Filed 2/22/12 Rodgers v. LA County Sheriff's Dept. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ADAM CHARLES RODGERS, Plaintiff and Appellant, v. LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, Defendant and Respondent.	B225800 (Los Angeles County Super. Ct. No. BC416870)
ADAM CHARLES RODGERS, Plaintiff and Appellant, v. ALEX SMITH et al., Defendants and Respondents.	B228089

APPEAL from judgments of the Superior Court of Los Angeles County. Jane L. Johnson, Judge. Affirmed as to case No. B225800. Affirmed in part; reversed in part as to case No. B228089.

Kirtland & Packard and Robert K. Friedl for Plaintiff and Appellant.

Hurrell Cantrall, Thomas C. Hurrell and Melinda Cantrall for Defendants and Respondents.

* * * * * *

This appeal follows the sustaining of a demurrer in favor of respondent Los Angeles County Sheriff's Department (LASD) on causes of action for violation of the federal civil rights statute, title 42 of the United States Code section 1983 (section 1983), and injunctive relief. The trial court also sustained a demurrer in favor of employees of LASD, respondents Alex Smith and Yesenia Castillo, on a cause of action for negligence. Additionally, the trial court granted summary adjudication of appellant Adam Rodgers's cause of action for violation of section 1983 against Smith and Castillo.

Rodgers's lawsuit stems from his placement in a booking cell with an armed cellmate. Although deputy sheriffs had searched the cellmate several times, they failed to detect his cellmate's handgun, which was concealed in a back brace.

We conclude that Rodgers should be permitted to proceed with his negligence cause of action. The trial court properly sustained the demurrer and entered judgment against him on his remaining causes of action. We affirm the judgment in favor of LASD and affirm in part and reverse in part the judgment in favor of Smith and Castillo.

FACTUAL AND PROCEDURAL BACKGROUND

On June 30, 2009, Rodgers sued among others respondents LASD, Smith, and Castillo, asserting causes of action for violation of section 1983, negligence, and injunctive relief.[1] The court sustained a demurrer to the complaint and gave Rodgers leave to amend.

Rodgers amended his complaint several times, and on March 19, 2010, filed his third amended complaint – the operative pleading. The operative pleading contained the following factual allegations: Deputy Sheriffs Smith, Castillo, and Justen Holm were on duty on March 2, 2009. While on duty, the deputy sheriffs encountered Christopher Broussard, a felon in possession of weapon. The weapon was concealed underneath his back brace. Under Smith's supervision, Holm searched Broussard for weapons, conducting a "High Risk Sweep for Weapons," with the purpose of discovering and retrieving concealed weapons. Holm failed to detect Broussard's handgun. Under Smith's

---

[1] Other defendants were dismissed from the lawsuit. Rodgers also asserted other causes of action, but we do not discuss them because he makes no claim on appeal that those causes of action were improperly dismissed.

supervision, Holm then conducted a "Pat Down/Cursory Search" to discover and retrieve concealed weapons. Holm failed to detect the handgun. During the booking search, Castillo noticed Broussard's back brace, but failed to detect the handgun.

LASD had no practices or procedures to address the situation of a booking search that revealed a back brace capable of concealing a weapon. Castillo asked Smith for advice, and Smith recommended Castillo put Broussard in a booking cell with Rodgers. "Because LASD's practices and procedures were inadequate to detect Broussard's holster/back brace until after Broussard was in the Booking Area, and because LASD had no practice or procedure for Smith and Castillo to follow under these circumstances, Smith and Castillo had to decide for themselves how to complete the Booking Search knowing that (1) officer safety and (2) the safety of other detainees were strongly implicated." "With no LASD practice or procedure to follow, Smith made a decision to have Castillo remove the handcuffs, and put Broussard in a cell with Rodgers, and Castillo agreed to do so . . . ." Smith and Castillo were deliberately indifferent to Rodgers's safety when they placed Broussard in the booking cell and when they left the room after discovering Broussard had a gun.

Immediately after learning that Broussard was armed, Smith retrieved his weapon and formed an assault team, which stormed the cell and subdued Broussard with a tazer. Rodgers sustained physical injuries to his ears and emotional injuries, including anxiety attacks.

Rodgers further alleged that LASD had a policy, pattern, or practice of inadequately searching people. On at least one other occasion, deputy sheriffs failed to detect a weapon. Rodgers sought to bring the lawsuit as a class action. His claim for injunctive relief was based on a request to represent others similarly situated to him.

The trial court sustained the demurrer to the third amended complaint and dismissed the lawsuit against LASD. Following a motion for summary judgment, the court found that Smith and Castillo were entitled to qualified immunity on the section 1983 claim. Appellant appealed from the judgment of dismissal in favor of LASD and the judgment in favor of Smith and Castillo. The two appeals were consolidated for purposes of decision.

DISCUSSION

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. . . . The court does not, however, assume the truth of contentions, deductions or conclusions of law. . . . The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken.' . . . However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. . . . And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967, citations omitted.)

