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Motions, Pleadings and Filings

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United States District Court,
N.D. California.
Blessed HERVE, Plaintiff,
v.
CITY AND COUNTY OF SAN FRANCISCO et al., Defendants.
No. C-03-4699 MMC.

Dec. 7, 2004.

Stephen T. Cox, Cox & Moyer, San Francisco, CA, for Plaintiff.

Scott J. Allen, Cox & Moyer, San Francisco, CA, for Plaintiff and Defendants.

David B. Newdorf, San Francisco City Attorney's Office, San Francisco, CA, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT; VACATING HEARING >Docket No. 27)

CHESNEY, J.

***1** Before the Court is the motion for partial summary judgment filed November 5, 2004 by defendants City and County of San Francisco ("City") and Police Officers Alice DiCroce ("Officer DiCroce"), Gabrial Alcaraz ("Officer Alcaraz") and Marc H. Chan ("Officer Chan") (collectively, "officers"). Plaintiff Blessed Herve ("Herve") has filed opposition to the motion, to which defendants have replied. Having considered the papers filed in support of and in opposition to the motion, the Court finds the matter appropriate for decision without oral argument, *see* Civil Local Rule 7-1(b), and hereby VACATES the December 10, 2004 hearing on the motion. For the reasons set forth below, the motion is GRANTED in part and DENIED in part.

BACKGROUND

Herve alleges that, on March 27, 2003, the defendant police officers "verbally assaulted and physically battered the Plaintiff (a) at a location near the intersection of Geary and Taylor Streets in San Francisco; (b) in a police patrol car operated by certain of the Defendant Officers; and (c) at the San Francisco police Central Station." (*See* Compl. ¶ 6.) Herve further alleges that Officer DiCroce "punched the Plaintiff in the stomach while the Plaintiff's hands were handcuffed behind his back, physically forced the Plaintiff to sit on a bench covered in human feces, choked the Plaintiff on the neck, slammed the Plaintiff's head into the wall of a holding cell at Central Station, kicked the Plaintiff in the testicles and grabbed his testicles." (*See id.*) Herve also contends that Officer DiCroce made "numerous threatening remarks" to him which he construed as demonstrating "hatred against the Plaintiff because of his gender, race, national origin and/or sexual orientation" and that the other defendant officers actively encouraged Officer DiCroce's alleged battery of Herve, and laughed at his plight. (*See id.*) According to Herve, the defendants conspired to cover up their alleged abuse of Herve by preparing a police report that did not mention that the abuse had occurred, and by failing to file a police report after Herve reported the alleged abuse. (*See id.* ¶ ¶ 7-8.)

Herve asserts seven causes of action against the defendant officers and the City. In Herve's first cause of action, for violation of 42 U.S.C. § 1983, he alleges that the defendant officers deprived him of his constitutional right to due process and equal protection. (*See id.* ¶ ¶ 9-12.) In Herve's second cause of action, he alleges that the defendant officers conspired to violate his civil rights, in violate of 42 U.S.C. § 1985(2) and (3). (*See id.* ¶ ¶ 13-17.) The third cause of action alleges "defendants" violated Herve's right to be free from violence committed against him because of his race, color, national origin, sex, and sexual orientation, pursuant to California Civil Code § § 51 .7 and 52(b). (*See id.* ¶ ¶ 18-21.) Herve's fourth cause of action, asserted against the defendant officers only, is for interference with the exercise of his civil rights, in violation of California Civil Code § 52.1. (*See id* ¶ ¶ 22-24.) Herve's fifth cause of action, asserted against all defendants, is for battery. (*See id.* ¶ 25-30.) The sixth cause of action, asserted against the City only, is for "negligent hiring, training and/or retention of unfit employees." (*See id.* ¶ ¶ 31-34 .) The final cause of action alleges "defendants" are liable for intentional infliction of emotional distress. (*See id.* ¶ ¶ 35-37.)

LEGAL STANDARD

***2** Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment as to "all or any part" of a claim "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See* Fed.R.Civ.P. 56(b), (c). Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* The Court may not weigh the evidence. *See id.* at 255. Rather, the nonmoving party's evidence must be believed and "all justifiable inferences must be drawn in [the nonmovant's] favor." *See United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir.1989) (en banc) (citing *Liberty Lobby*, 477 U.S. at 255).

