UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MARVIN GILLAM & PAMALA GILLAM,

Plaintiffs,

v.

CITY OF VALLEJO, et al.,

Defendants.

No. 2:14-cv-2217-KJM-KJN PS

FINDINGS AND RECOMMENDATIONS

INTRODUCTION

Presently pending before the court is defendants' motion for summary judgment, or in the alternative, partial summary judgment. (ECF No. 34.)[1] Plaintiffs have opposed defendants' motion and also filed a cross-motion for summary judgment. (ECF No. 38.) Thereafter, defendants filed a reply brief. (ECF No. 39.)[2]

After carefully considering the written briefing, the court's record, and the applicable law, the court recommends that defendants' motion for summary judgment be GRANTED IN PART and DENIED IN PART, and that plaintiffs' cross-motion for summary judgment be DENIED, for

[1] The action proceeds before the undersigned pursuant to Local Rule 302(c)(21).

[2] The motions were submitted for decision without oral argument based upon the record and written briefing. (ECF No. 37.)

the reasons discussed below.

BACKGROUND[3]

On October 13, 2012, at approximately 10:00 a.m., the Vallejo Police Department received a report that a cab driver was being threatened with a knife by his passengers and that they were refusing to pay. (See Defendants' Separate Statement of Undisputed Material Facts, ECF No. 34-6 ("SSUF") No. 1.) Defendants and Vallejo Police officers, Joe McCarthy ("Officer McCarthy") and Jerome Bautista ("Officer Bautista"), responded to the cab driver's location. (SSUF No. 2.) The cab driver pointed out the suspects, who were walking away and were later identified as plaintiffs Marvin Gillam ("Marvin") and Pamala Gillam ("Pamala"). (Id.) Officer McCarthy called out to Marvin, and Officer Bautista called out to Pamala. (SSUF No. 3.) At that point, neither officer knew where the reported knife was or whether it had been concealed on the person of either Marvin or Pamala. (SSUF Nos. 5, 17.)

Upon being contacted by Officer Bautista, Pamala immediately became verbally combative and refused to comply with Officer Bautista's orders to show her hands. (SSUF No. 4.) However, Officer Bautista ultimately succeeded in handcuffing Pamala. (SSUF No. 6.)[4] According to Pamala, the handcuffs were too tight, and even though Pamala immediately complained to Officer Bautista, he ignored her and refused to loosen the handcuffs. (Declaration of Pamala Gillam, ECF No. 38 at 9-11 ["Pamala Decl."] ¶¶ 3-6.) For his part, Officer Bautista

[3] Plaintiffs did not respond to defendants' separate statement of undisputed material facts by admitting or denying the proposed facts, along with citations to specific evidence to support any denial, as required by Local Rule 260(b). The mere fact that plaintiffs are proceeding without counsel does not exempt them from compliance with the Local Rules. However, because the declaration and evidence submitted by the *pro se* plaintiffs in this case are brief and make clear which proposed facts are ostensibly disputed by plaintiffs, the court exercises its discretion to proceed to the merits of the motions. Nevertheless, to the extent that the declaration and evidence submitted by plaintiffs do not dispute a proposed fact, the court generally deems that proposed fact admitted for purposes of these motions.

[4] There is an inconsistency in the record as to how the handcuffing came about. Officer Bautista claims that, while Pamala's attention was diverted, he immediately got behind her, grabbed both her hands, and handcuffed her. (Declaration of Jerome Bautista, ECF No. 34-4 ["Bautista Decl."] ¶ 5.) By contrast, at her deposition, Pamala testified that Officer Bautista asked for her hand, that she complied, and that Officer Bautista then handcuffed her. (Declaration of Kelly Trujillo, ECF No. 34-2, Ex. A, Deposition of Pamala Gillam ["Pamala Depo"] 16:25-17:17.)

claims that he handcuffed Pamala according to protocol, and that Pamala never complained about her handcuffs being too tight. (Declaration of Jerome Bautista, ECF No. 34-4 ["Bautista Decl."] ¶ 6.)

