UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-1492
Summary Calendar

Daniel Joe Hittle,

Plaintiff-Appellant,

VERSUS

City of Garland, Texas, Et Al.,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas

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(May 6, 1993)

Before THORNBERRY, DAVIS and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge*:

Plaintiff's civil rights complaint based on excessive force incident to arrest was dismissed for failure to state a claim upon which relief could be granted and for failure to name unnamed defendants in a timely manner. We reverse the district court's

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

action and remand for disposition consistent with this opinion.

Facts and Prior Proceedings

Daniel Joe Hittle filed a 42 U.S.C. § 1983 complaint alleging that officers of the Garland Police Department used excessive force in the course of his arrest. Specifically, Hittle alleged that certain unknown officers of the Garland Police Department violently attacked, beat and shot at him during the course of his arrest. The complaint also alleged that defendants allowed a police dog to attack and bite him without justification. Hittle complains that the City of Garland (City) was negligent in failing to enforce statutes prohibiting the use of excessive force and in failing to train and instruct its officers in a proper manner. Hittle failed to discover the identities of the officers who allegedly attacked him, therefore those defendants were named as John Doe defendants.

The City filed a motion to dismiss based on several grounds, including failure to state a claim. The district court granted the motion and dismissed the City based on the plaintiff's failure to plead a specific policy or custom of the City that would give rise to the alleged constitutional violation. The district court noted that the plaintiff's complaint failed to meet the pleading standard established by this Circuit in **Palmer v. City of San Antonio**, 810 F.2d 514, 516 (5th Cir. 1987). Specifically, the district court stated that the plaintiff had not even made conclusory allegations regarding a policy or custom of the defendants that caused the alleged violations. The district court also dismissed the complaint against the John Doe defendants because the court was of the opinion that the plaintiff had been given ample opportunity to

discover the identities of the John Doe defendants.

Discussion

A. Standard of Review

We review de novo a trial court's dismissal for failure to state a claim upon which relief may be granted. **Federal Deposit Insurance Corporation v. Ernst & Young**, 967 F.2d 166, 169 (5th Cir. 1992). A trial court's decision to grant a Rule 12(b)(6) motion may be upheld "only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." **Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc.,** 804 F.2d 879, 881 (5th Cir. 1986). In making this determination, we accept the well-pleaded allegations in a complaint as true. **O'Quinn v. Manuel**, 773 F.2d 605, 608 (5th Cir.1985).

B. Issue One: Failure to State a Claim

The Supreme Court has rejected the heightened pleading requirement in a § 1983 action against municipalities. **Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit**, 61 U.S.L.W. 4205 (U.S. March 2, 1993), *reversing* 954 F.2d 1054 (5th Cir. 1992). **Leatherman** holds that a plaintiff is not required to set out in detail the facts upon which his claim is based; rather, a plaintiff is only required to give "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." **Leatherman**, 61 U.S.L.W. at 4206 (internal citations omitted).[1]

[1] Of course, there is no doubt that a municipality can be sued under § 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury. **Leatherman**, 61

Since the district court relied on the heightened pleading requirement in dismissing Hittle's complaint against the City, we reverse and remand the case for consideration in light of **Leatherman.**

C. Issue Two: Identity of the John Doe Defendants

Hittle contends that he was unable to identify the John Doe defendants because he was unable to conduct discovery. Hittle filed a motion for production of documents in the district court record, seeking discovery of the name of the officers involved in the incident. About a month later, the district court denied the motion as premature because Hittle apparently had not served the discovery on the defendants. The district court advised Hittle to direct the discovery to defense counsel. The defendants contend that they did not receive the court's order or any discovery requests from Hittle. About this same time, Hittle received several motions to dismiss from the defendants. This may have thwarted his discovery efforts. Indeed, although the alleged excessive force incident occurred over two years prior to the district court's dismissal of the claims, the suit had only been pending for four months at the time of the dismissal. This Court does allows some leeway for pro se plaintiff's proceeding under 42 U.S.C. § 1983.

A plaintiff should be given an opportunity through discovery to determine the identity of a defendant; if the plaintiff fails to name the defendant after a reasonable period of time, the claim is

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U.S.L.W. at 4206. Indeed, we express no opinion whether plaintiff would survive other pre-trial motions based on his original and amended complaint. **See Leatherman**, 61 U.S.L.W. at 4207.

subject to dismissal for failure to prosecute. **See Colle v. Brazos County**, 981 F.2d 237, 243 (5th Cir. 1993). A dismissal of an unnamed defendant is reviewed for an abuse of discretion. **Id.**

The district court dismissed the claims against the John Doe defendants because it had been 2 1/2 years since the incident and Hittle had not yet discovered the names of the defendants. Although the dismissal was facially without prejudice, further claims against these officers would now be time-barred. **See Burrell v. Newsome**, 883 F.2d 416, 418 (5th Cir. 1989). Because the statute of limitations has run, this Court treats the dismissal as one with prejudice. **McGowan v. Faulkner Concrete Pipe co.**, 659 F.2d 554, 556 (5th Cir. 1981). A dismissal with prejudice is a discretionary matter, but this Circuit has generally permitted it only "in the fact of a clear record of delay or contumacious conduct by the plaintiff." **Colle**, 981 F.2d at 242.

Since Hittle's action had only been pending four months when it was dismissed, we find that Hittle was not given a reasonable time to conduct discovery, and therefore, the dismissal of the John Doe defendants at this early stage of the litigation was an abuse of discretion.

D. Appointment of Counsel

Hittle requests that counsel be appointed. If, after reconsideration of the complaint, the district court determines that Hittle has stated a claim for relief, it may wish to re-consider his motion for appointment of counsel.

Conclusion

For the foregoing reasons, we reverse and remand this action

to the district court.