The moving party bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, interrogatory answers, admissions and affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the nonmoving party will bear the burden of proof at trial, the moving party's burden is discharged when it shows the court that there is an absence of evidence to support the nonmoving party's case. *See id.* at 325.

Where the moving party "bears the burden of proof at trial, he must come forward with evidence which would entitle him to a directed verdict if the evidence went uncontroverted at trial." *See Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir.1992) (citations omitted); *see also Fontenot v. Upjohn*, 780 F.2d 1190, 1194 (5th Cir.1986) (holding when plaintiff moves for summary judgment on an issue upon which he bears the burden of proof, "he must establish beyond peradventure *all* of the essential elements of the claim ... to warrant judgment in his favor .") (emphasis in original).

A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of [that] party's pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." *See* Fed.R.Civ.P. 56(e); *see also Liberty Lobby*, 477 U.S. at 250. The opposing party need not show that the issue will be resolved conclusively in its favor. *See Liberty Lobby*, 477 U.S. at 248-49. All that is necessary is submission of sufficient evidence to create a material factual dispute, thereby requiring a jury or judge to resolve the parties' differing versions of the truth at trial. *See id.*

DISCUSSION

***3** As noted, defendants move for partial summary judgment. Defendants contend that Herve cannot prevail as to (1) any claims against Officer Chan; (2) his claim for battery against Officer Alcaraz; (3) his claims for conspiracy based on his race in violation of 42 U.S.C. § 1985; (4) and his claims based on negligence and intentional infliction of emotional distress.

A. Claims Against Officer Chan

Defendants argue that all of Herve's claims are based on use of excessive force and that there is no evidence that Officer Chan participated in any use of force against Herve. Consequently, defendants argue, summary judgment should be granted for Officer Chan on all of Herve's claims.

1. Battery

Herve concedes that Officer Chan "did not directly commit battery." (*See* Opp. at 12.) Herve argues, however, that Chan is liable for battery because "after the beating occurred" (*see* Opp. at 13), he joined a conspiracy with Officer DiCroce and Officer Alcaraz to cover up the fact that the beating occurred. [FN1]

> FN1. Herve also argues that Chan is liable, pursuant to 42 U.S.C. § 1983, for false arrest in violation of the Fourth Amendment, and also for common law false arrest and false imprisonment. As Herve has not pleaded such claims in his complaint, however, the Court will not consider these arguments in connection with defendants' motion for summary judgment. Herve has filed a separate motion for leave to amend his complaint, which the Court has addressed separately.

Herve relies on *DeVries v. Brumback*, 53 Cal.2d 643, 2 Cal.Rptr. 764, 349 P.2d 532 (1960), in which the California Supreme Court affirmed a judgment, for conspiracy to convert jewelry, against a party who did not join the conspiracy until after the jewelry had

been stolen. *See id.* at 645-46, 2 Cal.Rptr. 764, 349 P.2d 532. In so holding, the Supreme Court noted that conversion is "a continuing tort--as long as the person entitled to the use and possession of his property is deprived thereof" and, thus, "a conspiracy to convert is a continuing concert of action lasting so long as the agreement to exercise dominion over another's property continues." *See id.* at 647, 2 Cal.Rptr. 764, 349 P.2d 532. The Supreme Court concluded that the defendant "within a few hours of the robbery, joined the continuing conspiracy to convert and with full knowledge of the prior acts of his coconspirators, actively participated in the overall purpose to convert all of the stolen property to their use and benefit" and, consequently, was "a joint tortfeasor liable for the entire damage done in pursuance of the common design." *See id.* at 650, 2 Cal.Rptr. 764, 349 P.2d 532.

As defendants point out, however, the California Court of Appeal has held that one cannot be held liable for conspiring to commit a completed tort. *See Kidron v. Movie Acquisition Corp.*, 40 Cal.App.4th 1571, 1596, 47 Cal.Rptr.2d 752 (1996). In the instant case, Herve concedes that Chan "joined the conspiracy after the beating occurred." (*See* Opp. at 13.) Battery, unlike conversion, cannot be viewed as a continuing tort.

Accordingly, the Court agrees with defendants that Herve cannot show that Officer Chan is liable for conspiracy to commit battery and will GRANT defendants' motion as to the battery claim as alleged against Officer Chan.

