

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

3 EDWARD V. RAY, JR.,

No. C 11-05550 YGR (PR)

4 Plaintiff,

ORDER OF SERVICE

5 vs.

6 A. LEAL, et al.,

7 Defendants.
_____ /

8 **INTRODUCTION**

9 Plaintiff has filed a *pro se* civil rights action pursuant to 42 U.S.C. § 1983, complaining that
10 he was subjected to improper force during the course of his arrest.

11 His motion for leave to proceed *in forma pauperis* has been granted.

12 Venue is proper because the events giving rise to the claim are alleged to have occurred in
13 Alameda County, which is located in this judicial district. *See* 28 U.S.C. § 1391(b).

14 In his complaint, Plaintiff alleges that Oakland police officers used excessive force when
15 they arrested him on August 27, 2006. He names the following Defendants from the Oakland Police
16 Department: Officer A. Leal #8587P; Officer Francis #8365P; and Officer M. Ziebrath #8281P.

17 Plaintiff seeks monetary damages.

18 **DISCUSSION**

19 **I. Plaintiff's Response to Order to Show Cause**

20 This action was originally assigned to the Honorable Susan Illston when it was filed on
21 November 17, 2011. In an Order dated March 20, 2012, Judge Illson reviewed the complaint,
22 determined that the complaint filed more than four years after the acts and omissions complained of
23 appeared to be untimely, explained that the statute of limitations problem appeared complete and
24 obvious from the face of the complaint, and directed Plaintiff to show cause why the action should
25 not be dismissed as time-barred. (Mar. 20, 2012 Order at 2-3.)

26 Plaintiff then filed a response to Judge Illson's March 20, 2012 Order. Among other things,
27 he argues that from November 2006 through July 2009, he filed "several types of various actions
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1 (e.g.) complaint forms with both Internal Affairs Dept. [and] Oakland Police [Department]"
2 (Pl.'s Response at 1.) Plaintiff claims that he also "filed two complaints with the Citizens' Police
3 Review Board" and "a Government Tort Claim in Alameda County Superior Court." (*Id.* at 2.)
4 However, he alleges his complaints "went unanswered." (*Id.*)

5 Although the Court may still have doubts whether the complaint is timely, Plaintiff's
6 statements in his response lead the Court to conclude that it cannot *sua sponte* dismiss the complaint
7 as time-barred. Plaintiff might be able to avoid a statute of limitations bar to his complaint. This is
8 *not* a determination that the complaint is timely but instead is only a determination that the Court is
9 unable at this point to conclusively determine that the complaint is barred by the statute of
10 limitations.

11 Accordingly, the Court will now conduct an initial review under 28 U.S.C. § 1915A on the
12 complaint.

13 **II. Initial Review of Complaint**

14 **A. Standard of Review**

15 A federal court must engage in a preliminary screening of any case in which a prisoner seeks
16 redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C.
17 §1915A(a). The court must identify any cognizable claims, and dismiss any claims which are
18 frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief
19 from a defendant who is immune from such relief. *See* 28 U.S.C. §1915A(b)(1),(2).

20 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right
21 secured by the Constitution or laws of the United States was violated and (2) that the violation was
22 committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48
23 (1988).

24 **B. Excessive Force Claim**

25 A claim that a law enforcement officer used excessive force in the course of an arrest or
26 other seizure is analyzed under the Fourth Amendment reasonableness standard. *See Graham v.*
27 *Connor*, 490 U.S. 386, 394-95 (1989); *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir.
28 1994), *cert. denied*, 513 U.S. 1152 (1995). "Determining whether the force used to effect a

1 particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the
2 nature and quality of the intrusion on the individual's Fourth Amendment interests' against the
3 countervailing governmental interests at stake." *See Graham*, 490 U.S. at 396 (citations omitted).

