

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

NATHANIEL L. HALL,
Plaintiff,

No. C 11-06284 YGR (PR)

ORDER OF SERVICE

vs.

OFFICER G. CLEAVER, et al.,
Defendants.

INTRODUCTION

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

His motion for leave to proceed *in forma pauperis* will be granted in a separate written Order.

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

In his complaint, Plaintiff names the following Defendants: San Jose Police Department Officers Michael Kodres and Gregg Cleaver. Plaintiff seeks monetary damages.

DISCUSSION

I. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *Id.* § 1915A(b)(1), (2). *Pro se* pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:

- (1) that a right secured by the Constitution or laws of the United States was violated, and
- (2) that the alleged violation was committed by a person acting under the color of state law. *West v.*

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1 *Atkins*, 487 U.S. 42, 48 (1988).

2 **II. Legal Claims**

3 **A. Excessive Force**

4 A claim that a law enforcement officer used excessive force in the course of an arrest or
5 other seizure is analyzed under the Fourth Amendment reasonableness standard. *See Graham v.*
6 *Connor*, 490 U.S. 386, 394-95 (1989); *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir.
7 1994), *cert. denied*, 513 U.S. 1152 (1995). "Determining whether the force used to effect a
8 particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the
9 nature and quality of the intrusion on the individual's Fourth Amendment interests' against the
10 countervailing governmental interests at stake." *See Graham*, 490 U.S. at 396 (citations omitted).

11 Plaintiff alleges that he was subjected to excessive force during the course of his arrest by
12 Defendants Cleaver and Kodres on August 7, 2010. Specifically, Plaintiff alleges that Defendant
13 Kodres "grabbed Plaintiff by his shoulder & used a martial art[s] kick, kicking Plaintiff[s] legs from
14 under him, causing Plaintiff to land on his back causing injury to Plaintiff[s] head [which] hit the
15 ground and his right index finger to be injured [sic]." (Compl. at 3.) Plaintiff's allegations imply
16 that Defendant Cleaver failed to intervene. (*Id.*) He claims that Defendants' actions caused him to
17 sustain injuries and that the "tip of [his] finger" had to be amputated. (*Id.* at 3-3a.)

18 Liberally construed, Plaintiff's complaint states a cognizable claim against Defendants
19 Cleaver and Kodres for a Fourth Amendment violation.

20 **CONCLUSION**

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

22 1. Plaintiff states a cognizable Fourth Amendment claim for the use of excessive force
23 against Defendants Cleaver and Kodres.

24 2. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of
25 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint and
26 all attachments thereto (docket no. 1) and a copy of this Order to **San Jose Police Department**
27 **Officers Gregg Cleaver # 3516 and Michael Kodres # 3914**. The Clerk of the Court shall also
28 mail a copy of the complaint and a copy of this Order to the City Attorney's Office in San Jose.

1 Additionally, the Clerk shall mail a copy of this Order to Plaintiff.

2 3. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure requires
3 them to cooperate in saving unnecessary costs of service of the summons and complaint. Pursuant
4 to Rule 4, if Defendants, after being notified of this action and asked by the Court, on behalf of
5 Plaintiff, to waive service of the summons, fail to do so, they will be required to bear the cost of
6 such service unless good cause be shown for their failure to sign and return the waiver form. If
7 service is waived, this action will proceed as if Defendants had been served on the date that the
8 waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve
9 and file an answer before **sixty (60) days** from the date on which the request for waiver was sent.
10 (This allows a longer time to respond than would be required if formal service of summons is
11 necessary.) Defendants are asked to read the statement set forth at the foot of the waiver form that
12 more completely describes the duties of the parties with regard to waiver of service of the summons.
13 If service is waived after the date provided in the Notice but before Defendants have been
14 personally served, the Answer shall be due **sixty (60) days** from the date on which the request for
15 waiver was sent or **twenty (20) days** from the date the waiver form is filed, whichever is later.

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

18 a. No later than **ninety (90) days** from the date their answer is due, Defendants
19 shall file a motion for summary judgment or other dispositive motion. The motion shall be
20 supported by adequate factual documentation and shall conform in all respects to Federal Rule of
21 Civil Procedure 56. If Defendants are of the opinion that this case cannot be resolved by summary
22 judgment, they shall so inform the Court prior to the date the summary judgment motion is due. All
23 papers filed with the Court shall be promptly served on Plaintiff.

24 b. Plaintiff's opposition to the dispositive motion shall be filed with the Court
25 and served on Defendants no later than **sixty (60) days** after the date on which Defendants' motion
26 is filed. The Ninth Circuit has held that the following notice should be given to *pro se* plaintiffs
27 facing a summary judgment motion:

28 The defendant has made a motion for summary judgment by which they seek

1 to have your case dismissed. A motion for summary judgment under Rule 56 of the
Federal Rules of Civil Procedure will, if granted, end your case.

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

10 *See Rand v. Rowland*, 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc).

11 Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and *Celotex*
12 *Corp. v. Catrett*, 477 U.S. 317 (1986) (party opposing summary judgment must come forward with
13 evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is
14 cautioned that because he bears the burden of proving his allegations in this case, he must be
15 prepared to produce *evidence* in support of those allegations when he files his opposition to
16 Defendants' dispositive motion. Such evidence may include sworn declarations from himself and
17 other witnesses to the incident, and copies of documents authenticated by sworn declaration.
18 Plaintiff will not be able to avoid summary judgment simply by repeating the allegations of his
19 complaint.

20 c. Defendants shall file a reply brief no later than **thirty (30) days** after the date
21 Plaintiff's opposition is filed.

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

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

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

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Defendants or Defendants' counsel.

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

8. Extensions of time are not favored, though reasonable extensions will be granted. Any motion for an extension of time must be filed no later than **fifteen (15) days** prior to the deadline sought to be extended.

IT IS SO ORDERED.

DATED: February 9, 2012


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE