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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ALAN NAKAMURA,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA et al.,

Defendants and Respondents.

E056332

(Super.Ct.No. CIVBS1000041)

OPINION

APPEAL from the Superior Court of San Bernardino County. John B. Gibson, Judge. Affirmed.

Alan Nakamura, in pro. per., for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Kathleen A. Kenealy, Chief Assistant Attorney General, Kristin G. Hogue and Joel A. Davis, Deputy Attorneys General, for Defendants and Respondents.

No appearance for Respondents Ken's Towing & Tire, Happy Days (A Corporation) and Truck Driver Steve.

I

INTRODUCTION

Plaintiff Alan Nakamura appeals from an order declaring him a vexatious litigant and dismissing his entire action for false arrest and civil rights violations¹ against defendants²—the California Highway Patrol (CHP) and three CHP officers—after Nakamura failed to provide security for costs as required by the court. In the past, Nakamura received adverse determinations in five matters: a federal case against the City of Hermosa Beach; a federal appeal; a federal case against the City of Los Angeles; a state case against the City of Los Angeles; and a state appeal. Because Nakamura met the statutory definition of a vexatious litigant, and there was no reasonable probability that he could prevail in his lawsuit against the CHP, we affirm the trial court’s judgment.³

¹ The trial court’s order denying Nakamura’s motion to change venue is not appealable and can only be challenged by a petition for writ of mandate. (Code Civ. Proc., § 400; *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 41.)

² The nonstate defendants—“Ken’s Towing & Tire, Happy Days (A Corporation), Truck Driver Steve”—did not file respondents’ briefs.

³ We rule as follows on two appellate motions: we grant Nakamura’s motion for judicial notice filed August 6, 2013, as to exhibit 1 but deny the motion as to exhibits 2 and 3; and we grant defendants’ motion for judicial notice filed September 9, 2013. (Evid. Code, §§ 452, 453, and 459.) We deny defendants’ motion for sanctions filed October 25, 2013.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. The Underlying Facts

The operative pleading is the first amended complaint, filed on May 7, 2010. The complaint alleges that, on June 8, 2008, around 1:30 a.m., Nakamura was driving north of Baker on Interstate 15 when he noticed bright lights in his rearview mirror. Eventually he exited the freeway and parked at a gas station. As he left his car, he was confronted by police officers with drawn weapons. Nakamura was handcuffed, searched, and placed in the squad car. Officer Mitchell Romriell explained Nakamura was stopped for swerving. Nakamura was cited for three violations, including driving with an expired license, and his vehicle was impounded. The violations were dismissed in November and December 2008.

The declaration of Officer Romriell described the events of May 7, 2010, somewhat differently. When Romriell observed Nakamura “weaving” in the traffic lanes, he initiated an enforcement stop to investigate whether the driver was under the influence of drugs or alcohol. Even though Romriell was following closely behind Nakamura’s car with the patrol car lights flashing, Nakamura continued driving for at least two miles before pulling into a parking lot near a restaurant and gas station. Because Nakamura had failed to yield, Romriell employed the protocol for a high-risk traffic stop. Nakamura was uncooperative and argumentative. Romriell arrested him for failing to yield. Nakamura’s driver’s license had expired on March 15, 2007. The officer

cited him under Vehicle Code sections 12500, subdivision (a), [expired license]; 21658, subdivision (a), [weaving]; 21806, subdivision (a), [evading a peace officer]; and his vehicle was impounded. Romriell did not receive a subpoena to attend the hearing in which Nakamura's citations were dismissed.

B. The First Amended Complaint

The complaint alleges seven causes of action against defendants, three of which are alleged under 42 United States Code section 1983: (1) "Fourth Amendment Violations—Unreasonable Search & Seizure"; (2) "Fifth Amendment Violations—Deprivation of Liberty and Property Without Due Process of Law"; (3) "Fourteenth Amendment Violations—Deprivation of Due Process & Equal Protection"; (4) "State Pendent Claim: Assault"; (5) "State Pendent Claim: False Arrest"; (6) "State Pendent Claim: Abandonment"; (7) "State Pendent Claim: Intentional Infliction Of Emotional Distress." After their demurrer was overruled, defendants filed an answer on July 23, 2010.