At around the same time that Officer Bautista initially approached Pamala, Officer McCarthy made contact with Marvin and asked Marvin to sit down on the curb. (SSUF No. 16; Declaration of Joseph McCarthy, ECF No. 34-3 ["McCarthy Decl."] ¶¶ 4-5; Plaintiffs' Opposition Brief, ECF No. 38 at 4.) Marvin initially refused and told Officer McCarthy, "Fuck you, I'm 63 yrs old." (Id.) From that point on, the parties' accounts of the events concerning Marvin differ.

According to plaintiffs,[5] while Marvin was standing still "with his hands and arms down in a prone position," Officer McCarthy grabbed Marvin's hand and pulled Marvin to the ground. (Pamala Decl. ¶ 8.) After Marvin used "minimal resistance" to stay on his feet, Officer McCarthy struck Marvin in the face with a closed fist. (Id. ¶¶ 9-10.) McCarthy subsequently tasered Marvin in the chest several times. (Id. ¶ 11.) In deposition testimony cited by defendants, Marvin conceded that he then tried to grab the Taser, but maintained that he was only attempting to "defend away from the pain" and not trying to attack Officer McCarthy. (SSUF No. 23; Declaration of Kelly Trujillo, ECF No. 34-2, Ex. B ["Marvin Depo."] 25:6-11.) Thereafter, Officer McCarthy took a flashlight and struck Marvin at least 15-20 times with substantial force all over his body prior to placing Marvin in handcuffs. (Pamala Decl. ¶ 12.)

[5] Marvin, upon being questioned at his deposition regarding Officer McCarthy's alleged use of excessive force against Marvin, refused to answer virtually all questions on the basis of irrelevance and/or the Fifth Amendment privilege against self-incrimination. As defendants allude to in their briefing, Marvin may well be precluded from testifying at trial as to certain matters in light of the nature of his deposition testimony. See, e.g., Nationwide Life Ins. Co. v. Richards, 541 F.3d 903, 910-11 (9th Cir. 2008). That is an issue for the trial judge to determine, and the court expresses no opinion regarding the matter here. For purposes of the pending motions, the court need not resolve that issue, because plaintiffs have not offered Marvin's declaration to attempt to demonstrate a genuine dispute of material fact. Instead, plaintiffs offered Pamala's declaration, which does not implicate such concerns. Although Pamala also invoked the Fifth Amendment privilege as to some deposition questions, she did not refuse to answer questions concerning her observations of the interaction between Marvin and Officer McCarthy.

Officer McCarthy's version of events is quite different. According to Officer McCarthy, after Marvin refused to sit down and shouted profanities at Officer McCarthy, Marvin:

> took a step toward Officer Bautista (who at that point was dealing with [Pamala] and I prevented him from doing so by holding him and telling him again to take a seat. At this point, [Marvin] pushed my hands off of him. I pushed him up against a retaining wall to keep him from advancing toward Officer Bautista, as I still did not know the location of the knife. I had yet to pat search [Marvin], he was becoming more aggressive with his behavior, so I decided to draw my taser. [Marvin] grabbed my taser with his left hand so that when I deployed it, the taser darts deployed over [Marvin's] shoulder and hit the wall behind him. At this point, it became a fight for the taser itself. [Marvin] would not let go. I was afraid that [Marvin] would take the taser or retrieve the knife from somewhere on his person and stab me with it. I told [Marvin] several times to let go of my taser. I decided to use the taser in stun mode to try to gain compliance. Instead of pulling the taser away from [Marvin], I pushed it toward him in hopes that the stun would cause [Marvin] to release it. I made contact with [Marvin] two times in drive stun mode for a total of 1-2 seconds. [Marvin] still refused to let go of the taser and was actively fighting with me. I managed to pull him to the ground. I then grabbed my flashlight and struck [Marvin] in the arm. My flashlight fell out of my hand so I had to punch [Marvin] in the face. This caused [Marvin] to finally release the taser and by this time, Officer Bautista had handcuffed [Pamala] and was able to assist in handcuffing [Marvin]. The incident lasted less than two minutes from the time we arrived on scene to when we had both suspects in custody.

