United States District Court,
E.D. California.
Pamela KINCAID, et al., Plaintiffs,
v.
CITY OF FRESNO, et al., Defendants.
No. CV-F-06-1445 OWW/SMS.

May 12, 2008.

Michael Temple Risher, American Civil Liberties Union of Northern California, San Francisco, CA, Paul Alexander, Heller Ehrman LLP, Menlo Park, CA, for Plaintiffs.

James B. Betts, Betts & Wright, Fresno, CA, David Paul Harris, Navtej Singh Bassi, California Department of Transportation, Sacramento, CA, for Defendants.

MEMORANDUM DECISION GRANTING IN PART AND DENYING IN PART CALTRANS DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT (Docs. 183 & 199) AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AGAINST CALTRANS DEFENDANTS (Doc. 212)

OLIVER W. WANGER, District Judge.

***1** Before the Court are the motions for summary judgment filed by Defendants Will Kempton, Director of the California Department of Transportation (Caltrans), and Defendants James Province, Maintenance Area Superintendent in Fresno, District 6, and Daryl Glenn, a Caltrans Landscape Maintenance Lead Worker in charge of special programs personnel for Fresno Crew 652 in the Fresno Area Branch of Caltrans District 6, and Plaintiffs' motion for summary judgment against Defendants Province and Glenn.

Plaintiffs' motion was argued on April 25, 2008 and orally granted in part and denied in part from the bench. This Memorandum Decision is intended to amplify the Court's oral rulings made on April 25, 2008.[FN1]

> FN1. Plaintiffs' motion for summary judgment against the City Defendants is resolved by separate Memorandum Decision.

This action concerns a number of clean-up operations (sweeps) conducted in the City of Fresno. The certified class is comprised of "[a]ll persons in the City of Fresno who were or are homeless, without residence, after October 17, 2003, and whose personal belongings have been unlawfully taken and destroyed in a sweep, raid, or clean up by any of the Defendants."For more than a year, Defendants implemented a policy of seizing and immediately destroying personal property of homeless individuals in an effort to clean up the City of Fresno. A number of these clean up efforts occurred on property belonging to Caltrans. The SAC alleges nine claims for relief:

1. First Claim for Relief-Denial of Constitutional Right Against Unreasonable Search and Seizure in violation of the Fourth Amendment pursuant to 28 U.S.C. § 1983;

2. Second Claim for Relief-Denial of Constitutional Right to Due Process of Law in violation of the Fourteenth Amendment pursuant to 28 U.S.C. § 1983;

3. Third Claim for Relief-Denial of Constitutional Right to Equal Protection of the Laws in violation of the Fourteenth Amendment pursuant to 28 U.S.C. § 1983;

4. Fourth Claim for Relief-Denial of Constitutional Right Against Unreasonable Search and Seizure in violation of California Constitution, Article I, § 13;

5. Fifth Claim for Relief-Denial of Constitutional Right to Due Process of Law in violation of California Constitution Article I, § 7(A);

6. Sixth Claim for Relief-Denial of Constitutional Right to Equal Protection of the Laws in violation of California Constitution, Article I, § 7(A);

7. Seventh Claim for Relief-Violation of California Civil Code § 2080 *et seq.* and California Government Code § 815.6;

8. Eighth Claim for Relief-Violation of California Civil Code § 52.1;

9. Ninth Claim for Relief-Common Law Conversion.

The SAC prays for injunctive relief enjoining Defendants from continuing or repeating the alleged unlawful policies, practices and conduct; for declaratory relief that Defendants' alleged policies, practices and conduct were in violation of Plaintiffs' rights under the United States and California Constitutions and the laws of the United States and California; for return of Plaintiffs' property; for damages according to proof but no less than $4,000 per incident under California Civil Code §§ 52 and 52.1 and California Government Code § 815.6; for punitive and exemplary damages; and for attorneys' fees and costs of suit.