"We independently review an order granting summary judgment. . . . We determine whether the court's ruling was correct, not its reasons or rationale. . . . 'In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment.' . . . We review for abuse of discretion any evidentiary ruling made in connection with the motion." (*Shugart v. Regents of University of California* (2011) 199 Cal.App.4th 499, 504-505, citations omitted.)

1. Section 1983 and Injunctive Relief Against LASD (Demurrer)

The trial court sustained the demurrer to the operative pleading on Rodgers's causes of action for violation of section 1983 and for injunctive relief because Rodgers failed to allege that the execution of a LASD policy inflicted the injury as required by *Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658 (*Monell*). Rodgers argues that the demurrer should have been overruled as to both causes of action because he alleged that the violation of his constitutional rights resulted from the official policies or customs of the LASD.

In *Monell*, the United States Supreme Court held that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury

that the government as an entity is responsible under § 1983." (*Monell, supra,* 436 U.S. at p. 694.) The high court later clarified that "it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." (*Board of Comm'rs of Bryan Cty. v. Brown* (1997) 520 U.S. 397, 404.) "Some particularized facts demonstrating a constitutional deprivation are needed to sustain a cause of action under the Civil Rights Act [(section 1983)]." (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 564.)

Here, after multiple opportunities, Rodgers failed to allege that the injury was inflicted by a policy or custom of LASD. Rodgers alleged that LASD had procedures of conducting a patdown, cursory search, and booking search. Rodgers further alleged that LASD had no practices or policies to complete a booking search after Castillo discovered the back brace "because none existed." "Smith, using his tactical judgment, because no LASD practices and procedures existed to address this situation, instructed Castillo to unhandcuff Broussard" and "to put Broussard in the Booking Cell with Rodgers."

According to Rodgers's allegations, LASD had policies of conducting searches to detect and retrieve weapons. Rodgers does not allege he was injured because of those policies. According to Rodgers's allegations, LASD had no policy of dealing with a suspect wearing a back brace. Thus, Rodgers was not injured as a result of an LASD policy concerning back braces.

Rodgers's allegation that LASD had a policy of inadequately searching people is insufficient to avert dismissal. First, it is contrary to allegations in the complaint that LASD has a policy to conduct searches with the purpose "to discover and retrieve concealed weapons." Second, Rodgers identifies no policy requiring inadequate searches; he alleges no LASD policy that Smith and Castillo could have followed, which would have allowed them to search Broussard without finding the handgun. Instead, he assumes the existence of an inadequate policy because the search in this case was inadequate. Countenancing that assumption, however, would entirely circumvent the requirements of *Monell*, because it

would allow LASD to be sued based solely on an inadequate search conducted by its employees.

Rodgers also fails to allege any "permanent and well-settled" practice tantamount to a custom, which in addition to a policy may support a section 1983 cause of action. (See *Thompson v. City of Los Angeles* (9th Cir. 1989) 885 F.2d 1439, 1444, overruled on another ground in *Bull v. City and County of San Francisco* (9th Cir. 2010) 595 F.3d 964, 981.) Rodgers provides no "particularized facts" identifying the policy purporting to have caused him a constitutional deprivation. (*Bach v. County of Butte*, *supra*, 147 Cal.App.3d at p. 564.) No allegations in the complaint support an inference that Rodgers's alleged injury was caused by LASD's custom. (Cf. *Shaw v. Cal. Dept. of Alcoholic Beverage Control* (9th Cir. 1986) 788 F.2d 600, 610 [custom or policy may be inferred from allegations in complaint].) The trial court correctly found Rodgers had not asserted a cause of action for violation of section 1983 against LASD and that his request for injunctive relief on behalf of similarly situated persons necessarily failed.

2. Section 1983 Qualified Immunity of Smith and Castillo (Summary Judgment)

Smith and Castillo moved for summary adjudication of the section 1983 cause of action on the grounds that (1) Rodgers could not establish they were deliberately indifferent and (2) the deputies were entitled to qualified immunity. Relying on *Estate of Ford v. Ramirez-Palmer* (9th Cir. 2002) 301 F.3d 1043 (*Ford*), the trial court found the deputies were entitled to qualified immunity. On appeal, Rodgers argues that under the Eighth Amendment, prison officials had a duty to provide humane conditions of confinement and failed to do so when they placed Broussard in a cell with Rodgers.

In *Ford*, the Ninth Circuit held that "'[a] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" (*Ford, supra,* 301 F.3d at p. 1050.) The court found that *if* the plaintiff could show that the prison officials knew that a cellmate was a threat to the plaintiff, placing the cellmate in a cell with the plaintiff would violate the Eighth Amendment. (*Ford,* at p. 1050.)

Here, Rodgers argues that there was evidence raising a triable issue of material fact Smith and Castillo knew Broussard could have a gun and was highly dangerous. However, Rodgers cites no evidence that supports the theory that Smith and Castillo knew Broussard was armed. The evidence showed Broussard was a passenger in a vehicle Smith detained. Smith knew the vehicle was stolen and detained the occupants at gunpoint. Broussard may have been under the influence of a controlled substance at the time Smith detained him. Broussard later said that prior to being placed in the cell, Smith told him he was not going away for life because possession of methamphetamine was not a violent felony.

When she conducted a search of Broussard prior to placing him in the cell with Rodgers, Castillo told Smith that Broussard was wearing a brace. Smith told her to finish the search, after which they would address the brace. Believing the search was complete and thorough, Smith told Castillo to put Broussard in the cell and have him remove the back brace. Smith was aware that someone else was in the cell. After placing Broussard in the cell, Castillo told Smith Broussard had a gun. Rodgers heard Castillo say, "Holy shit, he has a gun."

None of this evidence supports the inference that Smith or Castillo knew Broussard was armed when they decided to place him in the cell with Rodgers.[2] Rodgers presented no evidence raising an inference that Smith and Castillo knew of the excessive risk and therefore Smith and Castillo cannot be held liable for violating the Eighth Amendment. The trial court properly granted summary adjudication of the section 1983 lawsuit against Smith and Castillo. (*Ford, supra*, 301 F.3d at pp. 1049-1050.)

3. Negligence Against Smith and Castillo (Demurrer)

Rodgers argues that the court erred in sustaining a demurrer to his negligence cause of action as to Castillo and Smith only.

---

[2] Our record contains documents filed under seal. We have reviewed those documents and conclude that no evidence supports an inference Smith or Castillo knew that Broussard was armed. The trial court sustained several objections to Rodgers's expert and Rodgers does not challenge those findings on appeal with any legal argument or citation to legal authority. He therefore has forfeited any challenge to the court's evidentiary rulings. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074.)

In the trial court, Smith and Castillo argued that they were immune from liability pursuant to Government Code section 815. Rodgers argues that section 815 does not shield Smith and Castillo from liability based on negligence. We agree as that statute shields only a public entity, not an employee. Section 815 provides: "Except as otherwise provided by statute: [¶] (a) A *public entity* is not liable for an injury, whether such injury arises out of an act or omission of the *public entity* or a public employee or any other person. [¶] (b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the *public entity* provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person." (Italics added.)

Apparently conceding the inapplicability of Government Code section 815, on appeal Smith and Castillo argue they are entitled to immunity under section 820.2. Section 820.2 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." As we explain, section 820.2 does not shield Castillo and Smith from negligence liability.

Under Government Code section 820.2, "[i]mmunity is granted for '"basic policy decisions [which have] been [expressly] committed to coordinate branches of government," and as to which judicial interference would thus be "unseemly." . . . Such "areas of quasi-legislative policy-making . . . are sufficiently sensitive" . . . to call for judicial abstention from interference that "might even in the first instance affect the coordinate body's decision-making process" . . . .' . . . . [¶] Ministerial acts 'that merely implement a basic policy already formulated' are not entitled to immunity. . . . Immunity only applies 'to deliberate and considered policy decisions' involving a conscious balancing of risks and advantages." (*Jamgotchian v. Slender* (2009) 170 Cal.App.4th 1384, 1397-1398, citations and italics omitted.)

Here, the alleged negligence concerned the deputy sheriffs failure to find Broussard's weapon during multiple searches – none of which were discretionary. The deputy sheriffs were implementing a basic policy in searching Broussard. Rodgers alleged that the deputy sheriffs had a duty to properly search each detainee for weapons before placing the detainee

in a cell. Thus, Castillo's search under Smith's supervision was a ministerial act, and Government Code section 820.2 does not shield Smith and Castillo from negligence liability. (See *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 261-262 [no immunity where injury results not from employee's exercise of discretion but from negligence in performing it].)

Smith and Castillo's final argument is that to assert a cause of action for negligence, Rodgers was required to file a claim under Government Code section 820, subdivision (a) instead of a common law negligence. The argument is based on a misreading of *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 245. *Giraldo* states that under section 820, public employees are liable for injuries resulting from their acts or admissions to the same extent as private persons unless exceptions apply. *Giraldo* did not hold that a claim against a public employee had to be stylized as a section 820 claim; indeed, it reversed an order sustaining a demurrer to a negligence cause of action. (*Giraldo,* at p. 260.) Finally, even assuming the cause of action was not appropriately stylized, that is not a proper basis for sustaining a demurrer without leave to amend as it indicates that an amendment would cure the error. (*Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at p. 967 ["it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment"].)

DISPOSITION

Judgment in case No. B225800 in favor of LASD is affirmed. Judgment in case No. B228089 in favor of Smith and Castillo is affirmed in part and reversed in part. It is reversed as to the negligence cause of action only. The case is remanded to the trial court. The parties shall bear their own costs on appeal.

FLIER, J.

We concur:

BIGELOW, P. J. RUBIN, J.