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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

RICHARD BONOMI,

Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN
FRANCISCO,

Defendant and Respondent.

A139431

(City and County of San Francisco
Super. Ct. No. CGC10505334)

This is an appeal from final judgment after the trial court granted the motion for summary judgment filed by defendant and respondent City and County of San Francisco (hereinafter, the City). The appellant, Richard Bonomi, sued the City for assault and battery based on the actions of one of its employees, Officer Dean Marcic, during a Forty-Niners football game at Candlestick Park, where both men were working at the time. The trial court granted summary judgment to the City after sustaining several of its evidentiary objections to appellant's evidentiary showing, and then concluding based on the remaining evidence in the record that appellant had failed to raise any triable issue of fact. On appeal, appellant challenges the trial court's evidentiary rulings with respect to two of the City's objections, as well as the trial court's ultimate conclusion that he failed to raise triable issues of fact. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 12, 2010, appellant filed a complaint in San Francisco Superior Court, which was later amended, asserting various causes of action against the City and

one of its police officers, Officer Marcic, based upon events occurring during an investigation of appellant on November 27, 2009 at a Forty-Niners football game at Candlestick Park. Specifically, appellant brought claims under federal law for unlawful arrest, excessive force, detention and confinement, and refusing or neglecting to prevent constitutional violations. (42 U.S.C. 1983.) In addition, under California law, appellant brought claims for false arrest and imprisonment, assault, battery, intentional infliction of emotional distress, and intentional interference with contractual relations. After the City answered the first amended complaint and removed the action to federal court in December 2010, the parties began to conduct discovery.

On March 27, 2012, the City deposed appellant, during which the following facts were revealed. Appellant, a retired California Department of Corrections prison guard and parole officer, was employed part-time as a security guard for Andrews International. On November 27, 2009, the day in question, appellant was working his usual shift on the loading dock at Candlestick Park. Among other duties, appellant was charged with preventing any unauthorized person from entering the stadium through the loading dock to watch the football game. For this particular game, appellant had made what he deemed proper arrangements for an acquaintance, Chris Simmons, to meet stadium usher, Walter Turner, at the loading dock, so Turner could escort Simmons and his friends to the so-called Community Door section of the stadium to watch the game. The Community Door program made a limited number of free game-day passes available to community members. Appellant knew Simmons from his prior work as a parole officer (Simmons was on parole), and occasionally engaged in various charity work with Turner.

After the November 27 game was underway, however, Simmons was taken into custody at Candlestick's San Francisco Police Department substation after security staff observed him to be excessively inebriated. Shortly thereafter, appellant was summoned to the substation. When he arrived, appellant noticed Simmons in a holding cell yelling his name. Officer Marcic and one of his colleagues, Sergeant Pete Dacre, began questioning appellant about Simmons' presence at the game and, in particular, about their

suspicion that appellant had helped him to illegally enter the stadium, a charge appellant vehemently denied.¹

According to appellant's deposition testimony, during his interrogation at the substation, Officer Marcic kept telling him to admit, "I just fucked up – I just fucked up, I'm sorry and I won't do it again." Appellant refused, continuing to deny any wrongdoing despite Officer Marcic's insistence otherwise. Minutes later, Officer Marcic's colleague, Sergeant Dacre, told appellant to "Go find the other person that [Simmons] came in with and bring him to the substation." Although appellant told the officers he did not know and would not recognize Simmons' companions, he nonetheless complied with their demand by leaving the substation to check the seating area for the unknown companions.

About 15 to 30 minutes later, appellant returned to the substation and Officer Marcic's questioning and accusations began anew. Appellant did not feel free to leave even though he was never handcuffed, patted down nor placed under arrest. After a few more minutes, appellant received a call from his supervisor, Robert Pasquinelli, on his radio, which was attached to his collar by a tether, asking when he intended to return to his station. Appellant asked Officer Marcic how he should reply, at which point appellant described the following sequence of events:

"A: [Officer Marcic] grabs the mic, leans over, pulls it from me and says, 'He'll be half an hour.'

