

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5023
Summary Calendar

STEVEN CLINTON OTTERSTATTER, III,

Plaintiff-Appellant,

versus

RICK PETERSON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Louisiana
(91-CV-1244)

(September 30, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

In this case, we review summary judgments entered in favor of a police officer and his municipal employers that dismissed a civil rights action arising from alleged police misconduct. We hold that judgment was proper with respect to the city and its police department, but we must remand with respect to the police officer. Accordingly, we affirm in part and reverse in part.

*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Steven Otterstatter, acting pro se, sued individual police officers, the police department (the "Police Department"), and the city of Lafayette, Louisiana (the "City"), alleging violations of 42 U.S.C. §§ 1983, 1985, 1988, and 1997 and state law. He claimed that Officer Rick Peterson (and several unnamed police officers now dismissed) arrested him without probable cause and used excessive force while doing so; and that by failing properly to discipline the police officers and to investigate claims of impropriety, the City and the Police Department encouraged and ratified a pattern of such unconstitutional conduct.

Otterstatter alleged that he was riding his bicycle on Pandora Street in Lafayette the night of June 14, 1991. He passed Officer Peterson without incident, but as he turned onto West Congress Street, Peterson pulled him over, put his bicycle in the squad car, handcuffed him, and arrested him for assaulting a police officer and for theft. After backup units arrived, Peterson and several unnamed police officers forcefully beat him, causing injury. Based on these allegations, Otterstatter asserted that the force used was "unjustified and unreasonable," and that the officers exercised "either malice, and/or a wanton and/or a reckless disregard" for his constitutional rights.

After discovery, the defendants moved for summary judgment. Attachments to their motion, which included copies of all discovery pleadings, responses, and production and an unsworn statement of

undisputed facts,¹ showed sharp differences with Otterstatter's version of events--so different, in fact, the two versions are nearly unrecognizable as even a similar event.

According to Peterson, while on a call to investigate an attempted residential burglary, he observed a white male with a full garbage bag jump a garden fence and mount a bicycle. Peterson followed the male and recognized him from previous contact as Steven Otterstatter. He stopped Otterstatter and questioned him about the garbage bag, which then broke open, spilling vegetables. Otterstatter claimed that he was authorized to take the vegetables, but when Peterson suggested that they speak with the owner of the garden to confirm his claim, Otterstatter pushed Peterson and swung his bicycle at him. Otterstatter then tried to flee, and Peterson tackled him. Otterstatter continued to struggle to escape on his bicycle and, in the struggle, swung his fists at Peterson several times. Peterson handcuffed Otterstatter, searched him for weapons, read him his Miranda warnings, and placed him in the squad car.

The district court deferred ruling on the motion and ordered Otterstatter to file a heightened pleading, which was then required

¹In his "Motion for oral argument, appealing and opposing defense counsel letters dated 2-8-93, 2-9-93, and also appealing depositions of 1-22-93 and 2-8-93," Otterstatter "oppos[ed]" the defendants' summary judgment motion and "appeal[ed] every motion, exhibits to be produced, and two separate depositions," and the defendants' statement of undisputed fact.

of a § 1983 plaintiff.² After his response, the district court granted the defendants' joint motion for summary judgment. This appeal followed.

²Following issuance of the order but preceding the grant of summary judgment, the Supreme Court reversed this circuit's heightened pleading requirement in § 1983 actions against municipalities and municipal corporations. See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, ___ U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). The Supreme Court held our heightened pleading standard to be inconsistent with the pleading requirements set forth in Rule 8(a) of the Federal Rules of Civil Procedure.

This court has not determined whether the heightened pleading standard still applies in suits against individuals. See Richardson v. Oldham, 12 F.3d 1373, 1380 (5th Cir. 1994); Burns-Toole v. Byrne, 11 F.3d 1270, 1275 (5th Cir. 1994), cert. denied, 62 USLW 3794 (U.S. June 13, 1994). But see Hoffman v. Sheffield, No. 93-1747 (5th Cir. Apr. 28, 1994) p. 13-14 (unpublished) (stating that Leatherman was not applicable to the case because the municipality was not a party, and applying heightened pleading standard to individual officials).

Otterstatter's appeal raises that question, but we find it unnecessary to address it. Although he argues that the district court erred in granting the motion for summary judgment based on his failure to meet the heightened pleading requirements, we find the record unclear whether the district court granted the motion based on a failure by Otterstatter to meet the requirement. Moreover, assuming such a requirement were imposed here, our review of the record convinces us that Otterstatter stated the basis for his claim with sufficient factual detail and particularity sufficient to satisfy the requirement. Accordingly, we will not address this issue.