2. § 1983 Claim

Herve submits no argument or evidence in support of his § 1983 claim against Officer Chan. Defendants correctly point out in their reply, however, that the Seventh Circuit has held that "a government official is liable as a conspirator, for purposes of establishing liability under § 1983, if he is a 'voluntary participant in a common venture, although [he] need not have agreed on the details of the conspiratorial scheme or even know who the other conspirators are ... [so long as he] understand[s] the *general objectives of the scheme, accept[s] them, and agree[s], either explicitly or implicitly, to do [his] part to further them.' See McCann v. Mangialardi*, 337 F.3d 782 (7th Cir.2003) (quoting *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir.1988)) (emphasis, ellipses and brackets in original). The Ninth Circuit similarly has held that to establish liability for a conspiracy to violate civil rights, a plaintiff must demonstrate the existence of an agreement to violate constitutional rights; " 'each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." ' *See Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1301 (9th Cir.1999) (quoting *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540- 41 (9th Cir.1989) (en banc)). Herve cannot show that Officer Chan "shared the common objective of the conspiracy" to commit battery against Herve when he concedes that Officer Chan did not join the conspiracy until after the battery occurred. Herve has cited no case law, and the Court is aware of none, holding a police officer liable for entering a conspiracy to engage in excessive force after the use of force has already been applied.

***4** As for Herve's claim that Officer Chan conspired to cover up a battery committed by other officers, the Ninth Circuit has held that a § 1983 claim can be based on police officers' conspiring to cover up evidence that is unknown to the plaintiffs, if such cover-up deprives the plaintiff of meaningful access to the courts. *See Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir.1998). The Ninth Circuit and California courts both have held, however, that a § 1983 claim based on allegations of a police cover-up of wrongdoing is not ripe and does not state a cognizable claim unless the defendants' actions obstructed justice by preventing the plaintiff from prevailing in a lawsuit against the alleged wrongdoers. *See Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621, 625 (9th Cir.1988); *see also Choate v. County of Orange*, 86 Cal.App.4th 312, 334, 103 Cal.Rptr.2d 339 (2000) (quoting *Delew*, 143 F.3d at 1223) ("For a 'cover-up' conspiracy, plaintiffs must show that the conspirators shared a common goal to intentionally conceal evidence and that the 'cover-up actually rendered all state court remedies ineffective." '). Here, as the instant action is still pending, Herve cannot show the alleged coverup has deprived him of all court remedies and, consequently, his claim is not ripe. *See id.; see also Karim-Panahi*, 839 F.2d at 625 ("[I]f plaintiff were to succeed in this suit, then his cover-up allegations would be mooted.") Moreover, Herve ultimately cannot show that any such cover-up deprived him of access to the courts, as he was aware of the extent to which he was beaten and, thus, cannot claim that the alleged cover-up deprived him of facts he did not know.

Herve's claim under California Civil Code § 52.1 relies on the same constitutional violations that form

the basis of his § 1983 claim. (*See* Com pl. ¶ ¶ 22-24.) As Herve cannot prevail on his § 1983 claim against Officer Chan, he likewise cannot prevail on his § 52.1 claim against Officer Chan.

Accordingly, the Court will GRANT defendants' motion for summary judgment as to the § 1983 claim and § 52.1 claim as asserted against Officer Chan.

3. Claim for violation of 42 U.S.C. § 1985

Herve's § 1985 claim is discussed below as to all defendants.

4. Claim under California Civil Code § § 51.7 and 52(b)

Herve's claim against Officer Chan under § § 51.7 and 52(b) is discussed below in conjunction with Herve's § 1985 claim.

5. Claim under California Civil Code § 52.1

Herve's claim against Officer Chan under § 52.1 has been discussed in conjunction with Herve's claim against Officer Chan under § 1983.

B. Battery Claim Against Officer Alcaraz

Defendants move for summary judgment as to the battery claim asserted against Officer Alcaraz on the ground it is undisputed that he did not use unreasonable force against Herve. *See Edson v. City of Anaheim*, 63 Cal.App.4th 1269, 1272, 74 Cal.Rptr.2d 614 (1998) (holding use of unreasonable force is element of battery claim against police officer).

***5** Here, there is no evidence that Officer Alcaraz used any force against Herve. Herve testified at deposition that Officer DiCroce was "the only one who beat [Herve] up." (*See* Newdorf Decl. Ex. A (Herve Dep.) at 219:18-21.)