"Q: Okay.

"A: And then drops the radio.

"Q: Referring to the microphone?

"A: The microphone.

"Q: Okay.

"A: Then --

¹ Throughout this time, other officers were on their radios or telephones trying to contact various individuals who worked with the Forty-Niners management and security staff to determine what had happened.

“Q: What became of the microphone when he let go of it?

“A: I think it was dangling.

“Q: Okay.

“A: It couldn’t have hit the ground because I have it attached to my tether.

“Q: So it wasn’t damage[d]?

“A: I don’t believe it was.

“Q: Did you reattach it to your lapel or just leave it hanging?

“A: I think I just left it hanging. I was just in shock because I know – I felt that, What happens if I move or jerk? They are going to call it resisting whatever.”²

Shortly after Officer Marcic released the microphone, appellant’s supervisor, Mr. Pasquinelli arrived, as well as several individuals associated with the Forty-Niners. Pasquinelli told appellant, “Come on,” and the men left the substation on their own accord. Appellant was suspended immediately pending an investigation, which ultimately concluded with appellant’s return to work with the same pay level and work load.

When appellant was asked during his deposition whether he experienced pain or was in any way physically injured when Officer Marcic grabbed the radio microphone, he responded in the negative. Appellant also responded, “No,” when asked whether he sought or received any medical treatment as a result of Officer Marcic’s conduct.³ At this point in the deposition, appellant was asked, quite directly, whether “[a]part from pulling the microphone from your hand, as you’ve described, is there any other force that you recall Officer Marcic or any other officer using in connection with the proceedings of

² Appellant clarified later in the deposition that Officer Marcic pulled the microphone from both his hand and lapel: “I placed my hand over the microphone when Pasquinelli called, I said, ‘What do I tell him?’ He reached over, pull[sic] it out of my hand and spoke into it.”

³ Appellant did state that that he experienced a two-day migraine following the events of November 27, 2009, but he acknowledged having experienced periodic migraines for over 29 years. No medical professional attributed this particular migraine to Officer Marcic’s conduct.

November 27th, 2009?” Appellant responded, “No.” Consistent with this response, appellant replied, “Yes,” when asked whether the only time Officer Marcic touched him was when he grabbed the microphone. And, when asked to state “everything that the officers did that you believe constituted assault,” appellant verified that his claim was based upon the officer’s “removing – taking the mic off my person and out of my hand” and “[j]ust the presence that he came forward to me.”

On November 28, 2012, appellant responded to the City’s written requests for admissions with the same information. When asked to provide all facts supporting his assault and battery claims, appellant stated (1) “[he] was battered when Officer Marci[c] grabbed the microphone from [his] hand, causing contact with [him]” and (2) “[he] was assaulted when Officer Marci[c] stood extremely close to [him] and reached out to grab the microphone from [his] hand, causing contact with [him].”

Based upon this discovery, the City moved for partial summary judgment in federal court, which motion was heard on July 11, 2012.⁴ The federal court granted the City’s motion as to appellant’s causes of action for excessive force, unlawful detention and confinement, false arrest and imprisonment, and intentional infliction of emotional distress. In doing so, the court specifically found that appellant had “fail[ed] to provide any evidence showing that the force used, judged objectively from the perspective of a reasonable officer in light of the circumstances, was excessive within the meaning of the Fourth Amendment.” The federal court also dismissed the complaint as to Officer Marcic for lack of proper service, and then remanded the two remaining causes of action for assault and battery back to state court.

Once back in San Francisco Superior Court, the City again moved for summary judgment, arguing that no triable issues of fact existed with respect to appellant’s remaining causes of action for assault and battery. Appellant opposed the motion and, on

⁴ On June 14, 2012, a few weeks before the hearing on the City’s motion for summary judgment in federal court, appellant stipulated to the dismissal without prejudice of his causes of action for unlawful arrest (42 U.S.C. 1983), refusing or neglecting to prevent constitutional violations (*ibid.*), and intentional interference with contractual relations.

April 2, 2013, submitted a new declaration to support his opposition and response to the City's separate statement of undisputed facts. Appellant acknowledged this declaration contained "new evidence" that was not in the record at the time the federal court dismissed his excessive force claim. According to appellant, this new evidence "presents the first time the question of whether Officer Marcic physically touched [him] has ever been directly answered, as Defendant's attorneys failed to ask the question at his deposition."

Specifically, appellant's declaration added the following "new" details from the November 27, 2009 incident relating to his assault and battery claims:

"5. As the conversation [among appellant, Sergeant Dacre and Officer Marcic] developed, it became clear to me that both Dacre and Marcic were very angry, particularly Marcic. They were concerned that I had enabled an improper person to enter the game (which was not true), and Marcic in particular began yelling, ordering me to admit that I had broken the law.

"6. *At various points of the conversation, Marcic clasped his fist, reared in back and began to go through a punching motion towards me, in an obvious attempt to intimidate me and place me in imminent apprehension of being punched. He succeeded in doing so, as, at several points in the conversation, I thought that Marcic was throwing a punch at me and I began to duck. Marcic seemed amused by my fear, and became even more animated, and began throwing more fake punches at me. I felt powerless to do anything about it because we were in the presence of an off-duty San Francisco Police Sergeant, who observed the entire incident and did nothing.* [¶]

"8. *Approximately one hour into this altercation, I received a call on my radio – which I was wearing incident to my security duties – in which my supervisor Robert Pasquinelli requested to know how much longer I was going to be away. I asked Officer Marcic, 'What should I tell him?' Officer Marcic, who was still yelling at me and angrily waving his arms and intimidating me, was plainly even more agitated to be interrupted. He suddenly reared back and threw his right arm toward my body, which made me think I was about to be punched. As I started to react by ducking, his hand grazed my chest*

and grabbed my hand (which was holding and fully covering the radio microphone), forcefully removing the radio from my hand, causing me some amount of pain. He then screamed into the radio something to the effect of, 'this guy isn't going anywhere for another thirty minutes!' He then continued to yell and scream at me, wave his arms at me, and this conduct continued for more than another fifteen minutes, accusing me of committing a felony by lying in a police investigation. [¶¶]” (Italics added.)

The City objected to several portions of what it deemed appellant’s “concocted” declaration, claiming it was “blatantly at odds with his earlier deposition testimony and his responses to written discovery.” The trial court agreed, sustaining all but one of the City’s objections, including those to the italicized portions of paragraphs six and eight set forth above.

Then, on June 5, 2013, the trial court granted the City’s summary judgment motion, concluding the City had successfully shifted the evidentiary burden to appellant, who had then failed to raise a triable issue of fact regarding whether he had been assaulted or battered, or whether Officer Marcic’s actions were objectively unreasonable. In reaching this conclusion, the trial court found that “[appellant] relies on his own declaration which contradicts his pervious [sic] sworn deposition testimony. Such evidence is insufficient to raise a triable issue of fact.” Judgment was thus entered in favor of the City, prompting this appeal.

DISCUSSION

Appellant challenges the trial court’s grant of summary judgment to the City on two alternative grounds. First, appellant contends the trial court erred in sustaining the City’s objections to certain statements in his declaration filed April 2, 2013, several months after the City filed its motion for summary judgment. Alternatively, appellant contends that, even if these objections were properly sustained, there remain triable issues of fact with respect to whether he was a victim of assault or battery at the hands of Officer Marcic. The governing law is generally well-established.

