

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No.	CV 11-6155 PA (SPx)	Date	November 17, 2011
Title	Christopher Hacopian and Scott Gibb v. Upland Police Dept., et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE
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Paul Songco Deputy Clerk	Not Reported Court Reporter	N/A Tape No.
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Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: IN CHAMBERS - COURT ORDER

Before the Court is a Motion to Dismiss Plaintiffs' Amended Complaint filed by defendants Upland Police Department, Officer Duran and Sergeant Belt ("Defendants"). (Docket No. 11.) Defendants also move to strike a paragraph of the First Amended Complaint ("FAC"). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds this matter appropriate for decision without oral argument. The hearing calendared for November 7, 2011 is vacated, and the matter taken off calendar.

I. Background

In their FAC, plaintiffs Christopher Hacopian and Scott Gibb ("Plaintiffs") allege claims under 42 U.S.C. § 1983 for violations of their First, Second, and Fourth Amendment rights, against all defendants, as well as a claim of battery against each of the individual officers. Plaintiffs seek general damages, punitive damages, damages for plaintiff Gibb's property, costs and attorneys' fees, and declaratory and injunctive relief.

Plaintiffs allege that they were lawfully carrying unloaded firearms in plain sight and distributing pamphlets when they were approached by Officer Duran and Sergeant Belt. Plaintiffs allege that "despite the absence of any criminal activity, threat, or even reasonable suspicion thereof," Sergeant Belt conducted an investigative stop and frisk, known as a "Terry stop." See *Terry v. Ohio*, 392 U.S. 1, 20, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968). During this Terry stop, Belt ordered Plaintiffs to put their hands up, to stop talking, and to get down on their knees. Plaintiffs allege that after complying with Sergeant Belt's orders, he handcuffed them, forcibly removed their wallets, and conducted a pat down search without their consent. Plaintiffs further allege that Defendants detained Plaintiffs longer than necessary to ascertain whether their weapons were loaded by running a background check on Plaintiffs and a serial number check on their firearms.

Plaintiffs also state that "it is unclear how Barry Belt remained employed as a peace officer . . . given his past unreasonable and violent conduct." (FAC ¶ 5.) Plaintiffs then quote an unpublished California Court of Appeals opinion in which the court upheld an arbitration award in favor of Belt's ex-

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girlfriend and her daughter. The award resulted from of a lawsuit accusing Belt of stalking and harassing his ex-girlfriend and her daughter, and of committing a sexual assault and battery on the ex-girlfriend. (FAC ¶ 5.) It is this paragraph that Defendants move to strike from the FAC as being irrelevant, immaterial, and intended to be inflammatory.

II. Standard on Motion to Dismiss

Generally, plaintiffs in federal court are required to give only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). While the Federal Rules allow a court to dismiss a cause of action for “failure to state a claim upon which relief can be granted,” they also require all pleadings to be “construed so as to do justice.” Fed. R. Civ. P. 12(b)(6), 8(e). The purpose of Rule 8(a)(2) is to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (internal quotation omitted). The Ninth Circuit is particularly hostile to motions to dismiss under Rule 12(b)(6). *See, e.g., Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248–49 (9th Cir. 1997) (“The Rule 8 standard contains a powerful presumption against rejecting pleadings for failure to state a claim.”) (internal quotation omitted).

However, in Twombly, the Supreme Court rejected the notion that “a wholly conclusory statement of a claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery.” Twombly, 550 U.S. at 561, 127 S. Ct. at 1968 (internal quotation omitted). Instead, the Court adopted a “plausibility standard,” in which the complaint must “raise a reasonable expectation that discovery will reveal evidence of [the alleged infraction].” Id. at 556, 127 S. Ct. at 1965. For a complaint to meet this standard, the “[f]actual allegations must be enough to raise a right to relief above the speculative level.” Id. at 555, 127 S. Ct. at 1965 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235–36 (3d ed. 2004) (“[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action”) (alteration in original)); Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002) (“All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.”) (quoting Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)). “[A] plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Twombly, 550 U.S. at 555, 127 S. Ct. at 1964–65 (internal quotations omitted). In construing the Twombly standard, the Supreme Court has advised that “a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009).

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III. Analysis

A. Fourth Amendment Claim

Defendants contend that “Plaintiffs fail to allege facts sufficient to constitute an illegal search or detention.” (Motion to Dismiss at 3.)

The Fourth Amendment protects the right of people to be free from unreasonable searches and seizures. U.S. Const. amend. IV. The Supreme Court has held that “police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot,’ even if the officer lacks probable cause.” U.S. v. Sokolow, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989) (citing Terry, 392 U.S. at 30, 88 S. Ct. at 1884-85).