Herve argues, however, that Officer Alcaraz is liable for conspiracy to commit battery. Herve relies on *Dickerson v. United States Steel Corp.*, 439 F.Supp. 55, 67 (E.D.Pa.1977), in which the court held, in ruling on a conspiracy claim brought pursuant to 42 U.S.C. § 1985(3), that "[i]f a party has the potential to stop illegal activity but fails to do so, and sits idly by, then that party may be said to have impliedly conspired in such illegalities." [FN2] Defendants do not address Herve's argument in their reply and, indeed, state that "[w]hat remains to be tried after this motion are the state battery, state civil rights, and federal claims against Officers DiCroce and Alcaraz." (*See* Reply at 1:14-16.)

> FN2. The Court notes that the Ninth Circuit has held that, under federal law, " 'police officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen" ' and that "officers can be held liable for failing to intercede ... if they had an opportunity to intercede." *See Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir.2000) (quoting *United States v. Koon*, 34 F.3d 1416, 1447 n. 25 (9th Cir.1994)).

As defendants, in their reply, offer no argument or authority contrary to, or facts distinguishing, the holding in *Dickerson*, and apparently concede that the battery claim against Officer Alcaraz remains for trial, the Court will DENY defendants' motion for summary judgment as to the claim for battery asserted against Officer Alcaraz.

C. Race-Based Conspiracy in Violation of 42 U.S.C. § 1985

Herve alleges, in his second cause of action, that defendants engaged in an unlawful conspiracy to deprive him of his civil rights in violation of 42 U.S.C. § 1985. (*See* Compl. ¶ 16.) In particular, he alleges that defendants violated the second clause of § 1985(2), which provides a cause of action for injuries caused by conspiracies "for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws," and the first clause of § 1985(3), which provides a cause of action for injuries caused by conspiracies "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws [.]" *See* 42 U.S.C. § § 1985(2) and (3).

Under either section of the statute, Herve must show that defendants were motivated by a racial or "other class-based, invidiously discriminatory animus." *See Mollnow v. Carlton*, 716 F.2d 627, 628 (9th Cir.1983) (discussing § 1985(3)); *see also Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 763 (9th Cir.1991) (discussing § 1985(2)). Defendants move for summary judgment on Herve's § 1985 claims on the ground that Herve cannot show that they entered into any conspiracy that was motivated by Herve's

race. Defendants point out that Herve testified at deposition that Officer DiCroce was the only officer who used a racial slur against him. (*See* Newdorf Decl. Ex. A (Herve Dep.) at 231:16-19.)

In opposition, Herve argues that circumstantial evidence supports his claim of a racebased conspiracy. *See* *Gilbrook v. City of Westminster*, 177 F.3d 839 (9th Cir.1999) ("A defendant's knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and from evidence of the defendant's actions .") In particular, Herve argues that Officer Alcaraz was present when Officer DiCroce called Herve a "nigger" and beat him, and that Officer Alcaraz did nothing but laugh in response. (*See* Cox Decl. Ex. D (Herve Dep.) at 179:13-20.) There is no evidence, however, that Officer Alcaraz heard Officer DiCroce make the racially derogatory comment; Herve acknowledges that Officer DiCroce was the only officer in the holding cell at the time she used the slur. (*See* Cox Decl. Ex. D (Herve Dep.) at 157:10-16.) [FN3] In his opposition, Herve further states: "DiCroce also derided the Plaintiff's foreign accent during the car ride to Central station; Alcaraz was present in the car yet did not voice any disapproval to DiCroce or attempt to prevent her from exhibiting further racial animus." (*See* Opp. at 17.) Herve has submitted no evidence of this incident, however. Herve also contends, without citation to the record, both that Officer Alcaraz falsely claimed that he never went into Central Station, and that Officer Alcaraz falsely claimed he was only at Central Station for a few minutes. (*See* Opp. at 17.) Even assuming that Officer Alcaraz made one or both misstatements about his presence at the station, however, neither gives rise to an inference of racial animus. Consequently, the Court finds that Herve has not raised an issue of material fact as to whether Officer Alcaraz entered into a race-based conspiracy.

> FN3. Herve testified that Officer Alcaraz accompanied Officer DiCroce into the holding cell during "the second episode," (*see id.* at 157:13- 14). Herve has submitted no evidence, however, as to what occurred during "the second episode."

***6** As to Officer Chan, Herve contends that Officer Chan participated in the alleged racebased conspiracy because "Officer Chan refused to talk to the black witnesses (Andre Johnson and Larry Moore) at the scene of the altercation between Mr. Herve and Brenda Sweet" ("Sweet"). [FN4] (*See Opp.* at 17.) The only evidence submitted in support of this contention, however, is Herve's deposition testimony, specifically: *"I did not see* [Officer Chan] being interested in getting my side of the story, in hearing me fully or talking to the witnesses who were standing next to me." (*See* Cox Decl. Ex. D at 107 (emphasis added).) Moreover, a failure to interview a witness, without more, does not support an inference of racial animus. Herve further contends that Officer Chan demonstrated racial animus by arresting Herve, who is black, instead of Sweet, who is white, even though Officer Chan acknowledged that he was not sure who was telling the truth. The only evidence submitted in support of this contention, however, is Officer Chan's deposition testimony that he did not know whether to believe Herve or Sweet at the time Officer Chan first arrived on the scene. (*See* Cox Decl. Ex. A (Officer Chan Dep.) at 21:3-20.) Herve also contends that Officer Chan filed a police report that failed to mention that Herve was beaten by Officer DiCroce. (*See* Opp. at 17-18.) Herve has submitted no evidence, however, permitting an inference that Officer Chan's failure to include such information in his police report was motivated by Herve's race. Consequently, the Court finds that Herve has not raised an issue of material fact as to whether Officer Chan entered into a race-based conspiracy.

> FN4. The altercation between Herve and Sweet led to Herve's arrest.

Similarly, to the extent Herve contends Officer Chan violated § § 51.7 and 52(b) by discriminating against Herve because of his "color, ... national origin, ... sex, [or] sexual orientation" (*see* Compl. ¶ 20), Herve has submitted no evidence giving rise to an inference of such discrimination by Officer Chan. [FN5]

> FN5. To the extent Herve's claims against Officer Chan for violation of California Civil Code § § 51.7 and 52(b) are based on race discrimination, (*see* Compl. ¶ 20), Herve likewise cannot prevail on those claims against Officer Chan.

As set forth above, Herve has submitted evidence that Officer DiCroce used a racial slur against him. There is no evidence, however, that Officer DiCroce was engaged in a racebased conspiracy with any other officers.

Accordingly, the Court will GRANT defendants' motion for summary judgment as to Herve's claims for violation of 42 U.S.C. § 1985.

D. State Law Immunity

Defendants move for summary judgment as to Herve's claims for negligent hiring or retention and intentional infliction of emotional distress on the ground that the individual defendants have absolute immunity against such claims, pursuant to California Government Code § 821.6, and consequently, the City is also immune, pursuit to California Government Code § 815.2.

Section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." Cal. Gov.Code § 821.6. Section 815.2(b) provides, in relevant part: "[A] public entity is not liable for an injury resulting from an act or omission of an employee where the employee is immune from liability." Cal. Gov.Code § 815.2(b).

***7** The California Supreme Court has held that § 821.6 "grants immunity to any 'public employee' for damages arising from malicious prosecution." *See Asgari v. City of Los Angeles*, 15 Cal.4th 744, 756, 63 Cal.Rptr.2d 842, 937 P.2d 273 (1997). Although § 821.6 " 'has primarily been applied to immunize prosecuting attorneys and other similar individuals, this section is not restricted to legally trained personnel but applies to all employees of a public entity." ' *See id.* at 756-57, 63 Cal.Rptr.2d 842, 937 P.2d 273 (quoting *Kemmerer v. County of Fresno*, 200 Cal.App.3d 1426, 1436, 246 Cal.Rptr. 609 (1988)). It applies to " 'police officers as well as public prosecutors since both are public employees within the meaning of the Government Code." ' *See id.* at 757, 63 Cal.Rptr.2d 842, 937 P.2d 273 (quoting *Randle v. City and County of San Francisco*, 186 Cal.App.3d 449, 455, 230 Cal.Rptr. 901 (1986)).