4 Plaintiff alleges that he was subjected to excessive force during the course of his arrest by
5 Defendants Leal, Francis, and Ziebrath on August 27, 2006. Specifically, Plaintiff alleges that
6 around 1:30 pm, Defendants used excessive force against him after conducting a traffic stop of the
7 car he was driving near the intersection of East 12th Street and 3rd Avenue. He claims that
8 Defendants' actions caused him to sustain injuries.

9 Liberally construed, Plaintiff's complaint states a cognizable claim against Defendants Leal,
10 Francis, and Ziebrath for a Fourth Amendment violation.

11 CONCLUSION

12 For the foregoing reasons, the Court orders as follows:

- 13 1. Plaintiff states a cognizable Fourth Amendment claim for the use of excessive force
14 against Defendants Leal, Francis, and Ziebrath.
- 15 2. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of
16 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint and
17 all attachments thereto (docket no. 1) and a copy of this Order to **Oakland Police Officers A. Leal**
18 **#8587P, Francis #8365P, and M. Ziebrath #8281P**. The Clerk of the Court shall also mail a copy
19 of the complaint and a copy of this Order to the City Attorney's Office in Oakland. Additionally,
20 the Clerk shall mail a copy of this Order to Plaintiff.
- 21 3. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure requires
22 them to cooperate in saving unnecessary costs of service of the summons and complaint. Pursuant
23 to Rule 4, if Defendants, after being notified of this action and asked by the Court, on behalf of
24 Plaintiff, to waive service of the summons, fail to do so, they will be required to bear the cost of
25 such service unless good cause be shown for their failure to sign and return the waiver form. If
26 service is waived, this action will proceed as if Defendants had been served on the date that the
27 waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve
28 and file an answer before **sixty-three (63) days** from the date on which the request for waiver was

1 sent. (This allows a longer time to respond than would be required if formal service of summons is
2 necessary.) Defendants are asked to read the statement set forth at the foot of the waiver form that
3 more completely describes the duties of the parties with regard to waiver of service of the summons.
4 If service is waived after the date provided in the Notice but before Defendants have been
5 personally served, the Answer shall be due **sixty-three (63) days** from the date on which the request
6 for waiver was sent or **twenty-one (21) days** from the date the waiver form is filed, whichever is
7 later.

8 4. Defendants shall answer the complaint in accordance with the Federal Rules of Civil
9 Procedure. The following briefing schedule shall govern dispositive motions in this action:

10 a. No later than **ninety-one (91) days** from the date their answer is due,
11 Defendants shall file a motion for summary judgment or other dispositive motion. The motion must
12 be supported by adequate factual documentation, must conform in all respects to Federal Rule of
13 Civil Procedure 56, and must include as exhibits all records and incident reports stemming from the
14 events at issue. A motion for summary judgment also must be accompanied by a *Rand*¹ notice so
15 that Plaintiff will have fair, timely and adequate notice of what is required of him in order to oppose
16 the motion. *Woods v. Carey*, 684 F.3d 934, 935 (9th Cir. 2012) (notice requirement set out in *Rand*
17 must be served concurrently with motion for summary judgment). A motion to dismiss for failure to
18 exhaust available administrative remedies must be accompanied by a similar notice. *Stratton v.*
19 *Buck*, 697 F.3d 1004, 1008 (9th Cir. 2012); *Woods*, 684 F.3d at 935 (notice requirement set out in
20 *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003), must be served concurrently with motion to
21 dismiss for failure to exhaust available administrative remedies).

22 If Defendants are of the opinion that this case cannot be resolved by summary judgment,
23 they shall so inform the Court prior to the date the summary judgment motion is due. All papers
24 filed with the Court shall be promptly served on Plaintiff.

25 b. Plaintiff's opposition to the dispositive motion shall be filed with the Court
26 and served on Defendants no later than **sixty-three (63) days** after the date on which Defendants'

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¹ *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998).

1 motion is filed.

