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THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARIA LEE KINSTLEY and
KENNETH R. KINSTLEY,

Case No. 07-02323 SBA

Plaintiffs,

ORDER
[Docket No. 77]

v.

CITY & COUNTY OF SAN
FRANCISCO, DIANNE KENNEY,
CITY OF PLEASANT HILL et al.,

Defendants.

_____ /

United States District Court
For the Northern District of California

Before the Court is the Motion to Dismiss All Claims with Prejudice, filed by Defendants City and County of San Francisco and Dianne Kenney (“San Francisco Defendants”). [Docket No. 77]. In addition to a dismissal of all of Maria Kinstley’s and Kenneth Kinstley’s claims against them with prejudice, the San Francisco Defendants further request the Court dismiss them from this case with prejudice. The motion is unopposed. For the reasons discussed herein, the Court GRANTS the motion, in part, and DENIES WITHOUT PREJUDICE, in part.

On March 6, 2008, the San Francisco Defendants “moved for dismissal with prejudice of (1) all state law claims and (2) all of plaintiffs' Fourth Amendment claims (with the exception of plaintiff Maria Lee Kinstley's excessive force claim), any Monell claim, and plaintiffs' "Civil Rights Act 440" claim in plaintiffs' Amended Complaint in this action pursuant to Federal Rule of Civil Procedure 12(b)(6).” [Docket No. 35]. The Court granted the motion, which was unopposed, and dismissed the claims without prejudice. [Docket No. 45]. The motion, and order granting the motion, clearly exclude a Fourth Amendment claim for excessive force by Maria Kinstley. This claim remains.

As to the claims that were dismissed without prejudice – all state law claims, plaintiffs' Fourth Amendment claims (with the exception of plaintiff Maria Lee Kinstley's excessive force claim), any *Monell* claim, and plaintiffs' "Civil Rights Act 440" claim – the Court now GRANTS the

1 motion to dismiss with prejudice. Pursuant to Federal Rule of Civil Procedure 41(b), if the plaintiff
2 fails to prosecute or to comply with the rules or a court order, a defendant may move to dismiss the
3 action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this
4 subdivision (b) and any dismissal not under this rule — except one for lack of jurisdiction, improper
5 venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.

6 Plaintiffs have not petitioned the Court to reinstate the dismissed claims or responded to the
7 pending Motion to Dismiss. Their inaction is a failure to prosecute the claims, and thus it is proper
8 for the Court to dismiss the claims with prejudice.

9 The motion to dismiss Maria Kinstley’s excessive force claim, however, is DENIED
10 WITHOUT PREJUDICE to filing a properly supported motion addressing the claim. The hearing
11 on the motion, scheduled for January 30, 2009, at 1:00 p.m., is VACATED.

12
13 IT IS SO ORDERED.

14
15 Dated: 1/22/09


SAUNDRA BROWN ARMSTRONG
United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 KINSTLEY ET AL et al,

5 Plaintiff,

6 v.

7 CITY & COUNTY OF SAN FRANCISCO ET
8 AL et al,

9 Defendant.

Case Number: CV07-02323 SBA

CERTIFICATE OF SERVICE

10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
11 Court, Northern District of California.

12 That on January 23, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said
13 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
14 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
15 located in the Clerk's office.

16 Maria Lee Kinstley
17 P.O. Box 126
18 Walnut Creek, CA 94597

19 Dated: January 23, 2009

Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk