

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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5 LASONJA PORTER,) 2:16-CV-01702 LEK
6)
7 Plaintiff,)
8)
9 vs.)
10)
11 SERGEANT MUNOZ in his)
12 individual capacity, DOES 1-)
13 10 in their individual)
14 capacities, CITY OF DAVIS)
15 POLICE DEPARTMENT, CITY OF)
16 DAVIS,)
17)
18 Defendants.)
19)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND TO STRIKE FIRST AMENDED COMPLAINT

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24 On February 23, 2017, Defendants Sergeant Munoz and the
25 City of Davis¹ ("the City," collectively "Defendants") filed
26 their Motion to Dismiss and to Strike First Amended Complaint
27 ("Motion"). [Dkt. no. 15.] Plaintiff Lasonja Porter
28 ("Plaintiff") filed her memorandum in opposition on March 8,
29 2017, and Defendants filed their reply on March 16, 2017. [Dkt.
30 nos. 16, 18.] The Court finds this matter suitable for
31 disposition without a hearing pursuant to L.R. 230(g) of the
32 Local Rules of the United States District Court for the Eastern
33 District of California ("Local Rules"). Defendants' Motion is

34 ¹ Sergeant Munoz is named in his individual capacity, and
35 the City is also named as the City of Davis Police Department.
36 [Pltf.'s First Amended Complaint for Damages ("Amended
37 Complaint"), filed 2/6/17 (dkt. no. 14), at 1.]

1 hereby granted in part and denied in part for the reasons set
2 forth below.

3 **BACKGROUND**

4 Plaintiff filed her original Complaint for Damages
5 ("Complaint") on July 22, 2016. [Dkt. no. 1.] The Complaint
6 alleged the following claims: a 42 U.S.C. § 1983 claim against
7 Sergeant Munoz alleging that his unreasonable use of force
8 violated Plaintiff's Fourteenth Amendment right to substantive
9 due process ("Count I"); a § 1983 claim against Sergeant Munoz
10 alleging that the unreasonable search violated Plaintiff's Fourth
11 Amendment and Fourteenth Amendment rights ("Count II"); a
12 negligence claim against Defendants based on bodily injury,
13 pursuant to California Government Code § 815.2 ("Count III"); a
14 negligence claim against Defendants based on the illegal search,
15 pursuant to § 815.2 ("Count IV"); a negligent infliction of
16 emotional distress ("NIED") claim against Sergeant Munoz
17 ("Count V"); and an intentional infliction of emotional distress
18 ("IIED") claim against Sergeant Munoz ("Count VI").

19 On October 14, 2016, Defendants filed a motion to
20 dismiss the Complaint and, on January 23, 2017, this Court issued
21 the Order Granting in Part and Denying in Part Defendants' Motion
22 to Dismiss and to Strike ("1/23/17 Order"). [Dkt. nos. 7, 13.²]
23 This Court: dismissed Count I without prejudice and struck the

24 ² The 1/23/17 Order is also available at 2017 WL 282591.

1 portion of Count II based on the Fourteenth Amendment because an
2 excessive force claim must be brought pursuant to the Fourth
3 Amendment, not the Fourteenth Amendment; dismissed Count III
4 without prejudice because Plaintiff failed to plead duty and
5 breach of duty and because Count III's factual allegations were
6 more consistent with a battery claim; dismissed Count IV without
7 prejudice because Plaintiff failed to plead duty and breach of
8 duty; and dismissed Count V with prejudice because there is no
9 independent NIED claim under California law.

