UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 14-02171 JGB (SPx)**	Date	April 17, 2015
Title	***Dan McKibben, et al. v. John McMahon, et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: **Order (1) GRANTING in part and DENYING in part Defendants' Motion to Dismiss (Doc. No. 24) and (2) VACATING the April 20, 2015 Hearing (IN CHAMBERS)**

Before the Court is Defendants' Motion to Dismiss the First Amended Complaint. (Doc. No. 24.) The Court finds this matter suitable for resolution without a hearing pursuant to Local Rule 7-15. After considering all papers submitted in support of and in opposition to the Motion, the Court GRANTS in part and DENIES in part Defendants' Motion and VACATES the April 20, 2015 hearing.

I. BACKGROUND

A. Procedural History

Plaintiffs Dan McKibben, et al. ("Plaintiffs") filed their putative class action complaint against Defendants John McMahon, Greg Garland, Jeff Rose, James Mahan, Armando Castillo, the County of San Bernardino, and the San Bernardino County Sheriff's Department (collectively, "Defendants") on October 22, 2014. (Doc. No. 1.) Plaintiffs filed a First Amended Complaint on January 14, 2015. ("FAC," Doc. No. 19.)

B. Factual Allegations

Within the San Bernardino County Jail,[1] inmates who self-identify as gay, bisexual, or transgender ("GBT") during the booking process are automatically transferred to an "Alternative Lifestyle Tank" ("ALT") at the West Valley Detention Center ("West Valley"). (FAC ¶¶ 1, 36.) The ALT is entirely separated from the general population unit at West Valley; the GBT inmates have no contact with the general population inmates. (Id. ¶ 36.) The ALT consists of 16 cells, each of which houses two inmates. (Id.)

Plaintiffs are 15 GBT inmates who are, or were, housed in the ALT. The crux of Plaintiffs' FAC is that inmates housed in the ALT experience worse conditions of confinement than non-GBT inmates housed in general population. This inferior treatment presents itself in various forms.

In the ALT, GBT inmates are allegedly locked inside their cells for approximately twenty-two and a half hours a day, regardless of their security classification. (Id. ¶ 6.) This stands in contrast with the procedures in general population, where inmates are usually allowed out of their cells all day. (Id.) Plaintiffs allege there is no justification for this difference, as the ALT has its own day room where prisoners could spend time outside of their cells. (Id.) Plaintiffs also allege the lockdown procedures are different in the ALT: when a GBT inmate causes a disturbance all inmates are locked down in their cells for the entire day, whereas in general population only the inmates involved in the disturbance are locked down. (Id.)

Plaintiffs further allege they are denied access to numerous programs made available to non-GBT inmates. GBT inmates are allegedly not allowed to access educational programming, including occupational, vocational, and GED classes. (Id. ¶ 8.) GBT inmates are also denied access to drug rehabilitation programs. (Id. ¶ 9.) For example, one program, called "Inroads," is only available at the Glen Helen rehabilitation facility, where GBT inmates cannot be housed. (Id.) Plaintiffs allege that since GBT inmates cannot participate in drug rehabilitation programs and thereby earn time off their sentences, they end up being incarcerated longer than non-GBT inmates. (Id.)

The FAC also alleges GBT inmates are not allowed access to religious services outside their unit, and the services inside the ALT – for example, access to chaplains and Bibles – are more limited than those in general population. (Id. ¶ 7.) Plaintiffs further allege that GBT inmates are regularly subjected to abusive conduct and derogatory name-calling by Sheriff's deputies. (Id. ¶ 48.)

Finally, some GBT inmates have allegedly been retaliated against for complaining about disparate treatment. (Id. ¶ 50.) Plaintiffs allege Defendant Castillo offered, presumably as a threat, to place certain Plaintiffs in general population. (Id.) These inmates, who had previously filed claims concerning their disparate treatment, refused to transfer to general population out of concern for their safety. (Id.)

[1] The Jail is run by the San Bernardino County Sheriff's Department.

Based on these assertions, the FAC alleges causes of action for: (1) violation of equal protection rights under the Fourteenth Amendment (42 U.S.C. § 1983); (2) violation of equal protection rights under the California Constitution (Cal. Civ. Code § 52.1 ("Bane Act")); (3) violation of equal protection rights (Cal. Govt. Code §§ 810.6, 815.6); (4) injunctive relief (Cal. Const. art. I, § 7, Cal. Govt. Code § 11135). (FAC ¶¶ 240-262.)

