IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8531
Summary Calendar

FLORENTINA ACOSTA AND RUBEN ACOSTA, SR.,

Plaintiffs-Appellants,

versus

CITY OF AUSTIN, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for
the Western District of Texas
(A-92-CA-625-SS)

(August 1, 1994)

Before REAVLEY, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Andres Acosta was fatally wounded by an officer during a drug raid in his home. His wife and son brought suit under 42 U.S.C. § 1983 against the city of Austin, the Austin anti-drug task force, and officers Mike Thompson and Al Alvarez, alleging that Andres was improperly shot in violation of his

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

constitutional rights. The district court granted summary judgment for the defendants. We affirm.

BACKGROUND

The officer involved gave an affidavit stating that on the night of the shooting the officers had announced their arrival at the Acosta home in accordance with proper police procedures[1] and that they had a valid warrant to raid the house for drugs.[2] A confidential informant had also warned the officers that guns were in the house. After entering the house, one of the officers fell to the floor after encountering Andres Acosta, yelling "he has a gun, he has a gun." The approaching officer then fired at Acosta because Acosta was waving a revolver between the two officers. The court found that under this uncontroverted account, further warning before the shooting would not have been reasonably feasible.

The Acostas appeal, and argue that they did not have a fair opportunity to conduct discovery and that there are genuine issues of material fact which should have precluded summary judgment.

ANALYSIS

The appellants first argue that the stated deadline for discovery was to be ignored and "held in abeyance" by the court

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[1] Other witnesses corroborated that the police loudly announced their arrival at the Acosta residence, and that they were wearing attire emblazoned with the words "POLICE."

[2] Ruben Acosta, Sr., and not Andres Acosta, was the suspected drug distributor.

pending resolution of the appellees' motions to dismiss. But the appellants point to no order in the record which stayed discovery or denied them an opportunity to conduct discovery. Furthermore, the appellants did not seek an extension or continuance and cannot now complain that their chance for discovery was "blocked" by the court when absolutely nothing in the record supports such a contention.

The appellants next argue that the trial judge erred in granting summary judgment because the pleadings sufficiently state a claim and Mrs. Acosta's deposition presents genuine issues of material fact. But a party responding to summary judgment must support their response with "specific, non-conclusory affidavits or other competent summary judgment evidence." Reese v. Anderson, 926 F.2d 494, 498 (5th Cir. 1991). The appellants did not respond to the motions for summary judgment and Mrs. Acosta's deposition does not present any genuine issues of fact. Mrs. Acosta first stated that she could not see any people when she heard shots being fired in the house because it was too dark. She further stated that she did not know what her husband was doing immediately before the shooting because she was looking at the door. Contrary to her prior testimony, Mrs. Acosta subsequently stated that her husband did not have a gun in his hand before the shooting.

The record demonstrates that Andres was shot by the officer during the raid because the officer had probable cause to believe that Andres posed a deadly threat to the officers at the scene,

and the appellants did not contradict this evidence. See Tennessee v. Garner, 105 S. Ct. 1694, 1701 (1985).

AFFIRMED.