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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KEITH ANDREW WILLIAMS, Plaintiff and Appellant, v. NEWPORT DIVERSIFIED, INC. et al., Defendants and Respondents.	B231112 (Los Angeles County Super. Ct. No. VC056127)

APPEAL from an order of the Superior Court of Los Angeles County, Yvonne T. Sanchez, Judge. Reversed in part; affirmed in part with directions.

Frederick Barak for Plaintiff and Appellant.

Bradley & Gmelich, Jonathan A. Ross and Arnold S. Levine for Defendants and Respondents.

I. INTRODUCTION

Plaintiff, Keith Williams, appeals from an order sustaining a demurrer without leave to amend and the dismissal of his first amended complaint. Plaintiff sued the operator of the Santa Fe Springs Swap Meet ("the swap meet"), defendant, Newport Diversified, Inc., and two of its employees, Lizabeth Arias, and Luis Viramontes. We reverse the dismissal order in part.

II. BACKGROUND

A. The First Amended Complaint

The trial court sustained demurrers to the defamation claim without leave to amend. Demurrers to the negligence and civil rights claims were sustained with leave to amend. The trial court instructed plaintiff that, while negligence may be generally pled, plaintiff had failed to articulate a duty or otherwise set forth sufficient facts to state a claim. The civil rights claim was uncertain because plaintiff failed to clarify the statutory basis for the cause of action.

The first amended complaint contains causes of action for: false arrest and imprisonment (first); negligence (second); and violation of the Unruh Civil Rights Act (third). In reviewing an order after a demurrer is sustained without leave to amend, all well-pleaded factual allegations must be assumed as true. (*Naegele v. R. J. Reynolds Tobacco Co.* (2002) 28 Cal.4th 856, 864-865; *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 946; *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 495-496.) Plaintiff alleges that Mr. Viramontes works as a security officer at the swap meet. Ms. Arias is also employed at the swap meet. Since January 2009, plaintiff contracted with the swap meet to market his products. On or around June 13, 2009, plaintiff paid a fee to secure a booth for June 20 and 21, 2009. On June 20, 2009, plaintiff went to the swap meet grounds with his merchandise to set up his booth. Ms. Arias made a citizen's arrest of plaintiff for alleged

trespass. Mr. Viramontes encouraged, directed and participated in plaintiff's arrest. After the citizen's arrest, Whittier Police Department officers handcuffed plaintiff and took him into custody.

It is alleged: "defendants told" the police that, on June 17, 2009, plaintiff was antagonistic and had an altercation with Mr. Viramontes; plaintiff was told not to return to the swap meet; defendants' statements to the police were false; plaintiff was not on the swap meet premises on June 17, 2009; and, in fact on June 17, 2009, plaintiff was being treated at a hospital for a diabetic condition. Plaintiff was injured by: having to retain a lawyer; the costs of retrieving his towed vehicle; lost opportunities to sell merchandise at the swap meet; emotional and physical pain from the incarceration and not being able to take his medication; and the embarrassment and humiliation of the arrest. Plaintiff further alleges that defendants acted without probable cause, willfully, maliciously, oppressively, deceitfully and without regard for his rights. Plaintiff also attached as an exhibit to the first amended complaint portions of a police report, which purportedly documented the arrest. The report states in part that Ms. Arias was asked and ultimately agreed that she would make a citizen's arrest of plaintiff. Thereafter, plaintiff was taken into custody after Ms. Arias signed the citizen's arrest form.

With respect to the negligence theories, plaintiff alleged that his right to quiet enjoyment of the swap meet booth was infringed. This occurred when defendants utilized self help to arrest and dispossess him in violation of sections 789.3 and 1954. The first amended complaint alleges the swap meet operator negligently trained Ms. Arias and Mr. Viramontes. The civil rights claim was predicated on the theory that plaintiff is an insulin dependent diabetic, which entitles him to protection under the Unruh Civil Rights Act. However, there are no allegations that defendants discriminated against plaintiff because of his condition.

