IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Benjamin K. Herrington, *Plaintiff*, *-vs-* Grundy County Sheriff's Deputy Aaron Cory, and Grundy County, Illinois, *Defendants.*	)	No. 24-cv-02940 *(Judge Gottschall)*

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS (ECF No. 7)

Plaintiff Benjamin Herrington brings this excessive force claim under 42 U.S.C. § 1983 against defendant Aaron Cory for actions that Cory took while working as a Grundy County Sheriff's Deputy. Plaintiff also joins Grundy County as the potential indemnifier of Cory. *See Schneider v. County of Will*, 528 F. App'x 590, 591 (7th Cir. 2013).

Defendants have responded to the complaint with a Rule 12(b)(6) motion to dismiss. (ECF No. 7.) Defendants begin their motion by mischaracterizing the complaint as alleging that defendant Cory used "excessive force while attempting to arrest Plaintiff *as he resisted*." (ECF No. 7 at 1) (emphasis added.) This characterization is incorrect.

Plaintiff squarely alleges in paragraph 9 of his complaint that he was *not* resisting arrest when defendant Cory used force:

> At a time when plaintiff did not present an imminent threat of harm, defendant Cory released his dog, instructed the animal to bite plaintiff, and stood by while the dog bit plaintiff on his right leg, specifically on his right pretibial and lateral mid-calf, causing plaintiff to receive bite wounds and incur serious personal injuries.

(ECF No. 1, Complaint, ¶ 9.) Plaintiff also alleges that,

> Defendant Cory did not have a reasonable basis to instruct his dog to bite plaintiff or to stand by while his dog bit plaintiff …

(ECF No. 1, Complaint, ¶ 12.)

Defendants may not controvert plaintiff's allegations on a Rule 12(b)(6) motion. As this Court recently stated in *Experiential Sys., Inc. v. Reddish*, No. 22-CV-4789, 2023 WL 6311694 (N.D. Ill. Sept. 28, 2023), the well settled standard on a Rule 12(b)(6) motion is as follows:

> When deciding a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss a complaint for failure to state a claim, the court must "construe the complaint in the light most favorable to plaintiff, accept all well-pleaded facts as true, and draw reasonable inferences in plaintiff's favor."

Id. at *1 (quoting *Taha v. Int'l Broth. of Teamsters, Loc.* 781, 947 F.3d 464, 469 (7th Cir. 2020).)

Plaintiff shows below that the factual allegations of the complaint "'raise a right to relief above the speculative level.'" *Texas Hill Country Landscaping, Inc. v. Caterpillar, Inc.*, 522 F. Supp. 3d 402, 412 (N.D. Ill.

2021) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).) The Court should therefore deny the motion to dismiss.

I. Facts

On April 25, 2022, law enforcement officers employed by the Illinois State Police and the Sheriff of Grundy County arrested plaintiff in Grundy County, Illinois. (ECF No. 1, Complaint, ¶ 5.) Defendant Cory, a canine officer, was among the officers involved in the arrest. (*Id.* ¶ 8.) Plaintiff does not challenge the existence of probable cause to arrest. (*Id.* ¶ 6.)

After the officers subdued plaintiff and at a time when plaintiff did not present an imminent threat of harm, defendant Cory released his dog, instructed the animal to bite plaintiff, and stood by while the dog bit plaintiff on his right leg, specifically on plaintiff's right pretibial and lateral mid-calf, causing plaintiff to receive bite wounds and incur serious personal injuries. (ECF No. 1, Complaint, ¶ 9.) The bite wounds caused plaintiff to experience severe pain and suffering requiring medical treatment and physical therapy and caused plaintiff to be permanently disfigured. (*Id.* ¶ 11.) Plaintiff alleges that Defendant Cory did not have a reasonable basis to instruct his dog to bite plaintiff or to stand by while his dog bit plaintiff. (*Id.* ¶ 12.)