C. Vexatious Litigant Motion

In March 2011, defendants filed a motion to declare Nakamura a vexatious litigant, for posting a security, and for a prefiling order. The motion was made on the grounds that Nakamura had initiated five pro se litigations against law enforcement agencies in the preceding seven years that were finally determined adversely to him. The five proceedings arise out of two incidents involving police, one occurring in Hermosa Beach in January 2006, and the other occurring in Hawaiian Gardens in October 2007.

The cases are (1) a federal case against the City of Hermosa Beach (*Nakamura v. City of Hermosa Beach*, case No. CV 06-06776 GW (SS)), dismissed May 20, 2009; (2) an appeal to the Ninth Circuit (*Nakamura v. City of Hermosa Beach*, No. 09-55961), judgment affirmed June 11, 2010; and three cases against the County of Los Angeles: (3) *Nakamura v. County of Los Angeles*, case No. SACV 09-00132 GW SS, dismissed August 5, 2009; (4) *Nakamura v. County of Los Angeles*, LASC, Case No. VC054406, dismissed May 24, 2010, and (5) *Nakamura v. County of Los Angeles*, 2nd District Court of Appeal, case No. B229123, dismissed January 10, 2011.

Defendants also moved for an order under Code of Civil Procedure section 391.1 that Nakamura be required to post security for costs. In March 2011, the court granted the motion, determining Nakamura to be a vexatious litigant, and the court ordered Nakamura to post \$30,000 for defense costs. In March 2012, after no security was posted, the court dismissed the action with prejudice.

III

VEXATIOUS LITIGANT

We review the trial court's order finding that a litigant is vexatious for an abuse of discretion. (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219.) We presume the order declaring a litigant vexatious is correct, and imply findings necessary to support the judgment. (*Ibid.*) The trial court's determination that a vexatious litigant has no reasonable probability of success on the merits, and therefore must post security for costs, is binding on the appellate court if supported by substantial evidence. (*Muller v. Tanner*

(1969) 2 Cal.App.3d 445, 464-465.)

The vexatious litigant statute (Code Civ. Proc, § 391, et seq.) was enacted to curb abuse. (*In re Bittaker* (1997) 55 Cal.App.4th 1004, 1008.) Code of Civil Procedure section 391, subdivision (b)(1), defines a vexatious litigant as one who “[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.” (Code Civ. Proc., § 391, subd. (b)(1).)

Nakamura claims he is not a vexatious litigant because the only case he has actually lost in the past seven years was his federal case against the City of Hermosa Beach. Otherwise, he contends, “[t]he rest are either duplicated events or technical dismissals, none of which could be construed as ‘final’ or ‘adverse’ or even ‘vexatious’ in the true spirit of this law (ie CCP 391).”

“Litigation” is broadly defined, however, as “any civil action or proceeding, commenced, maintained, or pending in any state or federal court” and includes appeals and writ petitions, which are considered to be new litigation. (Code Civ. Proc, § 391, subd. (a); *McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1220.)

Voluntary dismissals are counted as adverse determinations under the statute. (*Tokerud v. Capitolbank Sacramento* (1995) 38 Cal.App.4th 775, 777.) The trial court did not abuse its discretion in declaring Nakamura a vexatious litigant because Nakamura had

initiated at least five separate actions in pro per during the prior seven years that resulted in final determinations against him.

Nakamura's first litigation was *Nakamura v. City of Hermosa Beach*, case No. CV 06-06776-GW(SS), in which Nakamura claimed he was falsely arrested in January 2006 by city police based on a stalking complaint by a health club employee. On May 20, 2009, the federal district court granted the city's summary judgment motion, constituting a final determination of the merits of a case adverse to Nakamura. (*Stuart v. Lilves* (1989) 210 Cal.App.3d 1215, 1219.)

