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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MERRILL ADAMS,

Plaintiff and Appellant,

v.

SANTA CLARA COUNTY SHERIFF'S
DEPARTMENT, et al.,

Defendants and Respondents.

H039958

(Santa Clara County

Super. Ct. No. 1-11-CV207953)

Plaintiff Merrill Adams seeks review of an order granting summary judgment to the Santa Clara County Sheriff's Department and three of its officers in his action for assault and nuisance. Plaintiff contends that there were issues of fact requiring trial of his assault claim. We affirm.

Background

On November 24, 2010, Sergeant Chris Frechette and two deputies, Timothy Furtado and George Hessling, responded to a call from plaintiff's neighbor, Maria Rocha, requesting assistance in restoring water service to her property. Plaintiff had shut off the power supply to the well serving her property because Rocha had failed to pay her share of the utility bill and pump cost. In a 30-minute discussion with plaintiff, who remained behind the locked gate of his eight-foot wrought-iron fence, the officers asked plaintiff to restore power to the well. Plaintiff refused. The officers were never closer than four feet from plaintiff, and as the discussion wore on, they moved back to about six feet from the gate. They never attempted to open or climb over the gate; instead, Deputy Furtado

suggested that plaintiff “[c]ome on this side of the gate and we’ll take care of the situation.” Plaintiff later claimed that “Deputy Furtado also threatened [him] with physical force.” During his deposition he testified that the deputy suggested that he could climb the fence and “take care of the situation in a violent manner” or “take care of [plaintiff].”

At one point while talking with Sergeant Frechette and Deputy Hessling, plaintiff and his wife saw Deputy Furtado moving along a privacy fence separating plaintiff’s and Rocha’s properties. In his deposition plaintiff testified that the deputy’s weapon was drawn, but he could not say that the gun was pointed at him because he “wasn’t paying that much attention.” His attention was instead on Frechette and Hessling. When plaintiff’s wife called out to tell Deputy Furtado that they saw him, he stood up and holstered his gun.

Plaintiff filed this action in August 2011, naming the Santa Clara County Sheriff’s Department, Sergeant Frechette, and the two deputies. Plaintiff alleged that the three officers had “unlawfully and without legal cause threatened the Plaintiff with arrest and assaulted the Plaintiff by threatening him with physical harm.” In an amended complaint he added that these acts constituted a nuisance within the meaning of Civil Code section 3479.

Santa Clara County and the individual defendants responded with a motion for summary judgment, asserting three grounds: (1) All defendants were immune from liability while they were engaged in a discretionary investigation of a dispute between plaintiff and his neighbor; (2) the officers’ conduct did not constitute an assault because plaintiff “was not in imminent apprehension of physical injury and the officers never attempted or intended to touch [plaintiff]”; and (3) the officers were not liable for nuisance “because they did not substantially and unreasonably interfere with [plaintiff’s] property.”

After considering the parties' written and oral arguments, their separate statements, and their supporting declarations, the superior court granted defendants' motion, agreeing with defendants that they were immune under Government Code section 820.2, that defendants had established the lack of intent to assault, and that no interference with land had occurred to constitute a nuisance. The order was filed on July 3, 2013. No judgment followed. Plaintiff nevertheless filed his notice of appeal from the order on July 31, 2013.

Discussion

At the outset it is immediately apparent that plaintiff filed his notice of appeal from a nonappealable order. "A trial court's order is appealable when it is made so by statute." (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696; see also *Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5 ["The right to appeal is wholly statutory".]) In this case plaintiff has appealed from the order granting summary judgment, which is not an appealable order. To obtain review the appellant must appeal from the ensuing judgment. (*Avila v. Standard Oil Co.* (1985) 167 Cal.App.3d 441, 445; *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761, fn. 7.)