2 c. Plaintiff is advised that a motion for summary judgment under Rule 56 of the
3 Federal Rules of Civil Procedure will, if granted, end your case. Rule 56 tells you what you must do
4 in order to oppose a motion for summary judgment. Generally, summary judgment must be granted
5 when there is no genuine issue of material fact -- that is, if there is no real dispute about any fact that
6 would affect the result of your case, the party who asked for summary judgment is entitled to
7 judgment as a matter of law, which will end your case. When a party you are suing makes a motion
8 for summary judgment that is properly supported by declarations (or other sworn testimony), you
9 cannot simply rely on what your complaint says. Instead, you must set out specific facts in
10 declarations, depositions, answers to interrogatories, or authenticated documents, as provided in
11 Rule 56(e), that contradicts the facts shown in the defendant's declarations and documents and show
12 that there is a genuine issue of material fact for trial. If you do not submit your own evidence in
13 opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is
14 granted, your case will be dismissed and there will be no trial. *Rand*, 154 F.3d at 962-63.

15 Plaintiff also is advised that a motion to dismiss for failure to exhaust available
16 administrative remedies under 42 U.S.C. § 1997e(a) will, if granted, end your case, albeit without
17 prejudice. You must "develop a record" and present it in your opposition in order to dispute any
18 "factual record" presented by the defendants in their motion to dismiss. *Wyatt*, 315 F.3d at 1120
19 n.14. You have the right to present any evidence to show that you did exhaust your available
20 administrative remedies before coming to federal court. Such evidence may include:
21 (1) declarations, which are statements signed under penalty of perjury by you or others who have
22 personal knowledge of relevant matters; (2) authenticated documents -- documents accompanied by
23 a declaration showing where they came from and why they are authentic, or other sworn papers such
24 as answers to interrogatories or depositions; (3) statements in your complaint insofar as they were
25 made under penalty of perjury and they show that you have personal knowledge of the matters state
26 therein. In considering a motion to dismiss for failure to exhaust, the court can decide disputed
27 issues of fact with regard to this portion of the case. *Stratton*, 697 F.3d at 1008-09.

28 (The *Rand* and *Wyatt/Stratton* notices above do not excuse Defendants' obligation to serve

1 said notices again concurrently with motions to dismiss for failure to exhaust available
2 administrative remedies and motions for summary judgment. *Woods*, 684 F.3d at 935.)

3 d. Defendants shall file a reply brief no later than **twenty-eight (28) days** after
4 the date Plaintiff's opposition is filed.

5 e. The motion shall be deemed submitted as of the date the reply brief is due.
6 No hearing will be held on the motion unless the Court so orders at a later date.

7 5. Discovery may be taken in this action in accordance with the Federal Rules of Civil
8 Procedure. Leave of the Court pursuant to Rule 30(a)(2) is hereby granted to Defendants to depose
9 Plaintiff and any other necessary witnesses confined in prison.

10 6. All communications by Plaintiff with the Court must be served on Defendants, or
11 Defendants' counsel once counsel has been designated, by mailing a true copy of the document to
12 Defendants or Defendants' counsel.

13 7. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
14 informed of any change of address and must comply with the Court's orders in a timely fashion.
15 Pursuant to Northern District Local Rule 3-11 a party proceeding *pro se* whose address changes
16 while an action is pending must promptly file a notice of change of address specifying the new
17 address. *See* L.R. 3-11(a). The Court may dismiss without prejudice a complaint when: (1) mail
18 directed to the *pro se* party by the Court has been returned to the Court as not deliverable, and
19 (2) the Court fails to receive within sixty days of this return a written communication from the *pro*
20 *se* party indicating a current address. *See* L.R. 3-11(b).

21 8. Extensions of time are not favored, though reasonable extensions will be granted.
22 Any motion for an extension of time must be filed no later than **fourteen (14) days** prior to the
23 deadline sought to be extended.

24 IT IS SO ORDERED.

25 DATED: February 19, 2013


YVONNE GONZALEZ ROGERS

UNITED STATES DISTRICT COURT JUDGE