A defendant moving for summary judgment has met its burden to show a cause of action lacks merit if the defendant can show the plaintiff cannot establish one or more

elements of the cause of action. (Code of Civ. Proc., §437c, subd. (o)(2).)⁵ “In such a case, the defendant bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 [107 Cal.Rptr.2d 841, 24 P.3d 493] (*Aguilar*)).) If the defendant carries the burden of production, the burden shifts to the plaintiff to make his or her own prima facie showing of the existence of a triable issue of fact. (*Ibid.*) ‘There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. [Fn. omitted.]’ (*Ibid.*)” (*McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1103.)

“In moving for summary judgment, ‘[t]he defendant may . . . present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence — as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing.’ (*Aguilar, supra*, 25 Cal.4th at p. 855.) If plaintiffs respond to comprehensive interrogatories seeking all known facts with boilerplate answers that restate their allegations, or simply provide laundry lists of people and/or documents, the burden of production will almost certainly be shifted to them once defendants move for summary judgment and properly present plaintiffs’ factually devoid discovery responses. [Fn. omitted.]” (*Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 106-107; see also *Scheidig v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 83 [defendants seeking summary judgment may rely on “ ‘factually devoid’ discovery responses from which an absence of evidence can be inferred, ’ ” but “ ‘the burden should not shift without stringent review of the direct, circumstantial and inferential evidence’ ”].)

In reviewing an order granting summary judgment in favor of the defendant, we independently examine the record to determine whether there exists any triable issue of material fact. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) Thus, like

⁵ Unless otherwise stated, all statutory citations herein are to the Code of Civil Procedure.

the trial court, we consider all of the evidence set forth in the papers in the light most favorable to the plaintiffs as the losing parties. This review requires us to resolve any evidentiary doubts or ambiguities in the plaintiffs' favor. (*Id.* at p. 768; see also § 437c, subd. (c).) However, "[w]e review for abuse of discretion any evidentiary ruling made in connection with the [summary judgment] motion. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122 [59 Cal.Rptr.3d 618] (*Powell*))." (*Shugart v. Regents of University of California* (2011) 199 Cal. App. 4th 499, 505.)⁶ With these standards in mind, we return to the facts at hand.

We first consider whether the trial court abused its discretion in sustaining all but one of the City's objections to appellant's declaration, evidence he presented for the first time in opposing summary judgment. The trial court sustained the City's objections to significant portions of paragraphs six and eight of this declaration after accepting the City's argument that it was "new evidence" directly contrary to appellant's previous sworn deposition testimony and verified discovery responses. The record supports this evidentiary ruling. To identify some of the more blatant contradictions in appellant's evidentiary showing, while his declaration describes a nearly one hour episode involving Officer Marcic "clasp[ing] his fist, rear[ing] it back" and throwing multiple "fake punches" at appellant "in an obvious attempt to intimidate me and place me in imminent apprehension of being punched," appellant expressly denied during his deposition that the officer "ever rais[ed] his hand as though to strike [him]." Appellant also testified in deposition that just two of Officer Marcic's actions formed the basis of his claims of assault and battery – to wit, the officer's "taking the mic off [appellant's] person and out

⁶ "[T]he weight of California appellate court authority holds that a trial court's evidentiary rulings in summary judgment proceedings are reviewed for an abuse of discretion (*Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335 [115 Cal.Rptr.3d 538]), but the California Supreme Court has yet to determine 'generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or are reviewed de novo' (*Reid v. Google, Inc.* [(2010)] 50 Cal.4th [512,] 535)." (*Ahn v. Kumho Tire U.S.A., Inc.* (2014) 223 Cal.App.4th 133, 143-144.)

of [appellant's] hand” and that he “stood extremely close to [appellant].”⁷ He also testified that he “[a]bsolutely” did not “jerk” when Officer Marcic grabbed his microphone. Nonetheless, appellant’s declaration describes the officer’s repeated “punching motion,” “fake punches,” and “anгр[y] waving [of] his arms,” which appellant states caused him to “start[] to react by ducking.” Finally, while appellant’s declaration states that Officer Marcic “forcefully remov[ed] the radio from my hand, causing me some amount of pain,” he testified in deposition that he did not recall any pain when the officer removed the microphone from his hand.⁸

While appellant tries to explain away these inconsistencies by claiming that “the questions posed to him did not cover the[se] details,” the record belies him. The transcript from appellant’s deposition, just described, proves the opposite – to wit, he was asked, quite directly, to identify *all* of Officer Marcic’s actions he believed constituted assault and battery, whether these actions caused him pain or harm, and how he reacted to them. His suggestions otherwise thus merit no further discussion. Accordingly, the trial court’s evidentiary rulings stand. (E.g., *Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 382 [“the credibility of the admissions are valued so highly that the controverting affidavits may be disregarded as irrelevant, inadmissible or evasive”]; *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1087 [trial court had discretion to disregard the plaintiff’s declaration statement that he was exposed to asbestos while working at a plant, where his prior discovery response unequivocally stated that he did not work at the plant at the relevant time].)

⁷ Appellant thereafter confirmed in written discovery responses that underlying his assault and battery claims were just the following facts – Officer Marcic’s “grab[bing] the microphone from Plaintiff’s hand, causing contact with [him]” and “st[anding] extremely close to Plaintiff and reaching out to grab the microphone from Plaintiff’s hand,” which created an apprehension of immediate physical harm.

⁸ Specifically, when asked during the deposition whether he “fe[lt] pain at all at the moment that he took the microphone out of your hand,” appellant responded, “I cringed, but not enough to where he would put both his hands on me.” The questioning attorney then interrupted: “But the question is was it painful in any respect to have him remove the microphone from your hand?” Appellant replied: “I can’t recall it as such.”

Remaining for our consideration, however, is appellant's contention that, even without the additional details in his declaration, the facts set forth in his deposition testimony and discovery responses suffice to establish triable issues of fact. We disagree.

Appellant does not dispute that, to prevail on his assault and battery claims, he would need to prove Officer Marcic used an unreasonable amount of force on him. "A police officer in California may use reasonable force to make an arrest, prevent escape or overcome resistance, and need not desist in the face of resistance. (Pen. Code, § 835a.) The standard jury instruction in police battery actions recognizes this: 'A peace officer who uses unreasonable or excessive force in making a lawful arrest or detention commits a battery upon the person being arrested or detained as to such excessive force.' (BAJI No. 7.54.) By definition then, a prima facie battery is not established unless and until plaintiff proves unreasonable force was used. [¶] This rule takes into account the special situation of the police defendant. Unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties, because 'the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.' (*Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S. Ct. 1865, 1871-1872, 104 L.Ed.2d 443].) They are, in short, not similarly situated to the ordinary battery defendant and need not be treated the same. . . . [T]he burden of proof [is] upon the plaintiff to establish the use of excessive force' [Citation.]" (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272-1273 [footnotes omitted].)

Thus, in California, "[a] state law battery claim is a counterpart to a federal claim of excessive use of force. In both, a plaintiff must prove that the peace officer's use of force was unreasonable. [Citation.] 'Claims that police officers used excessive force in the course of an arrest, investigatory stop or other 'seizure' of a free citizen are analyzed under the reasonableness standard of the Fourth Amendment' [Citations.] The question is whether a peace officer's actions were objectively reasonable based on the facts and circumstances confronting the peace officer. [Citation.] The test is ' "highly

deferential to the police officer's need to protect himself and others.” ’ (*Ibid.*)” (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527 [fn. omitted].)

Applying these standards to the facts at hand, viewed in a light favorable to appellant and resolving all evidentiary doubts and ambiguities in his favor (§ 437c, subd. (c)), we agree with the trial court that summary judgment for the City was appropriate. “Parties have a duty to respond to discovery requests ‘as completely and straightforwardly as possible given the information available to them.’ [Citation.] When defendants conduct comprehensive discovery, plaintiffs cannot play ‘hide the ball.’ ” (*Andrews v. Foster Wheeler LLC, supra*, 138 Cal.App.4th at p. 106. See also *McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, 210 [“ ‘One of the principal purposes of the Discovery Act . . . is to enable a party to obtain evidence in the control of his adversary in order to further the efficient, economical disposition of cases according to right and justice *on the merits*. [Citations.] [Citation.]”].) “ ‘When discovery, properly used, makes it “perfectly plain that there is no substantial issue to be tried” [citation], section 437c, Code of Civil Procedure, is available for prompt disposition of the case.’ [Citation.]” (*D’Amico v. Board of Med. Examiners* (1974) 11 Cal.3d 1, 21 [*D’Amico*].)

“Moreover, when discovery has produced an admission or concession on the part of the party opposing summary judgment which demonstrates that there is no factual issue to be tried, certain of those stern requirements applicable in a normal case are relaxed or altered in their operation. Thus, in *King v. Andersen* [(1966)] 242 Cal.App.2d 606 . . . , the rule providing for liberal construction of counteraffidavits was held not to require reversal of a summary judgment for defendants where the plaintiff in an assault case, although having stated in his counteraffidavit that unnecessary force was used, nevertheless had stated in a previous deposition that no force was used; refusing to find that a triable issue was thus presented, the court said: ‘Where, as here, however, there is a clear and unequivocal admission by the plaintiff, himself, in his deposition . . . we are forced to conclude there is no *substantial* evidence of the existence of a triable issue of fact.’ [Citation.]” (*D’Amico, supra*, 11 Cal.3d at p. 21.) “As the law recognizes in other contexts (see Evid. Code, §§ 1220-1230) admissions against interest have a very high

credibility value. This is especially true when, as in this case, the admission is obtained not in the normal course of human activities and affairs but in the context of an established pretrial procedure whose purpose is to elicit facts. Accordingly, when such an admission becomes relevant to the determination, on motion for summary judgment, of whether or not there exist triable issues of *fact* (as opposed to legal issues) between the parties, it is entitled to and should receive a kind of deference not normally accorded evidentiary allegations in affidavits. [Citation.]” (*D’Amico, supra*, 11 Cal.3d at p. 22.)

Here, we conclude appellant’s admissions regarding what transpired during his interrogation by Officer Marcic on November 27, 2009, as detailed in his sworn deposition testimony and confirmed in his verified discovery responses, establish “there is no *substantial* evidence of the existence of a triable issue of fact.” [Citation.]” (*D’Amico, supra*, 11 Cal.3d at p. 21.) While it is, of course, true that a trial court should proceed cautiously before rejecting a plaintiff’s evidentiary showing in opposition to summary judgment based upon purported admissions against the plaintiff’s interest (see *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 482 [warning that *D’Amico* should be viewed “with caution” and that “summary judgment should not be based on tacit admissions or fragmentary and equivocal concessions”]), where, as here, the plaintiff’s admissions are clear and unequivocal in demonstrating the nonexistence of any triable fact, and there is no evidence in the record suggesting these admissions were a product of mistake or lack of understanding regarding the information sought by the moving party, we conclude summary judgment is indeed warranted. (Cf. *Ahn v. Kumho Tire U.S.A., supra*, 223 Cal.App.4th at p. 148.)

Accordingly, we stand by our conclusion that appellant’s deposition testimony and discovery responses are wholly devoid of material facts showing that he was a victim of assault or battery at the hands of Officer Marcic, and agree with the City that appellant “does not possess, and cannot reasonably obtain, needed evidence” to support his claims. (*Aguilar, supra*, 25 Cal.4th at p. 854.) The trial court’s judgment thus stands.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to the City.

Jenkins, J.

We concur:

McGuinness, P. J.

Siggins, J.