Courts have repeatedly held that § 821.6 immunity is not limited to claims for malicious prosecution, " 'although that is a principal use of the statute." ' *See Kemmerer*, 200 Cal.App.3d at 1436, 246 Cal.Rptr. 609 (quoting *Kayfetz v. State of California*, 156 Cal.App.3d 491, 497, 203 Cal.Rptr. 33 (1984)). In *Baughman v. State of California*, 38 Cal.App.4th 182, 45 Cal.Rptr.2d 82 (1995), the Court of Appeal held that § 821.6 immunized police officers from liability for a claim for conversion based on their destruction of computer disks during execution of a search warrant. *See Baughman*, 38 Cal.App.4th at 191-93, 45 Cal.Rptr.2d 82. In *Amylou R. v. County of Riverside*, 28 Cal.App.4th 1205, 34 Cal.Rptr.2d 319 (1994), the Court of Appeal held that § 821.6 immunized police officers from liability for intentional and negligent infliction of emotional distress based on statements made by the officers during their investigation of a rape. *See id.*

Under § 821.6, police officers' actions during an investigation are "cloaked with immunity," even if they "acted negligently, maliciously, or without probable cause in carrying out their duties." *See Baughman*, 38 Cal.App.4th at 192, 45 Cal.Rptr.2d 82. Police officers are not immune, however, from claims for false arrest or false imprisonment. *See id.* (citing Cal. Gov.Code § 820.4). Similarly, police officers are not immune for use of excessive force in making an arrest. *See Scruggs v. Haynes*, 252 Cal.App.2d 256, 267-68, 60 Cal.Rptr. 355 (1967) (citing Cal. Gov.Code § 820.2).

Here, defendants concede that "the California Government Code does not immunize police from liability for battery." (*See* Opp. at 7 and n. 2 (citing *Scruggs v. Haynes*, 252 Cal.App.2d at 267-68, 60 Cal.Rptr. 355). As Herve's claim for intentional infliction of emotional distress is based in part on his battery claim, defendants are not immune from liability, and defendants' motion for summary judgment as to Herve's claim for intentional infliction of emotional distress will be DENIED.

With respect to Herve's claim for negligent hiring and retention, defendants have cited no case holding such claims to be subject to § 821.6. Indeed, the California Supreme Court has repeatedly recognized that municipalities may be held liable for negligent hiring and retention of police officers. *See Grudt v. City of Los Angeles*, 2 Cal.3d 575, 583-85, 86 Cal.Rptr. 465, 468 P.2d 825 (1970) (finding trial court erred in striking cause of action against city for negligently continuing to employ police officers after city "knew or should have known that they were dangerous and violent officers, prone to the use of unnecessary force"); *see also Farmers Insurance Group v. County of Santa Clara*, 11 Cal.4th 992, 1022, 47 Cal.Rptr.2d 478, 906 P.2d 440 (1995) (George, J., concurring) ("Of course, if a public entity negligently hires or retains an officer who it knows, or reasonably should know, poses a danger of committing such misconduct, the entity may be held directly liable for the resulting injury.").

***8** Defendants nonetheless argue that because immunity under § 821.6 " 'is dependent on how the injury is caused," ' *see Asgari*, 15 Cal.4th at 756, 63

Cal.Rptr.2d 842, 937 P.2d 273 (quoting *Baughman*, 38 Cal.App.4th at 192, 45 Cal.Rptr.2d 82), and because the injury at issue in the instant case occurred in the course of investigating a crime, Herve cannot assert a claim against the City for negligent hiring or retention based on the same injury. *See* Cal. Gov.Code § 815.2(b) (providing "a public entity is not liable for an injury resulting from an act or omission of an employee where the employee is immune from liability.") Defendants concede, however, that police officers are not immune from liability for battery. As any officer who committed a battery against Herve is not immune from suit, § 815.2(b) does not immunize the City from a claim for negligent hiring or retention that resulted in a battery.

Accordingly, the Court will DENY defendants' motion for summary judgment as to Herve's claims for intentional infliction of emotional distress and for negligent hiring and retention.

CONCLUSION

For the reasons set forth above, defendants' motion for partial summary judgment is hereby GRANTED in part and DENIED in part, as follows:

1. The motion is GRANTED as to Herve's claims against Officer Chan for battery, violation of 42 U.S.C. § 1983, and for violation of Cal. Civ.Code § § 52(b), 51.7, and 52.1.

2. The motion is DENIED as to Herve's claim against Officer Alcaraz for battery.

3. The motion is GRANTED as to Herve's claims against all defendants for violation of 42 U.S.C. § 1985.

4. The motion is DENIED as to Herve's claims against the City for negligent supervision and retention, and against all defendants for intentional infliction of emotional distress.

The order closes Docket No. 27.

IT IS SO ORDERED.

2004 WL 2806165 (N.D.Cal.)

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