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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ELIEL PAULINO,  
Plaintiff,  
v.  
MARCO CRUZ, GERARDO SILVA,  
AND GURBAKSH SOHAL,  
Defendants.

Case No. 16-cv-02642-NC

**ORDER DENYING DEFENDANTS’  
MOTION FOR SUMMARY  
JUDGMENT**

Re: Dkt. No. 49

Plaintiff Eliel Paulino claims that San Jose Police Officers Marco Cruz, Gerardo Silva, and Gurbaksh Sohal violated his rights under the Fourth Amendment and various state laws when they arrested Paulino by taking him to the ground and striking him with batons. The defendant officers moved for summary judgment on all of Paulino’s claims, arguing that the force they used was reasonable as a matter of law and that qualified immunity shields them from liability. Fatal to defendants’ motion, however, the material facts of the case are far from undisputed. Most importantly, the parties dispute whether Paulino took a “preassaultive” stance and actively resisted Officer Cruz’s initial attempt at arrest by withdrawing his arm, and whether Paulino intentionally withheld his right arm from the officers to avoid being handcuffed when he was on the ground. Because a reasonable jury could find for either party on these factual issues, summary judgment must be denied.

**I. BACKGROUND**

On August 16, 2015, around 2:00 a.m., Officers Sohal and Silva were on patrol in a two-man vehicle near Cadillac Drive and Winchester Street in San Jose. Dkt. No. 49-2 at Case No. 16-cv-02642-NC

1 9–11. Defendants claim they knew this area was frequented by gang members and often  
2 had drug-related crime. Dkt. No. 49-3 at 8–9. The officers spotted Paulino’s vehicle and  
3 initiated a stop because the rear license plate light was not functioning. Dkt. Nos. 49-2 at  
4 12, 49-3 at 8. Paulino drove into a parking lot behind an apartment complex at 3137  
5 Cadillac Drive and pulled into a parking space, with Officers Sohal and Silva following  
6 behind in the patrol car. Dkt. No. 49-2 at 13.

7 A video<sup>1</sup> captures the remainder of the incident, beginning with Paulino and the two  
8 officers entering the parking lot. Dkt. No. 50 (“Video”). The video is visible, albeit dark,  
9 but no sound is audible.

10 Once Paulino parked, Officer Silva instructed Paulino to stay in his vehicle while  
11 Officer Sohal searched the parking lot for other possible suspects. Dkt. No. 49-2 at 17.  
12 Paulino complied with the order. Dkt. No. 49-2 at 17. When Officer Sohal returned,  
13 Officer Silva instructed Paulino to exit his vehicle and approach the officers, which he did.  
14 Dkt. No. 49-2 at 17–18. Officer Silva asked Paulino, in Spanish, whether he was drunk,  
15 and Paulino told him he was. Dkt. No. 49-4 at 24. The officers asked for identification,  
16 and Paulino gave them his Mexican Consulate card. Dkt. No. 49-4 at 24–25. Officer  
17 Sohal then pat searched Paulino, who was cooperative, and found no weapons. Dkt. No.  
18 49-3 at 13–14. Shortly thereafter, Officer Cruz arrived on scene. Video at 5:30. Officer  
19 Cruz stood next to Paulino, who was leaning on the patrol vehicle’s front panel, while  
20 Officer Sohal searched Paulino’s vehicle and Officer Silva ran Paulino’s information in the  
21 patrol vehicle computer. Video at 6:55–7:30; Dkt. No. 49-3 at 16–17.

22 During these events, a man later identified as Paulino’s father, Jose Luis Paulino  
23 Norberto, was talking and yelling from a window in the nearby apartment building. Dkt.  
24 No. 49-3 at 18, 53. Paulino began talking with his father in Spanish, which Officer Cruz  
25 does not understand. Dkt. No. 49-3 at 56–58. Officer Cruz instructed Paulino to stop  
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28 <sup>1</sup> The video is from a security surveillance camera installed by Juan Ramirez, a resident at  
the apartment complex where the incident took place. Dkt. No. 49-4 at 10–12. Ramirez  
also provided witness testimony. Dkt. No. 49-4 at 1–15.

1 talking, but Paulino continued speaking to his father in Spanish. Dkt. Nos. 49-3 at 57–58,  
2 49-4 at 31–32.

