:6-8; Video 2 15:51:10.47.) Since pushing is use
2 of unlawful force, Herminghaus had probable cause to arrest
3 Plaintiff for criminal battery.

4 Lack of probable cause is an essential element of false
5 arrest and malicious prosecution. Cabrera v. City of Huntington
6 Park, 159 F.3d 374, 380 (9th Cir. 1998) ("To prevail on his [42
7 U.S.C.] § 1983 claim for false arrest. . . [the plaintiff] would
8 have to demonstrate that there was no probable cause to arrest
9 him."); Lacey v. Maricopa Cnty, 693 F.3d 896, 919 (9th Cir. 2012)
10 ("To claim malicious prosecution, a petitioner must allege 'that
11 the defendants prosecuted [him]. . . without probable cause...").
12 Therefore, each Defendant's motion for summary judgment on
13 Plaintiff's false arrest and malicious prosecution claims is
14 granted.

15 **B. Fabrication of False Evidence and Conspiracy Claims**

16 Defendants seek summary judgment on Plaintiff's
17 fabrication of false evidence and conspiracy claims arguing the
18 record is devoid of evidence supporting these claims. A
19 fabrication of false evidence claim requires Plaintiff to "point
20 to evidence that supports at least one of the following two
21 propositions: (1) Defendants continued their investigation of
22 [Plaintiff] despite the fact that they knew or should have known
23 that he was innocent; or (2) Defendants used investigative
24 techniques that were so coercive and abusive that they knew or
25 should have known that those techniques would yield false
26 information." Constanich v. Dep't of Social and Health Servs.,
27 627 F.3d 1101, 1111 (9th Cir. 2010) (citing Devereaux v. Abbey,
28 263 F.3d 1070, 1076 (9th Cir. 2001)).

1 There is no evidence in the summary judgment record
2 from which a reasonable inference could be drawn that the
3 investigation into the alleged battery continued despite the fact
4 that officers knew or should have known the Plaintiff was
5 innocent or that any officer used coercive and abusive
6 investigative techniques.

7 Further, a conspiracy claim requires evidence of
8 agreement. Avalos v. Baca, 596 F.3d 583, 592 (9th Cir. 2010)
9 (indicating a plaintiff is required to establish a conspiracy
10 claim with evidence of an express or implied agreement).
11 Plaintiff contends “[d]iscovery brought to light several disputed
12 facts that Plaintiff’s arrest and prosecution were based on
13 fabricated evidence and conspiracy to pursue prosecution.” (Opp’n
14 11:21-24.) However, Plaintiff’s conclusory argument is not
15 supported by sufficient factual evidence of an agreement. T.W.
16 Elec. Serv., Inc., 809 F.2d at 630 (finding that when the movant
17 satisfies its summary judgment burden, the nonmoving party must
18 set forth specific facts showing a genuine issue for trial to
19 prevent summary judgment). Therefore, each Defendant’s motion for
20 summary judgment on Plaintiff’s fabrication of false evidence and
21 conspiracy claims is granted.

22 **C. City Liability**

23 The City seeks summary judgment on Plaintiff’s claim in
24 which Plaintiff alleges: the City failed to implement appropriate
25 policies, customs and practices concerning the excessive force he
26 experienced; ratified that use of excessive force; and, failed to
27 adequately train and supervise Officer Herminghaus so that he
28 would not have inflicted that excessive force. The City argues

1 "discovery has revealed zero evidence to support" these claims.
2 (Mot. 14:14-19.)

3 Plaintiff counters the City "failed to follow its own
4 policy [of] investigat[ing] the use of force, [and that failure]
5 result[ed] in [Plaintiff's] physical injury;" and since
6 Herminghaus was never disciplined in connection with the arrest,
7 "[t]he City of South Lake Tahoe Police Department ratified and
8 affirmed as appropriate, the amount of force that Herminghaus
9 used . . . [against] Plaintiff." (Opp'n 18:7-12.)

10 Plaintiff may establish that the City is liable for the
11 excessive force to which he claims he was subjected by presenting
12 evidence that the alleged "constitutional violation [was]
13 pursuant to a formal governmental policy" or by proving that "a[
14 [City] official with final policymaking authority ratified
15 [Herminghaus's alleged] unconstitutional...action and the basis
16 for it." Gillette v. Delmore, 972 F.2d 1342, 1346-47 (9th Cir.
17 1992). Plaintiff may establish that the City is liable for his
18 failure to train claim by demonstrating that the City's training
19 of its officers was deliberately indifferent to Plaintiff's right
20 not to be subjected to excessive force. Flores v. Cnty. of Los
21 Angeles, 758 F.3d 1154, 1158 (9th Cir. 2014).

22 1. City Policy

23 The City policy that Plaintiff argues supports his
24 claim states in pertinent part: "When a supervisor is able to
25 respond to an incident in which there has been a reported
26 application of force, the supervisor is expected to" perform
27 certain duties. (Decl. Susan M. Leeder, Ex. 9, ECF No. 45-9)
28 (emphasis added). However, no evidence has been presented from

1 which a reasonable inference could be drawn that a police
2 department supervisor was able to respond to an incident of
3 reported excessive force, or otherwise violated the policy.

4 **2. Ratification**

5 Nor has evidence been presented from which a reasonable
6 inference could be drawn that the City "ratified as appropriate"
7 Herminghaus' actions. "To show ratification, a plaintiff must
8 prove that the 'authorized policymakers approve[d] a
9 subordinate's decision and the basis for it.'" Christie v. Iopa,
10 176 F.3d 1231, 1239 (9th Cir. 1999) (quoting City of St. Louis v.
11 Praprotnik, 485 U.S. 112, 127 (1988)). "Ratification . . .
12 generally requires more than acquiescence." Sheehan v. City and
13 Cnty. of San Francisco, 743 F.3d 1211, 1231 (9th Cir. 2014).

14 **3. Deliberate Indifference**

15 Plaintiff has also failed to present facts from which a
16 reasonable inference could be drawn that the inadequacy of
17 Herminghaus' training amounted to deliberate indifference to
18 Plaintiff's right not to be subjected to excessive force.
19 "[A]bsent evidence of a 'program-wide inadequacy in training,'
20 any [asserted] shortfall in a single officer's training" is
21 insufficient to demonstrate deliberate indifference. Blankenhorn
22 v. City of Orange, 485 F.3d 463, 484-85 (9th Cir. 2007) (citing
23 Alexander v. City and Cnty. of San Francisco, 29 F.2d 1355, 1367
24 (9th Cir. 1994)).

25 For the stated reasons, the City Defendants' summary
26 judgment motions are granted.

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