10 Plaintiff filed the Amended Complaint on February 6,
11 2017. The factual allegations in the Amended Complaint are the
12 same as the original Complaint's factual allegations, which are
13 summarized in the 1/23/17 Order. This Court therefore will not
14 repeat them here. The Amended Complaint alleges the following
15 claims: a § 1983 claim against Sergeant Munoz alleging that his
16 unreasonable use of force violated Plaintiff's Fourteenth
17 Amendment right to substantive due process ("Amended Count I"); a
18 § 1983 claim against Sergeant Munoz alleging that the
19 unreasonable search violated Plaintiff's Fourth Amendment rights
20 ("Amended Count II"); a claim under the Tom Bane Civil Rights
21 Act, California Civil Code § 52.1, against Defendants ("Amended
22 Count III"); a negligence claim against Defendants based on the
23 allegedly illegal search, pursuant to California Government Code
24 § 815.2 ("Amended Count IV"); an IIED claim against Sergeant

1 Munoz ("Amended Count V"); and a battery claim against Defendants
2 ("Amended Count VI").

3 In the instant Motion, Defendants seek to have: the
4 references to the Fourteenth Amendment in Amended Count I
5 stricken; and Amended Counts III and IV dismissed. This Court
6 does not construe the Motion as seeking either the dismissal of
7 Amended Count I or the dismissal of Amended Counts II, V, or VI.

8 **DISCUSSION**

9 **I. Amended Count I**

10 In spite of the 1/23/17 Order, Plaintiff continues to
11 base Amended Count I on the Fourteenth Amendment instead of the
12 Fourth Amendment. Defendants argue that this Court should strike
13 the references to the Fourteenth Amendment in Amended Count I and
14 "construe that claim as a Fourth Amendment Excessive Force
15 claim." [Mem. in Supp. of Motion at 4.] Fed. R. Civ. P. 12(f)
16 states, in pertinent part: "The court may strike from a pleading
17 an insufficient defense or any redundant, immaterial,
18 impertinent, or scandalous matter." This Court agrees that
19 Amended Count I's references to the Fourteenth Amendment are
20 immaterial to the claim, which - when read in context with the
21 Amended Complaint as a whole - is clearly based on the Fourth
22 Amendment. Defendants' Motion is granted insofar as the
23 references to the Fourteenth Amendment in Amended Count I are
24 stricken, and Amended Count I is construed as a § 1983 claim

1 based on the alleged violation of Plaintiff's Fourth Amendment
2 rights.

3 **II. Amended Count III**

4 Amended Count III alleges that Munoz - and the City
5 through *respondeat superior* - violated California Civil Code
6 § 52.1, which is known as the Bane Act.

7 The Bane Act provides "a state law remedy for
8 constitutional or statutory violations
9 accomplished through intimidation, coercion, or
10 threats." Davis v. City of San Jose, 69 F. Supp.
11 3d 1001, 1007 (N.D. Cal. 2014). The Bane Act
12 requires an "an [sic] attempted or completed act
13 of interference with a legal right, accompanied by
14 a form of coercion." Austin B. v. Escondido Union
15 Sch. Dist., 149 Cal. App. 4th 860, 882 (2007)
16 (quoting Jones v. Kmart Corp., 17 Cal. 4th 329,
17 338 (1998)). To state a claim under the Bane Act,
18 the plaintiff need not plead that "the defendant
19 acted with discriminatory animus or intent; a
20 defendant is liable if he or she interfered with
21 the plaintiff's constitutional rights by the
22 requisite threats, intimidation, or coercion."
23 Austin B [sic], 149 Cal. App. 4th at 882.

24
25 Johnson v. City of Atwater, Case No. 1:16-cv-01636-AWI-SAB, 2017

26 WL 1383283, at *12 (E.D. Cal. Apr. 18, 2017), *report and*
27 *recommendation adopted*, 2017 WL 1742897 (May 4, 2017). "[A]
28 plaintiff in a search-and-seizure case must allege threats or
29 coercion beyond the coercion inherent in a detention or search in
30 order to recover under the Bane Act." Lyall v. City of Los
31 Angeles, 807 F.3d 1178, 1196 (9th Cir. 2015) (some citations
32 omitted) (citing Allen v. City of Sacramento, 234 Cal. App. 4th
33 41, 183 Cal. Rptr. 3d 654, 678 (2015) ("[A] wrongful arrest or