II

Summary judgment is reviewed de novo, using the same criteria as the district court. Figgie Int'l, Inc., v. Bailey, 25 F.3d 1267 (5th Cir. 1994). In reviewing the district court's rulings, we view the evidence and any inferences in the light most favorable to the opposing party. King v. Chide, 974 F.2d 653, 655-56 (5th Cir. 1992). This does not mean, of course, that we must take Otterstatter's allegations or denials as sufficient. Instead, after the moving parties--Peterson, the Police Department, and the City--inform the court of the basis for their motions and identify those portions of record that entitle them to summary judgment, Otterstatter must produce evidence tending to show the existence of a genuine issue for trial. Fed. R. Civ. P. 56; see Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

III

The district court entered judgment in favor of the City and the Police Department for the reason that Otterstatter had failed to link the harms he alleges to a city or department policy, and in favor of Peterson on the basis of qualified immunity. Because the judgments rest on distinct grounds, we deal with them in turn.

A

Our review of the judgment with respect to the City and the Police Department is straightforward: to prove a § 1983 action against Lafayette or its police department for failing to discipline or properly investigate police personnel, Otterstatter

must establish that his alleged constitutional deprivation is directly and causally linked to a policy or custom amounting to deliberate indifference to the rights of persons with whom the police come into contact. City of Canton, Ohio v. Harris, 489 U.S. 378, 385, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

Otterstatter alleged that the City and its Police Department failed to discipline the police officers and to investigate claims of impropriety, and that in doing so the City and the Police Department encouraged and ratified a pattern of unconstitutional conduct. In their motion for summary judgment, the City and the Police Department asserted that Otterstatter had failed to produce any evidence to link the actions causing the alleged constitutional violation to acts or omissions of any supervisory personnel. See Celotex, 477 U.S. at 325.

In his response, Otterstatter, then bearing the burden outlined above, failed to produce any evidence of a genuine issue for trial against the City or the Police Department. To the contrary, he stated that "no evidence in the record . . . refute[s] these defendants' liability." He argues that first he must prove his case against Peterson; "then, the question of the City's and Police Department's liability becomes ripe." For that reason, reinstating his suit "could very well bear out his assertions."

The argument here misapprehends the burden of the non-moving party: to avoid summary judgment, he must set forth specific facts showing there is a genuine issue for trial. He cannot defer that

response, and he must come forward with evidence to shift the burden. Because Otterstatter has failed to show any substantive evidence of their liability, summary judgment as to the City and the Police Department was entirely proper and is affirmed. See Celotex, 477 U.S. at 325; City of Canton, 489 U.S. at 391.

B

The judgment in favor of Officer Peterson presents a more complicated question. The district court entered summary judgment on the basis of qualified immunity. An officer is immune unless the plaintiff alleges a violation of a clearly established constitutional right and the court determines that the defendant's conduct was objectively unreasonable in the light of clearly established law. See Siegert v. Gilley, ___ U.S. ___, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991); Mouille v. City of Live Oak, Tex., 977 F.2d 924, 927-28 (5th Cir. 1992).

Otterstatter has sufficiently alleged a violation of a clearly established constitutional right, to wit, the right not to have police officers apply unreasonable or excessive force when arresting him. We face the question whether Peterson's conduct was objectively unreasonable.

On this point, Peterson failed to meet his summary judgment burden. In the allegations involving the City, we have noted that no material dispute existed--the City pointed out that Otterstatter had failed to establish a necessary link, and because he failed to

come forward with factual evidence of such a link, summary judgment was entered against him. But here, Peterson faces sufficient sworn averments of excessive force which, if believed, would show excessive force and false arrest.

Peterson's immunity depends upon the reasonableness of his actions. To weigh those actions, we must be clear what they were. See Spann v. Rainey, 987 F.2d 1110, 1115 (5th Cir. 1993) (determining whether force was excessive "requires a close examination of the facts and circumstances of each case."). As the recitation of the facts at the beginning of this opinion makes clear, the parties sharply dispute what happened. Had Peterson followed the dictates of Rule 56(e) and properly supported his motion, then Otterstatter may have been obliged to come forward with specific facts in rebuttal. But Peterson did not do so. Neither his "affidavit for warrant of arrest" nor his "statement of undisputed facts" were sworn. Although this court may consider documents on summary judgment that are unsworn or otherwise do not meet the requirements of rule 56, we may not do so if the opposing party objects. See Equia v. Tompkins, 756 F.2d 1130, 1136 (5th Cir. 1985). Otterstatter raised an objection that is sufficient to remove from our consideration all unsworn or certified materials submitted by Peterson. We therefore face two conflicting stories. While the "mere existence of an alleged factual dispute" does not preclude summary judgment, Lechuga v. Southern Pac. Transp. Co.,

949 F.2d 790 (5th Cir. 1992), summary judgment is not the appropriate vantage point for us to weigh credibility or to resolve disputed claims about prior material events. Accordingly, we reverse the district court's grant of summary judgment with respect to Peterson.

IV

Having found the district court's grant of summary judgment appropriate with respect to the City, we AFFIRM that part of the district court's judgment. In the light of Officer Peterson's failure to bear his burden in establishing his qualified immunity, however, we REVERSE the trial court's grant of summary judgment and REMAND for further proceedings.

AFFIRMED in part; REVERSED in part; and REMANDED.