On February 17, 2015, Defendants filed a Motion to Dismiss the FAC. ("Motion," Doc. No. 9.) Defendants opposed on March 2, 2015. ("Opp'n," Doc. No. 27.) Plaintiffs filed a reply on March 9, 2015. ("Reply," Doc. No. 29.)

II. LEGAL STANDARD[2]

Federal Rule of Civil Procedure 12(b)(6) allows a party to bring a motion to dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2); Conley v. Gibson, 355 U.S. 41, 47 (1957) (holding that the Federal Rules require that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests") (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint — as well as any reasonable inferences to be drawn from them — as true and construe them in the light most favorable to the non-moving party. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005); Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id.

To survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570; Ashcroft v. Iqbal, 556 U.S. 662, 697 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 556). The Ninth Circuit has clarified that (1) a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively," and (2) "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be

[2] Unless otherwise noted, all mentions of "Rule" refer to the Federal Rules of Civil Procedure.

subjected to the expense of discovery and continued litigation." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

III. DISCUSSION

Defendants move to dismiss two of the four claims asserted in the FAC. Specifically, Defendants challenge (1) Plaintiffs' Bane Act claim for California constitutional violations and (2) Plaintiffs' claim under California Government Code § 815.6.

A. Plaintiffs' Bane Act Claim

Plaintiffs' second cause of action alleges a Bane Act claim against John McMahon, Greg Garland, Jeff Rose, James Mahan, or Armando Castillo (the "Individual Defendants"). California Civil Code § 52.1 – known as the Bane Civil Rights Act – provides a cause of action for interference with an individual's civil rights. The statute allows an aggrieved individual to bring a civil action for damages when that person's Constitutional or statutory rights have been "interfered with . . . by threats, intimidation, or coercion" or by attempts to threaten, intimidate, or coerce. Cal. Civ. Code § 52.1(a)-(b).

Defendants contend Plaintiffs' Bane Act claim should be dismissed for two reasons. First, Defendants argue the FAC does not sufficiently allege "threats, intimidation, or coercion" beyond that inherent in the act of incarceration itself. (Motion at 4-6.) Second, Defendants assert the FAC does not contain allegations that the five individual Defendants threatened, intimidated, or coerced each and every one of the fifteen named Plaintiffs.

1. Threats, Intimidation, or Coercion

The Bane Act's requirement that interference with rights must be accomplished by threats intimidation or coercion "has been the source of much debate and confusion." Sanchez v. City of Fresno, 2013 WL 2100560, at *11 (E.D. Cal. May 14, 2013). Courts have struggled with how to apply these broad terms in a coherent fashion. However, for the reasons explained below, the Court finds that the FAC sufficiently alleges coercive interference with Plaintiffs' equal protection rights.

Defendants argue that the "mere act of incarceration does not satisfy the 'coercion' element of Section 52.1." (Motion at 4-6.) But that argument misses the key distinction: Plaintiffs are not alleging that their incarceration itself was coercive. Rather, Plaintiffs allege they were subjected to a coercive choice while incarcerated: remain in the ALT or be placed in general population. Placement in general population would afford Plaintiffs the benefits of equal treatment but would subject them to an increased risk of violence due to their sexual and gender identities. On the other hand, Plaintiffs can enjoy the safety of the ALT, but endure inferior conditions of confinement. It is this coercive choice, based on a policy voluntarily instituted by jail officials, that distinguishes this case from those cited by Defendants.

Defendants rely on two cases in support of their argument. First, Defendants cite Shoyoye v. Cnty of Los Angeles, 203 Cal. App. 4th 947 (2012). In that case, a clerical error

resulted in the plaintiff being held in jail for 16 days past his release date. 203 Cal. App. 4th at 950. A jail employee mistakenly attached another inmate's paper work to the plaintiff's, which caused the error. Id. at 951. The court noted that none of the county employees wrongfully detained the plaintiff with actual or presumed knowledge that he should have been released; thus, the court held that plaintiff could not establish "coercion independent of that inherent in the wrongful detention itself," and therefore could not succeed on his claim under the Bane Act. Id. at 962.

A number of district courts have read Shoyoye as imposing a distinction between intentional conduct – which is actionable – and unintentional conduct – which is not. See, e.g., Bass v. City of Fremont, 2013 WL 891090 (N.D. Cal. Mar. 8, 2013). In Bass, the court declined to dismiss a Bane Act claim where the plaintiff's allegedly unconstitutional "detention and arrest resulted from the officers' action, rather than their inaction." The court concluded that "Shoyoye is best viewed as a carve-out from the general rule stated in Venegas. In Shoyoye, the plaintiff's overdetention resulted from the negligent inaction of administrators, whereas in Venegas, the defendant officer engaged in a series of actions involving 'threats, intimidation, or coercion' that resulted in the plaintiff's unreasonable seizure and wrongful arrest." Id. at *6–7. See also Holland v. City of San Francisco, 2013 WL 968295 (N.D. Cal. Mar. 12, 2013) (rejecting defendants' Shoyoye argument because plaintiff alleged intentional, not unintentional, interference with constitutional rights); Skeels v. Pilegaard, 2013 WL 970974, at *4 (N.D. Cal. Mar. 12, 2013) (distinguishing Shoyoye because plaintiff's alleged harms "were not brought about by human error, but rather by intentional conduct, conduct which could be reasonably perceived as threatening, intimidating, or coercive"). Here, Plaintiffs have alleged the Individual Defendants – through the implementation of their housing policy – made a conscious, voluntary choice to subject GBT inmates to worse conditions than non-GBT inmates. This, by itself, is arguably sufficient to distinguish Shoyoye.

However, there is more. Shoyoye itself contains language supporting the existence of a Bane Act claim in this case. The Shoyoye court specifically noted that, in that case, there was "no evidence that [plaintiff] was treated differently than other inmates who were lawfully incarcerated, or that any conduct directed at him was for the purpose of interfering with his constitutional rights." 203 Cal. App. 4th at 961. Here, Plaintiffs are alleging that they were treated differently, and that conduct was purposefully directed at them for the purpose of interfering with their constitutional rights.

Additionally, as explained above, the act of coercion here – forcing Plaintiffs into an untenable choice – is conceptually distinguishable from the underlying alleged constitutional violation: the disparate treatment. This distinguishes this case from the second case cited by Defendants, Allen v. City of Sacramento, 234 Cal. App. 4th 41 (2015.) There, homeless residents brought an action challenging the city's enforcement of an ordinance that prohibited extended camping without a city permit. 234 Cal. App. 4th at 46. The plaintiffs asserted a violation of the Bane Act based on allegations that the police arrested them for violating the ordinance. Id. at 66-67. However, the court found that the plaintiffs' claim failed, as there was no "alleged coercion beyond the coercion inherent in any arrest." Id. at 69. The court concluded

that "a wrongful arrest or detention, without more, does not satisfy both elements of section 52.1." Id. Here, the coercive choice is the "more" that separates this case from Allen.[3]

The Court finds that the expansive reading of Shoyoye and Allen urged by Defendants to preclude the claims here would undermine the California Supreme Court's explanation of the Bane Act's breadth in Venegas v. County of Los Angeles, 32 Cal. 4th 820 (2004.) There, the concurring opinion noted, albeit in expressing his disapproval, that because of the court's holding, "it should not prove difficult to frame many, if not most, asserted violations of any state or federal statutory or constitutional right . . . as incorporating a threatening, coercive, intimidating verbal or written component." 32 Cal. 4th at 851 (Baxter, J., concurring). As a sister court has stated, relying upon Venegas, "[w]hen a Section 52.1 claim is alleged against a government actor, the burden of showing 'threats, intimidation or coercion' is minimal." Mateos-Sandoval v. Cnty. of Sonoma, 2013 WL 3878181, at *7 (N.D. Cal. July 25, 2013)

Accordingly, the Court finds Plaintiffs have sufficiently alleged the coercion necessary to state a claim under the Bane Act.

2. Coercion by the Individual Defendants

The Court next turns to whether Plaintiffs have sufficiently alleged coercion by the Individual Defendants. The Individual Defendants are command staff who hold positions of authority within the San Bernardino Jail system. McMahon is the Sheriff of San Bernardino County, and Garland is the Deputy Chief in charge of the Corrections Bureau. (SAC ¶¶ 25-26.) Rose, a captain, is the commanding officer of the West Valley. (Id. ¶ 27.) Mahan is a deputy sheriff holding the rank of sergeant. (Id. ¶ 28.) Finally, Castillo is a deputy sheriff who holds the rank of corporal. (Id. ¶ 29.)

