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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

GERALD CAMPBELL et al.,

Plaintiffs and Appellants,

v.

COUNTY OF MERCED et al.,

Defendants and Respondents.

F062227

(Super. Ct. No. CV001382)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Gerald Campbell and Antoinette Searle, in pro. per., for Plaintiffs and Appellants.
James N. Fincher, County Counsel, James E. Stone, Deputy County Counsel, and Roger S. Matzkind for Defendants and Respondents.

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Plaintiffs Gerald Campbell and Antoinette Searle, doing business as All Angels Preschool/Daycare, appeal after the trial court sustained a demurrer to their second amended complaint without leave to amend. We agree with the trial court that plaintiffs failed to state facts constituting any cause of action against defendants County of Merced (the County), Merced County Board of Supervisors (the Board) and “Sheriff[’s] Officer Doe One,” and that no basis for leave to amend was presented. Accordingly, we will affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiffs’ original complaint was filed October 1, 2010. Defendants interposed a general demurrer to the complaint, but on December 6, 2010, prior to the hearing of the demurrer, plaintiffs filed an amended complaint. The revised pleading was numbered as the second amended complaint and for convenience we will refer to it as such (as did the trial court). The second amended complaint attempted to frame or construct various causes of action against defendants based on an assortment of alleged statutory or constitutional violations. Plaintiffs’ claims were purportedly based on the following alleged facts: (i) two or three incidents in which Los Banos police officers or California Highway Patrol officers wrote traffic tickets while their patrol vehicle was parked on the street outside of the plaintiffs’ daycare premises and temporarily blocked plaintiffs’ driveway; (ii) police officers and/or sheriff’s deputies once raided a nearby business to make an arrest; (iii) an officer or deputy once allegedly touched his holster and then pointed in the direction of plaintiffs’ daycare business; and (iv) the Board sent a letter returning plaintiffs’ claim for damages and informing plaintiffs that their claim was untimely.¹

¹ Other background facts were mentioned in the allegations but were not relevant to plaintiffs’ claims and were not in any way connected to the conduct of defendants. These included allegations that unknown persons uttered demeaning words or dumped trash in the play area of plaintiffs’ daycare business.

Defendants filed a general demurrer to the second amended complaint, challenging the sufficiency of each and every cause of action. In the conclusion to defendants' points and authorities in support of their demurrer, defendants summarized the gist of their argument as follows: "[1] The County of Merced and the Merced County Board of Supervisors have no control over either the Los Banos Police Department or the California Highway Patrol. [2] It is not a tort for a police vehicle to park on the street in front of a building while writing a traffic ticket. [3] Sending a late claim letter is neither a crime nor a tort[i]ous act. In fact, it is required by Government Code section 911.3. [4] It is not a tort to point during a police raid. [5] No tortious acts or omissions were committed by defendants, County of Merced, County of Merced Board of Supervisors, or any Merced County Deputy Sheriff."

Prior to the hearing date of the demurrer, and without leave of the court, plaintiffs filed another amended complaint denominated as the third amended complaint. The trial court disregarded that improper pleading and focused on the second amended complaint at the demurrer hearing. (Code Civ. Proc., § 472 [a party may amend only once "of course" before demurrer hearing].)²

The hearing of the demurrer to the second amended complaint was held on February 3, 2011. The trial court announced that its tentative ruling was to sustain the demurrer without leave to amend, and it urged plaintiffs to focus their oral remarks on whether any possible basis for leave to amend existed. Following oral argument, the trial court explained that the County was not responsible for the actions of the Los Banos Police Department or the California Highway Patrol. The trial court further explained that the County's responsive letter to plaintiffs' tort claim was not a basis for a cause of action against the County. Since no grounds for leave to amend were presented, the trial

² We note the improperly filed third amended complaint was in substance the same as the second amended complaint.

court sustained the demurrer without leave to amend. On February 18, 2011, the trial court entered its written order sustaining the demurrer to the second amended complaint and dismissing the action against defendants with prejudice.³

Plaintiffs' timely appeal followed.

DISCUSSION

I. Standard of Review

“In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

II. Plaintiffs Failed to State a Cause of Action

A. Causes of Action Premised on Board's Response to Tort Claim

We begin with our consideration of the causes of action premised upon the letter sent by or on behalf of the Board to plaintiffs, informing them that their claim was not timely and advising that a petition to file a late claim may be presented. Plaintiffs' first,

³ An order of dismissal of an action is treated as the equivalent of a judgment. (Code Civ. Proc., § 581d.)

second, third, ninth and tenth causes of action in the second amended complaint were based on the Board's letter. We will analyze each of these causes of action, in turn.