A. *GOVERNING STANDARDS.*

***2** Summary judgment is proper when it is shown that there exists "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."Fed.R.Civ.P. 56. A fact is "material" if it is relevant to an element of a claim or a defense, the existence of which may affect the outcome of the suit. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987). Materiality is determined by the substantive law governing a claim or a defense. *Id.* The evidence and all inferences drawn from it must be construed in the light most favorable to the nonmoving party. *Id.*

The initial burden in a motion for summary judgment is on the moving party. The moving party satisfies this initial burden by identifying the parts of the materials on file it believes demonstrate an "absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden then shifts to the nonmoving party to defeat summary judgment. *T.W. Elec.,* 809 F.2d at 630. The nonmoving party "may not rely on the mere allegations in the pleadings in order to preclude summary judgment," but must set forth by affidavit or other appropriate evidence "specific facts showing there is a genuine issue for trial."*Id.* The nonmoving party may not simply state that it will discredit the moving party's evidence at trial; it must produce at least some "significant probative evidence tending to support the complaint."*Id.* As explained in *Nissan Fire & Marine Ins. Co. v. Fritz Companies,* 210 F.3d 1099, 1102-1103 (9th Cir.2000):

> The vocabulary used for discussing summary judgments is somewhat abstract. Because either a plaintiff or a defendant can move for summary judgment, we customarily refer to the moving and nonmoving party rather than to plaintiff and defendant. Further, because either plaintiff or defendant can have the ultimate burden of persuasion at trial, we refer to the party with and without the ultimate burden of persuasion at trial rather than to plaintiff and defendant. Finally, we distinguish among the initial burden of production and two kinds of ultimate burdens of persuasion: The initial burden of production refers to the burden of producing evidence, or showing the absence of evidence, on the motion for summary judgment; the ultimate burden of persuasion can refer either to the burden of persuasion on the motion or to the burden of persuasion at trial.
>
> A moving party without the ultimate burden of persuasion at trial-usually, but not always, a defendant-has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment ... In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial ... In order to carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact ....
>
> ***3** If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial ... In such a case, the nonmoving party may defeat the motion for summary judgment without producing anything ... If, however, a moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense ... If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment ... But if the nonmoving party produces enough evidence to create a genuine issue of material fact, the nonmoving party defeats the

motion.

In *Carmen v. San Francisco Unified School District, supra,* 237 F.3d at 1031, the Ninth Circuit held:

> [T]he district court may determine whether there is a genuine issue of material fact, on summary judgment, based on the papers submitted on the motion and such other papers as may be on file and specifically referred to and facts therein set forth in the motion papers. Though the court has discretion in appropriate circumstances to consider other materials, it need not do so. The district court need not examine the entire file for evidence establishing a genuine issue of material fact, where the evidence is not set forth in the opposing papers with adequate references to that it could conveniently be found.

The question to be resolved is not whether the "evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *United States ex rel. Anderson v. N. Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir.1995). This requires more than the "mere existence of a scintilla of evidence in support of the plaintiff's position"; there must be "evidence on which the jury could reasonably find for the plaintiff."*Id.* The more implausible the claim or defense asserted by the nonmoving party, the more persuasive its evidence must be to avoid summary judgment." *Id.*

B. *UNDISPUTED FACTS.*

With the exception of the professional job titles and duties of Defendant Kempton and individual Caltrans Defendants and certain other admitted facts, the balance of the facts in this action are disputed and will be resolved at trial. Because the parties' respective statements of undisputed facts and responses thereto are voluminous this Memorandum Decision does not describe them in any further detail.

