

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ARGELIO LOZANO,
Plaintiff,
v.
CITY OF SAN PABLO,
Defendant.

Case No.: 4:14-cv-00898 KAW
ORDER GRANTING MOTION TO DISMISS
WITH LEAVE TO AMEND

The City of San Pablo moves to dismiss Argelio Lozano's complaint. The motion has been fully briefed and is suitable for disposition without hearing pursuant to Civil Local Rule 7-1(b). For the reasons set forth below, the motion is granted with leave to amend.

I. BACKGROUND

A. Factual background

On April 25, 2010, San Pablo Police Department officers were in foot pursuit of Argelio Lozano ("Plaintiff"), who was suspected of automobile theft. (Compl. ¶ 5, Dkt. No. 1.) A police canine unit officer ordered Plaintiff to stop and get down on the ground. (Id. ¶ 6.) Plaintiff complied, got down on the ground, and put his hands behind his head. (Id. ¶ 7.) At that point, the police canine ran toward Plaintiff, who was not resisting arrest,¹ and bit his right underarm, puncturing an artery. (Id.)

¹ Though Plaintiff alleges that he was not resisting arrest, the City of San Pablo ("City") indicates in its opposition that Plaintiff was convicted for multiple offenses, including resisting arrest, stemming from the events that occurred on August 25, 2010. The City, however, did not request that the Court take judicial notice of any documents relating to that conviction. As a result, the Court has not considered this information in ruling on the instant motion. Nonetheless, the Court notes that in the event the City does submit a proper request for judicial notice in connection with a future dispositive motion, there may be a question as to whether Plaintiff's § 1983 claim has accrued at all. See Heck v. Humphrey, 512 U.S. 477 (1994).

1 Plaintiff requested medical attention and was taken to a hospital. (Id. ¶¶ 8, 9.) En route,
2 he "expired due to a loss of blood and was resuscitated." (Id. ¶ 9.) Plaintiff underwent
3 emergency surgery and remained in critical condition after suffering organ failure as a result of
4 blood loss due to the dog bite. (Id. ¶ 11.) His right arm, right hand, and fingers are now "almost
5 completely disabled" (Id. ¶ 12.)

6 **B. Procedural background**

7 On February 27, 2014, Plaintiff filed his complaint, in which he alleges violations of the
8 Fourth and Fourteenth Amendments² based on the use of excessive force during his arrest. (Id. ¶
9 14.) He also asserts that such use of force stems from an established policy, practice, or custom
10 and that the City knew that canine units "have operated and continue to operate in such a way as
11 to deprive numerous individuals of their constitutional rights" (Id. ¶ 15.) On April 1, 2014,
12 the City moved to dismiss the complaint for failure to state a claim upon which relief can be
13 granted. (Def.'s Mot., Dkt. No. 10.) Plaintiff's opposition followed on April 2, 2014, and the City
14 filed its reply on April 22, 2014. (Pl.'s Opp'n, Dkt. No. 15; Def.'s Reply, Dkt. No. 16.)

15 **II. LEGAL STANDARD**

16 Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss
17 based on the failure to state a claim upon which relief may be granted. A motion to dismiss
18 under Rule 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint.
19 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

20 In considering such a motion, the court must "accept as true all of the factual
21 allegations contained in the complaint," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per
22 curiam) (citation omitted), and may dismiss the case or a claim "only where there is no
23 cognizable legal theory" or there is an absence of "sufficient factual matter to state a facially
24 plausible claim to relief." *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035,
25 1041 (9th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Navarro*, 250
26 F.3d at 732).

27
28 ² Plaintiff has withdrawn his Fourteenth Amendment claim. Pl.'s Opp'n at 5.

1 A claim is plausible on its face when a plaintiff "pleads factual content that allows
2 the court to draw the reasonable inference that the defendant is liable for the misconduct
3 alleged." Iqbal, 556 U.S. at 678 (citation omitted). In other words, the facts alleged must
4 demonstrate "more than labels and conclusions, and a formulaic recitation of the elements of
5 a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).
6 "Threadbare recitals of the elements of a cause of action" and "conclusory statements" are
7 inadequate. Iqbal, 556 U.S. at 678; see also Epstein v. Wash. Energy Co., 83 F.3d 1136,
8 1140 (9th Cir. 1996) ("[C]onclusory allegations of law and unwarranted inferences are
9 insufficient to defeat a motion to dismiss for failure to state a claim."). "The plausibility
10 standard is not akin to a probability requirement, but it asks for more than a sheer possibility
11 that a defendant has acted unlawfully. . . . When a complaint pleads facts that are merely
12 consistent with a defendant's liability, it stops short of the line between possibility and
13 plausibility of entitlement to relief." Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at
14 557).

15 "When a motion to dismiss is based on the running of the statute of limitations, it can
16 be granted only if the assertions of the complaint, read with the required liberality, would not
17 permit the plaintiff to prove that the statute was tolled." Jablon v. Dean Witter & Co., 614
18 F.2d 677, 682 (9th Cir. 1980.)

19 Generally, if the court grants a motion to dismiss, it should grant leave to amend even if
20 no request to amend is made "unless it determines that the pleading could not possibly be cured
21 by the allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (citations
22 omitted).

23 III. DISCUSSION

24 A. Plaintiff fails to state a claim upon which relief can be granted.

25 The City seeks dismissal of the complaint without leave to amend. (Def.'s Mot. at 1.) It
26 argues that Plaintiff fails to state a claim upon which relief can be granted because his claims are
27 time-barred, having been filed nearly four years after the events complained of occurred and thus
28 well outside the governing two-year statute of limitations. (Id. at 2.)

1 In opposition, Plaintiff argues that his claims are not time-barred. (Pl.'s Opp'n at 2.) He
2 asserts that pursuant to California Civil Code section 352.1, the applicable statute of limitations
3 was tolled for an additional two years because Plaintiff has been incarcerated since his April 25,
4 2010 arrest.³ (Id.) On these grounds, he claims that his February 27, 2014 was filed within the
5 two-year tolling period.

6 Section 1983 contains no independent statute of limitations. *Wallace v. Kato*, 549 U.S.
7 384, 387 (2007); *Azer v. Connell*, 306 F.3d 930, 935-36 (9th Cir. 2001). "Instead, the applicable
8 limitation period is determined by borrowing the forum state's limitation period, including its
9 tolling provisions, for the most analogous personal injuries." *Ellis v. City of San Diego*, 176 F.3d
10 1183, 1188 (9th Cir. 1999) (citation omitted). In California, the statute of limitations for personal
11 injury actions is two years. Cal. Civ. Proc. Code § 335.1; *Maldonado v. Harris*, 370 F.3d 945,
12 954 (9th Cir. 2004). California Code of Civil Procedure section 352.1 provides that this two-year
13 statute of limitations may be tolled for an additional two years if the "person entitled to bring the
14 action is, at the time the cause of action accrued, imprisoned on a criminal charge"

15 As the City points out in its reply, Plaintiff's complaint does not provide a factual or legal
16 basis for tolling the applicable statute of limitations. (Def.'s Reply at 2.) The factual allegations
17 in the complaint are as follows:

18 5. On or around April 25, 2010, the plaintiff was a suspect in an auto-theft
and was being pursued by the defendants.

19 6. During a foot chase, the plaintiff was ordered to stop by the defendant
20 who was a K9 Unit officer and he was ordered to surrender and get down on the
ground.

21 7. The plaintiff complied with the defendant's order to get down on the
22 ground and put his hands behind his head. At that time, the K9 that the defendant
was in charge of handling ran toward the plaintiff who was not resisting arrest, and
23 bit him under his right arm-pit, puncturing an artery.

24 8. The defendant subsequently removed the K9 away from the plaintiff and
observed that the plaintiff was bleeding profusely and asking for the defendant to
25 get him medical attention.

26 9. The plaintiff was subsequently taken to a hospital, and while on the way
to the hospital the plaintiff expired due to a loss of blood and was resuscitated.

27 _____
28 ³ The complaint contains no allegations regarding tolling and makes no mention of Plaintiff's
incarceration for any criminal charges stemming from the April 25, 2010 arrest.

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10. The plaintiff was taken to a hospital trauma center where he immediately underwent surgery.

11. The plaintiff was then placed in critical condition after suffering organ failure as a result of the loss of blood due to the police dog bite.

12. The plaintiff's right arm, right hand and fingers are almost completely disabled as a result of the police dog bite.

These allegations, even when taken as true, do not support Plaintiff's assertion, found only in his opposition, that tolling applies because he "has been incarcerated from the time of his arrest to this present date." (See Pl.'s Opp'n at 4.) Thus, the complaint, in its current form, must be dismissed for failure to state a claim upon which relief can be granted. See Jablon, 614 F.2d at 682. The events giving rise to Plaintiff's § 1983 claim occurred on April 25, 2010. (Compl. ¶ 5.) Yet, Plaintiff did not file his complaint until February 27, 2014, well outside the standard two-year statute of limitations period.


Accordingly, Plaintiff's complaint is dismissed for failure to state a claim upon which relief can be granted. The Court, however, grants Plaintiff leave to amend the complaint to include a proper factual and legal basis that would support tolling. Thus, to the extent Plaintiff wishes to rely on his continuous incarceration to establish tolling, he shall include appropriate allegations in the complaint.

IV. CONCLUSION

For the reasons set forth above, the City's motion is granted with leave to amend. Plaintiff shall file an amended complaint within 14 days of this order.

IT IS SO ORDERED.

Dated: May 9, 2014


KANDIS A. WESTMORE
United States Magistrate Judge