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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STEPHEN E. EBERHARD,
Plaintiff,
v.
CALIFORNIA HIGHWAY PATROL, et al.,
Defendants.

Case No. 14-cv-01910-JD

**ORDER RE MOTION TO AMEND
SECOND AMENDED COMPLAINT,
MOTION TO AMEND THIRD
AMENDED COMPLAINT, AND
MOTION TO DISMISS THIRD
AMENDED COMPLAINT**

Re: Dkt. Nos. 73, 98, 106

Plaintiff Stephen Eberhard has filed two motions: a motion to amend the second amended complaint to allege that California Highway Patrol Captain James T. Epperson violated his First, Fourth, and Fourteenth Amendment rights, Dkt. No. 73; and a motion to amend the third amended complaint to add Sergeant Steven Lott as a defendant for allegations of First and Fourteenth Amendment violations and false arrest and imprisonment, Dkt. No. 98. Defendant Caltrans moves to dismiss the false arrest and false imprisonment allegations against it. *See* Dkt. No. 106.

BACKGROUND

The procedural and factual details of this case are set out at length in the Court’s prior orders granting motions to dismiss and will not be repeated here. *See* Dkt. Nos. 49, 79. The high-level summary is that Stephen Eberhard is a photojournalist for The Willits News (“TWN”) who covered the Willits Bypass Project, a highway construction project near Willits, California, that has attracted a number of protests. He alleges that several California Highway Patrol officers engaged in a campaign of harassment against him, which culminated in his arrest by the CHP on July 23, 2013 during a protest at the project site. He was released later that day, and on April 24, 2014, he sued the arresting officers, the California Highway Patrol, the California Department of Transportation, California Highway Patrol Chief Bridget Lott, and California Department of

1 Transportation District 1 Director Charlie Fielder. The allegations against Lott and Fielder were
2 based on a letter to the editor they sent to various newspapers defending their respective agencies'
3 roles in the arrest, and in Lott's case, another letter that she wrote to the Society of Environmental
4 Journalists defending the CHP's conduct.

5 Caltrans, Fielder, and Lott moved to dismiss Eberhard's First and Fourteenth Amendment
6 claims and his state law false imprisonment claims, and the Court granted the motion without
7 prejudice to replead. Dkt. No. 49. Eberhard filed a second amended complaint with similar
8 allegations, which the same three defendants again moved to dismiss. Dkt. Nos. 60, 67. Before
9 the Court ruled on the motion, Eberhard filed a motion to file a third amended complaint with
10 additional allegations against Caltrans, Lott, Fielder, and CHP Captain James T. Epperson, for
11 allegedly writing the letter Lott sent to the Society for Environmental Journalists. Dkt. No. 73.
12 The Court granted the motion to dismiss with a final opportunity to replead, denied the motion to
13 file a third amended complaint with respect to Caltrans, Lott, and Fielder, and did not rule on the
14 new allegations against Epperson until briefing on Eberhard's motion to amend Dkt. No. 79.

15 Eberhard then filed a Third Amended Complaint, dropping his claims against Lott and
16 Fielder and reasserting only a single state law false arrest and imprisonment claim against
17 Caltrans. *See* Dkt. No. 97. Eberhard simultaneously filed a motion to amend his third amended
18 complaint to add Sergeant Steven Lott as a defendant. *See* Dkt. No. 98.

19 On the defense side, Caltrans moved to dismiss the sole remaining claim against it -- the
20 state law false arrest claim in Eberhard's third amended complaint. *See* Dkt. No. 106. All of the
21 motions have been fully briefed.

22 **DISCUSSION**

23 **I. MOTION TO ADD ALLEGATIONS AGAINST CPT. EPPERSON**

24 Captain Epperson is the captain in charge of the Ukiah division of the CHP. Dkt. No. 73-1
25 ¶ 9. Eberhard wants to amend his complaint to allege that Epperson wrote the letter to the Society
26 of Environmental Journalists that Chief Lott signed. *Id.* ¶ 75. The Court has already determined
27 that Chief Lott's alleged involvement with the letter was insufficient to state First Amendment
28 retaliation and due process claims against her, *see* Dkt. No. 49 at 4:5-12:1, Dkt. No. 79 at 4:1-

1 7:25, and the proposed claims against Epperson fail for the same reasons. Because “[I]eave to
2 amend need not be given if a complaint, as amended, is subject to dismissal,” *Moore v. Kayport*
3 *Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989), the Court denies Eberhard’s motion to
4 amend his complaint to add allegations against Epperson.

5 **II. MOTION TO ADD SGT. LOTT AS A DEFENDANT**

6 According to Eberhard, Sgt. Steven Lott was the on-duty sergeant on the day of Eberhard’s
7 arrest. *See* Declaration of Duffy Carolan ¶ 2, Dkt. No. 98. Eberhard concedes that Lott was not
8 on the site at the time of the arrest, but says he “arrived shortly thereafter” and “assum[ed] the role
9 of incident commander,” determined that Eberhard had trespassed, and declined to intervene or to
10 order that Eberhard be cited and released rather than incarcerated. *Id.* Eberhard also alleges that a
11 recording features Lott saying, “I think it sends the wrong message when someone’s in custody
12 then release him like a little parakeet. No way was I going to send the wrong message to the
13 officers there . . . not going to send the wrong message to the protesters” *See* Dkt. No. 98-1 ¶
14 76.

15 The deadline for adding parties under the scheduling order was November 14, 2014, *see*
16 Dkt. No. 45. Consequently, Eberhard must show that there is “good cause” to modify the order to
17 allow Lott to be added as a defendant. Fed. R. Civ. P. 16(b)(4); *Johnson v. Mammoth*
18 *Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992). Eberhard argues that good cause exists
19 because he did not know about Sgt. Lott’s role until his deposition on April 25, 2015, and because
20 it took him some time to review the recording, which CHP produced on February 4, 2015.
21 Carolan Decl. ¶ 4.

22 The problem with this argument is that most of the essential facts that Eberhard relies on in
23 arguing that Sgt. Lott should be added as a defendant were known to him before the deadline to
24 add parties. In his first amended complaint, filed July 22, 2014, before the deadline for adding
25 parties expired, Eberhard alleged:

26 After about another 15 minutes [in the back of a patrol car after
27 Eberhard’s arrest], Sergeant Lott opened the door and asked
28 Eberhard how he was doing. Eberhard, said, “Sgt. Lott, it’s a
mistake to arrest the press for trying to document the story.”
Eberhard told him he should let him go. Eberhard then told Lott that

1 he had four surgeries on his shoulder and that it was hurting him bad
2 in this position. Lott did not respond to this. The two proceeded to
3 have a conversation where Eberhard conveyed that he had always
4 shown respect to him and the other CHP officers and that there was
only one time that he called out Babcock for shoving him repeatedly
on May 21, 2013, when he was with his escort. Lott smiled and said
he had heard about those prior incidents. He then closed the door
and walked back to a group of officers.

5 Dkt. No. 26 ¶ 32. Eberhard’s theory of liability with respect to Lott -- that he failed to intervene
6 and prevent Eberhard from being incarcerated -- could have been pleaded with reference to facts
7 that Eberhard has known since July 2014. Because Eberhard could have added Lott as a defendant
8 before the scheduling order deadline, no good cause exists to excuse Eberhard’s failure to name
9 Lott. The motion to amend is denied.

10 **III. MOTION TO DISMISS FALSE ARREST CLAIM AGAINST CALTRANS**

11 To survive a motion to dismiss, a complaint must include “sufficient factual matter,
12 accepted as true, to ‘state a claim for relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556
13 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although a
14 complaint to state a claim “does not need detailed factual allegations, . . . a plaintiff’s obligation to
15 provide the ‘grounds of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and
16 a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must
17 be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555

18 The only remaining claim against Caltrans in Eberhard’s third amended complaint is for
19 false arrest and false imprisonment, *see* Dkt. No. 97 ¶¶ 113-124, and related claims for declaratory
20 and injunctive relief, *see id.* ¶¶ 148-150, p. 44.

21 False imprisonment under California law is the “unlawful violation of the personal liberty
22 of another.” *Asgari v. City of Los Angeles*, 63 Cal. Rptr. 2d 842, 850 (Cal. Ct. App. 1997). False
23 arrest is not a different tort; it is merely “one way of committing a false imprisonment.” *Collins v.*
24 *City & Cnty. of San Francisco*, 123 Cal. Rptr. 525, 526 (Cal. Ct. App. 1975). “Under California
25 law, the elements of a claim for false imprisonment are: (1) the nonconsensual, intentional
26 confinement of a person, (2) without lawful privilege, and (3) for an appreciable period of time,
27 however brief.” *Young v. County of Los Angeles*, 655 F.3d 1156, 1169 (9th Cir. 2011) (quoting
28 *Easton v. Sutter Coast Hospital*, 80 Cal.App.4th 485, 496 (2000)).


1 Eberhard's third amended complaint alleges sufficient facts to proceed with a claim of
2 false arrest and false imprisonment against Caltrans. According to the complaint, an email from
3 Caltrans media representative, Matt McKeon, states that on May 13, 2013, he and a Caltrans
4 resident engineer, Geoff Wright, "told Epperson to arrest or turn away TWN videographer Tony
5 Ellis 'or anyone else' should they enter the site 'without an escort.'" Dkt. No. 97 ¶ 51. The
6 complaint says that at that time, the escort protocol applied only to Eberhard, Ellis, and TWN. *Id.*
7 In addition, the complaint alleges that on the morning Eberhard was arrested, one of the arresting
8 officers -- Kory Reynolds -- went to Caltrans transportation engineer Melanie Collins and asked if
9 Eberhard had permission to be on the site, and was told that he did not. *See id.* at 59. These
10 allegations are enough to infer -- when all inferences are drawn in Eberhard's favor, as they must
11 be on a motion to dismiss -- that Caltrans's actions were what caused CHP to arrest Eberhard, and
12 that they would not have done so if Caltrans had told them, for example, that Eberhard was
13 authorized to be on the site, or that CHP should simply turn Eberhard away instead of arresting
14 him. While Caltrans argues that it can only be liable for false arrest if its own employees did the
15 arresting, it cites no authority suggesting that the offense of false arrest under California law is so
16 limited.

17 It may well turn out that CHP was within its rights to arrest Eberhard for showing up at the
18 site without an escort, in which case Caltrans would be in the clear even if it was responsible for
19 the arrest. It may also turn out that Eberhard will be unable to prove up his allegations concerning
20 Caltrans's involvement. But there is no legal reason why the allegations in Eberhard's complaint
21 are insufficient even to proceed with a false arrest claim against Caltrans. Caltrans's motion to
22 dismiss is denied.

23 **IT IS SO ORDERED.**

24 Dated: August 10, 2015

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JAMES DONATO
United States District Judge