C. *DEFENDANT WILL KEMPTON.*

Defendant Will Kempton, sued in his official capacity as Caltrans' Director and only in regard to the First, Second and Third Claims for Relief alleging violation of Federal constitutional rights, moves for summary judgment on the ground that he is not a "person" within the meaning of 42 U.S.C. § 1983. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

***4** Plaintiffs acknowledge that damages are not available against Defendant Kempton. Plaintiffs assert that the only relief sought against Defendant Kempton is injunctive and declaratory relief pursuant to *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Defendant Kempton argues that Plaintiffs' requests for injunctive and declaratory relief do not target Caltrans policies, practices and customs: "Ratification, acquiescence, and other theories of vicarious liability are alleged in conclusory fashion in the SAC, but almost no positive acts or omissions are charged nor did discovery [sic]." Defendant Kempton asserts that Caltrans' policies, customs and practices are not the genesis of the alleged constitutional violations: "Plaintiffs have charged codefendants with unconstitutional conduct then attempted to ensnare the Caltrans Defendants, including Defendant Kempton, with blanket claims of involvement or ratification."

Plaintiffs respond that they need not establish that Caltrans had an official policy of violating the Constitution in order to obtain relief. Plaintiffs cited *Truth v. Kent School Dist.*, 499 F.3d 999, 1008 (9th Cir.2007): "*Monell'* s requirements do not apply where the plaintiffs only seek prospective relief ...*See Chaloux v. Killeen*, 886 F.2d 247, 250-51 (9th Cir.1989)." Plaintiffs further cite *National Audobon Society, Inc. v. Davis*, 307 F.3d 835, 846-847 (9th Cir.2002). There, the Ninth Circuit "declined to read additional 'ripeness' and 'imminence' requirements into the *Ex Parte Young* exception to Eleventh Amendment immunity in actions for declaratory relief beyond those already imposed by a general Article III and prudential ripeness analysis." *Id.* at 847.The state had argued for a "ripeness" component in the *Ex Parte Young* exception based on cases addressing whether a named state official has direct authority and practical ability to enforce the challenged statute. *Id.* at 846.*See, e.g., Snoeck v. Brussa*, 153 F.3d 984, 987 (9th Cir.1998) ("As *Ex Parte Young* explains, the officers of the state must be cloaked with a duty to enforce the laws of the state and must threaten or be about to commence civil or criminal proceedings to enforce an unconstitutional act.").

Plaintiffs argue that evidence shows that it is customary for Caltrans to work with the City in facilitating the sweeps of homeless encampments that are conducted on Caltrans property and that a permanent injunction is necessary to prevent Caltrans from providing assistance in the form of equipment and personnel to destroy that property. Plaintiffs asserts that Caltrans itself appears to have destroyed property of the homeless even after the Court's Preliminary Injunction. Plaintiffs argue that this evidence demonstrates the need for a permanent injunction to prevent Caltrans from continuing this conduct and that such an injunction is properly directed to Defendant Kempton because he has direct authority over Caltrans.

***5** Defendant Kempton's motion for summary judgment is DENIED. The existence of disputed issues of fact as to the participation in the seizure and immediate destruction of Plaintiffs' property by Caltrans through Defendants Province and Glenn preclude any grant of permanent injunctive relief until the completion of trial.

E. *ALLEGED CONSTITUTIONAL VIOLATIONS.*

Defendants move for summary judgment in their favor in connection with the federal constitutional claims alleged against them.

Defendants note that Plaintiffs had no legal right to encamp on Caltrans' rights-of-way. Defendants argue that the rights-ofway are public property belonging to the State of California, but its public use is for transportation purposes only. Caltrans has a statutory duty to improve and maintain the state highways. California Streets & Highways Code § 91. The term "highway" "includes bridges, culverts, curbs, drains, and all works incidental to highway construction, improvement, and maintenance."California Streets & Highways Code § 23. "Maintenance" includes "[t]he preservation and keeping of rights-of-way, and each type of roadway, structure, safety convenience or device, planting, illumination equipment, and other facility, in the safe and usable condition to which it has been improved or constructed, but does not include reconstruction or other improvement."California Streets & Highway Code § 27(a). Defendants assert that Caltrans' rights-of-way are a design element that provide a clear recovery zone for errant automobiles, *see* Exhibit 1; Defendant Kempton's Motion for Summary Judgment; Caltrans Design Manual, Topic 309.1(2), as well as access for emergency and maintenance vehicles, firebreaks, and adequate drainage, *see* Exhibit 2; Defendant Kempton's Motion for Summary Judgment; Caltrans Maintenance Manual, Ch. D1. California Streets & Highways Code § 91.6 provides that Caltrans "shall, within its maintenance programs relating to litter cleanup and abatement, assign a high priority to litter deposited along state highway segments adjoining storm drains, streams, rivers, waterways, beaches, the ocean, and other environmentally sensitive areas."Caltrans' Maintenance Manual, relying on Streets & Highways Code § 91.6, provides that "[i]n addition, removal efforts should be focused on routes to airports, commuter routes, and heavily traveled inter-city routes."

1. *Fourth Amendment.*

Plaintiffs allege that their rights under the Fourth Amendment against unreasonable searches and seizures were violated by Defendants taking and destroying their personal property, without providing either adequate notice or an opportunity to retrieve personal possessions before they were destroyed, and without a legitimate government interest.

Defendants contend they are entitled to summary judgment on this claim because no Caltrans employee seized any personal property of Plaintiffs.

Plaintiffs argue that the fact none of these Defendants personally and directly seized their personal property and destroyed it does not entitle them to summary judgment.

***6** Plaintiffs cite *Johnson v. Duffy*, 588 F.2d 740, 743-744 (9th Cir.1978):

> A person 'subjects' another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirming act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made ... Moreover, personal participation is not the only predicate for section 1983 liability. Anyone who 'causes' any citizen to be subjected to a constitutional deprivation is also liable. The

> requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

Plaintiffs refer to evidence that Defendant Glenn provided Caltrans' equipment and employees, inmate work crews and supervision to the City Defendants, thereby facilitating the City-initiated clean-ups. Plaintiffs refer to evidence that Defendant Province was kept informed of Defendant Glenn's actions in regard to the clean-ups and approved the resources and other support given by Caltrans to the City to aid the clean-up efforts. Plaintiffs cite *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir.1991):

> Supervisory liability is imposed against a supervisory official in his individual capacity for his 'own culpable action or inaction in the training, supervision, or control of his subordinates,'... for his " 'acquiesce[nce] in the constitutional deprivations of which [the] complaint is made,' "..., or for conduct that showed a " 'reckless or callous indifference to the rights of others.' "

Plaintiffs argue that Defendant Province's knowledge of Caltrans' participation in the City's clean-ups and his acquiescence to it "was a key link in the causal chain leading to the violation of Plaintiffs' constitutional rights, and gives rise to his individual liability."Plaintiffs argue that it is irrelevant whether the Caltrans Defendants had the opportunity or authority to intervene in, or stop, the City's conduct because the Caltrans Defendants "never ceased *their own* support and facilitation of the Clean-Ups."Plaintiffs contend that the Caltrans Defendants knew how the clean-ups were conducted and that Plaintiffs' property was summarily destroyed, yet kept providing equipment, work crews and supervision to facilitate them.

Because the facts are disputed as to the roles and conduct of the Caltrans Defendants, summary judgment for either party with regard to Plaintiffs' claim of Fourth Amendment violation is DENIED.

2. *Fourteenth Amendment Due Process.*

Plaintiffs' Fourteenth Amendment Due Process Clause claim is grounded on procedural due process.

The Plaintiffs' personal possessions constitute property for purposes of the Fourteenth Amendment. *See Fuentes v. Shevin*, 407 U.S. 67, 84, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972)."The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard at a meaningful time and in a meaningful manner." *Orloff v. Cleland*, 708 F.2d 372, 379 (9th Cir.1983). As explained in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433-434, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982):

> ***7** As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that '*some* form of hearing' is required before the owner is finally deprived of a protected property interest ... And that is why the Court has stressed that, when a 'statutory scheme makes liability an important factor in the State's determination ..., the State may not, consistent with due process, eliminate consideration of that factor in its prior hearing ... To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.