3 The parties disagree on the details of what happened next, but the video shows the  
4 following. Officer Cruz walks closer to Paulino and reaches for Paulino’s arm, seemingly  
5 in an attempt to handcuff him. Officer Cruz does not immediately get the handcuffs on  
6 and continues to grab at Paulino’s arms, and both men stumble back along the patrol car  
7 toward the front passenger door, which sits ajar. The other two officers quickly move to  
8 the scene. Paulino hits the passenger door with his body and nearly falls, at which point  
9 Officer Silva jabs Paulino with a baton. Officer Silva steps away from the struggle as  
10 Officers Cruz and Sohal work to bring Paulino to the ground. Paulino winds up on the  
11 ground with Officer Cruz on top of him. The video is too dark to ascertain many more  
12 details, but while Paulino is on the ground, Officer Sohal strikes Paulino with his baton  
13 several times, pausing occasionally and reaching down toward Paulino. Officer Silva  
14 returns to the struggle, and the three officers restrain Paulino. Video at 8:55–10:20.

15 Defendants assert that before Officer Cruz initially tried to handcuff Paulino,  
16 Paulino took a “preassaultive” stance and clenched his fists. Dkt. No. 49 at 11. When  
17 Officer Cruz reached for Paulino’s arm, defendants claim Paulino drew back and  
18 prevented his arm from being handcuffed. Dkt. No. 49 at 11. They also assert that, even if  
19 Paulino did not intend to resist Cruz’s efforts at arrest, Paulino’s body weight falling away  
20 from Officer Cruz gave the impression of resistance. Dkt. No. 49 at 11. After bringing  
21 Paulino to the ground, defendants allege Officer Cruz “placed his left shin across  
22 Plaintiff’s back to keep him from getting up” while Officer Sohal attempted to gain control  
23 of Paulino’s right arm. Dkt. No. 49 at 13. According to defendants, Paulino actively  
24 prevented Officer Sohal from accessing his right arm by keeping it underneath his body,  
25 and Officer Sohal responded by striking Paulino with his baton to induce Paulino’s  
26 cooperation. Eventually, defendants claim, Paulino relented by saying “okay, okay” and  
27 giving up his arm. Dkt. No. 49 at 13.

28 Paulino offers a different version of the facts. According to him, he did not resist

1 Officer Cruz’s initial attempt to handcuff him, and he fell backward inadvertently because  
2 his feet were tangled and he lost his balance. Dkt. No. 53 at 9. After stumbling backward  
3 and hitting the patrol car’s front passenger door, Paulino claims he was “thrown to the  
4 ground” and landed face down before Officer Sohal “arrived and put his knee on  
5 [Paulino’s] back and hit him very hard with the baton.” Dkt. No. 53 at 9. Paulino  
6 contends that he was unable to free his right arm because it was pinned beneath his body  
7 and that once he said, “no problem,” the officers stopped hitting him. Dkt. No. 53 at 10.  
8 He asserts that at no time did he “challenge, resist, fight, or threaten the officers.” Dkt.  
9 No. 53 at 10.

10 Paulino filed this action against the defendant officers on May 17, 2016, alleging  
11 excessive force in violation of the Fourth Amendment under 42 U.S.C. § 1983 and state  
12 law claims for battery, negligence, and intentional infliction of emotional distress. Dkt.  
13 No. 1. Paulino filed an amended complaint adding a claim under California Civil Code §  
14 52.1. Dkt. No. 28. Defendants moved for summary judgment on all claims, Dkt. No. 49,  
15 and Paulino opposed the motion. Dkt. No. 53. All parties consented to the jurisdiction of  
16 a magistrate judge. Dkt. Nos. 11, 19.

17 **II. LEGAL STANDARD**

18 Summary judgment may be granted only when, drawing all inferences and  
19 resolving all doubts in favor of the nonmoving party, there is no genuine dispute as to any  
20 material fact. Fed. R. Civ. P. 56(a); *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014);  
21 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Reasonable factual inferences must be  
22 construed in favor of the non-moving party, and summary judgment should not be granted  
23 if “a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty*  
24 *Lobby, Inc.*, 477 U.S. 242, 248 (1986).

25 Because police misconduct cases frequently involve “disputed factual contentions”  
26 and “almost always turn on credibility determinations,” the Ninth Circuit has “held on  
27 many occasions that summary judgment . . . in excessive force cases should be granted  
28 sparingly.” *Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003) (citation

1 omitted); *see also Liston v. Cty of Riverside*, 120 F.3d 965, 976 n.10 (“[T]he  
2 reasonableness of force used is ordinarily a question of fact for the jury.”).

