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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER LULL,  
  
Plaintiff,  
  
v.  
  
COUNTY OF SACRAMENTO, CORY  
STEWART, MICHAEL DOANE, and  
DOES 1 to 100,  
  
Defendants.

No. 2:17-cv-1211-TLN-EFB PS

FINDINGS AND RECOMMENDATIONS

This case was before the court on July 17, 2019, for hearing on defendant Cory Stewart’s motion for reconsideration of the court’s order granting in part and denying in part defendants’ motion to dismiss plaintiff’s second amended complaint. ECF No. 42. Attorney Wendy Motooka appeared on behalf of defendant Stewart, and plaintiff appeared pro se. For the following reasons, it is recommended that defendant’s motion be denied.

I. Background

This action proceeds on plaintiff’s second amended complaint. ECF No. 22. Plaintiff alleges that on July 17, 2016, he visited the River Bend Park beach area in Rancho Cordova, California. *Id.* at 3. While loading a kayak onto a vehicle parked in a restricted area, plaintiff was confronted by defendant Cory Stewart (hereinafter “Stewart”). *Id.* Stewart made several requests for plaintiff to produce identification. These requests were met with criticism and

1 condescending remarks, as well as a refusal to produce identification. *Id.* at 4, 8. Ultimately,  
2 plaintiff was arrested and charged with a violation of California Penal Code § 148(a)(1) (resisting,  
3 delaying, or obstructing a peace officer). *Id.* at 5; ECF No. 24-2 at 43. Plaintiff’s second  
4 amended complaint alleged claims for violation of plaintiff’s rights under the First, Fourth, and  
5 Fourteenth Amendments, and violation of California’s Bane Act. ECF No. 22 at 5-9.

6 Defendants moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure  
7 12(b)(6), arguing, among other things, that plaintiff’s First Amendment retaliatory arrest claim  
8 failed because Stewart had probable cause to arrest plaintiff. ECF No. 24. Defendants’ motion  
9 was denied as to plaintiff’s First Amendment retaliation claim and related Bane Act claim<sup>1</sup> and  
10 granted as to his Fourth and Fourteenth Amendment claims. ECF No. 37 at 2. Of significance  
11 here, the court rejected Stewart’s argument that plaintiff’s “no contest” plea to violating  
12 California Penal Code 148(a)(1)—which establishes probable cause for plaintiff’s arrest—  
13 foreclosed his retaliatory arrest claim. Relying on *Ford v. City of Yakima*, 706 F.3d 1188 (9th  
14 Cir. 2013) and *Dietich v. John Ascuaga’s Nugget*, 548 F.3d 892 (9th Cir. 2008), the court held  
15 that plaintiff could state a First Amendment retaliation claim even if his arrest was supported by  
16 probable cause. ECF No. 34 at 9; *see Ford*, 706 F.3d at 1196 (“police action motivated by  
17 retaliatory animus [is] unlawful, even if probable cause existed for [the] action.”); *Dietich*, 548  
18 F.3d at 901 (the fact that a defendant officer “had probable cause is not dispositive. But it  
19 undoubtedly has high probative force.”).

20 Defendant moves for reconsideration of that holding, arguing that the Ninth Circuit’s  
21 holding in *Ford* is no longer controlling in light of the Supreme Court’s recent decision in *Nieves*  
22 *v. Bartlett*, 139 S. Ct. 1715 (2019).<sup>2</sup> ECF No. 42.

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26 <sup>1</sup> Plaintiff’s Bane Act claim is based on the same allegations as his First Amendment  
27 retaliation claim. ECF No. 22 at 7-9.

28 <sup>2</sup> *Nieves* was decided on May 28, 2019, approximately two months after the court issued  
its order on defendants’ motion to dismiss.

1 II. Legal Standards

2 Federal Rule of Civil Procedure 60 provides that a court may relieve a party of a final  
3 judgment or order for mistake, inadvertence, surprise, or excusable neglect. Fed. R. Civ. P. 60(b)  
4 (1). “Reconsideration is appropriate if the district court (1) is presented with newly discovered  
5 evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is  
6 an intervening change in controlling law.” *School Dist. No. 1J v. AC and S, Inc.*, 5 F.3d 1255,  
7 1263 (9th Cir. 1993). Further, Local Rule 230(j) requires that a motion for reconsideration state,  
8 “what new or different facts or circumstances are claimed to exist which did not exist or were not  
9 shown upon such prior motion, or what other grounds exist for the motion,” and “why the facts or  
10 circumstances were not shown at the time of the prior motion.” E.D. Cal. L.R. 230(j)(3)-(4).

11 III. Discussion

12 Stewart argues that under the Supreme Court’s decision in *Nieves*, plaintiff is required to  
13 allege the absence of probable cause to state a First Amendment retaliatory arrest claim. He  
14 contends that because plaintiff pled no contest to violating section California Penal Code  
15 § 148(a), probable cause for his arrest is established. Accordingly, Stewart argues that plaintiff’s  
16 First Amendment retaliatory arrest and Bane Act claims must be dismissed.

17 In *Nieves*, the Supreme Court held that a plaintiff bringing a First Amendment retaliatory  
18 arrest claim must generally “plead and prove the absence of probable cause.” 139 S.Ct. at 1723.  
19 The court, however, carved out a narrow exception to the “no-probable-cause requirement.”  
20 Under the exception, a plaintiff is not required to establish the absence of probable cause if he  
21 “presents objective evidence that he was arrested when otherwise similarly situated individuals  
22 not engaged in the same sort of protected speech had not been.” *Id.* at 1727.

23 Here, it is doubtful that otherwise similarly situated individuals who did not engage in  
24 protect speech have been arrested. The facts as alleged by plaintiff are that he refused to present  
25 identification but otherwise did nothing to physically impede or obstruct the officer. Yet, plaintiff  
26 entered a plea of “no contest” to resisting, delaying, or obstructing a peace officer. Assuming that  
27 the no contest plea establishes probable cause for his arrest, *see Dobson Med. Group, Inc. v.*  
28 *Midland Risk Ins. Co.*, 18 F. App’x 578, 580 (9th Cir. 2001) (unpublished) (finding that a

1 conviction arising from a no contest plea established guilt and superseded the question of whether  
2 there was probable cause to arrest), the question remains whether other individuals under the  
3 same circumstances pled in the complaint but without making statements critical of the officer  
4 have been arrested. Accepting plaintiff's allegations as true, which the court must at this  
5 juncture, there appears a reasonable possibility that the exception in *Nieves* to the "no-probable-  
6 cause requirement" will apply in this case.

7 As previously summarized by the court, plaintiff alleges that:

8 he was loading a Kayak onto a car parked in a restricted area when  
9 he was approached by Stewart.

10 . . .

11 Stewart asked plaintiff to provide identification, but plaintiff ignored  
12 the request and "began to make criticizing gestures and comments  
13 towards [Stewart] for his attempts to investigate" plaintiff. Plaintiff  
14 appears to contend that there was no basis for Stewart's request for  
15 identification because Stewart did not witness plaintiff commit a  
16 crime or operate the [car parked in the restricted area] . . . After  
17 plaintiff made his criticizing remarks, Stewart "placed himself in the  
18 direct path of [plaintiff's] physical movements . . . in order to get  
19 [plaintiff's] attention." Plaintiff allegedly attempted to ignore  
20 Stewart by walking around him. Stewart then placed his hands on  
21 plaintiff's chest to stop plaintiff from moving. Plaintiff immediately  
22 stopped, placed his hands in the air, and asked if he was being  
23 detained. Stewart informed him that he was being detained, and  
24 plaintiff then "immediately surrendered to Stewart and became  
25 docile." Stewart allegedly made another demand for identification,  
26 which was again met with verbal criticism and condescending  
27 remarks, including "you don't need to know who I am." Stewart then  
28 placed plaintiff in handcuffs, searched him without consent, and  
placed him in the back of a "patrol vehicle without a warrant."

ECF No. 34 at 2-3.

Plaintiff may have interfered with Stewart's ability to investigate the unauthorized vehicle  
and plaintiff's relationship to it. He does allege that he attempted to walk around Stewart after  
Stewart requested identification and blocked plaintiff's path of travel.<sup>3</sup> But, under the allegations  
of the complaint, plaintiff was otherwise cooperative aside from exercising his right to criticize

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<sup>3</sup> See *In re Gregory S.*, 112 Cal. App. 3d 764, 771, 778 (1980) (holding that while the defendant was free to refuse to identify himself or to answer questions, his forceful attempt to leave—which involved the defendant struggling and attempting to pull his arm away from the investigating officer—violated section 148).

1 Stewart and not produce identification. *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)  
2 (where an officer has reasonable suspicion that a particular person has committed a crime, the  
3 officer “may detain that person briefly . . . [and] ask the detainee a moderate number of  
4 questions to determine his identity and to try an obtain information confirming or dispelling the  
5 officer’s suspicions. But the detainee is *not* obligated to respond.” (emphasis added)).  
6 Defendant’s motion does not provide any examples of other similarly situated individuals who  
7 have been arrested, and at oral argument counsel could provide no such examples. Indeed, it  
8 appears unlikely that they exist. *See People v. Quiroga*, 16 Cal. App. 4th 961, 969 n.2 (1993)  
9 (observing that a “defendant’s refusal to identify himself or to answer questions [is] protected  
10 speech.”). Rather, from the allegations of the complaint it appears that the distinguishing  
11 circumstance leading to plaintiff’s arrest was his comments critical of the officer. But such  
12 statements cannot legitimately form the basis for the arrest. *United States v. Poocha*, 259 F.3d  
13 1077, 1080 (9th Cir. 2001) (“[T]he First Amendment protects verbal criticism, challenges, and  
14 profanity directed at police officers unless the speech is ‘shown likely to produce a clear and  
15 present danger of a serious substantive evil that rises far above public inconvenience, annoyance,  
16 or unrest.’”); *Quiroga*, 16 Cal. App. 4th at 971-72 (finding that protected speech may not be  
17 considered in assessing violation of Cal. Penal Code § 148.). Whether there are such examples is  
18 a matter that can form the basis of discovery, and if appropriate, a summary judgment motion  
19 where declarations and exhibits or other material extrinsic to the complaint may be properly  
20 considered.

21 Based on the facts as alleged in the complaint, the exception to the “no-probable-cause  
22 requirement” could apply in this case. Plaintiff should therefore be given the opportunity to  
23 conduct discovery related to whether the exception outlined in *Nieves* applies. Similarly,  
24 defendant may address the issue in a properly-filed motion for summary judgment.

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1 IV. Conclusion

2 Accordingly, it is hereby RECOMMENDED that defendant’s motion for reconsideration  
3 (ECF No. 42) be denied.

4 These findings and recommendations are submitted to the United States District Judge  
5 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
6 after being served with these findings and recommendations, any party may file written  
7 objections with the court and serve a copy on all parties. Such a document should be captioned  
8 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections  
9 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*  
10 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

11 DATED: December 19, 2019.

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13 EDMUND F. BRENNAN  
14 UNITED STATES MAGISTRATE JUDGE

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