"We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in " 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." ' " *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). When a protected property interest is threatened, three factors must be considered to determine whether the basic requirements of procedural due process have been met:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirement would entail."

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Plaintiffs argue that they are entitled to summary judgment that the City Defendants violated their right to procedural due process. Plaintiffs do not discuss the adequacy of notice but, rather, focus solely on the immediate destruction of property following the seizures during the clean ups. Plaintiffs contend that the record in this action establishes that this immediate destruction prevented Plaintiffs from any opportunity to present a claim of entitlement to the property destroyed.

Plaintiffs argue that the Caltrans Defendants are not entitled to summary judgment with regard to this claim for the same reasons argued in opposition to the Fourth Amendment claim, i.e., evidence that the Caltrans Defendants facilitated the clean-ups by providing equipment, work crews and supervision.

The parties' respective motions for summary judgment with regard to Plaintiffs' claim of violation of procedural due process is DENIED because factual issues exist. However, assuming *arguendo* that the Caltrans Defendants knowingly facilitated the immediate destruction of Plaintiffs' personal property as Plaintiffs assert, there is a question how the Caltrans Defendants facilitated or participated in the *City's* alleged failure to provide notice and an opportunity to be heard prior to the destruction of personal property. Although the Caltrans Defendants were not in a position to provide procedural due process, establishment of knowing participation with notice of the immediate destruction practice could provide a basis for liability.

3. *Fourteenth Amendment Equal Protection.*

***8** "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)."The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons ... We have attempted to reconcile the principle with reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

As discussed in the accompanying Memorandum Decision as to the City Defendants, the respective motions for summary judgment are DENIED; factual issues exist as to whether persons other than the homeless had their personal property immediately destroyed.

F. *QUALIFIED IMMUNITY.*

Defendants Province and Glenn move for summary judgment in connection with the federal constitutional claims against them on the basis of qualified immunity. Plaintiffs argue that summary judgment on this ground should be denied.

Qualified immunity serves to shield government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The Ninth Circuit employs a three-part test to determine whether an individual is entitled to qualified immunity. First, the specific right allegedly violated must be identified. Secondly, it must be determined whether that right was so clearly established as to alert a reasonable officer to its constitutional parameters. Third, if the law is clearly established, it must be determined whether a reasonable officer could have believed lawful the particular conduct at issue. *Kelly v. Borg*, 60 F.3d 664, 666 (9th Cir.1995). The plaintiff in a Section 1983 action bears the burden of proving that the right allegedly violated was clearly established at the time of the officer's allegedly impermissible conduct. *Camarillo v. McCarthy*, 998 F.2d 638, 640 (9th Cir.1993). A law is "clearly established" when "the contours of that right [are] sufficiently clear that a reasonable officer would understand that what he is doing violates that right."*Anderson v. Creighton*, 489 U.S. 635, 640 (1987). To demonstrate clearly established law at the time of the events in question, the plaintiff

'must show that *the particular facts* of [the] case support a claim of clearly established right.'...This does not mean that the 'exact factual situation' of [the case] must have been previously litigated ... 7F[S]pecific binding precedent is not required to show that a right is clearly established for qualified immunity purposes.' ...Absent binding precedent, 'a court should look at all available decisional law including decisions of state courts, other circuits, and district courts to determine whether the right was clearly established.'...Nonetheless, '[t]he contours of the [clearly established] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'....