Investigative stops based upon suspicion short of probable cause are . . . constitutionally permissible only where the means utilized are the least intrusive reasonably available. “[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.”

Kraus v. Pierce County, 793 F. 2d 1105, 1108 (9th Cir. 1986) (quoting Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 1325-26, 75 L. Ed. 2d 229 (1983)).

Plaintiffs allege that Defendants violated the Fourth Amendment by conducting a Terry stop, detaining, patting down, handcuffing, and running background checks on Plaintiffs, even though “there was no crime by Plaintiffs, no suspicion of a crime, no threat to officer safety and no probable cause or reasonably articulable suspicion of any crime of any sort.” (FAC ¶ 24.) Plaintiffs allege that by running a check on the firearms’ serial numbers, Defendants went beyond the scope of a reasonable search needed to determine whether the firearms were unloaded. (FAC ¶¶ 15, 24.) The Court finds these allegations sufficient to state a claim for violation of the Fourth Amendment.

B. First Amendment Claim

Defendants contend that Plaintiffs have not properly alleged a First Amendment violation because they “failed to allege the specific conduct that [Defendants] committed that led to a violation of their First Amendment Rights.” (Motion to Dismiss at 2.)

Plaintiffs allege that they were “engaged in political speech passing out pamphlets educating the public about the Second Amendment. . . .” (FAC ¶ 1.) Plaintiffs also allege that the officers actions were in retaliation to Plaintiffs’ engaging in political speech, “conduct clearly resented by [Defendants]

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who repeatedly battered and insulted Plaintiffs for engaging in such conduct.” (FAC ¶ 25.) “Political speech, of course, is ‘at the core of what the First Amendment is designed to protect.’” Morse v. Frederick, 551 U.S. 393, 403, 127 S. Ct. 2618, 2626, 168 L. Ed. 2d 290 (2007) (quoting Virginia v. Black, 538 U.S. 343, 365, 123 S. Ct. 1536, 1551, 155 L. Ed. 2d 535 (2003)). Alleging that Defendants battered Plaintiffs and conducted an unreasonable search and seizure because they were engaged in political speech properly alleges a First Amendment violation. Therefore, the Court denies Defendants’ motion to dismiss Plaintiffs’ First Amendment claim.

C. Second Amendment Claim

Plaintiffs allege that their Second Amendment rights were violated because “Plaintiffs were illegally searched and seized for simply exercising this Right.” As to Plaintiffs’ Second Amendment claim, Defendants again contend that “Plaintiffs fail to allege facts sufficient to constitute an illegal search and detention.” (Motion to Dismiss at 2.) It is upon this alleged illegal search and seizure that Plaintiffs base their Second Amendment claim.

In District of Columbia v. Heller, the Supreme Court held that the Second Amendment protects an individual’s right to keep and bear arms, a right unconnected to service in the militia. District of Columbia v. Heller, 554 U.S. 570, 593, 128 S. Ct. 2783, 2799, 171 L. Ed. 2d 637 (2008). Two years later, the Supreme Court held that “the Second Amendment right is fully applicable to the States.” McDonald v. City of Chicago, __ U.S. __, 130 S. Ct. 3020, 3025, 177 L. Ed. 2d 894 (2010). The alleged incident occurred on July 13, 2011, after the McDonald case held that the Second Amendment right is fully applicable to the States.

As noted above, Plaintiffs properly allege a Fourth Amendment claim by alleging facts to support that Defendants conducted an unreasonable search and seizure. In their FAC, Plaintiffs allege that they “were illegally searched and detained for simply exercising [their Second Amendment] Right.” (FAC ¶ 26.) Plaintiffs allege that after Defendants checked to make sure that Plaintiffs’ firearms were unloaded, Defendants went beyond the scope of a permissible search by running background checks on them and serial number checks on their firearms, as well as handcuffing Plaintiffs, ordering them to get on their knees, and forcibly removing Plaintiffs’ wallets without their consent. Therefore, Plaintiffs have properly alleged a Second Amendment violation.

D. Battery Claims

Defendants assert that Plaintiffs fail to allege facts supporting battery claims against either Officer Duran or Sergeant Belt. Plaintiffs allege that they were subjected to an unlawful search and seizure, where Sergeant Belt handcuffed plaintiffs, forcibly removed their wallets, and conducted a pat down search without consent and over Plaintiffs’ objections. Thus, the motion to dismiss the battery claim against Sergeant Belt is denied.

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The battery allegation made against officer Duran is that he, “without consent, and over clearly voiced objection, caused a harmful and offensive touching upon Plaintiffs.” Because this allegation merely states the elements of a battery claim with nothing more, the allegation is wholly conclusory. The Court therefore dismisses the battery claim against officer Duran with leave to amend.