B. Demurrer, Opposition And Reply

Defendants demurred to the first amended complaint. Defendants asserted the false imprisonment claim was barred by the Civil Code section 47,[1] subdivision (b) absolute privilege for communications to a law enforcement about suspected criminal activity. The negligence claim was challenged as uncertain in that it combined three theories which should have been separately pleaded. The theories are: breach of the duty of quiet enjoyment; negligently identifying plaintiff as a person who committed trespass and making racial epitaphs on June 17, 2009; and negligent training and supervision of its employees against Newport Diversified, Inc. According to defendants, the quiet enjoyment statutes (§§ 789.3, 1954) were inapplicable to the commercial as opposed to a residential transaction. The negligent or careless mistaken identity allegation is contradicted by allegations that defendants intentionally misrepresented the facts to the police. Defendants argue the swap meet operator did not owe plaintiff any duty of care. With respect to the civil rights claim, defendants argued there were no facts showing that plaintiff's diabetic condition was known to defendants or resulted in discrimination against him. The absolute privilege in section 47, subdivision (b) barred the civil rights claim.

Plaintiff opposed the demurrers asserting that the trial court had previously concluded that section 47, subdivision (b) did not bar the false imprisonment claim. Plaintiff argued that the citizen's arrest was not a privileged communication but conduct. The police report, which was attached to the first amended complaint, shows defendants are liable because of their conduct and not a communication. Neither the negligence hiring theory nor the civil rights claim was barred by the section 47, subdivision (b) privilege. Finally, plaintiff contended that his rights as an occupant or licensee were protected under sections 789.3 and 1954.

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[1] All further statutory references are to the Civil Code unless otherwise indicated.

In reply, defendants argued the plaintiff did not allege he was actually restrained. The only allegation is that Mr. Viramontes advised plaintiff to leave the premises and not return. Defendants are only accused of authorizing, encouraging, directing or assisting the officers, which is a privileged communication. The negligence theories are uncertain and unsupported. And, defendants argue the civil rights claim does not have sufficient facts to show defendants knew of a diabetic condition which resulted in discrimination.

C. The Ruling And Order

After taking the matter under submission, over defendants' objection, the trial court judicially noticed the police report. The trial court ruled: the arrest/imprisonment claim was barred because it was based in part on inaccurate allegations made to the police; the inaccurate allegation was that plaintiff was antagonistic and told not to return to the swap meet; the citizen's arrest theory failed because there was no conduct; "the allegations here arise solely from defendants' alleged communications," "the events leading up to the citizen's arrest (executed by the Whittier Police), as alleged, are privileged," sections 789.3 and 1954 by their express terms apply to a dwelling; the negligent training theory was not supported by facts; and the civil rights theory was not artfully pled and lacked sufficient facts showing defendants knew of his disability. The trial court indicated that plaintiff was instructed to amend the original complaint to address specified deficiencies. The demurrers without leave to amend were sustained and the first amended complaint was dismissed. This timely appeal followed.

III. DISCUSSION

A. Standard of Review

The Supreme Court has defined our task as follows, "On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of

review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citations.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions, or conclusions of law. [Citations.] 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." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865; *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

B. False Imprisonment/Arrest

False arrest and false imprisonment are not separate torts. An unlawful arrest is one way of committing false imprisonment. (*Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744, 753, fn. 3; accord *Hagberg v. California Federal Bank FSB* (2004) 32 Cal.4th 350, 372-373.) False imprisonment is the nonconsensual, intentional confinement or restraint of another without legal privilege for an appreciable period of time. (*Hagberg v. California Federal Bank FSB, supra*, 32 Cal.4th at pp. 372-373; *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 715.)

Defendants assert that they are entitled to rely on the absolute privilege from section 47, subdivision (b). Our Supreme Court has held that section 47, subdivision (b) provides an absolute privilege for tort claims for *communications* concerning possible wrongdoing made to a local police department. (*Hagberg v. California Federal Bank FSB, supra*, 32 Cal.4th at p. 364; accord *Mulder v. Pilot Air Freight* (2004) 32 Cal.4th 384, 387.) Our Supreme Court explained that section 47, subdivision (b) "'serves the important public interest of securing open channels of communications'" between citizens and law enforcement personnel investigating wrongdoing. (*Mulder v. Pilot Air*

Freight, *supra*, 32 Cal.4th at p. 387; *Hagberg v. California Federal Bank FSB*, *supra*, 32 Cal.4th at p. 372.)

However, there is a difference between pure communication, which is protected, and unprotected *actions* such as the malicious conduct of a citizen that leads to an unlawful arrest. (*Hagberg v. California Federal Bank FSB*, *supra*, 32 Cal.4th at p. 374; see also *Wang v. Hartunian* (2003) 111 Cal.App.4th 744, 750-751.) Moreover, a citizen's arrest is considered conduct and not communication within the meaning of section 47, subdivision (b). (*Kesmodel v. Rand* (2004) 119 Cal.App.4th 1128, 1134-1137; *Wang v. Hartunian*, *supra*, 111 Cal.App.4th at pp. 750-751.) As a result, a party falsely making a citizen's arrest is not protected by the section 47, subdivision (b) absolute statutory privilege. Rather, a party who has been falsely arrested by a citizen and then is taken into custody by a peace officer as a result of a citizen's arrest has a remedy against the offending citizen. (*Kesmodel v. Rand*, *supra*, 119 Cal.App.4th at pp. 1134-1137; *Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 503-504.) Had Mr. Viramontes and Ms. Arias merely related facts to the police officers who in turn arrested plaintiff, the result may be different. Defendants' section 47, subdivision (b) arguments have no merit.

C. Negligence Theories

Defendants argue that none of the negligence theories are viable as alleged because they do not contain specific facts. Defendants argue no facts support: the statutory claims; the mistaken identity claim; or the employer's breach of duties in training or supervising its employees. The first amended complaint alleges: plaintiff paid a fee to operate a booth at the swap meet; Newport Diversified, Inc., operated the swap meet; defendants' employees' negligently and falsely identified plaintiff as a person who had caused an incident on a prior occasion; defendants' employees caused plaintiff to be falsely imprisoned; and plaintiff was injured by his unlawful confinement. The facts concerning the employer's liability for injury to a business invitee at the hands of

employees were sufficiently pleaded to withstand a general demurrer. (§ 1714, subd. (a); *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 123-124; *Southland Corp. v. Superior Cour*t (1988) 203 Cal.App.3d 656, 663-664; *Nevarez v. Thriftimart, Inc.* (1970) 7 Cal.App.3d 799, 804.) More specifically, the employer may be liable to plaintiff for negligence in hiring or retaining an unfit or incompetent employee. (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139; *Underwriters Ins. Co. v. Purdie* (1983) 145 Cal.App.3d 57, 69.) The demurrer to the negligence claim should have been overruled with respect to the employer's and two employees' potential liability. We need not decide whether the other theories were viable or subject to a motion to strike.

D. Civil Rights Claim

We agree with defendants that the section 51, subdivision (b) claim failed because it is unclear how plaintiff's civil rights were violated. The only allegation is that plaintiff had diabetes. There are no allegations showing defendants knew of his illness or discriminated against him because of his diabetic condition. (§ 51, subd. (b); *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1154-1155, superseded by statute on a different point as stated in *Munson v. Del Taco, Inc*. (2009) 46 Cal. 4th 661, 664-665.) Plaintiff was given an opportunity to cure the defective pleading in the original complaint. Plaintiff failed to do so. It must be assumed the first amended complaint stated as strong a case as possible. The order sustaining the demurrer without leave to amend to the third cause of action must be affirmed. (*Drum v. San Fernando Valley Bar Assn.* (2010) 182 Cal.App.4th 247, 251; *Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 981.)

IV. DISPOSITION

The order dismissing the first amended complaint is reversed in part and affirmed in part. Upon remittitur issuance, a new order is to be entered overruling the demurrer to the false arrest/imprisonment and negligence claims. The order sustaining the demurrer without leave to amend is affirmed as the Unruh Civil Rights Act claim. Plaintiff, Keith Williams, is awarded his costs on appeal from defendants, Newport Diversified, Inc., Lizbeth Arias, and Luis Viramontes.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.