1 detention, without more, does not satisfy both elements of [the
2 Bane Act]."); Quezada v. City of L.A., 222 Cal. App. 4th 993, 166
3 Cal. Rptr. 3d 479, 491 (2014) ("The coercion inherent in
4 detention is insufficient to show a Bane Act violation.")). This
5 district court has recognized that "at the pleading stage, the
6 relevant distinction for purposes of the Bane Act is between
7 intentional and unintentional conduct." Sanchez v. City of
8 Fresno, No. 1:12-CV-00428-LJO-SKO, 2013 WL 2100560, at *11 (E.D.
9 Cal. May 14, 2013) (citing Bass v. City of Fremont, 2013 WL
10 891090 (N.D. Cal. Mar. 8, 2013)).

11 Amended Count IV alleges that she "attempted to invoke
12 her constitutional rights by denying defendant Munoz consent to
13 search her private room and personal property," but Sergeant
14 Munoz prevented her from doing so "by restricting her movement to
15 the living room portion of her house." [Amended Complaint at 8.]
16 Plaintiff alleges that he did so by "grab[bing] and tug[ging] on
17 her shoulder." [Id.] According to Plaintiff, prior to the
18 incident, she had informed the officers about her previous
19 shoulder injury. Sergeant Munoz's action caused Plaintiff
20 "unbearable" pain and "plac[ed] her in to an extreme state of
21 anxiety." [Id. at 4-5.]

22 Plaintiff's factual allegations, which are presumed to
23 be true, sufficiently state a plausible Bane Act claim. See Bell
24 Atlantic Corp. v. Twombly, 550 U.S. 544, 572 (2007) ("a judge

1 ruling on a defendant's motion to dismiss a complaint must accept
2 as true all of the factual allegations contained in the
3 complaint" (citations and internal quotation marks omitted));
4 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("To survive a motion
5 to dismiss, a complaint must contain sufficient factual matter,
6 accepted as true, to 'state a claim to relief that is plausible
7 on its face.'" (quoting Twombly, 550 U.S. at 570, 127 S. Ct.
8 1955)).

9 Although Amended Count III alleges that Sergeant Munoz
10 grabbed and tugged Plaintiff's shoulder to prevent her from
11 refusing to consent to parts of the search, the Amended Complaint
12 also alleges that, when he grabbed her shoulder, she was on her
13 way to her bedroom to retrieve her blood pressure medication.
14 Afterward, Sergeant asked Plaintiff where Cairo was and which
15 room was his. [Amended Complaint at 4-5.] The apparent
16 inconsistency between the factual allegations about the incident
17 may raise credibility issues. However, credibility
18 determinations are beyond the scope of a motion to dismiss.
19 Ransom v. McCabe, No. 1:13cv01779 AWI DLB PC, 2015 WL 5159412, at
20 *3 (E.D. Cal. Sept. 2, 2015) (citing Albino v. Baca, 747 F.3d
21 1162, 1169 (9th Cir. 2014)), *report and recommendation adopted*,
22 2015 WL 6438150 (Oct. 22, 2015). This Court therefore denies
23 Defendants' request to dismiss Amended Count III.

1 **III. Amended Count IV**

2 In the 1/23/17 Order, this Court dismissed Count IV
3 because Plaintiff did not plead duty and breach of duty in the
4 original Complaint. 2017 WL 282591, at *3. Defendants argued
5 that Count IV should be dismissed with prejudice because it
6 improperly alleged a negligent violation of Plaintiff's Fourth
7 Amendment rights, and negligent acts cannot support a
8 constitutional violation. This Court disagreed, construing
9 Count IV as alleging an alternate theory that Sergeant Munoz's
10 **actions** were negligent. Id. The 1/23/17 Order did not suggest
11 that Plaintiff could state a plausible negligence claim by
12 alleging a negligent violation of her Fourth Amendment rights.