E. Qualified Immunity

Defendants also move the court to dismiss the City of Upland as a defendant because defendants Duran and Belt are entitled to qualified immunity. Defendants cite Los Angeles v. Heller, 475 U.S. 796 (1986) for the proposition that a public entity is not liable for § 1983 claims when the individual official inflicted no constitutional harm to the plaintiff.

Qualified immunity shields law enforcement officers “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). The threshold question in the qualified immunity analysis is whether or not the defendant officer violated the plaintiff’s constitutional rights. Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001). If the answer to that threshold question is yes, the officer may still be entitled to qualified immunity if (1) the law governing the official’s conduct was not clearly established; or (2) a reasonable officer could have believed the conduct was lawful. Mena v. City of Simi Valley, 226 F.3d 1031, 1036 (9th Cir. 2000). An officer may be entitled to immunity even for actions that violated the Constitution. See Saucier, 533 U.S. at 205, 121 S. Ct. at 2158; see also Romero v. Kitsap County, 931 F.2d 624, 627 (9th Cir. 1991).

“In essence, at the first step, the inquiry is whether the facts alleged constitute a violation of the plaintiff’s rights. If they do, then, at the second step, the question is whether the defendant could nonetheless have reasonably but erroneously believed that his or her conduct did not violate the plaintiff’s rights.” Devereaux v. Abbey, 263 F.3d 1070, 1074 (9th Cir. 2001); see also Brosseau v. Haugen, 543 U.S. 194, 198, 125 S. Ct. 596, 599, 160 L. Ed. 2d 583 (2004) (“Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer’s conduct violated the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.”) (citation omitted).

Though Defendants are within their right to raise the issue of qualified immunity on a motion to dismiss, given the dearth of a factual record developed at this stage of the litigation and the court’s decision to bifurcate the claims against the City of Upland, the motion for qualified immunity is premature. The Court therefore denies Defendants’ motion to dismiss the City of Upland based on

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qualified immunity without prejudice.

IV. Motion to Strike Paragraph 5 of the FAC

Paragraph 5 of the FAC quotes a California Court of Appeals opinion which upheld an arbitration award against Sergeant Belt. The arbitration resulted from Sergeant Belt's alleged sexual assault and battery of his ex-girlfriend, as well as the alleged stalking and harassment of his ex-girlfriend and her daughter. Federal Rule of Civil Procedure Rule 12(f) provides, "The court may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." Sidney-Vinsein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983). Matter is "immaterial" where it has "no essential or important relationship to the claim for relief . . . being pleaded." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994). Motions to strike are disfavored and infrequently granted. See Pease & Curren Ref., Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 947 (C.D. Cal. 1990). "[M]otions to strike should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation." Colaprico v. Sun Microsystems, Inc., 758 F. Supp. 1335, 1339 (N.D. Cal. 1991).

Defendants ask that this Court strike paragraph 5 from the FAC because it is immaterial and irrelevant. Plaintiffs contend that the public information regarding Sergeant Belt's alleged past history of violence is "necessary to establish the animus and intent surrounding the insults and threats made by Barry Belt, and the intent required for some of the claims alleged." The Court finds that the relationship between Sergeant Belt's past legal issues and the FAC's allegations has little, if any, relevance to the claims alleged in this action. The Court also finds that the scandalous nature of the information greatly outweighs any relevance the information may have. For these reasons, Defendants' motion to strike paragraph 5 from the FAC is granted.

V. Punitive Damages

Defendants contend that Plaintiffs' request for punitive damages against the City of Upland is improper because such damages are not recoverable against a public entity as a matter of law. The Court agrees. Punitive damages are not available in an action against a municipality under § 1983, even though they may be available in an action against a local government official in his or her individual capacity. City of Newport v. Facts Concert, Inc., 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981).

Moreover, Plaintiffs admit that punitive damages are only available against the individual officers. (Opp. at 6.) Accordingly, the Court holds that the punitive damages allegation is limited to the individual defendants, Officer Duran and Sergeant Belt.

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Conclusion

For the foregoing reasons, the Court rules as follows: (1) Defendants' motion to strike paragraph 5 from the FAC is granted; (2) Defendants' motion to dismiss the City of Upland as a defendant is denied; (3) Defendants' request that punitive damages be limited to the individual defendants is granted; and (4) Defendants' Motion to Dismiss is denied as to all claims except for the battery claim against Officer Duran, which is dismissed with leave to amend. Plaintiffs' Second Amended Complaint, if any, shall be filed no later than December 2, 2011. Failure to file an Amended Complaint by that date may result in dismissal of this action without prejudice.

IT IS SO ORDERED.