(McCarthy Decl. ¶¶ 5-10.)

A large kitchen knife with an approximately 5-inch blade was ultimately located at the scene. (SSUF No. 20; Bautista Decl. ¶ 9.) Marvin was subsequently taken to Sutter Solano Medical Center by ambulance, where he was apparently cleared to go to jail. (SSUF No. 27.)[6] Pamala was placed in Officer Bautista and Officer McCarthy's patrol car for direct transport to the jail. (SSUF No. 10.) Officer Bautista placed his camera on the front passenger visor and turned it on, recording the entire drive to the jail, Pamala's removal from the patrol car, and her placement in a holding cell. (SSUF Nos. 10, 11; see also video footage lodged with court as Exhibit A to Bautista Decl.) For the duration of the video footage, Pamala used a significant

[6] The parties dispute the extent of Marvin's injuries and whether it was appropriate for Sutter Solano Medical Center to have cleared Marvin for jail. However, Sutter Solano Medical Center is not a party to this action, and those factual disputes are not pertinent to the court's resolution of the instant motions.

amount of profanity and made several offensive statements about the officers, but never mentioned that her handcuffs were too tight or that she was experiencing any pain. (Id.)

On September 24, 2014, plaintiffs commenced this action, alleging the following claims: (1) a claim by Marvin against Officer McCarthy for excessive force in violation of the Fourth Amendment pursuant to 42 U.S.C. § 1983; (2) a claim by Pamala against Officer Bautista for excessive force in violation of the Fourth Amendment pursuant to 42 U.S.C. § 1983; and (3) a claim by both plaintiffs against the City of Vallejo pursuant to Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978). (ECF No. 1.) On December 23, 2014, defendants answered the complaint, and on June 15, 2015, the court entered a pretrial scheduling order requiring all law and motion matters, including dispositive motions, to be heard no later than April 28, 2016. (ECF Nos. 9, 23.)

On March 22, 2016, defendants timely filed a motion for summary judgment, which was noticed for hearing on April 28, 2016. (ECF No. 34.) Thereafter, on April 15, 2016, one day after plaintiffs' opposition was due, plaintiffs filed a motion for an extension of time to oppose defendants' motion. (ECF No. 36.) Despite the tardy request, the court, in light of plaintiffs' *pro se* status, granted the request. (ECF No. 37.) Plaintiffs were granted an extension until May 4, 2016, to file their opposition to defendants' motion for summary judgment, and defendants were permitted to file a reply brief no later than May 13, 2016. (Id.) The court advised that, in light of the rapidly approaching final pretrial conference, the court was strongly disinclined to grant any further extensions of time absent extraordinary circumstances. (Id.) Subsequently, on May 3, 2016, plaintiffs filed their opposition to defendants' motion for summary judgment, as well as a cross-motion for summary judgment. (ECF No. 38.) Defendants filed their reply brief on May 13, 2016. (ECF No. 39.)

Pursuant to the court's prior order, the motions were submitted for decision on the record and written briefing, and are now ripe for resolution. (ECF No. 37.)

LEGAL STANDARD

Federal Rule of Civil Procedure 56(a) provides that "[a] party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which

summary judgment is sought." It further provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).[7] A shifting burden of proof governs motions for summary judgment under Rule 56. Nursing Home Pension Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.), 627 F.3d 376, 387 (9th Cir. 2010). Under summary judgment practice, the moving party:

> always 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. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P. 56(c)). "Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." In re Oracle Corp. Sec. Litig., 627 F.3d at 387 (citing Celotex Corp., 477 U.S. at 325); see also Fed. R. Civ. P. 56 advisory committee's notes to 2010 amendments (recognizing that "a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact").