1. First Cause of Action

Plaintiffs' first cause of action is for an alleged violation of Civil Code section 52.1. That section permits the recovery of damages where rights secured by the United States Constitution, or by the California Constitution or other laws have been interfered with (or attempted to be interfered with) by means of threats, intimidation or coercion. (Civ. Code, § 52.1, subd. (b).) The basis of plaintiffs' claim was that the Board sent a letter to plaintiffs, dated May 25, 2010, that stated: "The complaint you presented to the Merced County Board of Supervisors on April 28, 2010, is being returned to you because it was not presented within six months after the event or occurrence as required by law." The Board's letter further advised plaintiffs of their right to apply for leave to present a late claim.⁴ Plaintiffs alleged that the Board's letter was somehow intended to interfere with their ability to pursue claims against the County.

We agree with the trial court that the Board's letter cannot be the basis of the alleged cause of action. First, the Board's letter plainly did not threaten, intimidate or coerce plaintiffs, and therefore the statute did not apply as a matter of law. (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 843 [Civ. Code, § 52.1 is limited to threats, intimidation or coercion that interferes with a constitutional or statutory right].) Second, the Board's letter did not interfere with plaintiffs' rights, but responded to plaintiffs' claim in a manner expressly permitted by the statutory provisions governing the handling

⁴ Government Code section 911.2 requires that a claim for damages based on injury to person or property be filed within six months of accrual of the cause of action. Here, the claim was filed with the Board on April 28, 2010, and referenced conduct occurring in June 2009, more than six months prior. The Board's letter informed plaintiffs of this fact and also that plaintiffs' recourse was to apply for leave to present a late claim under Government Code section 946.6.

of claims against public entities (Gov. Code, §§ 911.2, 911.3, 911.6, 911.8, 912.2). Indeed, Government Code section 911.3 authorizes use of the identical language that was set forth in the letter. And even assuming for the sake of argument that the Board incorrectly classified the case as within the six-month presentation period, there were well-established means of relief or recourse available, one of which the Board brought to plaintiffs' attention in the same letter.⁵ For these reasons, we conclude the Board's letter did not interfere with plaintiffs' rights, and it certainly did not do so by means of threat, intimidation or coercion. There was no violation of Civil Code section 52.1 as a matter of law.⁶

2. Second, Third and Ninth Causes of Action

In the second, third and ninth causes of action, plaintiffs contended that the Board's letter in response to plaintiffs' tort claim was somehow *criminal* in nature. Plaintiffs' second cause of action was for violation of Penal Code section 136.2. That

⁵ That is, even if the Board erred and certain claims did not come within the six-month presentation requirement, the issue of the correctness of the Board's position could have been raised in either a petition for relief (*Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 711; Gov. Code, § 946.6), or by filing the complaint and allowing the issue of timeliness to be resolved on demurrer or summary judgment motion (*Toscano v. County of Los Angeles* (1979) 92 Cal.App.3d 775, 783). Here, the Board's letter expressly invited plaintiffs to petition for relief, but plaintiffs declined to do so. The plaintiffs were not denied an opportunity to present their position or seek relief. Of course, to the extent the allegations were based on state law tort grounds, as appears to be largely the case (aside from conclusory federal claims), the six-month period *was* applicable. (See *State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239.)

⁶ In light of this decision, it is unnecessary to consider the additional grounds for demurrer raised by defendants, including that (i) the Board is *immune* from liability pursuant to Government Code section 820.2 for making a discretionary judgment or decision (i.e., determining how to handle the tort claim), and (ii) there can be no liability apart from an authorizing statute specifically creating such liability against the public entity defendants (Gov. Code, §§ 815, subd. (a), 815.6; *Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 802).

statute relates to restraining orders that may be imposed in the event of intimidation of witnesses or crime victims. Penal Code section 136.2 obviously had no bearing on the facts of this case and the trial court was correct in determining that no basis for a cause of action was stated. Likewise, plaintiffs' third cause of action, for violation of Penal Code section 182, subdivision (a), which defines the crime of criminal conspiracy, obviously had no correlation to any fact or circumstance in this case. The ninth cause of action was allegedly premised on Penal Code section 136, but that section simply furnishes statutory definitions for the terms "witness," "malice" and "victim" for purposes of the criminal offense of intimidating a witness. Again, no facts were alleged that could potentially come within these criminal categories and the statute was inapplicable on its face.