Nakamura's second litigation was his appeal to the Ninth Circuit in *Nakamura v. City of Hermosa Beach*, case No. 09-55961. On March 30, 2010, the Ninth Circuit affirmed the district court's judgment. The appeal constitutes a second final adverse determination against Nakamura.

The third litigation was *Nakamura v. County of Los Angeles*, case No. SACV 09-00132 GW SS, in which Nakamura alleged that his constitutional rights were violated when he was stopped in October 2007 by sheriff's deputies at a sobriety checkpoint. The deputies cited him for an expired driver's license⁴ (Veh. Code, § 12500, subd. (a)) and impounded his vehicle. Nakamura asserted five causes of action for violations of the Fourth, Fifth, and Fourteenth Amendments, and false arrest and intentional infliction of emotional distress.

⁴ He was still driving with an expired license in this case in June 2008.

The federal district court dismissed the complaint with leave to amend, concluding that defendants' actions as alleged were constitutional and that Nakamura failed to state a claim for each cause of action against the county and deputy sheriffs. The court explained that, as a matter of law, stopping motorists at a sobriety checkpoint was constitutional. Nakamura's other claims failed because he was driving with an expired license and the deputies were entitled to perform an inventory search pursuant to the impound of his car. (*U. S. v. Caseres* (9th Cir. 2008) 533 F.3d 1064, 1074.)

The court offered express instructions on how Nakamura should amend his complaint to cure deficiencies. Nakamura did not file an amended complaint. Instead, on July 24, 2009, Nakamura filed a request for dismissal without prejudice. The court dismissed the action without prejudice. Even though Nakamura sought voluntarily to dismiss the action, it is still considered a final determination adverse to him for purposes of the vexatious litigant statute. (*Tokerud v. Capitol Bank Sacramento, supra*, 38 Cal.App.4th at p. 777.)

Nakamura's fourth litigation, *Nakamura v. County of Los Angeles*, case No. VC054406, in the Superior Court of the County of Los Angeles, involved causes of action nearly identical to those in the federal court case. Nakamura filed the same federal and pendant law claims, although the district court had already explained why they lacked any merit. Nakamura voluntarily dismissed the case on May 24, 2010, terminating the action adversely to himself.

Nakamura's fifth litigation was the appeal, *Nakamura v. County of Los Angeles*,

Case No. B229123. On January 10, 2011, the Court of Appeal dismissed the appeal—which was brought from a nonappealable order—constituting a final adverse determination. We disregard Nakamura’s argument and defendant’s response concerning another subsequent appeal, except to acknowledge that it was also dismissed adversely to Nakamura on April 9, 2012. Based on these five actions and appeals, the trial court did not abuse its discretion in ruling that Nakamura is a vexatious litigant.

IV

PROBABILITY OF PREVAILING

To obtain an order requiring a vexatious litigant to post security, defendants must show there is not a reasonable probability Nakamura will prevail in the litigation against them. (Code Civ. Proc., § 391.1.) Nakamura argues the court could not have overruled defendants’ demurrer but then find Nakamura had no reasonable probability of prevailing on the merits. A demurrer tests the pleadings and all properly pleaded facts are presumed to be true. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 682.) In determining a motion under Code of Civil Procedure section 391.1, however, the court is not required to assume the facts alleged are true, and it may weigh the evidence submitted by the parties on the merits. (*Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 782.)

Nakamura did not plead specific facts to support his seven causes of action. Although he denied he was weaving, he admitted he did not pull over immediately when he noticed the bright lights behind him and that he was driving with an expired driver’s

license. Nakamura's failure to yield to the patrol car was a separate violation in itself from his initial moving violation. Nakamura continued driving for almost two miles before exiting the freeway and stopping in a parking lot. His actions provided probable cause for an enforcement stop as a matter of law. A police officer, is permitted to stop and briefly detain a person if the officer has reasonable suspicion of criminal activity. (*Terry v. Ohio* (1968) 392 U.S. 1, 20-22.) Police can arrest motorists even for petty traffic offenses without violating their Fourth Amendment rights. (*Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 323.) Once the CHP released Nakamura from custody, they properly impounded and towed his vehicle since he could not legally continue to drive. A warrantless inventory search may be conducted as a matter of course after impoundment. (*Colorado v. Bertine* (1987) 479 U.S. 367, 371-372.)