3 **III. DISCUSSION**

4 Defendants assert that undisputed material facts entitle them to summary judgment  
5 on each of Paulino’s claims. However, the parties offer materially different versions of the  
6 dispositive facts, and the video—which offers the most objective depiction of events—  
7 does not clearly support defendants’ position. Most importantly, the degree to which  
8 Paulino resisted arrest is not clear, and there is no indisputable evidence that Paulino was a  
9 serious threat to anyone’s safety. This uncertainty vitiates defendants’ summary judgment  
10 motion on excessive force, qualified immunity, and the remaining state law claims.

11 **A. Triable Issues of Fact Preclude Granting Summary Judgment on Paulino’s**  
12 **Excessive Force Claim.**

13 Summary judgment is not warranted for any of the officers regarding Paulino’s  
14 Fourth Amendment excessive force claim. Defendants’ argument hinges on their claim  
15 that the officers reasonably believed Paulino was resisting arrest. *See* Dkt. No. 49 at 15–  
16 19. But the undisputed evidence on record, especially the video of the incident, simply  
17 does not support this claim to a degree that warrants summary judgment. A jury could  
18 reasonably conclude that Paulino was cooperative and not resisting arrest, and that the  
19 force used was unreasonable under the circumstances.

20 Under the Fourth Amendment, police officers may use only “objectively  
21 reasonable” force “in light of the facts and circumstances confronting them, without regard  
22 to their underlying intent or motivation.” *Graham v. Connor*, 490 U.S. 386, 393–94  
23 (1989). This test requires courts to balance the “nature and quality of the intrusion on a  
24 person’s liberty with the countervailing governmental interests at stake.” *Davis v. City of*  
25 *Las Vegas*, 478 F.3d 1048, 1054 (9th Cir. 2007). To do so, courts primarily consider three  
26 factors: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate  
27 threat to the safety of the officers or others, and (3) whether the suspect was actively  
28 resisting arrest or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396. Other

1 factors relevant to the specific circumstance may be considered as well. *See Bryan v.*  
 2 *MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010); *George v. Morris*, 736 F.3d 829, 837–38  
 3 (9th Cir. 2013). The second *Graham* factor—whether the suspect posed an immediate  
 4 threat to officer or public safety—is most important. *Young v. Cty. of Los Angeles*, 655  
 5 F.3d 1156, 1163 (9th Cir. 2011) (citing *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir.  
 6 2005)). The reasonableness of a particular use of force is evaluated “from the perspective  
 7 of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”  
 8 *Graham*, 490 U.S. at 396 (citation omitted).

9 Here, the nature of the intrusion was use of physical force that included taking  
 10 Paulino to the ground, kneeling on him to hold him down, and using baton strikes to  
 11 effectuate arrest, so the Court queries whether these uses of force were objectively  
 12 reasonable under the circumstances, from the perspective of an officer in the defendants’  
 13 shoes. Notably, defendants focus more on Paulino’s resistance than on any threat to safety  
 14 he created. *See* Dkt. No. 49 at 15–19. Because defendants moved for summary judgment,  
 15 the Court makes credible factual inferences in Paulino’s favor. Each officer’s actions are  
 16 evaluated separately.<sup>2</sup>

17 **1. Officer Cruz**

18 Officer Cruz initiated the physical effort to arrest Paulino while the other two  
 19 officers stood or sat nearby. Video at 8:50. Making factual inferences in Paulino’s favor,  
 20 Officer Cruz reached for Paulino’s arms and pushed him, causing Paulino to stumble over  
 21 his own tangled feet. Officer Cruz, along with Officer Sohal, then tackled or threw  
 22 Paulino to the ground and kneeled on his back while Officer Sohal used his baton to strike  
 23 Paulino.

24 Tackling and kneeling upon a suspect may constitute excessive force when a

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26 <sup>2</sup> Note, though, that an officer need only to have been an “integral participant,” which  
 27 “does not require that each officer’s actions themselves rise to the level of a constitutional  
 28 violation.” *Blankenhorn*, 485 F.3d at 481 n.12 (quoting *Boyd v. Benton Cty.*, 374 F.3d 773,  
 780 (9th Cir. 2004)). It requires only “some fundamental involvement in the conduct that  
 allegedly caused the violation.” *Id.*

