

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MICHAEL FOLEY,

Plaintiff,

v.

VILLAGE OF WESTON and
DOUGLAS SANN,

Defendants.

OPINION and ORDER

06-C-350-C

In this civil action for monetary relief, plaintiff Michael Foley, proceeding pro se, contends that his Fourteenth Amendment rights were violated when defendant Douglas Sann, a police officer, used excessive force against him and when defendant Village of Weston failed to properly train Sann or implement policies and procedures designed to prevent officers from using excessive force. Jurisdiction is present under 28 U.S.C. § 1331.

Before the court are defendant Village of Weston's and defendant Douglas Sann's motions for summary judgment. Also before the court is plaintiff's second motion for an extension of time to file a response to each motion. In an order dated March 22, 2007, Magistrate Judge Stephen Crocker granted plaintiff a post hoc extension of time for filing

his response to defendants Village of Weston's and Douglas Sann's motion for summary judgment. Now, plaintiff contends that he needs more time for filing his response brief because he "never received notification as requested at the deposition on January 23, 2007, that the [transcript of the] Deposition of Mark Anesko was available."

In the magistrate judge's preliminary pretrial conference order, he warned the parties:

BE AWARE: you are not going to get an extension of [the dispositive motion] deadline. The only way to get more time would be if you can convince the court that something totally unfair happened that actually prevented you from meeting your deadline, and this was completely somebody else's fault. Some things that might seem unfair to you are not reasons to get more time. For example . . . [y]ou will not get more time if you waited too long to get all the information you think you need to respond to the motion.

Plaintiff has not suggested why he was unable to respond to defendants' motion in any way without the deposition transcript. No reason is apparent. Plaintiff has been granted one extension already; no more are warranted.

Because I am denying plaintiff's motion for an extension of time, I will address defendants' pending motions. Defendant Village of Weston's motion will be granted because the village did not employ defendant Sann and was not responsible for training him or implementing policies that might have prevented his aggressive treatment of plaintiff on July 1, 2003. Defendant Sann's motion be granted as well because plaintiff has not come forward with any evidence suggesting that defendant Sann's used force was excessive rather than merely rough.

From defendants' proposed findings of fact, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Michael Foley is a resident of the Village of Weston, Wisconsin. At all times relevant to this lawsuit, plaintiff owned a restaurant in Wausau, Wisconsin called the Little Italy Cosina.

Defendant Douglas Sann is a police officer employed by the Everest Metropolitan Police Department.

Defendant Village of Weston is a Wisconsin municipality.

B. The Accident

On June 27, 2003, defendant Sann was contacted by his dispatcher to investigate a one-car rollover accident. Upon arriving at the scene of the accident, Sann observed a 1996 Ford Ranger pick-up truck lying on its roof underneath a pine tree. The registration number of the 1996 Ford Ranger pick-up truck was 598-133.

Defendant Sann observed spots of blood in the interior of the Ford Ranger pick-up truck, indicating to him that a person had sustained some type of an injury as a result of the

accident. When defendant Sann ran a check of the truck, he discovered that it was registered to the Little Italy Cucina restaurant.

Although defendant Sann left a voicemail messages at plaintiff's residence and at the restaurant, plaintiff did not return defendant Sann's phone calls. However, on June 30, 2003, Sann received a certified letter from plaintiff which contained a copy of an accident report. Defendant Sann continued to investigate the accident to determine whether a crime had been committed.

On several occasions, defendant Sann visited plaintiff's home and left phone messages stating that he needed to speak with plaintiff. Plaintiff did not return defendant Sann's phone calls.

C. July 1, 2003

On July 1, 2003, Sann called plaintiff's home. A woman answered the phone, but immediately hung up when defendant Sann identified himself and explained why he was calling. At approximately 5:27 p.m., Sann decided to go to Little Italy Cucina to speak with plaintiff. When he arrived at the restaurant, defendant Sann observed plaintiff, whom he mistook for a restaurant employee.

From the foyer of the restaurant, defendant Sann observed plaintiff preparing food on the kitchen stove. The door to the restaurant was locked, so defendant Sann knocked.

Plaintiff walked to the door and unlocked it.

When defendant asked whether “Foley” was present, plaintiff identified himself. Plaintiff knew defendant Sann was a police officer because Sann was in uniform. Plaintiff opened the door partially, holding on to the door handle. When plaintiff asked defendant Sann why he had come, Sann explained that plaintiff’s business vehicle had been involved in an accident, and that Sann needed to speak to plaintiff about the accident. Plaintiff responded by stating that everything he had to say about the accident was contained in the report he had mailed earlier.

As plaintiff began to close the door, defendant Sann grabbed the door and “jerked it open” in order to prevent injury to his hand, which was between the door frame and the door. When plaintiff tried to close the door, he “came into physical contact” with defendant Sann, pushing him backward. (Defendant Sann was trained to maintain a distance of approximately two feet between himself and other persons at all times.) Plaintiff did not lose his balance.

After defendant Sann pushed him, plaintiff ran to the phone and dialed 911. (Defendants do not propose any facts regarding what happened between the time plaintiff called 911 and the time responding “plainclothes police officers” arrived on the scene.) Plaintiff informed the responding officers that he was in “severe pain.”

Plaintiff did not tell defendant Sann that he was injured and Sann did not hear

plaintiff tell anyone else that he was injured. Defendant Sann did not arrest plaintiff or issue him a citation.

C. Everest Metropolitan Police Department

Defendant Village of Weston does not have its own police force. Instead, it shares the Everest Metropolitan Police Department with the neighboring City of Schofield, Wisconsin. The Everest Police Department is a separate and distinct municipal entity from the City of Schofield and the Village of Weston. The Everest Metropolitan Police Department is run by the chief of police and by an independent police committee, comprising members appointed by the City of Schofield and defendant Village of Weston. The Everest Metropolitan Police Committee and the police chief hire all police officers and establish all rules, policies, ordinances and police practices for the Everest Metropolitan Police Department.

OPINION

A. Defendant Sann

In his complaint, plaintiff alleged that defendant Sann used excessive force against him when Sann threw open the door to plaintiff's restaurant and "bodyslammed" plaintiff, sending him stumbling for several feet and causing him serious pain. The right to be free

from the use of excessive force by state actors may arise under a number of constitutional provisions; See e.g., Graham v. Connor, 490 U.S. 386, 394 (1989). In plaintiff's case, because he was not a prisoner or an arrestee, his right to be free from excessive force arises under the Fourteenth Amendment's due process clause. The liberty protected by the due process clause "includes bodily integrity and is infringed by a serious, as distinct from a nominal or trivial, battery." Alexander v. DeAngelo, 329 F.3d 912, 916 (7th Cir. 2003).

Although plaintiff alleged in his complaint that defendant Sann "bodyslammed" him, causing him serious pain and leading him to call for emergency medical assistance, the undisputed facts are that defendant Sann shoved plaintiff away from the restaurant door, causing him discomfort no doubt, but not even knocking him down. Under the circumstances, defendant Sann's conduct did not rise to the level of an unconstitutional deprivation of liberty under the Fourteenth Amendment. Id. (citing Cameron v. IRS, 773 F.2d 126, 129 (7th Cir. 1985) ("[M]ost batteries are too trivial to amount to deprivations of liberty.")).

The Court of Appeals for the Seventh Circuit has stated repeatedly that summary judgment is the "put up or shut up" moment in a lawsuit. A party's failure to show what evidence he has to convince a trier of fact to accept his version of the facts entitles the opposing party to summary judgment in its favor. Fed. R. Civ. P. 56(e); Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 901 (7th Cir. 2003); Celotex Corp. v. Catrett,

477 U.S. 317, 322-23 (1986). Because plaintiff has not adduced evidence in support of his claim that defendant Sann violated his right to bodily integrity by using excessive force against him on July 1, 2003, defendant Sann's motion for summary judgment will be granted.

B. Defendant Village of Weston

Local governing bodies, such as defendant Village of Weston, may be sued under 42 U.S.C. § 1983 only when their allegedly unconstitutional actions were the result of the implementation or execution of a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or were undertaken "pursuant to governmental custom, even [though the] custom has not received formal approval through the body's official decisionmaking channels." Monell v. Department of Social Services of City of New York, 436 U.S. 658, 690 (1978). In his complaint, plaintiff alleged that defendant Sann was employed by defendant Village of Weston and that Sann would not have violated plaintiff's rights had it not been for the village's failure to properly train him and to implement and enforce policies designed to safeguard plaintiff's constitutional rights.

It is now undisputed that defendant Village of Weston did not employ defendant Sann and had no responsibility for training him or establishing policies to govern police conduct. Defendant Sann was employed by the independent Everest Metropolitan Police

Department, which had policies and procedures to which defendant Sann was required to adhere. Because defendant Village of Weston was not responsible for overseeing defendant Sann's work, it may not be held liable for his allegedly unconstitutional conduct. Consequently, defendant Village of Weston's motion for summary judgment will be granted.

ORDER

IT IS ORDERED that

1. Plaintiff Michael Foley's motion for an extension of time is DENIED.
2. Defendant Village of Weston's motion for summary judgment is GRANTED.
3. Defendant Douglas Sann's motion for summary judgment is GRANTED.
4. Defendant Sann's "Motion to Strike Plaintiff's Named Experts" (dt. #26) is DENIED as moot, as is plaintiff's "Motion to Deny Defendants' Motion to Strike Plaintiff's Named Experts" (dkt. #26).
5. The clerk of court is directed to enter judgment in favor of defendants and close

this case.

Entered this 3rd day of April, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge