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NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JESSE GRANT III,)	No. C 07-06191 JF (PR)
)	
Plaintiff,)	ORDER OF SERVICE; ORDER
)	DIRECTING DEFENDANTS TO
vs.)	FILE DISPOSITIVE MOTION OR
)	NOTICE REGARDING SUCH
W. CHEA, et al.,)	MOTION; INSTRUCTIONS TO
)	CLERK
Defendants.)	
)	(Docket No. 7)

Plaintiff, a state prisoner proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff has been granted leave to proceed in forma pauperis in a separate written order. (See Docket No. 4.) Accordingly, Plaintiff’s motion to proceed in forma pauperis (Docket No. 7) is DENIED as moot. Plaintiff’s original complaint was dismissed with leave to amend. Plaintiff’s amended complaint is now before the Court for initial review pursuant to 28 U.S.C. § 1915A.

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DISCUSSION

A. 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. See 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. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. See 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. See West v. Atkins, 487 U.S. 42, 48 (1988).

B. Plaintiff's Claims

Plaintiff alleges that defendant Sergeant Maharaj of the Milpitas Police Department came to his house in Hayward accompanied by two officers: Officer W. Chea from the Alameda County Sheriff's Department and Officer Varela from the Hayward Police Department. After learning from Plaintiff's wife that Plaintiff was out riding his motorcycle, Maharaj dispatched this fact to the other police officers. By chance Plaintiff was riding past his house at the time, and Officers Chea and Varela got in a patrol car to follow him. Plaintiff alleges that the officers, without warning, struck Plaintiff's motorcycle twice from behind, causing Plaintiff numerous injuries. Liberally construed, this claim of excessive force by police officers is cognizable under § 1983. See Graham v. Connor, 490 U.S. 386, 394-95 (1989). The Court will order service of the complaint on the Defendants Chea and Varela.

With respect to Sergeant Maharaj, the allegations indicate that he was at Plaintiff's house radioing the other officers, and not in the cars that allegedly struck Plaintiff's

1 motorcycle. There is no allegation or indication that Maharaj ordered the other officers to
2 strike Plaintiff's motorcycle, knew that they would strike him, or otherwise proximately
3 caused them to strike him. Plaintiff was advised in the Court's previous order of
4 dismissal that naming the police and sheriff's departments does not suffice to plead a §
5 1983 claim because there is no respondeat superior liability under § 1983, and plaintiff
6 has not alleged that the use of force was pursuant to a policy or practice. See Monell v.
7 Dep't of Social Servs., 436 U.S. 658, 690 (1978) (rejecting concept of respondeat
8 superior liability in § 1983 context, and requiring a policy or practice to establish liability
9 of municipal entity). Accordingly, Defendant Maharaj is **DISMISSED** as a party from
10 this action.

11 Furthermore, defendants not named in an amended complaint are no longer
12 defendants. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir.1992). Accordingly,
13 the Milpitas Police Department, the Hayward Police Department and the Alameda County
14 Sheriff Department are **DISMISSED** from the instant action.

16 CONCLUSION

17 For the reasons stated above, the Court orders as follows:

18 1. The Clerk of the Court shall issue summons and the United States Marshal
19 shall serve, without prepayment of fees, a copy of the first amended complaint (Docket
20 No. 6), all attachments thereto, and a copy of this order upon the Officer W. Chea at the
21 Alameda County Sheriff's Department and Officer Varela at the Hayward Police
22 Department. The Clerk shall also mail courtesy copies of the complaint and this order to
23 the California Attorney General's Office.

24 2. No later than **sixty (60) days** from the date of this order, Defendants shall
25 file a motion for summary judgment or other dispositive motion with respect to the claim
26 in the complaint as set forth above.

27 a. If Defendants elect to file a motion to dismiss on the grounds that
28 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.

1 § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to
2 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.
3 Terhune, 540 U.S. 810 (2003).

4 b. Any motion for summary judgment shall be supported by adequate
5 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
6 Civil Procedure. **Defendants are advised that summary judgment cannot be granted,**
7 **nor qualified immunity found, if material facts are in dispute. If any Defendant is of**
8 **the opinion that this case cannot be resolved by summary judgment, he shall so**
9 **inform the Court prior to the date the summary judgment motion is due.**

10 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court
11 and served on Defendants no later than **thirty (30) days** from the date Defendants'
12 motion is filed.

13 a. In the event Defendants file an unenumerated motion to dismiss
14 under Rule 12(b), Plaintiff is hereby cautioned as follows:¹

15 The Defendants have made a motion to dismiss pursuant to Rule
16 12(b) of the Federal Rules of Civil Procedure, on the ground you have not
17 exhausted your administrative remedies. The motion will, if granted, result
18 in the dismissal of your case. When a party you are suing makes a motion
19 to dismiss for failure to exhaust, and that motion is properly supported by
20 declarations (or other sworn testimony) and/or documents, you may not
21 simply rely on what your complaint says. Instead, you must set out specific
22 facts in declarations, depositions, answers to interrogatories, or documents,
23 that contradict the facts shown in the Defendant's declarations and
24 documents and show that you have in fact exhausted your claims. If you do
25 not submit your own evidence in opposition, the motion to dismiss, if
26 appropriate, may be granted and the case dismissed.

27 b. In the event Defendants file a motion for summary judgment, the
28 Ninth Circuit has held that the following notice should be given to Plaintiffs:

The defendants have made a motion for summary judgment by
which they seek 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.

¹The following notice is adapted from the summary judgment notice to be given to pro se
prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See
Wyatt v. Terhune, 315 F.3d at 1120 n.14.

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

17 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
18 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477
19 U.S. 317 (1986) (holding party opposing summary judgment must come forward with
20 evidence showing triable issues of material fact on every essential element of his claim).
21 Plaintiff is cautioned that failure to file an opposition to Defendants' motion for summary
22 judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and
23 granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52,
24 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

25 4. Defendants shall file a reply brief no later than **fifteen (15) days** after
26 Plaintiff's opposition is filed.

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

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

4 7. Discovery may be taken in accordance with the Federal Rules of Civil
5 Procedure. No further Court order is required before the parties may conduct discovery.

6 8. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
7 Court informed of any change of address and must comply with the Court's orders in a
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1 timely fashion. Failure to do so may result in the dismissal of this action for failure to
2 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

3 This order terminates Docket No. 7.

4 IT IS SO ORDERED.

5 DATED: 11/12/08



JEREMY FOGEL
United States District Judge

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