

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RAFAEL CHAVEZ-ALVAREZ,
Plaintiff,

v.

SAN JOSE POLICE DEPT., et al.,
Defendants.

Case No. 16-02796 EJD (PR)

**ORDER OF SERVICE; DIRECTING
DEFENDANT TO FILE
DISPOSITIVE MOTION OR
NOTICE REGARDING SUCH
MOTION; INSTRUCTIONS TO
CLERK**

Plaintiff, a California state prisoner, filed the instant pro se civil rights action pursuant to 42 U.S.C. § 1983 against the San Jose Police Department (“SJPD”) and its officers. After an initial review, the Court found the complaint was attempting to state an excessive force claim, (Docket No. 6 at 2.) However, Plaintiff failed to specify how each of the eight defendants caused his injuries. (Id.) Plaintiff was given leave to file an amended complaint to correct this deficiency. (Id. at 3.) Plaintiff has filed an amended complaint. (Docket No. 7.)

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a

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

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

11 **B. Plaintiff’s Claims**

12 Plaintiff claims that on February 9, 2014, he was shot multiple times by two or
13 more officers and repeatedly tasered during the course of his arrest, which amounted to
14 excessive force. (Am. Compl. at 3.) Plaintiff names Defendant Officer Monzon as one of
15 the officers who shot and struck him twice with bullets. (Id.) Liberally construed,
16 Plaintiff’s allegations are sufficient to indicate that excessive force may have been used
17 during the course of his arrest which is a valid claim under § 1983. See Rutherford v. City
18 of Berkeley, 780 F.2d 1444, 1447 (9th Cir. 1986), overruled on other grounds by Graham
19 v. Connor, 490 U.S. 386 (1989).

20 Plaintiff also names other officers of the San Jose Police Department, (Am. Compl.
21 at 2), but fails to explain how each of the officers acted during the course of his arrest to
22 establish a claim against them. As explained in the previous court order, without an
23 adequate description of the specific acts each individual defendant allegedly committed,
24 and how the alleged acts violated his constitutional rights, the Court cannot determine
25 whether Plaintiff has stated claims for relief against each named defendant. (Docket No. 6
26 at 3.) Accordingly, the other named officers shall be dismissed from this action without
27 prejudice until such time Plaintiff, through discovery, is able to establish their involvement

1 in the excessive force claim arising out of the February 9, 2014 arrest. He may do so by
2 filing a motion to add newly identified defendants, as they become known, along with a
3 supplemental complaint describing their unlawful actions. *See Brass v. County of Los*
4 *Angeles*, 328 F.3d 1192, 1195–98 (9th Cir. 2003).

5
6 **CONCLUSION**

7 For the reasons state above, the Court orders as follows:

8 1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for
9 Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy
10 of the amended complaint, (Docket No. 7), all attachments thereto, and a copy of this order
11 upon **Defendant Officer Monzon (Badge # 4147)** at the **San Jose Police Department**
12 (201 W. Mission Street, San Jose, CA 95110). The Clerk shall also mail a copy of this
13 Order to Plaintiff.

14 All other Defendants are **DISMISSED** from this action.

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

4 3. No later than **ninety-one (91) days** from the date of this order, Defendants
5 shall file a motion for summary judgment or other dispositive motion with respect to the
6 claims in the complaint found to be cognizable above.

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

13 b. **In the event Defendants file a motion for summary judgment, the**
14 **Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate**
15 **warnings under Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See**
16 **Woods v. Carey, 684 F.3d 934, 940 (9th Cir. 2012).**

17 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court
18 and served on Defendants no later than **twenty-eight (28) days** from the date Defendants'
19 motion is filed.

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

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5. Defendants shall file a reply brief no later than **fourteen (14) days** after Plaintiff's opposition is filed.

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

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

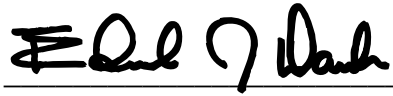
8. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is required before the parties may conduct discovery.

9. 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. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

10. Extensions of time must be filed no later than the deadline sought to be extended and must be accompanied by a showing of good cause.

IT IS SO ORDERED.

Dated: 4/5/2017


EDWARD J. DAVILA
United States District Judge