1 suspect is not resisting or is only minimally arresting, and the suspect is not causing a  
2 serious safety risk. In *Blankenhorn v. City of Orange*, 485 F.3d 463 (9th Cir. 2007), the  
3 Ninth Circuit denied summary judgment for defendant officers who “gang tackled” a  
4 suspect, kneeled on his body while he was face down, punched him while attempting to  
5 extricate his arm from beneath his body, and used hobble restraints. *Id.* at 477–80. The  
6 defendant officers in *Blankenhorn* claimed that the plaintiff had taken a combative stance  
7 before the arrest and intentionally held his arm beneath his body when he was on the  
8 ground, and the plaintiff’s own evidence showed that he offered some resistance during his  
9 arrest, including refusing to kneel down when ordered to do so, jerking his arm away from  
10 an officer’s grip, and yelling and raising his arms. *Id.* at 469–70. Still, the court held that a  
11 reasonable jury could conclude that tackling and kneeling on the plaintiff was  
12 unreasonable under the circumstances. *Id.* at 479–80. The non-serious nature of the crime  
13 (trespassing) and absence of a serious threat to the officers’ or others’ safety weighed  
14 against the defendants, and the plaintiff’s version of the facts reflected only minimal  
15 resistance before and during the arrest. *Id.* at 479.

16 Here, as in *Blankenhorn*, a jury could reasonably find that Officer Cruz violated  
17 Paulino’s Fourth Amendment rights by taking him to the ground and pinning him down  
18 with his knee. Paulino’s testimony suggests he was cooperative, non-violent, and  
19 unresisting, and Ramirez’s witness testimony supports that claim. Dkt. No. 49-4 at 8–10,  
20 32–41. The video also does not clearly show otherwise. Based on these facts, a  
21 reasonable jury could find that Paulino offered little or no resistance to arrest and created  
22 little risk to others’ safety, making Officer Cruz’s actions unreasonable. Thus, summary  
23 judgment may not be granted in Officer Cruz’s favor.

## 24 2. Officer Silva

25 Officer Silva used his baton to jab Paulino in the midsection before the other two  
26 officers brought Paulino to the ground. Video at 9:00–9:05. Defendants argue that Officer  
27 Silva reasonably believed Paulino was actively resisting Officer Cruz’s attempts at arrest  
28 when Officer Silva struck Paulino. Dkt. No. 49 at 20–21.

1           Batons are considered an intermediate use of force that requires a commensurately  
 2 serious state interest. *Young*, 655 F.3d at 1161. While active resistance may warrant the  
 3 use of batons in some cases, little or no resistance typically does not. *See id.* (holding that  
 4 a reasonable jury could find excessive force by an officer who pepper sprayed and used a  
 5 baton to strike a minimally-resistant suspect); *see also Felarca v. Birgeneau*, No. 11-cv-  
 6 5719-YGR, 2016 WL 324351, at \*17 (N.D. Cal. Jan. 27, 2016) (denying summary  
 7 judgment for defendant officers on excessive force claims where the officers used batons  
 8 to break through a crowd of protesters). Batons may not be reasonable even when a  
 9 suspect is actively resisting arrest in a dangerous situation. *See Hudson v. City of San*  
 10 *Jose*, No. 05-cv-03015-RS, 2006 WL 1128038, at \*4 (N.D. Cal. Apr. 27, 2006) (finding  
 11 triable issues of fact that precluded summary judgment where officers used tasers and  
 12 batons on a suspect who was actively wrestling with an armed officer).

13           The facts do not indisputably show that Paulino resisted in a way that justifies baton  
 14 strikes as a matter of law. This is especially true because, when a person is “not perfectly  
 15 passive” but his resistance is also not “particularly bellicose,” the resistance factor offers  
 16 “little support” for the use of more significant force. *Gravelet-Blondin v. Shelton*, 728  
 17 F.3d 1086, 1092 (9th Cir. 2013). As always, the inquiry is whether, in light of all the  
 18 circumstances, the force was reasonable. *See Bryan*, 630 F.3d at 830 (“We must eschew  
 19 ultimately unhelpful blanket labels and evaluate the nature of any resistance in light of the  
 20 actual facts of the case.”). Although defendants argue Officer Silva reasonably believed  
 21 Paulino was resisting Officer Cruz’s efforts at arrest, Paulino’s version of the facts simply  
 22 do not support this contention. Because there are disputed factual questions about the  
 23 degree of resistance Paulino offered and the reasonableness of Officer Silva’s response,  
 24 summary judgment is not appropriate.