***9** *Doe By and Through Doe v. Petaluma City School Dist.*, 54 F.3d 1447, 1450 (9th Cir.1995). The Supreme Court has set forth a two-pronged inquiry to resolve all qualified immunity claims. First, "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officers' conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If the court determines that the conduct did not violate a constitutional right, the inquiry is over and the officer is entitled to qualified immunity. However, if the court determines that the conduct did violate a constitutional right, Saucier's second prong requires the court to determine whether, at the time of the violation, the constitutional right was "clearly established." *Id.*"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."*Id.* at 202.

This inquiry is wholly objective and is undertaken in light of the specific factual circumstances of the case. *Id.* at 201.Even if the violated right is clearly established, *Saucier* recognized that, in certain situations, it may be difficult for a police officer to determine how to apply the relevant legal doctrine to the particular circumstances he faces. If an officer makes a mistake in applying the relevant legal doctrine, he is not precluded from claiming qualified immunity so long as the mistake is reasonable. If "the officer's mistake as to what the law requires is reasonable, ... the officer is entitled to the immunity defense."*Id.* at 205.In *Brosseau v. Haugan*, 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004), the Supreme Court reiterated:

Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. *Saucier v. Katz*, 533 U.S., at 206 (qualified immunity operates 'to protect officers from the sometimes "hazy border between excessive and acceptable force" '). Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

It is important to emphasize that this inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'*Id.*, at 201.As we previously said in this very context:

'[T]here is no doubt that *Graham v. Connor, supra*, clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet, that is not enough. Rather, we emphasized in *Anderson [v. Creighton]*"that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right.'...The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted .'...

***10** The Court of Appeals acknowledged this statement of law, but then proceeded to find fair warning in the general tests set out in *Graham* and *Garner*... In so doing, it was mistaken. *Graham* and *Garner*, following the lead of the Fourth Amendment's text, are cast at a high level of generality. See *Graham v. Connor, supra*, at 396 (" '[T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or

mechanical application"'). Of course, in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law.'

543 U.S. at 198-199.

Plaintiffs argue that Defendants are not entitled to summary judgment on the ground of qualified immunity. Plaintiffs cite *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 977-978 (9th Cir.2005): "These cases would have alerted any reasonable officer that the Fourth Amendment forbids ... the destruction of a person's property, when that destruction is unnecessary-*i.e.*, when less instrusive, or less destructive, alternatives exist."Plaintiffs also cite *Logan v. Zimmerman Brush Co., supra*, 455 U.S. at 433:"[I]t has become a truism that '*some* form of hearing' is required before the owner is finally deprived of a protected property interest."

Because the facts are disputed, the respective motions for summary judgment on the ground of qualified immunity are DENIED.

D. *STATE LAW CLAIMS FOR DAMAGES.*

Defendants move for summary judgment on the state law claims for relief to the extent that the SAC seeks money damages on the ground that Plaintiffs did not file a claim against their employing entity, Caltrans, as required by the California Government Claim Act before bringing suit against Defendants Province and Glenn.

Plaintiffs oppose summary judgment on this ground. As explained in *Gatto v. County of Sonoma*, 98 Cal.App.4th 744, 762, 120 Cal.Rptr.2d 550 (2002):

" '[A]n action for specific relief does not lose its exempt status solely because incidental money damages are sought.'...The claims filing requirement remains applicable to actions in which money damages are not incidental or ancillary to any specific relief that is also sought, but the primary purpose of the action.

Plaintiffs assert that a "class-action civil rights suit seeking to overturn a City policy is not subject to the claims requirement, even when it seeks damages in addition to equitable relief."[FN2]

FN2. Plaintiffs note that the Court, in granting Plaintiffs' motion for class certification, stated, in discussing the superiority of a class action under Rule 23(b)(3), Federal Rules of Civil Procedure, that "[t]he primary relief sought in injunctive relief." *Kincaid v. City of Fresno*, 244 F.R.D. 597, 607 (E.D.Cal.2007). Because the Court's statement was made in the context of an entirely different issue, it does not bind the Court.

