

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK VINCENT HALL, BBK134,)	
)	
Plaintiff(s),)	No. C 12-2340 CRB (PR)
)	
v.)	ORDER OF SERVICE
)	
HAYWARD POLICE DEP'T, et al.,)	
)	
Defendant(s).)	

Plaintiff, a pretrial detainee at Alameda County's Santa Rita Jail, has filed a pro se complaint for damages under 42 U.S.C. § 1983 alleging excessive force during arrest and unlawful arrest and prosecution due to various misconduct. Plaintiff also seeks dismissal of the criminal charges against him.

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted," or "seeks monetary relief from a defendant who is immune from such relief." *Id.* § 1915A(b). Pro se pleadings must be liberally construed, however. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

1 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two
2 essential elements: (1) that a right secured by the Constitution or laws of the
3 United States was violated, and (2) that the alleged violation was committed by a
4 person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48
5 (1988).

6 B. Legal Claims

7 The use of excessive force in the context of an arrest or investigatory stop
8 of a free citizen may violate the Fourth Amendment. See Graham v. Connor, 490
9 U.S. 386, 394-95 (1989). Here, plaintiff's allegations that Hayward police
10 officers M. Troche, M. Miller, J. Faria and C. Norris used excessive force while
11 arresting him (e.g., slammed him onto ground head first and dragged him through
12 driveway) appear to state a cognizable claim under § 1983, when liberally
13 construed, and will be served on these four defendants. See Rutherford v. City of
14 Berkeley, 780 F.2d 1444, 1447 (9th Cir. 1986) (allegation of use of excessive
15 force by law enforcement officer in effectuating arrest states claim under § 1983),
16 overruled on other grounds by Graham v. Connor, 490 U.S. 386 (1989).¹

17 But plaintiff's allegations of misconduct implicating the unlawfulness of
18 his arrest and prosecution (entering premises without a warrant or probable cause,
19 tampering with evidence, malicious prosecution, false imprisonment, etc.) will be
20 stayed until plaintiff's criminal case is ended. See Wallace v. Kato, 549 U.S. 384,
21 393-94(2007). If plaintiff is later convicted, and if the stayed allegations state a
22 claim which would impugn that conviction, Heck v. Humphrey, 512 U.S. 477

23
24 ¹The City of Hayward and the Hayward Police Department are dismissed
25 in connection with this claim because a city may not be held vicariously liable for
26 the unconstitutional acts of its employees under the theory of respondeat superior
27 and plaintiff sets forth no other basis for municipal liability. See Board of Cty.
28 Comm'rs. of Bryan Cty. v. Brown, 520 U.S. 397, 403 (1997).

(1994), will require dismissal; otherwise, the claim may then proceed. See Wallace, 549 U.S. at 394.²

Finally, plaintiff's request for dismissal of the charges against him must be dismissed without prejudice. To whatever extent plaintiff seeks to challenge the legality of his detention, his sole remedy is to file a petition for writ of habeas corpus under 28 U.S.C. § 2241 after exhausting state judicial remedies. See McNeely v. Blanas, 336 F.3d 822, 824 n.1 (9th Cir. 2003); Carden v. Montana, 626 F.2d 82, 83-84 & n.1 (9th Cir. 1980).

In sum, this action will proceed only as to plaintiff's § 1983 claim for damages for use of excessive force during arrest against Hayward police officers M. Troche, M. Miller, J. Faria and C. Norris.

CONCLUSION

For the foregoing reasons and for good cause shown,

1. The clerk shall issue summons and the United States Marshal shall serve, without prepayment of fees, copies of the complaint in this matter, all attachments thereto, and copies of this order on Hayward police officers M. Troche, M. Miller, J. Faria and C. Norris. The clerk also shall serve a copy of this order on plaintiff.

2. In order to expedite the resolution of this case, the court orders as follows:

a. No later than 90 days from the date of this order, defendants shall serve and file a motion for summary judgment or other dispositive motion.

²Plaintiff's general allegations of police and municipal negligence may be dismissed now because it is well established that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. See County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998); Davidson v. Cannon, 474 U.S. 344, 348 (1986); Daniels v. Williams, 474 U.S. 327, 328 (1986).

1 A motion for summary judgment must be supported by adequate factual
2 documentation and must conform in all respects to Federal Rule of Civil
3 Procedure 56, and must include as exhibits all records and incident reports
4 stemming from the events at issue. A motion for summary judgment also must
5 be accompanied by a Rand notice so that plaintiff will have fair, timely and
6 adequate notice of what is required of him in order to oppose the motion. Woods
7 v. Carey, Nos. 09-15548 & 09-16113, slip op. 7871, 7874 (9th Cir. July 6, 2012)
8 (notice requirement set out in Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998),
9 must be served concurrently with motion for summary judgment). A motion to
10 dismiss for failure to exhaust available administrative remedies similarly must be
11 accompanied by a Wyatt notice. Id. (notice requirement set out in Wyatt v.
12 Terhune, 315 F.3d 1108 (9th Cir. 2003), must be served concurrently with motion
13 to dismiss for failure to exhaust available administrative remedies).

14 If defendants are of the opinion that this case cannot be resolved by
15 summary judgment or other dispositive motion, they shall so inform the court
16 prior to the date their motion is due. All papers filed with the court shall be
17 served promptly on plaintiff.

18 b. Plaintiff must serve and file an opposition or statement of
19 non-opposition to the dispositive motion not more than 28 days after the motion
20 is served and filed.

21 c. Plaintiff is advised that a motion for summary judgment
22 under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your
23 case. Rule 56 tells you what you must do in order to oppose a motion for
24 summary judgment. Generally, summary judgment must be granted when there
25 is no genuine issue of material fact – that is, if there is no real dispute about any
26 fact that would affect the result of your case, the party who asked for summary
27

1 judgment is entitled to judgment as a matter of law, which will end your case.
2 When a party you are suing makes a motion for summary judgment that is
3 properly supported by declarations (or other sworn testimony), you cannot simply
4 rely on what your complaint says. Instead, you must set out specific facts in
5 declarations, depositions, answers to interrogatories, or authenticated documents,
6 as provided in Rule 56(e), that contradicts the facts shown in the defendant's
7 declarations and documents and show that there is a genuine issue of material
8 fact for trial. If you do not submit your own evidence in opposition, summary
9 judgment, if appropriate, may be entered against you. If summary judgment is
10 granted, your case will be dismissed and there will be no trial. Rand v. Rowland,
11 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc) (App. A).

12 Plaintiff also is advised that a motion to dismiss for failure to exhaust
13 available administrative remedies under 42 U.S.C. § 1997e(a) will, if granted,
14 end your case, albeit without prejudice. You must "develop a record" and present
15 it in your opposition in order to dispute any "factual record" presented by the
16 defendants in their motion to dismiss. Wyatt v. Terhune, 315 F.3d 1108, 1120
17 n.14 (9th Cir. 2003).

18 (The Rand and Wyatt notices above do not excuse defendants' obligation
19 to serve said notices again concurrently with motions to dismiss for failure to
20 exhaust available administrative remedies and motions for summary judgment.
21 Woods, slip op. at 7874.)

22 d. Defendants must serve and file a reply to an opposition not
23 more than 14 days after the opposition is served and filed.

24 e. The motion shall be deemed submitted as of the date the
25 reply is due. No hearing will be held on the motion unless the court so orders at a
26 later date.

1 3. Discovery may be taken in accordance with the Federal Rules of
2 Civil Procedure. No further court order under Federal Rule of Civil Procedure
3 30(a)(2) or Local Rule 16 is required before the parties may conduct discovery.

4 4. All communications by plaintiff with the court must be served on
5 defendants, or defendants' counsel once counsel has been designated, by mailing
6 a true copy of the document to defendants or defendants' counsel.

7 5. It is plaintiff's responsibility to prosecute this case. Plaintiff must
8 keep the court and all parties informed of any change of address and must comply
9 with the court's orders in a timely fashion. Failure to do so may result in the
10 dismissal of this action pursuant to Federal Rule of Civil Procedure 41(b).

11 SO ORDERED.

12 DATED: July 23, 2012



CHARLES R. BREYER
United States District Judge