25           **3. Officer Sohal**

26           Officer Sohal used more force than either of the other two officers. He was  
 27 involved in the take-down of Paulino and struck Paulino numerous times with a baton.  
 28 Video at 9:02–9:28. As discussed above, a jury could find that the lesser uses of force by



1 Officers Cruz and Silva were unreasonable under the circumstances, and the same is true  
2 of the significantly greater amount of force used by Officer Sohal. Summary judgment  
3 cannot be granted in favor of Officer Sohal.

4 **B. The Officers Are Not Entitled to Qualified Immunity.**

5 Defendants also argue they are entitled to qualified immunity because they  
6 reasonably believed at the time of the incident that there were not violating Paulino’s  
7 rights. Dkt. No. 49 at 25–27. An officer is entitled to qualified immunity as a matter of  
8 law only if, taking the facts in the light most favorable to the nonmoving party, he did not  
9 violate any clearly established constitutional right. *Torres v. City of L.A.*, 548 F.3d 1197,  
10 1210 (9th Cir. 2008). The analysis involves two determinations: (1) whether the facts  
11 alleged show the officers violated a constitutional right; and (2) whether the right was  
12 clearly established. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see also Pearson v.*  
13 *Callahan*, 555 U.S. 223, 236 (2009). A right is clearly established if “it would be clear to  
14 a reasonable officer that his conduct was unlawful in the situation he confronted.” *Conner*  
15 *v. Heiman*, 672 F.3d 1126, 1132 (9th Cir. 2012).

16 At the time of Paulino’s arrest, it was clearly established that the degree of force  
17 used by the officers would be excessive if Paulino was unresisting and nonviolent.  
18 Typically, the “very action at issue” need not have been held unlawful before qualified  
19 immunity is shed. *Wall v. Cty. of Orange*, 364 F.3d 1107, 1111 (9th Cir. 2004). But here,  
20 Paulino’s rights vis-à-vis the defendants’ actions were eminently clear at the time of the  
21 incident, because the Ninth Circuit addressed a nearly identical situation in *Blankenhorn*.  
22 There, the plaintiff had committed a relatively minor crime, was not obviously a safety  
23 threat to others, and offered a disputed level of resistance similar in magnitude to the  
24 resistance contemplated here. *Blankenhorn*, 485 F.3d at 469–70. According to the  
25 defendants in *Blankenhorn*, the plaintiff pulled his arm away from an officer, clenched his  
26 fists and took a combative stance, and refused to kneel when told. *Id.* The officers  
27 responded by tackling the plaintiff to the ground and kneeled on him while he was face  
28 down, and then punched him while trying to access and handcuff his arm from beneath his

1 body. *Id.* A video captured the incident. *Id.*

2 Officers “can still be on notice that their conduct violates established law even in  
3 novel factual circumstances,” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), but in light of  
4 *Blankenhorn*, it is hard to imagine a less novel factual situation than the one defendants  
5 encountered here. The Ninth Circuit in *Blankenhorn* held that a reasonable jury could find  
6 the officers’ use of force was unreasonable given the circumstances and refused to grant  
7 qualified immunity. The Court does the same here. The first element of the *Saucier* test—  
8 whether there was a violation of a right—is a factual question for the jury. And the second  
9 element—whether the right was clearly established—does not entitle defendants to  
10 summary judgment, because the rights violations alleged here were addressed to a T in  
11 *Blankenhorn*. *See id.*; *see also Torres*, 548 F.3d at 1210 (holding that if reasonable jurors  
12 could believe that the defendant violated the plaintiff’s constitutional right, and the right at  
13 issue was clearly established, the case should proceed to trial).

14 **C. Factual Disputes Preclude Summary Judgment on the State Law Claims.**

15 Paulino’s remaining claims ultimately depend on the same disputed facts as the  
16 excessive force claim. Each of them centers on the defendants’ and Paulino’s conduct,  
17 which are heavily disputed by the parties and not objectively resolved by the video  
18 evidence. Thus, summary judgment is not warranted for these claims.

19 **IV. CONCLUSION**

20 Because the parties disagree on facts that are material to all of Paulino’s claims, and  
21 because the Fourth Amendment rights at issue were established with sufficient clarity to  
22 preclude qualified immunity, defendants’ motion for summary judgment is DENIED.

23  
24 **IT IS SO ORDERED.**

25  
26 Dated: July 7, 2017

27   
28 NATHANAEL M. COUSINS  
United States Magistrate Judge