If the moving party meets its initial responsibility, the opposing party must establish that a genuine dispute as to any material fact actually exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). To overcome summary judgment, the opposing party must demonstrate the existence of a factual dispute that is both material, i.e., it affects the outcome of the claim under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc., 618 F.3d 1025, 1031 (9th Cir. 2010), and genuine, i.e., "'the evidence is such that a reasonable jury could return a verdict for the nonmoving party,'" FreecycleSunnyvale v. Freecycle Network, 626 F.3d 509, 514 (9th Cir. 2010) (quoting Anderson, 477 U.S. at 248). A party opposing summary

[7] Federal Rule of Civil Procedure 56 was revised and rearranged effective December 10, 2010. However, as stated in the Advisory Committee Notes to the 2010 Amendments to Rule 56, "[t]he standard for granting summary judgment remains unchanged."

judgment must support the assertion that a genuine dispute of material fact exists by: "(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."[8] Fed. R. Civ. P. 56(c)(1)(A)-(B). However, the opposing party "must show more than the mere existence of a scintilla of evidence." In re Oracle Corp. Sec. Litig., 627 F.3d at 387 (citing Anderson, 477 U.S. at 252).

In resolving a motion for summary judgment, the evidence of the opposing party is to be believed. See Anderson, 477 U.S. at 255. Moreover, all reasonable inferences that may be drawn from the facts placed before the court must be viewed in a light most favorable to the opposing party. See Matsushita, 475 U.S. at 587; Walls v. Cent. Contra Costa Transit Auth., 653 F.3d 963, 966 (9th Cir. 2011). However, to demonstrate a genuine factual dispute, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts...Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 586-87 (citation omitted).

DISCUSSION

Defendants' Motion for Summary Judgment

Defendants move for summary judgment as to all of plaintiffs' claims. The court first addresses plaintiffs' individual claims under 42 U.S.C. § 1983, and then turns to the Monell claim against the City of Vallejo.

Marvin's 42 U.S.C. § 1983 claim against Officer McCarthy

As noted above, Marvin asserts an individual claim against Officer McCarthy for excessive force in violation of the Fourth Amendment pursuant to 42 U.S.C. § 1983.

[8] "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). Moreover, "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2).

As the United States Supreme Court has explained:

> Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires 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. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight…As in other Fourth Amendment contexts, however, the reasonableness inquiry in an excessive force case is an objective one: 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. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

Graham v. Connor, 490 U.S. 386, 396-97 (1989) (internal citations and punctuation marks omitted).

Here, Officer McCarthy essentially contends that, after Marvin's refusal to sit down and use of profanity, it was reasonably necessary to escalate the level of force used to deploying a taser, striking with a flashlight, and eventually punching Marvin in the face, because Marvin was advancing towards Officer Bautista and getting more and more aggressive. If persuaded by Officer McCarthy's account, a trier of fact may well find that Officer McCarthy's use of force was objectively reasonable, particularly given the cab driver's report of a knife (which at the time had not yet been located), the potential immediate threat to both officers, and Marvin's increasing active resistance.

However, plaintiffs strongly dispute that Marvin was advancing towards Officer Bautista and becoming increasingly aggressive. They apparently concede that Marvin initially refused to sit down and used profanity, but claim that Marvin was standing still with his hands and arms

down when Officer McCarthy grabbed and pulled Marvin, a 63-year old, to the ground. When Marvin then minimally resisted by attempting to stay on his feet, Officer McCarthy allegedly resorted to punching, tasering, and striking Marvin with a flashlight. Although Marvin admittedly at some point tried to grab the taser, he claims that it was only to defend against the pain. As such, plaintiffs contend that it was Officer McCarthy who from the outset unnecessarily and unreasonably escalated the level of force used. If plaintiffs' version is found credible, Marvin arguably did not pose an immediate threat to the safety of the officers, because he had made no overt movements towards the officers, nor did he otherwise physically threaten the officers. Therefore, a rational trier of fact may find that Officer McCarthy's level of force used was objectively unreasonable.

Consequently, a genuine dispute of material fact here precludes a grant of summary judgment in Officer McCarthy's favor.

