

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MAMBERTO REAL,

Plaintiff,

v.

Case No: 2:17-cv-117-FtM-38CM

THE CITY OF FORT MYERS,
MICHEL PERRY and MICHAEL
PERRY,

Defendants.

OPINION AND ORDER¹

Pending before the Court is Defendant Officer Michael Perry's Motion to Dismiss ([Doc. 25](#)) and Defendant City of Fort Myers' Motion to Dismiss Amended Complaints ([Doc. 26](#)). Plaintiff Mamberto Real, appearing *pro se*, has not opposed the motions and the time to do so has expired.

This is a civil rights action under 42 U.S.C. § 1983. Real sues the City and Officer Perry² for constitutional violations because of a late-night encounter between him and the Officer. A homeless Real was sleeping in his car in a local company's parking lot. Officer Perry allegedly approached Real's car with a flashlight, "and without any protocolary [sic] introduction, the Officer stated, 'They do not want you here, I already know you have

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² The operative pleading names both "Michel Perry" and "Michael Perry" as defendants. ([Doc. 14](#)). Based on Officer Perry's motion, it appears that Real is suing only him and merely offered different spellings for the Officer's first name.

driver license; you have five seconds to leave, or I am going to shoot you NIGGER.” (Doc. 14 at ¶ 8). Officer Perry counted to five and allegedly pointed his gun at Real, who left the parking lot without any physical injury. (*Id.*). Real filed this suit about a week later. (Doc. 1).

A year and two tries later, United States Magistrate Judge Carol Mirando allowed Real to proceed *in forma pauperis*. (Doc. 13). In doing so, the Magistrate Judge reviewed the amended complaint in which Real asserted only Fourteenth Amendment equal protection and due process claims against Officer Perry. (Doc. 11). The due process claim was found to be plausible and the sole basis for granting IFP relief. Yet, the Magistrate Judge allowed Real to file a second amended complaint that re-alleged his equal protection claim. (Doc. 13 at 8). The Magistrate Judge told Real that if he did not file a second amended complaint, the amended complaint would be the operative pleading.

Real elected to file a Second Amended Complaint. (Doc. 14). Not only did he re-allege the equal protection claim, but he also added Fourth and Eighth Amendment claims and added the City as a defendant. (*Id.*). According to Real, Officer Perry violated his Fourth and Eighth Amendment rights because the Officer pointing his gun at him was excessive force and cruel and unusual punishment. (*Id.* at ¶¶ 13-14). Real also alleges that Officer Perry violated his equal protection rights because he is African-American (and Hispanic) and Officer Perry would have treated a white person in his “social situation” more favorably. (*Id.* at ¶ 15). Officer Perry also violated, in Real’s view, the due process clause because he “pointed a gun upon Plaintiff’s face arbitrarily, without any justifiable legal defense to do so.” (*Id.* at ¶ 16). And Real alleges the City violated his constitutional

rights through “an official policy, custom, or usage.” (*Id.* at ¶ 20). Allowing Real to re-plead a second amended complaint while granting him IFP has created a procedural hiccup. And to complicate matters, Officer Perry and the City have filed separate motions to dismiss that are directed at the amended complaint – not the Second Amended Complaint. (Doc. 25; Doc. 26). Their focus on the amended complaint suggests they were not served with the operative pleading. And the record does not clarify this added service issue.

While the case’s procedural posture is muddled and the record hazy, it is clear that this case has to get back on track. Real initiated this case more than one year ago and Defendants still appear to be unclear on what document is the operative pleading. Because the City’s and Officer Perry’s motions to dismiss do not address the Second Amended Complaint, the Court denies the motions without prejudice and permits them to file renewed responses to the Second Amended Complaint.³

Accordingly, it is now

ORDERED:

(1) Defendant Michael Perry’s Motion to Dismiss (Doc. 25) is **DENIED** without prejudice.

(2) Defendant City of Fort Myers’ Motion to Dismiss Amended Complaints (Doc. 26) is **DENIED** without prejudice.

(3) Defendants must respond to the Second Amended Complaint on or before **April 25, 2018**.

³ In filing motions before this Court, Defendants are reminded that they cannot state empty legal conclusions and declare victory. Nor can they expect the Court to fill in the missing analysis and legal authority that may support their conclusory positions.

DONE and **ORDERED** in Fort Myers, Florida this 11th day of April 2018.


SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

Copies: Magistrate Judge Carol Mirando
All Parties of Record