II. Plaintiff States an Excessive Force Claim Against Defendant Cory

Defendants contend that plaintiff fails "to sufficiently plead Deputy Cory acted unreasonably." (ECF No. 7 at 3.) Defendants seek to support

this meritless argument by citing a case in which "the plaintiff checked boxes for unlawful search and excessive force, [but] nothing in the complaint supports those allegations." *Mong v. McKenzie*, No. 21 CV 2420, 2023 WL 7629667, at *2 (N.D. Ill. Nov. 14, 2023). Defendants overlook the Court's discussion in *Mong* of the plaintiff's allegations of unlawful arrest and conspiracy to commit unlawful arrest, which the Court found were sufficient to state a claim:

> Here, the complaint states that the Defendant Officers arrested the plaintiff without probable cause and provides some information concerning the circumstances of his arrest, including that on the day of his arrest, McKenzie sent a letter containing inaccurate information to the Defendant Officers to have him falsely arrested. R. 13 at 2, 5. The complaint further alleges that "McKenzie and his associates have worked together to sabotage [the plaintiff's] works and relationships" and suggests that McKenzie used the "false arrest to deter [the plaintiff]" from fighting for his family property. R. 13 at 5. These allegations state a claim for conspiracy and unlawful arrest as to McKenzie and the Defendant Officers.

Id.

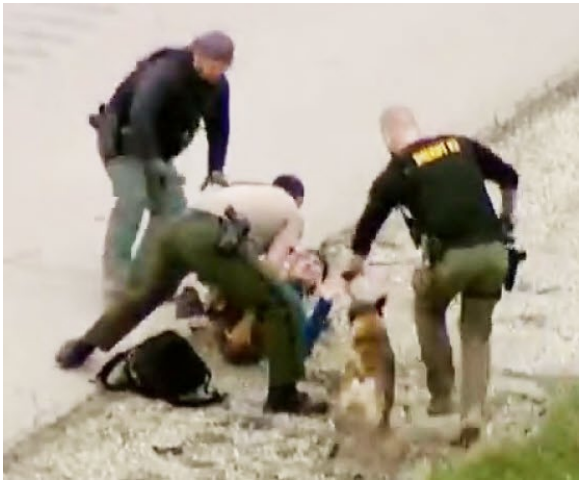
Plaintiff's allegations about excessive force also state an actionable claim. Plaintiff plainly alleges that, at a time when plaintiff was not resisting arrest, defendant Cory instructed his dog to bite plaintiff and stood by while the dog bit plaintiff. That is sufficient to plead a Fourth Amendment claim. *E.g.*, *Becker v. Elfreich*, 821 F.3d 920 (7th Cir. 2016). This is a case where the alleged unconstitutional acts "are straightforward, and the complaint

provides enough notice." *Cosby v. Rodriquez*, No. 23 C 2236, 2024 WL 167711, at *10 (N.D. Ill. Jan. 16, 2024).

In the face of plaintiff's well-pleaded allegations, defendants assert that digital images plaintiff included in his complaint in paragraphs 7 and 10 show that plaintiff had not been subdued when Cory "instructed his canine to bite Plaintiff." (ECF No. 7 at 3.) The Court should reject this argument because defendants misinterpret the images.

The image in paragraph 7 shows Cory holding his dog while two other officers place plaintiff under arrest. Paragraph 7 of the complaint states as follows:

> 7. Three law enforcement officers, including defendant Cory, placed plaintiff under arrest, as depicted in the following image of plaintiff's arrest on April 25, 2022:



(ECF No. 1, Complaint, ¶ 10.)

Plaintiff alleges in paragraph 8 that defendant Cory used excessive force *after* the events depicted in the image included in paragraph 7. Plaintiff alleges the following in paragraph 8:

> 8. After the officers depicted above had subdued plaintiff and at a time when plaintiff did not present an imminent threat of harm, defendant Cory released his dog, instructed the animal to bite plaintiff, and stood by while the dog bit plaintiff on his right leg, specifically on his right pretibial and lateral mid-calf, causing plaintiff to receive bite wounds and incur serious personal injuries.

(ECF No. 1, Complaint, ¶ 8.)

Defendants assert that the images plaintiff included in paragraph 10 show that plaintiff was "not subdued" but was "resisting" when defendant Cory "instructed his canine to bite Plaintiff." (ECF No. 7 at 3, 4.) The images in paragraph 10 do not show that plaintiff had not been subdued. Nor do the images show that plaintiff was "resisting." The images in paragraph 10 are set out below:

(ECF No. 1, Complaint, ¶ 10.)

To justify the grant of a 12(b)(6) motion to dismiss, video images must "utterly discredit" the allegations of the complaint. *Gant v. Hartman*, 924 F.3d 445, 449 (7th Cir. 2019). Defendants are unable to show that the images in plaintiff's complaint meet this standard.

The static images plaintiff included in paragraph 10 of his complaint are not the type of "unambiguous video evidence" that justifies dismissal on a Rule 12(b)(6) motion. In a recent summary judgment case, the Seventh Circuit considered an ambiguous video and held, "This is certainly not the rare case where the video definitively demonstrates what occurred." *Kailin v. Vill. of Gurnee*, 77 F.4th 476, 482 (7th Cir. 2023); *see also Ferguson v. McDonough*, 13 F.4th 574, 581 (7th Cir. 2021) (reversing grant of summary judgment when video was open to interpretation); *Gupta v. Melloh*, 19 F.4th 990, 998 (7th Cir. 2021) (reversing a grant of summary judgment where reasonable jurors could have many different and opposing conclusions about the video evidence); *McCottrell v. White*, 933 F.3d 651, 661 n.9 (7th Cir. 2019) (declining to draw independent factual conclusions from a poor-quality, black and white video lacking audio)

This case does not involve a video. Nor is there an audio recording of the plaintiff's interaction with the police. This case is similar to *McCottrell v. White*, 933 F.3d 651 (7th Cir. 2019), where the Court held that the "quality

of the blurred black and white video is extremely poor and there is no audio track." *Id.* at 661 n.9. The Court there "credit[ed] plaintiff's version of events on summary judgment." *Id.* This Court should likewise reject defendants' request to make unreasonable inferences from the images plaintiff included in his complaint.

III. Defendant Cory Is Not Entitled to Qualified Immunity

There is no merit in Cory's perfunctory request for dismissal on qualified immunity grounds. Cory wisely does not contend that the law was unsettled. "Commanding a dog to attack a suspect who is already complying with orders clearly violates the principles set forth in *Holmes* [*v. Village of Hoffman Estates*, 511 F.3d 673, 687 (7th Cir. 2007)] and *Rambo* [*v. Daley*, 68 F.3d 203, 207 (7th Cir. 1995)." *Alicea v. Thomas*, 815 F.3d 283, 292 (2016).

Instead, Cory limits his qualified immunity argument to the meritless argument that plaintiff's "allegations are defeated by his own complaint as he included two photos depicting the scene of the arrest at the time of Deputy Cory's instruction and the moment immediately after it." (ECF No. 7 at 4-5.) Plaintiff showed the folly of this argument above.

The Seventh Circuit has recognized that "the motion-to-dismiss stage is rarely 'the most suitable procedural setting to determine whether an official is qualifiedly immune.'" *Roldan v. Stroud*, 52 F.4th 335, 339 (7th Cir. 2022) (quoting *Hanson v. LeVan*, 967 F.3d 584, 589 (7th Cir. 2020).) This rule

applies here because, as explained above, the Court must take as true plaintiff's allegations that defendant Cory used excessive force after plaintiff was subdued, wrongdoing that violates "well-established" law. *E.g.*, *Abbott v. Sangamon County*, 705 F.3d 706, 732 (7th Cir. 2013).

IV. Plaintiff Has Properly Joined Grundy County as the Potential Indemnitor

Defendant Grundy County seeks dismissal, asserting that by joining it as the potential indemnitor, plaintiff is relying on the doctrine of respondeat superior. (ECF No. 7 at 5.) This is incorrect. As the Court stated in *Coles v. City of Chicago,* 361 F. Supp. 2d 740, 746 n. 5 (N.D. Ill. 2005), "it is common, and indeed advisable, for a plaintiff who expects a public entity to indemnify a Section 1983 judgment to add that entity as a defendant on the indemnity claim during the pendency of the Section 1983 case." Grundy County is a necessary party because it is "a potential indemnitor." *Ziccarelli v. Dart*, 35 F.4th 1079, 1092 (7th Cir. 2022).

V. Conclusion

The Court should therefore deny defendants' motion to dismiss.

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