There was no reasonable probability that Nakamura would prevail on his claim that the CHP violated his constitutional rights when they detained him and searched and seized his vehicle. The trial court did not abuse its discretion in determining that Nakamura is a vexatious litigant because there was no reasonable probability that Nakamura would prevail on his several constitutional claims.

The court also correctly determined that Nakamura had no reasonable probability of prevailing on his assault claim because the state is statutorily immune from liability when its employees are personally immune from liability for their acts. (Gov. Code, § 815.2, subd. (b).) The CHP officers are immune from liability for assault under the Government Claims Act, Government Code sections 810, et seq. According to

Government Code section 820.2, “a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.” This provision of the Tort Claims Act provides immunity to police officers for discretionary acts made during an arrest. (*Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 487; *Price v. County of San Diego* (1998) 990 F.Supp. 1230, 1244.)

The immunity provided in Government Code section 820.2, however, does not apply when an officer uses unreasonable force during an arrest. (*Blankenhorn v. City of Orange, supra*, 485 F.3d at p. 487; *Scruggs v. Haynes* (1967) 252 Cal.App.2d 256, 264.)

Relying on this exception, Nakamura alleges that CHP officers used unreasonable force when it “drew and pointed deadly weapons at [him] without probable cause”

However, the officers’ actions were reasonable under the circumstances. Officer Romriell initiated an enforcement stop and turned on his emergency patrol lights after he observed Nakamura weaving on the freeway. Instead of yielding, Nakamura continued driving for at least two miles before pulling into a parking lot. The CHP drew their weapons as a necessary precaution to safeguard against Nakamura’s potential resistance. The officers acted reasonably under the circumstances and the officers are immune from liability for an assault claim. The state is also immune from liability. (See Gov. Code, § 815.2, subd. (b).) Nakamura had no reasonable probability of prevailing on his fourth cause of action.

The fifth cause of action for false arrest also lacks merit because the arrest was

lawful under Penal Code section 847, based on Nakamura's evasion of and failure to yield to the CHP. (Pen. Code, § 847; Veh. Code, §§ 2800.1 and 21806, subd. (a)(1).) Because the CHP officers were acting lawfully, they are immune from civil liability for false arrest. The sixth cause of action for "abandonment" in the desert, late at night, fails because Nakamura could not legally drive with an expired license. The trial court correctly determined that Nakamura had no reasonable probability of prevailing on his false arrest or abandonment claims.

The final cause of action for intentional infliction of emotional distress cannot succeed because the CHP officers did not exhibit outrageous conduct with the intent of causing emotional harm. (*Cervantez v. J. C. Penney Co.* (1979) 24 Cal.3d 579, 593.) Once Nakamura failed to yield, the officers had probable cause for the arrest and properly conducted a high-risk traffic stop. The officers reasonably believed that Nakamura posed a threat to officer safety. Therefore, Nakamura had no reasonable probability of prevailing on his intentional infliction of emotional distress claim or any of his other claims.

V

POSTING SECURITY

Code of Civil Procedure section 391.1 provides the court may order a plaintiff to furnish security if there is not a reasonable probability that he will prevail. Security is defined in Code of Civil Procedure section 391, subdivision (c), to mean "an undertaking to assure payment, to the party for whose benefit the undertaking is required to be

furnished, of the party's reasonable expenses, including attorney's fees" as a result of defending an action initiated by a vexatious litigant. The trial court's order for Nakamura to post \$30,000 in security was a reasonable amount to defend the action. The court did not abuse its discretion in ordering Nakamura to post security, which he then failed to do.

VI

DISPOSITION

We affirm the judgment. Defendants, the prevailing parties, shall recover their costs on appeal.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.