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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

ABDUL R. D. SALEM,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

No. ED CV 15-02091 JGB (SPx)

Hearing Date: June 5, 2017
Hearing Time: 9:00 a.m.
Courtroom: 1

REPLY IN SUPPORT OF INDIVIDUAL FEDERAL DEFENDANTS' MOTION TO DISMISS

Hon. Jesus G. Bernal

I. INTRODUCTION

As set forth in the motion to dismiss (ECF No. 72), plaintiff Abdul R.D. Salem ("Plaintiff") failed to set forth non-conclusory factual allegations sufficient to establish any of his Bivens claims against Zoila Flores, Robert Rector, Angel Colmenero and Bryan McKenrick ("Federal Defendants"). As noted in the Motion, Plaintiff's third Amended Complaint ("TAC") is devoid of sufficient non-conclusory factual allegations directed as against each individual federal defendant, as to their specific alleged conduct, to warrant requiring each of them to endure the burdens of further litigation of these insufficiently plead claims.

Plaintiff's Opposition (ECF No. 76, the "Opposition") fails to point to sufficient factual allegations in the TAC, against each individual regarding their specific individual conduct, to save his claims against them. Moreover, Plaintiff's Opposition fails to establish that this Court should recognize a Bivens remedy under the circumstances of this case. Finally, even if Plaintiff had alleged sufficient non-conclusory factual allegations to establish his claims against each Federal Defendant, Plaintiff's Opposition fails to set forth sufficient legal precedent to show that his rights were clearly established on the day in question, as required to overcome the individual Federal Defendants' presumptive entitlement to qualified immunity.

II. PLAINTIFF'S OPPOSITION FAILS TO POINT TO NON-CONCLUSORY FACTUAL ALLEGATIONS SUFFICIENT TO ESTABLISH ANY OF HIS *BIVENS* CLAIMS AGAINST ANY OF THE INDIVIDUAL DEFENDANTS.

As noted in the Motion, a Bivens plaintiff must plead and prove "that *each* Government-official defendant, through the official's *own individual actions*, has violated the Constitution." Iqbal, 556 U.S. at 676 (emphasis added); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). The plaintiff must allege facts, not simply conclusions, which show that the defendant was personally involved in the deprivation of his constitutional rights. Barren v. Harrington, 152 F.3d 1193, 1194 (9th

Cir. 1998); Jones v. Williams, 297 F.3d 930, 936 (9th Cir. 2002). As noted in the motion, Plaintiff's TAC failed to make specific non-conclusory factual allegations against each individual defendant that, if true, could establish their individual liability to the Plaintiff. The TAC's generalities – rehashed in the Opposition – do not suffice to "plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011); (see also ECF 76.)

A. Plaintiff Fails to Allege Sufficient Facts Which, if True, Could Establish Any Fourth Amendment Search or Detention Claim Against Any Federal Defendant

As noted in the motion, Plaintiff failed to make specific non-conclusory factual allegations against each individual defendant as to that individual's specific alleged conduct relating to Plaintiff's search and detention. Plaintiff's Opposition failed to remedy the lack of specific factual allegations in the TAC concerning which defendants allegedly committed what acts to Plaintiff, pertaining to his alleged unlawful search and detention. Rather, Plaintiff's Opposition cites to paragraphs of the TAC that describe his allegations broadly as to CBP Officers as a whole, including paragraphs referring generally to the "officers' search" of his bags, and even referring to paragraphs affirmatively lumping all of the officers together collectively as the "officers." (TAC ¶20.). Plaintiff's failure to make individualized allegations as to each defendant is fatal to his Bivens claims. Barren, 152 F.3d at 1194; Jones, 297 F.3d at 936.

In addition to the Opposition's failure to illuminate which officers are accused of engaging in what allegedly unconstitutional search or detention, Plaintiff's Opposition fails to remedy the defects in Plaintiff's analysis of the constitutionality of the officers' conduct. Specifically, Plaintiff's Opposition references the border search exception and opines that because the TAC alleges in a conclusory fashion that the searches in question were unreasonable, the motion to dismiss should be denied. However, Plaintiff's

argument misses the mark. The searches described in the TAC are reasonable as a matter of law for the mere fact that they took place at the functional equivalent of the border. Indeed, "Congress, since the beginning of our Government, 'has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.'" United States v. Flores-Montano, 541 U.S. 149, 153, 124 S. Ct. 1582, 1585, 158 L. Ed. 2d 311 (2004) (additional citations omitted). Plaintiff's Opposition fails to address this well-established precedent dating to the founding of our Republic. See also United States v. Ramsey, 431 U.S. 606, 616, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977) ("searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border."); United States v. Okafor, 285 F.3d 842, 845 (9th Cir. 2002) ("it is well established that a border search can be conducted without a warrant and without any articulable level of suspicion, so long as the search is routine."); see also 19 U.S.C. § 1581 ("It shall be the duty of the several officers of the customs to seize and secure any vessel, vehicle, or merchandise which shall become liable to seizure, and to arrest any person who shall become liable to arrest, by virtue of any law respecting the revenue, as well without as within their respective districts, and to use all necessary force to seize or arrest the same.")

Plaintiff's arguments regarding his alleged detention are similarly unavailing. Indeed, as a matter of law, delays of one to two hours at international borders are to be expected, United States v. Flores-Montano, 541 U.S. 149, 155 ("We think it clear that delays of one to two hours at international borders are to be expected.") and detentions of up to 6 hours are not unexpected. See e.g. Tabbaa v. Chertoff, 509 F.3d 89, 100–01 (2d Cir. 2007). As with the respondents in Flores-Montano, Plaintiff here fails to point to any "cases indicating the Fourth Amendment shields entrants from inconvenience or

delay at the international border." Accordingly, the detentions and searches Plaintiff alleges occurred were "routine" in the border context and thus did not violate the Fourth Amendment. See id.; see also Tabbaa v. Chertoff, 509 F.3d 89, 100–01 (2d Cir. 2007). Accordingly, the Court should grant the motion to dismiss as to Plaintiff's Fourth Amendment claims set forth in the First Cause of Action.

B. Plaintiff Fails to State Any Fourth Amendment Excessive Force Claim Against Any Federal Defendant

As noted in the motion, Plaintiff failed to set forth sufficient non-conclusory factual allegations to establish any individual Federal Defendant used excessive force against him on the day in question. While Plaintiff alleged in a conclusory fashion that "Officers" used excessive force against him, and that he was "physically battered and assaulted over the course of several hours…" that is insufficient to establish a Fourth Amendment claim against any particular individual Federal Defendant. Moreover, all of the specific uses of force Plaintiff contends establish excessive force are within the realm of normal detention and handcuffing procedures, found to be constitutional as a matter of law by numerous courts. See Rodriguez v. Farrell, 280 F.3d 1341, 1351–53 (11th Cir. 2002) (citing cases) ("What would ordinarily be considered reasonable force does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time"); Glenn v. City of Tyler, 242 F.3d 307, 314 (5th Cir. 2001) ("handcuffing too tightly, without more, does not amount to excessive force"); Brown v. Gilmore, 278 F.3d 362 (4th Cir.2002); Neague v. Cynkar, 258 F.3d 504 (6th Cir.2001); see also 19 U.S.C. § 1581 ("It shall be the duty of the several officers of the customs to…arrest any person who shall become liable to arrest, by virtue of any law respecting the revenue, as well without as within their respective districts, and to use all necessary force to seize or arrest the same.").While, if true, it is unfortunate that Plaintiff's arm was injured, the mere fact that an individual suffers an injury is insufficient to state a claim for excessive force. Id.

Importantly, Plaintiff does not allege, nor suggest in the Opposition, that any individual officer used any force with malice, or with the intent to do Plaintiff harm. Accordingly, the Court should grant the motion to dismiss as to Plaintiff's Fourth Amendment claims set forth in the Second Cause of Action.

C. Plaintiff Fails to State Any Fifth Amendment Claim Against Any Federal Defendant

In his third cause of action, Plaintiff attempts to set forth a *Bivens* claim against Federal Defendants McKenrick, Flores, Rector and Colmenereo. However, as noted in the Motion, Plaintiff failed to set forth non-conclusory factual allegations against each individual sufficient to establish that each individual intentionally violated his Fifth Amendment rights. Indeed, the Opposition sets forth a perfectly logical explanation for Officer Flores request to see Plaintiff's passport. Namely, that Plaintiff was travelling with two passports that reflected different names, and that he had previously been stopped because his passport did not match his boarding pass. (Oppn' at 12.)

Moreover, Plaintiff's contentions that he was discriminated against *in part* because of his national origin is insufficient to state a claim under the Fifth Amendment. See Iqbal at 676-77 (citing Washington v. Davis, 426 U.S. 229, 240 (1976) (discriminatory purpose required to establish Fifth Amendment Equal Protection claim). In addition, his discrimination claims are facially implausible as Plaintiff simultaneously alleges that he was boarding a flight to Egypt and that no other passengers were harassed. (Oppn' at 12; TAC ¶ 17.) Were purposeful discrimination afoot, others boarding the flight *to Egypt* would likely have experienced discrimination. The Opposition's reference to unnamed Officers referring to Plaintiff as a "bad man" do not rise to the level of a Fifth Amendment violation.

In sum, the factual allegations in Plaintiffs' Complaint fail to support Plaintiff's claim that any individual Federal Defendant's actions were based *solely* on animus toward Plaintiff because of his ethnicity or national origin. Accordingly, the Court

should grant the motion to dismiss as to Plaintiff's Fifth Amendment claims set forth in the Third Cause of Action.

III. THE COURT SHOULD NOT IMPLY A *BIVENS* REMEDY IN THIS CASE

As noted in the Motion, the Supreme Court has been loath to extend a Bivens remedy to new contexts. (See Motion pp. 11-13). Plaintiff's opposition fails to address the essence of the arguments raised therein, other than to cite a District Court case from another district, and the Windsor Decision for the proposition that a Bivens remedy should be recognized in this context. United States v. Windsor, 133 S. Ct. 2675 (2013) (holding Section 3 of the Defense of Marriage Act unconstitutional.) However, neither case, establishes a Plaintiff's right to bring a Bivens action under the facts alleged in the TAC. Accordingly, Plaintiff's argument that the Court should recognize a Bivens remedy under the circumstances is unavailing and the Court should decline to do and grant the motion to dismiss as to Plaintiff's Fifth Amendment claims set forth in the Third Cause of Action for this reason as well.

IV. FEDERAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Even if the TAC had set forth factual allegations which, if true, were sufficient to establish that Officers Zoila Flores, Robert Rector, Angel Colmenero and Bryan McKenrick violated Plaintiffs' Constitutional Rights, these officers are entitled to qualified immunity. As noted in the Motion, a qualified immunity analysis is generally a two-step inquiry, whether the Defendant violated a plaintiff's constitutional rights, and whether the right in question was clearly established. See Pearson v. Callahan, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). However, a court may examine either prong first based on the circumstances. Id.

As the Supreme Court noted in its recent reversal of the Ninth Circuit's denial of qualified immunity to a law enforcement officer, a right is not clearly established, and an officer is entitled to qualified immunity, *in all cases* where the constitutional question at issue is not "beyond debate." Stanton v. Sims, 134 S. Ct. 3, 7, 187 L. Ed. 2d 341 (2013) (per curiam). Indeed, it is "[o]nly when an officer's conduct violates a clearly established

constitutional right – when the officer should have known he was violating the Constitution – does he forfeit qualified immunity." Lacey, 693 F.3d at 915. Before a court can impose liability on [any individual Federal Defendant, it] must identify precedent as of the date of the incident at issue, that put each Federal Defendant on notice that their particular conduct, under the specific circumstances of the case would be unconstitutional. S.B. v. Cty. of San Diego, No. 15-56848, 2017 WL 1959984, at *6 (9th Cir. 2017) (additional citations omitted). In order to establish that a particular right was clearly established so as to defeat an officer's entitlement to qualified immunity, a plaintiff must "identify a case where an officer acting under similar circumstances…was held to have violated the Fourth Amendment." *Id.*

Here, Plaintiff's Opposition falls far short. Indeed, the portion of the Opposition discussing qualified immunity cites no cases whatsoever pertaining to the alleged use of force at issue, or issues relating to any alleged Fifth Amendment violation. Plaintiff's failure to do so is fatal to their claims and establishes that the federal defendants are entitled to qualified immunity. White v. Pauly, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463 (2017) ("As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity ... into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.") (internal citations omitted). Because Plaintiff failed to cite to any precedent to establish that every reasonable officer in Federal Defendants positions on notice that their specific alleged conduct was unconstitutional, the Federal Defendants are entitled to qualified immunity.

V. CONCLUSION

For all the foregoing reasons, and those set forth in the Motion, Federal Defendants respectfully request that the court dismiss all claims against them pursuant to Federal Rule of Civil Procedure 12(b)(6).

Dated: May 22, 2017

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