The appellate record, however, contains no judgment. Although we are inclined to dismiss the appeal without prejudice to subsequent review upon the entry of judgment (see, e.g., *Cohen v. Equitable Life Assurance Society* (1987) 196 Cal.App.3d 669, 671 ["[w]e are wearying of 'appeals' from clearly nonappealable orders"]), we are aware that plaintiff is proceeding in propria persona, and defendants have not moved to dismiss. Consequently, on this limited occasion we will modify the order to incorporate a judgment in defendants' favor and proceed to examine the merits. (Cf. *Dover v. Sadowinski* (1983) 147 Cal.App.3d 113, 115 [absent existence of judgment, court amends summary judgment order "to make it an appealable judgment"]; *Francis v. Dun & Bradstreet, Inc.* (1992) 3 Cal.App.4th 535, 539 [questioning "the wisdom of dismissing

an appeal where the judgment itself was little more than a formality” and construing the order to incorporate a judgment “ ‘in the interest of justice and to avoid delay’ ”].)

1. *Standard and Scope of Review*

The parties appear to understand the principles governing this court’s review. Code of Civil Procedure section 437c permits a court “to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*)). The motion will be properly granted if there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250.) When the moving party is the defendant, the motion will be granted if one or more of the elements of the cause of action cannot be separately established or the defendant establishes a complete defense to that cause of action. (Code Civ. Proc., § 437c, subds. (o), (p)(2); *Aguilar, supra*, at p. 850; *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 109.)

A defendant moving for summary judgment has the initial burden of showing that the action has no merit—that is, “that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action.” (Code Civ. Proc., § 437c, subds. (a), (p)(2).) If the moving defendant makes that showing, the burden then shifts to the plaintiff to make a prima facie showing that there exists a triable issue of material fact. (*Aguilar, supra*, 25 Cal.4th at p. 850.) “The plaintiff . . . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action” (Code Civ. Proc., § 437c, subd. (p)(2).) On appeal, we independently review the record to “determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff’s case,

or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334; *Daly v. Yessne* (2005) 131 Cal.App.4th 52, 58; *Washington Mutual Bank v. Jacoby* (2009) 180 Cal.App.4th 639, 643.)

2. Assault

In describing the first cause of action for assault, plaintiff alleged that Sergeant Frechette and the two deputies were “engaged in the course and scope of their employment” when they “unlawfully and without legal cause threatened the Plaintiff with arrest and assaulted the Plaintiff by threatening him with physical harm.” Defendants’ summary judgment motion rested on two grounds: (1) The Government Code¹ provided them immunity from liability for the officers’ discretionary act of attempting to resolve plaintiff and Rocha’s dispute; and (2) Plaintiff would not be able to establish the elements of assault because it was undisputed that the officers lacked the intent and ability to harm him. Plaintiff did not address the immunity claim, and on appeal he only briefly and belatedly mentions it in his reply brief, where he states that he does not intend to argue the issue of the officers’ discretionary acts, except to “note that no evidence was ever presented which would have supported any claim that the act of assaulting the Appellant was a ‘discretionary act’ on the part of Deputy Furtado.”

Having received no contrary argument from plaintiff, the trial court ruled that the officers and the sheriff’s department were immune from liability under Government Code

¹ In both the trial court and this court defendants have continued to cite Government Code section 820.25, which has nothing to do with the facts presented here; that provision applies to an officer’s decision to render assistance to a motorist not involved in an accident or the decision to leave the scene of an accident after rendering assistance. The trial court properly assumed that defendants were relying on Government Code section 820.2.

section 820.2 (hereafter “section 820.2”). That statute provides: “Except as otherwise provided by statute, 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.” “A decision to arrest, or to take some protective action less drastic than arrest, is an exercise of discretion for which a peace officer may not be held liable in tort.” (*McCarthy v. Frost* (1973) 33 Cal.App.3d 872, 875.)