In short, the second, third and ninth causes of action were nothing more than vague and conclusory references to manifestly inapplicable Penal Code sections, and therefore plaintiffs failed to plead facts constituting a cause of action. (Code Civ. Proc., § 425.10, subd. (a).) The trial court was correct to give short shrift to such frivolous pleading.⁷

3. Tenth Cause of Action

The tenth cause of action was also based on the Board's letter informing plaintiffs that their tort claim was not timely presented and advising that a petition to file a late claim may be made. The tenth cause of action recited article I, section 1, of the California Constitution, which states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Plaintiffs alleged, in conclusory fashion, that the Board's letter violated plaintiffs' basic constitutional rights, but once again no factual or legal basis to

⁷ See also, footnote 6, *ante*, regarding other grounds for demurrer that we do not reach here because the statutes are so plainly inapplicable.

support such a claim was set forth in the pleading or in plaintiffs' argument. The demurrer to the 10th cause of action was properly sustained by the trial court. (Code Civ. Proc., § 425.10, subd. (a).)

B. Causes of Action Based on Law Enforcement Conduct

In the factual allegations of the second amended complaint, plaintiffs described several instances of allegedly wrongful police conduct. Allegedly, in January of 2009, a Los Banos police officer parked in front of plaintiffs' preschool business when writing a traffic ticket and temporarily blocked plaintiffs' driveway located at or near Highway 152 and J Street in Los Banos. In February 2009, Los Banos police officers conducted a raid of a nearby business and caused preschool children in plaintiff's premises to be frightened. In May 2009, a Los Banos police officer parked in front of plaintiffs' business while giving a motorist a traffic ticket (at or near Highway 152 and J Street) and blocked plaintiffs' driveway. In June 2009, it happened again but the traffic officer was with the California Highway Patrol. At the time of the June 2009 incident, a second officer arrived at the scene and parked behind the first one. The second officer touched his gun holster and then pointed in the direction of the front window of plaintiffs' business. The second officer was allegedly "sheriff[s] officer Doe One."

The above allegations constituted the sole factual basis for the remaining causes of action. Plaintiffs strained to pigeonhole the above facts into a statutory or constitutional violation. We briefly summarize the claimed violations. The fourth cause of action was for alleged violation of Civil Code section 52.1 (threats, intimidation or coercion that interferes with a constitutional or statutory right) and of Civil Code section 1708 ("[e]very person is bound ... to abstain from injuring the person or property of another, or infringing upon any of his or her rights"). The fifth cause of action asserted "the officer's actions" violated the Fourteenth Amendment to the United States Constitution. The sixth cause of action claimed the officer's conduct violated Penal Code section 422, which prohibits criminal threats. The seventh cause of action was for "Interfering With The

Operation of a Business” in violation of law. The eighth cause of action was for transgression of “rights” guaranteed by the United States Constitution in violation of title 42 United States Code section 1983. The tenth cause of action alleged the officer’s conduct violated the California Constitution. The eleventh cause of action was for violation of Penal Code 417, subdivision (b), which prohibits drawing a gun in a threatening manner in a day care center. Each purported cause of action relied on the same police conduct noted above, drew the conclusion that a statute or other law was violated, and sought damages as a result.

Although plaintiffs recited a barrage of statutes or constitutional provisions, they did not present the factual elements of any recognizable, actionable cause of action. They failed to articulate how the mere occurrence of three traffic stops (over a six-month period) by different law enforcement agencies in which motorists were briefly issued tickets in front of plaintiffs’ business premises were tortious or actionable under any legal theory. In any event, those tickets were written by police officers for the City of Los Banos and by an officer of the California Highway Patrol. The County is *a separate legal entity* from the City of Los Banos and the State of California, and accordingly it was not responsible for the actions of the particular agencies or officers involved. Plaintiffs’ claims, if any, were clearly directed against the wrong public entity.

Plaintiffs offer a cursory argument that the County was somehow in concert with the other agencies since the County’s sheriff’s deputy failed to intervene to protect plaintiffs’ rights. We disagree. The mere fact that a ticket was being written by another agency in front of plaintiffs’ business premises would not give rise to a duty to take particular action. Nor do we believe that a single, brief (alleged) incident of a sheriff’s deputy touching his holster and pointing to plaintiffs’ window was itself wrongful or actionable. The trial court correctly sustained the demurrer.

On the question of leave to amend, plaintiffs amended their pleading once after the first demurrer was interposed, and at the hearing on the demurrer to the second amended

complaint the trial court gave plaintiffs ample opportunity to present any facts or circumstances indicating a potential basis for leave to amend. No basis for leave to amend was presented, nor has any been brought to our attention. We conclude that leave to amend was properly denied.

DISPOSITION

The judgment of the trial court is affirmed. Costs on appeal are awarded to defendants.

Kane, J.

WE CONCUR:

Cornell, Acting P.J.

Poochigian, J.