13 Amended Count IV alleges that Sergeant Munoz had a duty
14 to "follow the Law Enforcement Code of Ethics which mandates that
15 as a law enforcement officer they will 'respect the
16 Constitutional rights of all men to liberty, equality and
17 justice,' obey all laws, and will never 'employ unnecessary force
18 or violence' while performing their duties as a law enforcement
19 agency." [Amended Complaint at 9.] Plaintiff further alleges
20 that Sergeant Munoz "breached [his] duty to not violate the
21 constitutional rights of citizens when [he] violated Plaintiff's
22 constitutional rights to be free from unreasonable searches."
23 [Id. (emphases omitted).]

1 Plaintiff's negligence claim in Amended Count IV
2 essentially alleges that Sergeant Munoz breached his duty not to
3 violate Plaintiff's Fourth Amendment rights. To the extent that
4 Amended Count IV alleges that Sergeant Munoz's negligence
5 violated Plaintiff's constitutional right, the claim fails to
6 state a plausible claim because negligent acts do not give rise
7 to constitutional liability. See Billington v. Smith, 292 F.3d
8 1177, 1190 (9th Cir. 2002) ("The Fourth Amendment's
9 'reasonableness' standard is not the same as the standard of
10 'reasonable care' under tort law, and negligent acts do not incur
11 constitutional liability." (footnotes omitted)).³ To the extent
12 that Amended Count IV is based upon the same standard as a claim
13 alleging a Fourth Amendment violation, it is duplicative of
14 Amended Counts I and II. Amended Count IV must be dismissed for
15 failure to state a claim upon which relief can be granted because
16 of Plaintiff's failure to plead a duty and a breach of duty to
17 support her negligence claim.

18 Because the 1/23/17 Order provided Plaintiff notice of
19 this defect in her negligence claim and she was unable to cure
20 the defect, this Court concludes that it is not possible for
21 Plaintiff to cure the defect by further amendment of her
22 complaint. See Rodriguez v. Brown, 1:15-cv-01754-LJO-EPG-PC,

23 ³ Billington was abrogated on other grounds by County of Los
24 Angeles v. Mendez, 137 S. Ct. 1539 (2017).

1 2016 WL 6494705, at *3 (E.D. Cal. Nov. 1, 2016) (“Whether
2 dismissal is with or without prejudice will depend upon whether
3 it is possible for Plaintiff to cure any defects.” (citing Vess
4 v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107-08 (9th Cir. 2003)
5 (collecting cases))), *report and recommendation adopted*, 2016 WL
6 7104173 (E.D. Cal. Dec. 6, 2016). The dismissal of Amended
7 Count IV must be with prejudice.

8 In light of this Court’s ruling, it need not address
9 Defendants’ other arguments in support of their request to
10 dismiss Amended Count IV.

11 **CONCLUSION**

12 On the basis of the foregoing, Defendants’ Motion to
13 Dismiss and to Strike First Amended Complaint, filed February 23,
14 2017, is HEREBY GRANTED IN PART AND DENIED IN PART. The Motion
15 is GRANTED insofar as: the references to the Fourteenth Amendment
16 in Amended Count I are STRICKEN; Amended Count I is construed as
17 a 42 U.S.C. § 1983 claim based on the alleged violation of
18 Plaintiff’s Fourth Amendment rights; and Amended Count IV is
19 HEREBY DISMISSED WITH PREJUDICE. The Motion is DENIED as to
20 Amended Count III.

21 The Court ORDERS Defendants to file their answer to the
22 remaining portions of Plaintiff’s First Amended Complaint for
23 Damages by **September 19, 2017**.

24 IT IS SO ORDERED.

1 DATED AT HONOLULU, HAWAII, August 21, 2017.



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5 /s/ Leslie E. Kobayashi
6 Leslie E. Kobayashi
7 United States District Judge
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