In *Watts v. County of Sacramento* (1982) 136 Cal.App.3d 232 (*Watts*), the county sheriff was called by a landowner who claimed that plaintiffs were trespassing. The plaintiffs had entered the landowner’s property in accordance with a contract that allowed them to grow crops there. The sheriff ordered plaintiffs, upon threat of arrest, to leave the property, and the landowner thereafter converted the crops to his own use. Upon plaintiffs’ suit against the sheriff the appellate court held that the action was barred by the immunity provisions of section 820.2, which applied to both the officers and the county. (*Watts, supra*, at p. 234.)

Defendants continue to rely on *Watts* in asserting immunity here. That case, however, did not apply section 820.2 in the specific context of an alleged assault. The statute clearly applies to the nuisance cause of action, but we question the implied assumption that if an assault occurred, it was the result of an exercise of discretion *as a matter of law*. A finding of immunity “requires proof that the *specific conduct* that gave rise to the suit involved an actual exercise of discretion—a conscious balancing of risks and advantages; the term is limited to ‘basic policy decisions.’ [Citations.]” (*Bell v. State of California* (1998) 63 Cal.App.4th 919, 929; cf. *Scruggs v. Haynes* (1967) 252 Cal.App.2d 256, 266-268 [section 820.2 does not automatically immunize police officer who uses unreasonable force in effecting arrest].)

Nevertheless, plaintiff cannot succeed on his claim. To establish assault at trial, he would have to prove “(1) the defendant acted with intent to cause harmful or offensive

contact, or threatened to touch the plaintiff in a harmful or offensive manner; (2) the plaintiff reasonably believed he was about to be touched in a harmful or offensive manner or it reasonably appeared to the plaintiff that the defendant was about to carry out the threat; (3) the plaintiff did not consent to the defendant's conduct; (4) the plaintiff was harmed; and (5) the defendant's conduct was a substantial factor in causing the plaintiff's harm." (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 890; *So v. Shin* (2013) 212 Cal.App.4th 652, 668-669.)

In support of their motion defendants offered the declarations of all three officers. Each one stated that at no time during the encounter with plaintiff did he "attempt or intend to harm [plaintiff] in any way," or "to place [plaintiff] in fear of immediate or imminent harm." This evidence was sufficient to shift the burden to plaintiff to present evidence demonstrating a triable issue of fact on the element of intent. Plaintiff did not refute defendants' statements, however; instead, he called them "disputed" but based that assertion on a different element, his "reasonable fear for his safety and well being and that of his wife." This assertion, moreover, was addressed only to Furtado's act of drawing his gun, not to any conduct by the other two officers. Plaintiff thus failed to offer evidence permitting even an inference that the officers *intended* to cause plaintiff harmful or offensive contact. Recognizing plaintiff's failure to meet his burden to show evidence raising a triable issue of fact on this element, the trial court properly granted summary adjudication of the assault cause of action.

3. *Nuisance*

Plaintiff's cause of action for nuisance also fails. First, as the trial court observed, there was no allegation of a physical interference with plaintiff's property or substantial interference with his enjoyment of his land. Defendants established that the officers' conduct did not rise to the level of a substantial and unreasonable interference with plaintiff's enjoyment of his land, and that the 30-minute discussion would not have " 'substantially annoyed or disturbed' " a reasonable person in these circumstances.

(*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938.)² In any event, defendants’ assertion of immunity is well taken as applied to this claim. It is undisputed that the officers were investigating Rocha’s complaint, and their 30-minute discussion with plaintiff took place outside plaintiff’s gate in an attempt to resolve the dispute between Rocha and plaintiff. Section 820.2 plainly applies here. (See *Watts, supra*, 136 Cal.App.3d at p. 234.) Finally, we note that on appeal plaintiff makes no attempt to defend the nuisance cause of action. We interpret this omission as either an abandonment of this claim or an implicit concession that it is without merit.

Disposition

The order is modified to state that judgment is entered for defendants, and the resulting judgment is affirmed.

²

Civil Code section 3479, on which plaintiff based his nuisance cause of action, defines “nuisance” as “[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.”

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.