IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-9086
Summary Calendar

FAUSTINA GARZA DIAZ, JR.,

Plaintiff-Appellant,

VERSUS

CITY OF BROWNFIELD, TEXAS, et al.,

Defendants,

CITY OF BROWNFIELD, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
5:92 CV 40 C

August 20, 1993

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Terry County, Texas, jail inmate Faustina Diaz filed this civil rights suit, pursuant to 42 U.S.C. § 1983, against the "Brownfield Police Dept.," the Terry County Sheriff [sic] Dept. at

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Brownfield, Tx.," and the "Dept. of Public Safety at Brownfield, Tx." Diaz appeals the district court's dismissal for failure to state a claim. We affirm in part and vacate and remand in part.

I.

Diaz alleged that after a high-speed chase, law enforcement officers apprehended him, and a police officer threw him to the pavement and handcuffed him. While lying on the ground, Diaz saw "different police uniforms" around him and felt blows to his head and body "coming from all sides." As Diaz was getting up, unknown officers "threw him against the bed of [his] truck with tremendous force." Diaz apparently began to pass out at this point. Diaz stated that he "would like to find out" who was responsible for this "act of police brutality."

The magistrate judge sua sponte ordered the caption of the suit to be amended to name as defendants the City of Brownfield; Terry County; Jerry L. Johnson, Sheriff of Terry County, Texas, in his official capacity; and the Texas Department of Public Safety ("DPS"). The magistrate judge ordered that the defendants be served.

The defendants answered the suit. The Department of Public Safety contended that Diaz had failed to state a claim upon which relief could be granted and urged that it was immune from suit under the Eleventh Amendment. The county and the sheriff asserted that Diaz's claims were barred by the doctrine of absolute immunity or, alternatively, that they were entitled to qualified immunity.

They also suggested that FED. R. CIV. P. 12(b)(6) required that the suit be dismissed because Diaz had failed to plead any facts showing a constitutional violation. The city asserted the defense of qualified immunity and urged that the complaint failed to state a claim for which relief could be granted.

On August 11, 1992, the magistrate judge ordered Diaz to respond to the defendants' pleadings within thirty days. Diaz was served with this order but did not file a response. The county, the sheriff, and the city each filed a rule 12(b)(6) motion to dismiss.

On September 28, 1992, the magistrate judge entered an order requiring that Diaz file supplemental pleadings, noting that the court was unaware of any discovery by Diaz and gave him additional time in which to identify the officers involved and their employer. Diaz never received this order[1] but was served with unrelated orders entered a few weeks later. Citing Diaz's failure to respond to the two orders to file a response, the court dismissed the suit without prejudice as to each defendant because of Diaz's failure to state a claim upon which relief could be granted.

II.

We review a district court's ruling on a rule 12(b)(6) motion de novo. Jackson v. City of Beaumont Police Dep't, 958 F.2d 616, 618 (5th Cir. 1992). A district court should not dismiss a pro se

[1] In his brief, Diaz alleges that the sheriff's department purposefully caused him to be transferred from jail to jail so that he would not receive court documents.

plaintiff's complaint for failure to state a claim "unless it appears that the plaintiff can prove no set of facts which would entitle him to relief." Moawad v. Childs, 673 F.2d 850, 851 (5th Cir. 1982). If the plaintiff is given an opportunity to amend and still fails adequately to allege a claim, however, the district court may dismiss. Jacquez v. Procunier, 801 F.2d 789, 792-93 (5th Cir. 1986). "In order to successfully plead a cause of action in § 1983 cases, plaintiffs must enunciate a set of facts that illustrate the defendants' participation in the wrong alleged." Id. at 793.

Under the principles of liberal construction accorded pro se litigants, Diaz's complaint should have been construed to name, as individual "John Doe" defendants, several unidentified law enforcement officers. See Haines v. Kerner, 404 U.S. 519, 520 (1972); see also Dayse v. Schuldt, 894 F.2d 170, 174 (5th Cir. 1990) (pro se plaintiff raising a constitutional claim who has sued the wrong parties should be given an opportunity to amend complaint to name the appropriate parties). Because Diaz did not receive the order to file supplemental pleadings, as a practical matter he was not given an opportunity to amend his complaint. See Gallegos v. La. Code of Crim. Procedures Art. 658 Paragraph A and C(4), 858 F.2d 1091, 1092 (5th Cir. 1988) (pro se plaintiff should be allowed to amend pleadings to name proper party when complaint makes it clear that he states colorable ground for relief).

The allegation that unidentified officers beat Diaz while he was lying on the ground in handcuffs states a claim that Diaz's

arrest involved an unconstitutional use of excessive force. Graham v. Connor, 490 U.S. 386, 397-99 (1989); Martin v. Thomas, 973 F.2d 449, 455 (5th Cir. 1992). Although it is unlikely that Diaz will be able to prove facts that would entitle him to relief from the named defendants, their dismissal under rule 12(b)(6) nevertheless was improper because it does not appear that Diaz can prove no set of facts that would entitle him to relief. Moawad, 673 F.2d at 851; see Benavides v. County of Wilson, 955 F.2d 968, 972 (5th Cir.) (municipality may incur section 1983 liability for excessive force of officers), cert. denied, 113 S. Ct. 79 (1992). This is not so as to the DPS, however, as it plainly is entitled to Eleventh Amendment immunity, so we affirm the dismissal of the DPS, but as modified to show it as an Eleventh Amendment dismissal with prejudice.

Although the district court's order of dismissal states that the dismissal is for failure "to state a cause of action upon which relief can be granted against any of the named defendants,"[2] the rationale for the order appears to be that Diaz failed to prosecute the case by not identifying individual defendants. We review a dismissal with prejudice for failure to prosecute for abuse of discretion. Colle v. Brazos County, Tex., 981 F.2d 237, 242 (5th Cir. 1993). Dismissals for failure to prosecute "should be used sparingly and only when less drastic alternatives have been

[2] Although the district court did not cite this Court's requirement of heightened pleading in civil rights cases against municipal entities, its decision may have been influenced by that doctrine. The Supreme Court since has stricken this requirement in suits alleging municipal liability under § 1983. Leatherman v. Tarrant County Narcotics Unit, 113 S. Ct. 1160 (1993).

explored." McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 557 (5th Cir. Unit A Oct. 1981) (quotation and citation omitted). We generally uphold such a dismissal "only in the face of a clear record of delay or contumacious conduct by the plaintiff." Colle, 981 F.2d at 243 (quotation and citation omitted).

The circumstances in this case do not warrant a dismissal for failure to prosecute. Accordingly, the judgment of dismissal as to the DPS is AFFIRMED as modified, the judgment of dismissal as to the other defendants is VACATED, and the case is REMANDED to provide Diaz an opportunity to conduct discovery and to amend his pleadings to identify individual defendants. We express no view as to the ultimate merits of this case.