Defendants contend that because Plaintiffs cannot show specific acts of coercion, threats, or intimidation by each Individual Defendant against each Plaintiff, the Individual Defendants should be dismissed. (Motion at 6-8.) However, as the Court has explained, Plaintiffs have sufficiently alleged coercion through the implementation of a policy that forced Plaintiffs to choose between safety and equal treatment. The FAC alleges that each of the Individual Defendants had a high degree of control over the policies that governed the ALT. McMahon is alleged to be the policy maker for the entire San Bernardino County Sheriff's Department. (SAC ¶ 25.) The FAC alleges Garland is in charge of the Corrections Bureau, which oversees all jail facilities, including West Valley. (Id. ¶ 26.) Rose is the commanding officer at West Valley. (Id. ¶ 27.) Mahan allegedly handles grievances by GBT inmates, and is also responsible for determining the eligibility of GBT inmates for programs. (Id. ¶ 28.) Lastly, the FAC alleges Castillo is in charge of classification and placement of GBT inmates in the ALT, and is also

[3] Defendants contend in their reply that since Plaintiffs have alleged that those who self-identify as GBT during the booking process are "automatically transferred" to the ALT, there is no coercive choice presented to Plaintiffs. (Reply at 7.) However, this ignores the decision Plaintiffs face when choosing whether to self-identify as GBT, and that because of this choice Plaintiffs face being sent either to the ALT or to general population.

involved in reviewing grievances by GBT inmates. (Id. ¶ 29.) In sum, the FAC alleges that the Individual Defendants, as supervisors or persons responsible for the jail's governance, have instituted a coercive policy that infringes Plaintiffs' constitutional rights.

Accordingly, the Court finds Plaintiffs have sufficiently alleged coercion on the part of the Individual Defendants. See Starr v. Baca, 652 F.3d 1202, 1207-08 (9th Cir. 2011)[4] (supervisorial liability exists based on defendant's "personal involvement in the constitutional deprivation" or a "sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation".")

B. Plaintiffs' California Government Code § 815.6 Claim

Under the Government Claims Act (Gov. Code, § 810 et seq.), there is no common law tort liability for public entities in California; instead, such liability must be based on statute. (Gov.Code, § 815, subd. (a) ("Except as otherwise provided by statute . . . A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity...."]; see Williams v. Horvath (1976) 16 Cal.3d 834, 838 ("intent of the act is not to expand the rights of plaintiffs in suits against governmental entities, but to confine potential governmental liability to rigidly delineated circumstances"). Government Code section 815.6 – upon which Plaintiffs' base their third cause of action – is a statute that provides for public entity liability. It states:

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

Cal. Govt. Code. § 815.6. California courts use a three part test to determine if liability for a mandatory duty may be imposed upon a public entity: (1) an enactment must impose a mandatory duty; (2) the enactment must intend to protect against the kind of risk of injury suffered by the plaintiff; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered. Dept. of Corp. v. Superior Court, 153 Cal. App. 4th 916, 922 (2007).

Defendants seek the dismissal of Plaintiffs' third cause of action for two reasons. First, Defendants argue the constitutional provisions cited by Plaintiffs do not create "mandatory duties" within the meaning of Section 815.6. In other words, Defendants contend Plaintiffs do not satisfy the first prong of Section 815.6's three-part test. Second, Defendants contend California Government Code § 844.6(a)(2) provides a public entity with immunity for claims asserting injury to a prisoner. The Court finds Defendants' first argument dispositive, and therefore does not address the second.

[4] While Starr concerned a claim under 28 U.S.C. § 1983, it is instructive here, especially as there is limited California constitutional law regarding supervisory liability.

Whether an enactment is intended to impose a mandatory duty is a question of law. Cnty. Of Los Angeles v. Superior Court, 102 Cal. App. 4th 627, 638-639 (2002). Here, the enactments at issue are equal protection provisions of the Federal and California Constitutions.[5] The Court finds these provisions do not impose a mandatory duty on Defendants within the meaning of Section 815.6.

As the California Supreme Court has stated, "First and foremost, application of section 815.6 requires that the enactment at issue be obligatory, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken." Haggis v. City of Los Angeles, 22 Cal.4th 490, 498 (2000) (emphasis in original). Courts have construed this first prong strictly, finding a mandatory duty only if the enactment "affirmatively imposes the duty and provides implementing guidelines." O'Toole v. Superior Court, 140 Cal. App. 4th 488, 510 (2006); see also Clausing v. San Francisco Unified School Dist., 221 Cal.App.3d 1224, 1240 (1990) ("If rules and guidelines for the implementation of an alleged mandatory duty are not set forth in an otherwise prohibitory statute, it cannot create a mandatory duty.") Here, the constitutional provisions at issue do not affirmatively impose a duty and certainly do not provide implementing guidelines.

To elucidate the above point, it is helpful to look to cases where courts have found a mandatory duty. In Braman v. California, 28 Cal. App. 4th 344, the court found the California Department of Justice had a mandatory duty to conduct a particularized investigation into the background of a prospective handgun purchaser. 28 Cal. App. 4th at 353. The statute that provided the duty, California Penal Code § 12076, stated "the department shall examine its records . . . in order to determine if the purchaser [is receiving inpatient treatment for a mental disorder or has been adjudicated to be a danger to others as a result of mental disorder]. If the department determines that the purchaser [is within the categories] it shall immediately notify the dealer of that fact." Id. at 350. In Trewin v. California, 150 Cal. App. 3rd 975 (1984), the court found the plaintiff had sufficiently alleged the Department of Motor Vehicles had a mandatory duty to deny a license to a person unable to operate a vehicle safely because of disability. Vehicle Code 12805(d), the source of the duty, provides that "the department shall not issue a driver's license to . . . any person . . . when it is determined [] that the person is unable to safely operate a motor vehicle." 150 Cal. App. 3rd at 978. Finally, in Sullivan v. Los Angeles, 12 Cal.3d 710 (1974), the court acknowledged the county jail had a mandatory duty to release the plaintiff, after dismissal of his case, under California Penal Code § 1384, which states "if the court directs the action to be dismissed, the defendant must, if in custody, be discharged therefrom." 12 Cal.3d at 715-17. These cases illustrate the type of enactments that can impart a mandatory duty. See also Bradford v. California, 36 Cal. App. 3d 16 (1973) (after plaintiff's criminal case dismissed, state had mandatory duty to ensure the records reflected as much); Scott v. Los Angeles, 27 Cal. App. 4th 125 1994 (county liable for failing to fulfill the mandatory duty imposed by state regulation requiring social workers to make monthly visits to foster children and foster parents).

[5] In the California Government Code, an "enactment" is defined as "a constitutional provision, statute, charter provision, ordinance or regulation." Cal. Gov. Code. § 810.6

The Court's reading of Section 815.6 is also finds support from another source. Plaintiffs have not provided any cases, and the Court has not been able to locate any, where a plaintiff successfully alleged a constitutional provision provided the mandatory duty in a claim under Section 815.6. If constitutional provisions were found to create mandatory duties, it would turn Section 815.6 into a general civil rights statute, allowing plaintiffs to sue public entities for civil rights violations without having to satisfy the heightened requirements of 42 U.S.C. § 1983 or California Civil Code § 52.1. There is nothing in the statutory language or case law to suggest such a broad expansion.

Plaintiffs argue that a separate provision of the California Constitution shows that Defendants do have a mandatory duty. (Opp'n at 18.) Article 1, Section 26 of the California Constitution provides that "the provisions of the Constitution are mandatory and prohibitory." However, while the equal rights provision is inarguably mandatory, it falls short of creating a "mandatory duty." As explained by the California Supreme Court, "mandatory" as used in Section 26 means that "all branches of government are required to comply with constitutional directives." Katzberg v. Regents of University of California, 29 Cal.4th 300, 206 (2002). In other words, the equal protection clause provides a "mandatory" prohibition on public entities engaging in certain activities, like discriminating against certain classes of citizens, but it does not require any affirmative act of a public entity sufficient to qualify as a mandatory duty under Section 815.6.

Accordingly, the Court DISMISSES WITHOUT LEAVE TO AMEND Plaintiffs' Third Cause of Action. See Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (holding that when it is clear the complaint cannot be saved by amendment, dismissal without leave to amend is appropriate).

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS in part and DENIES in part Defendants' Motion. The Court:

1) DENIES Defendants' Motion as to Plaintiffs' cause of action under the Bane Act; and

2) DISMISSES WITHOUT LEAVE TO AMEND Plaintiffs' cause of action for violation of California Government Code § 815.6

IT IS SO ORDERED.