To make the determination whether a government claim is required, California courts analyze the various claims for relief in the complaint at issue. *See Loehr v. Ventura County Community College Dist.*, 147 Cal.App.3d 1071, 1080-1082, 195 Cal.Rptr. 576 (1983); *Gatto, supra*, 98 Cal.App.4th at 762, 120 Cal.Rptr.2d 550; *Lozada v. City and County of San Francisco*, 145 Cal.App.4th 1139, 1168-1170, 52 Cal.Rptr.3d 209 (2006); *see also Independent Housing Services of San Francisco v. Fillmore Center Associates*, 840 F.Supp. 1328, 1358 (N.D.Cal.1993):

***11** While plaintiffs do seek damages, their request for an injunction declaring that the Agency is in violation of the handicap access laws and must comply with them in the future is of great weight and not just ancillary to the request for damages. IHS's potential damages are small and particularly inconsequential compared to the effect of the declarations it seeks. The court therefore finds that no statutory notice was required under the Tort Claims Act.

The SAC prays for no less than $4,000.00 "per incident" under California Civil Code §§ 52 and 52.1, California Government Code § 815.6, and under the common law doctrine of conversion. Although there does not yet appear to be a firm estimate of the number of class members, the class is "[a]ll persons in the City of Fresno who were or are homeless, without residence, after October 17, 2003, and whose personal belongings have been unlawfully taken and destroyed in a sweep, raid, or clean up by any of the Defendants."In their motion for class certification, Plaintiffs represented that "hundreds" of homeless persons in Fresno meet the class definition. If there

are 200 class members, the damages sought by Plaintiffs totals $800,000.00. In addition, Plaintiffs seek exemplary and punitive damages. Here, it cannot be concluded that Plaintiffs' prayer for damages are not small or incidental to their prayers for injunctive and declaratory relief.

In addition, Plaintiffs contend that a claim for return of property is not subject to the claim requirement. *Minsky v. City of Los Angeles*, 11 Cal.3d 113, 123-124, 113 Cal.Rptr. 102, 520 P.2d 726 (1974).

Plaintiffs reliance on *Minsky* is misplaced. The gravamen of this litigation is the immediate destruction of unattended personal property. Plaintiffs make no claim for the return of property; nor is there any suggestion there exists property to return. Plaintiffs have emphasized that their property is destroyed and lost forever.

Plaintiffs have not complied with the claim requirements of the California Tort Claim Act with regard to Defendants Province 22 and Glenn. Defendants Province and Glenn's motion for summary judgment on the state law claims for damages is GRANTED; Plaintiffs' motion for summary judgment against Defendants Province and Glenn on the state law claims for damages is DENIED.

E. *PRAYERS FOR INJUNCTIVE AND DECLARATORY RELIEF*.

Plaintiffs and the Caltrans Defendants move respectively for summary judgment on the prayers for permanent injunctive and declaratory relief. The Caltrans Defendants refer to the City's administrative order adopted following the preliminary injunction and further assert that any injunctive relief should not include Defendants Glenn and Province. Plaintiffs argue that such relief is still necessary because the City could revise or disregard the administrative order. These issues are subject to proof.

The parties' respective motions for summary judgment are DENIED; whether the injunctive or declaratory remedies sought are available and necessary cannot be determined until after trial.

CONCLUSION

***12** For the reasons stated above:

A. Defendant Kempton's motion for summary judgment is DENIED;

B. Plaintiffs' motion for summary judgment against Defendants Province and Glenn is DENIED;

C. Defendants Province and Glenn's motion for summary judgment is GRANTED as to the state law claims for damages asserted against them and DENIED on all other grounds.

D. Counsel for the Caltrans Defendants shall prepare and lodge a form of order that the rulings set forth in this Memorandum Decision within five (5) days following the date of service of this decision.

IT IS SO ORDERED.

E.D.Cal.,2008.
Kincaid v. City of Fresno
Slip Copy, 2008 WL 2038386 (E.D.Cal.)

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