Defendants also argue that, even if a constitutional violation occurred, Officer McCarthy is entitled to qualified immunity. "Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation." Torres v. City of Madera, 648 F.3d 1119, 1123 (9th Cir. 2011). "An officer will be denied qualified immunity in a § 1983 action only if (1) the facts alleged, taken in the light most favorable to the party asserting injury, show that the officer's conduct violated a constitutional right, and (2) the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood her conduct to be unlawful in that situation." Id. In this case, if plaintiffs' evidence is believed, a reasonable officer would plainly have understood that it was unlawful to resort to punching, tasering, and striking Marvin with a flashlight merely because Marvin initially refused to sit down and used some profanity, and without posing an immediate threat to the officer's safety or the safety of others. Therefore, the court cannot find that Officer McCarthy is entitled to qualified immunity at the summary judgment stage.

Pamala's 42 U.S.C. § 1983 claim against Officer Bautista

Pamala also asserts an individual claim against Officer Bautista for excessive force in violation of the Fourth Amendment pursuant to 42 U.S.C. § 1983. Pamala's claim is based

exclusively on the fact that Officer Bautista allegedly placed her in too tight handcuffs and refused to loosen the handcuffs despite Pamala's complaints. See LaLonde v. County of Riverside, 204 F.3d 947, 960 (9th Cir. 2000) (recognizing that tight handcuffing can constitute excessive force).

Defendants point out that Pamala testified at her deposition that she told Officer Bautista that her handcuffs were too tight on numerous occasions, including repeatedly during the ride in the patrol car to the jail. (SSUF No. 9; Pamala Depo 22:14-24:16.) By contrast, the video footage from the patrol car shows that Pamala used a significant amount of profanity and made several offensive statements about the officers, but never mentioned that her handcuffs were too tight or that she was experiencing any pain. (See video footage lodged with court as Exhibit A to Bautista Decl.) Defendants also note that Pamala, at her deposition, could not even remember if she asked for medical treatment for her wrists at the jail or at any time thereafter. (SSUF No. 12; Pamala Depo 26:21-27:6.)

Plaintiffs counter that Pamala did in fact complain about the handcuffs, but that she may have forgotten exactly when she had complained. In her declaration submitted in opposition to defendants' motion, Pamala asserts that, upon being handcuffed, she immediately complained to Officer Bautista that the handcuffs were too tight, but that he ignored her and refused to loosen the handcuffs. (Pamala Decl. ¶¶ 3-6.) Plaintiffs posit that Pamala's complaints were likely made before the camera was turned on.

After reviewing the video footage, the court is troubled by the glaring inconsistency between Pamala's deposition testimony and the video footage, particularly given her testimony that she *repeatedly* complained during the car ride. That said, because the video camera only started recording when Pamala was placed in the patrol vehicle, the video footage does not definitively show that Pamala entirely failed to complain about the tightness of her handcuffs. To be sure, in light of the above, defendants will have significant fodder for cross-examination at trial. However, if the evidence is viewed in the light most favorable to Pamala, a genuine dispute of material fact nonetheless precludes a grant of summary judgment in Officer Bautista's favor. Furthermore, because a reasonable officer would plainly have understood that it is unlawful to put

a person in excessively tight handcuffs and to ignore such a person's complaints, the court also cannot find that Officer Bautista is entitled to qualified immunity at the summary judgment stage.[9]

Plaintiffs' Monell claim against the City of Vallejo

Plaintiffs further assert a Monell claim against the City of Vallejo, alleging that the City of Vallejo has a longstanding practice, policy, or custom of allowing police officers to use excessive force. (ECF No. 1.) See Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978) (holding that, since there is no *respondeat superior* liability under section 1983, municipal entities may be sued under section 1983 only upon a showing that an official policy, custom, or practice of the municipal entity caused the constitutional tort).

The City of Vallejo argues that it is entitled to summary judgment on plaintiffs' Monell claim, because plaintiffs have produced no admissible evidence of a policy, custom, or practice of allowing police officers to use excessive force by the City of Vallejo. That argument has merit. In their complaint, plaintiffs allege the existence of various lawsuits against the City of Vallejo involving claims of excessive force and other Fourth Amendment violations. (ECF No. 1.) However, the mere fact that such lawsuits were filed does not support the existence of a policy, custom, or practice of allowing excessive force by police officers. See Hocking v. City of Roseville, 2008 WL 1808250, at *5 (E.D. Cal. Apr. 22, 2008) ("Statistics of unsustained complaints of excessive force and other police misconduct, without any evidence that those complaints had merit, does not suffice to establish municipal liability under § 1983."); Strauss v. City of Chicago, 760 F.2d 765, 768-69 (7th Cir. 1985) (noting that "the number of complaints filed, without more, indicates nothing. People may file a complaint for many reasons, or for no reason at all. That they filed complaints does not indicate that the policies that Strauss alleges exist do in fact exist and did contribute to his injury."). Most of the lawsuits listed in plaintiffs'

[9] Defendants also move for summary judgment with respect to a purported state law tort claim by Pamala for infliction of emotional distress related to Pamala witnessing Officer McCarthy's interaction with Marvin. Pamala testified at her deposition to suffering such emotional distress. However, defendants' request is moot, because plaintiffs' complaint does not allege any state law claims, nor does plaintiffs' opposition brief contend that such a state law claim is asserted.

complaint remain pending and have not, at least as of yet, resulted in a finding of a constitutional violation. Even if a few of the lawsuits against individual officers were ultimately successful on the merits or settled, see, e.g., Deocampo, et al. v. Potts, et al., 2:06-cv-1283-WBS-CMK; Cooley v. City of Vallejo, et al., 2:12-cv-591-LKK-AC, "[l]iability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996).

Here, plaintiffs have produced no admissible evidence of the City of Vallejo's purported policy, custom, or practice. Tellingly, plaintiffs' opposition brief does not even attempt to address plaintiffs' Monell claim, and effectively concedes its inadequacy.

Therefore, the City of Vallejo is entitled to summary judgment on plaintiffs' Monell claim.

Plaintiffs' Cross-Motion for Summary Judgment

Along with their opposition to defendants' motion for summary judgment, plaintiffs also filed a cross-motion for summary judgment with respect to their individual claims against Officer McCarthy and Officer Bautista.

As an initial matter, plaintiffs' cross-motion should be denied as untimely. The pretrial scheduling order required dispositive motions to be filed so that they may be heard no later than April 28, 2016. (ECF No. 23.) After defendants filed a timely motion for summary judgment, plaintiffs sought, and were granted, an extension to oppose defendants' motion until May 4, 2016. (ECF No. 37.) No extension to file their own dispositive motion was granted.

Moreover, even if the motion were not untimely, it should be denied on the merits. For the reasons discussed above, genuine disputes of material fact remain concerning both Marvin's and Pamala's excessive force claims, and summary judgment is inappropriate under the applicable legal standards.

CONCLUSION

In sum, the court concludes that summary judgment should be granted as to plaintiffs' Monell claim against the City of Vallejo. However, Marvin's 42 U.S.C. § 1983 claim against

Officer McCarthy and Pamala's 42 U.S.C. § 1983 claim against Officer Bautista should proceed to trial.

Accordingly, IT IS HEREBY RECOMMENDED that:

1. Defendants' motion for summary judgment (ECF No. 34) be GRANTED IN PART and DENIED IN PART.
2. Plaintiffs' cross-motion for summary judgment (ECF No. 38) be DENIED.
3. Summary judgment be granted in favor of the City of Vallejo as to plaintiffs' Monell claim.
4. Summary judgment be denied as to Marvin's 42 U.S.C. § 1983 claim against Officer McCarthy and Pamala's 42 U.S.C. § 1983 claim against Officer Bautista.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen (14) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served on all parties and filed with the court within fourteen (14) days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

IT IS SO RECOMMENDED.

Dated: May 26, 2016

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE