

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Freedom Christopher Austin Pfaendler,
Plaintiff,
v.
Town of Sahuarita, et al.,
Defendants.

No. CV-20-00188-TUC-JCH
ORDER

Before the Court is Defendants George, Rivera, Villanueva, and Collier's Motion for Partial Summary Judgment Re Notice of Claim (Doc. 41).¹ No opposition has been filed and the time for filing an opposition has passed. As explained below, the motion will be granted in part.

I. Background

This action arises out of alleged events that occurred at a Walmart in Sahuarita, Arizona on August 6, 2019, between Plaintiff and Town of Sahuarita Police officers. (Doc. 30 at ¶ 17.) On September 27, 2021, Plaintiff filed his First Amended Complaint alleging, *inter alia*, state law claims of false arrest (Count VII) and malicious prosecution (Count VIII) against Town of Sahuarita police officers John George ("George"), Joseph Rivera ("Rivera"), Jess Villanueva ("Villanueva") and Shannon Collier ("Collier") in their individual and official capacities. *Id.* at pp. 2, 11. The First Amended Complaint also

¹ Defendants' request for oral argument is denied as the Court finds that oral argument would not aid it in its decision. See Fed. R. Civ. P. 78 (district court may decide motions without oral argument).

1 asserts a vicarious liability claim (Count XI) against the Town of Sahuarita based on the
2 individual officer Defendants' alleged conduct. (Doc. 30 at pp. 12-13.)

3 Defendants George, Rivera, Villanueva, and Collier request judgment on the state
4 law claims (Counts VII, VIII and XI). (Doc. 41 at 5.) They argue that Plaintiff failed to
5 personally serve them with a notice of claim as required by Ariz. Rev. Stat. § 12-821.01(A)
6 and that such failure requires dismissal of the state law claims alleged against them. *Id.* at
7 3-5.

8 **II. Legal Standard**

9 Summary judgment is proper where there are no genuine issues of material fact and
10 the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A party
11 seeking summary judgment bears the initial burden of informing the court of the basis for
12 its motion and of identifying those portions of the pleadings and discovery responses that
13 demonstrate the absence of a genuine issue of material fact." *Soremekun v. Thrifty Payless,*
14 *Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
15 (1986)).

16 **III. Analysis**

17 As mentioned above, Plaintiff has failed to respond to Defendants' motion and the
18 time for filing a response has elapsed. This Court is not required to grant summary
19 judgment when a non-movant fails to respond to a movant's motion for summary judgment
20 even in light of Rule 7.2 of the Local Rules of Civil Procedure.² See *Joe Hand Promotions,*
21 *Inc. v. Donaldson*, No. CV-14-02042-PHX-JAT, 2016 WL 3269723, at *3 (D. Ariz. June
22 15, 2016) (citing *Finkle v. Ryan*, No. CV-14-01343-PHX-DGC, 2016 WL 1241878, at *3
23 (D. Ariz. Mar. 30, 2016) (finding that plaintiff's failure to respond to defendant's motion
24 for summary judgment did not warrant granting the motion despite Local Rule of Civil
25 Procedure 7.2(i))). In this circuit, the local rules "cannot provide a valid basis for granting
26 a motion for summary judgment where the motion is unopposed, as Federal Rule of Civil

27 ² Rule 7.2(i), LRCiv, provides in relevant part, "If...counsel does not serve and file the
28 required answering memoranda...such non-compliance may be deemed a consent to the
denial or granting of the motion and the Court may dispose of the motion summarily." See
LRCiv 7.2(i).

1 Procedure 56 ‘authorizes the court to consider a fact as undisputed,’ but does not allow the
2 court to grant summary judgment by default.” *Joe Hand Promotions, Inc.*, 2016 WL
3 3269723, at *3 (quoting *Heinemann v. Satterberg*, 731 F.3d 914, 917 (9th Cir. 2013)). In
4 light of the foregoing, the Court will consider the merits of Defendants’ motion recognizing
5 that it may only grant summary judgment if it finds there is no genuine issue as to any
6 material fact.

7 Arizona’s notice of claim statute, Ariz. Rev. Stat. § 12-821.01(A), provides, in
8 relevant part:

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10 Persons who have claims against a public entity, public school or public
11 employee shall file claims with the person or persons authorized to accept
12 service for the public entity, public school or public employee as set forth in
13 the Arizona rules of civil procedure within one hundred eighty days after the
cause of action accrues...Any claim that is not filed within one hundred
eighty days after the cause of action accrues is barred and no action may be
maintained thereon.

14 Ariz. Rev. Stat. § 12-821.01(A). Rule 4.1(d), Ariz. R. Civ. P., requires a plaintiff to deliver
15 a notice of claim to a public employee personally, an individual of suitable age and
16 discretion residing with the public employee, or the public employee’s appointed agent in
17 order to perfect his claims against a public employee. *See* Ariz. R. Civ. P. 4.1(d).

18 “Arizona courts have made clear that ‘[w]hen a person asserts claims against a
19 public entity and public employee, the person must give notice of the claim to *both* the
20 employee individually and to his employer.” *Hughes v. Kisela*, No. CV-11-00366-TUC-
21 FRZ, 2012 WL 1605904, at *2 (D. Ariz. May 8, 2012) (quoting *Harris v. Cochise Health*
22 *Sys.*, 160 P.3d 223, 231 (Ariz. App. 2007)) (italics in *Hughes*) (additional citations and
23 internal quotations omitted). *See also Simon v. Maricopa Med. Ctr.*, 234 P.3d 623, 629
24 (Ariz. App. 2010) (holding that the plaintiff was required to deliver a notice of claim to the
25 defendant officer personally, an individual of suitable age and discretion residing with the
26 officer or the officer’s appointed agent in order to perfect a claim against individual
27 officer); *Johnson v. Superior Court, Cnty. of Pima*, 763 P.2d 1382, 1384 (Ariz. App. 1988)
28 (holding that Ariz. Rev. Stat. § 12-821(A) unambiguously requires that notice be given to

1 both the public employee and the public entity for claims arising from acts or omissions
2 committed or allegedly committed by the employee within the scope of his or her
3 employment). “[S]trict compliance with [Ariz. Rev. Stat.] § 12-821.01(A) is required and
4 substantial compliance is insufficient.” *Hughes*, 2012 WL 1605904, at *2 (quoting *Simon*,
5 234 P.3d at 630). *See also Stuart v. Cty of Scottsdale*, No. CV-20-00755-PHX-JAT, 2021
6 WL 3675220, at *2 (D. Ariz. Aug. 19, 2021) (recognizing that actual notice and substantial
7 compliance do not excuse failure to comply with the statutory requirements of Ariz. Rev.
8 Stat. § 12-821.01(A)).

9 Here, Plaintiff was required to serve his notice of claim no later than February 3,
10 2020—180 days after August 6, 2019, the date of the alleged events giving rise to
11 Plaintiff’s claims. The individual officer Defendants present evidence that on or about
12 December 31, 2019, the Town of Sahuarita Department of Law was served with a notice
13 of claim on Plaintiff’s behalf. (Doc. 42 at ¶ 1.) The notice of claim was served on the Town
14 Clerk. *Id.* at ¶ 2; Doc. 42-2 at p. 2. The notice of claim contains the names of Defendants
15 George, Rivera, Villanueva, and Collier but it does not contain any addresses for these
16 Defendants. *Id.* at 4; Doc. 42-1 at p. 2. The record contains no evidence that each individual
17 officer Defendant was served with the notice of claim in accordance with Rule 4 of the
18 Arizona Rules of Civil Procedure.

19 In light of the foregoing, the Court finds that there is no dispute that Defendants
20 George, Rivera, Villanueva, and Collier were not served with Plaintiff’s notice of claim as
21 required by Ariz. Rev. Stat. § 12-821.01(A). The individual officer Defendants are entitled
22 to judgment in their favor on the state law claims alleged in Counts VII and VIII of the
23 First Amended Complaint.

24 The individual officer Defendants also seek summary judgment on Plaintiff’s state
25 law vicarious liability claim (Count XI). *See* Doc. 41 at 5. Plaintiff’s vicarious liability
26 claim is a claim against Defendant Town of Sahuarita based upon the individual officer
27 Defendants’ alleged conduct. *See* Doc. 30 at ¶¶ 126-128. As a general rule, summary
28 judgment against an agent requires summary judgment against her principal on a vicarious

1 liability claim. *See Hansen v, Garcia, Fletcher, Lund & McVean*, 713 P.2d 1263, 1265-66
2 (1985).

3 However, on the record before the Court it is unclear whether the Town of Sahuarita
4 is permitted to avoid liability because of Plaintiff's failure to serve the individual officer
5 Defendants with his notice of claim when the Town of Sahuarita was itself served with
6 Plaintiff's notice of claim. Recently, in *Banner Univ. Med. Cntr. Tucson Campus, LLC v.*
7 *Gordon*, 502 P.3d 30, 31 (2022), the Arizona Supreme Court held that the trial court's
8 dismissal of the defendant physician-employees for want of service of a notice of claim
9 pursuant to Ariz. Rev. Stat. § 12-821.01(A) was not a final judgment on the merits and
10 therefore did not have a preclusive effect on the plaintiffs' vicarious liability claim against
11 defendant hospital-employer. Because it reached its decision on procedural grounds, the
12 Arizona Supreme Court did not address the underlying merits of whether a dismissal of an
13 employee pursuant to Ariz. Rev. Stat. § 12-821.01 precludes a claim of vicarious liability
14 against an employer. *Id.* at n.2.

15 This issue was not addressed in Defendants' motion. The Town of Sahuarita did not
16 join in the individual officer Defendants' motion nor has it filed its own motion.³ The Court
17 finds that Defendant Town of Sahuarita is not a movant, and even if the Court considered
18 it a movant, the Court finds that it has failed to meet its burden of establishing that it is
19 entitled to judgment as a matter of law on the vicarious liability claim. The Court will not
20 dismiss the vicarious liability claim at this juncture.

21 **IV. Conclusion**

22 For the foregoing reasons,

23 **IT IS HEREBY ORDERED GRANTING IN PART** Defendants George, Rivera,
24 Villanueva, and Collier's Motion for Partial Summary Judgment Re Notice of Claim (Doc.
25 41). Defendants George, Rivera, Villanueva, and Collier are entitled to entry of judgment
26 in their favor on the state law claims alleged in Counts VII and VIII of the First Amended

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28 ³ The Court recognizes that all Defendants are represented by the same counsel. (Doc. 15.)
However, the instant motion is explicitly brought by the individual officer Defendants
George, Rivera, Villanueva, and Collier. (Doc. 41.)

1 Complaint. Plaintiff's vicarious liability claim (Count XI) against the Town of Sahuarita
2 remains.

3 Dated this 28th day of March, 2022.

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6 
7 Honorable John C. Hinderaker
8 United States District Judge
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