Filed 8/21/13 Munoz v. City of Carson CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CHRISTOPHER MUNOZ Plaintiff and Appellant, v. CITY OF CARSON et al., Defendants and Respondents.	B237951 (Consolidated with B242960) (Los Angeles County Super. Ct. No. TC024684)

APPEAL from an order and a judgment of the Superior Court of Los Angeles County, Rose Hom and Lynn Olson, Judges. Affirmed.

Law Offices of Stanley S. Delnick and Stanley S. Delnick for Plaintiff and Appellant.

Aleshire & Wynder, William W. Wynder, Mily C. Huntley and Brandon D. Ward for Defendants and Respondents.

In his third amended complaint (complaint), plaintiff and appellant Christopher Munoz asserts causes of action for negligence and violation of civil rights against defendants and respondents City of Carson (City) and City employee Daniel Perez. The trial court sustained defendants' demurrer to the complaint without leave to amend, and then entered an order of dismissal and a judgment in favor of defendants. We affirm.

This is a personal injury action. Plaintiff sustained injuries after being attacked by third parties in a public park owned and operated by the City. He claims that he went to the park pursuant to an "invitation" posted on the City's website, and that the City and Perez are liable for his injuries. The primary issue on appeal is whether defendants owed a duty to provide adequate security at the park and to warn plaintiff about third party attacks there. We conclude defendants did not have such a duty.

BACKGROUND

1. *Summary of Allegations in the Complaint*[1]

On or about July 1, 2009, plaintiff went to Calas Park in Carson to watch his friend play in a women's softball game. Plaintiff is a Latino male who was 16 years old at the time. Plaintiff's friend played on a team consisting of Hispanic players. The other team consisted of Samoan women. At some point during or after the game, plaintiff was attacked and beaten in the park by relatives of a Samoan team member who were "known gang members." Plaintiff believes his assailants were "racially motivated." As a result of the attack, plaintiff sustained serious personal injuries.

Calas Park was owned and operated by the City. The park "was a known hangout for gang members of a criminal gang known as 'Calas Piru' and other gang associations which are known by other names." Prior "incidents of violence" have occurred in the park.

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[1] We assume the factual allegations in the complaint are true, but we do not assume the truth of plaintiff's contentions, deductions or conclusions of law. (*Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, 87 (*Maxton*).)

Plaintiff contends that he went to the park on the day of the attack pursuant to an "invitation to the general public" to enjoy "safe" recreational activities posted on the City's website. Attached as an exhibit to the complaint is a print-out of the relevant website pages.[2] Because the contents of the website are crucial to plaintiff's claims, we shall review them in some detail.

The website stated: "**Welcome!** Thank you for visiting Calas Park's webpage. Here you can find our contact information as well as hours of operation and upcoming recreational activities." Elsewhere, the website included the following statement by Cedric L. Hicks, Sr., the Recreation Superintendent: "On behalf of the City of Carson Parks and Recreation Department, I would like to take this opportunity to welcome you to our newly designed website. The Recreation Division is responsible for supervised recreational activities at twelve parks . . . . [¶] . . . The Recreation Division is a professional innovative organization that provides fun, safe, quality recreational programs which inspire people and enhance the vitality and well being of all who participate." Additionally, the website indicated that the City supervised a softball league.

Based on these allegations, the complaint sets forth a negligence cause of action against the City and Daniel Perez.[3] Perez was allegedly a City employee and a "staff person from [Calas Park] in charge of the Samoan women team." He and the City allegedly had a "special relationship" with plaintiff created by the City's "invitation" to enter Calas Park posted on its website. Defendants allegedly breached their duty of care to plaintiff by failing to provide adequate security at Calas Park and failing to warn plaintiff about "the location's dangerous criminal activity."

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[2] To the extent the facts appearing in the exhibit contradict those alleged in the body of the complaint, the facts in the exhibit take precedence. (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 282.)

[3] This cause of action is also against "Does 1 through 15," unknown employees of the City sued under fictitious names. Another cause of action for assault and battery is stated against "Doe[s] 16 through 50," the unknown individuals who attacked plaintiff.

The complaint also sets forth a cause of action for violation of civil rights. This claim is based on the events of July 1, 2009. The complaint alleges that by failing to protect and warn plaintiff, the City and Perez violated his "right to be free from violence by reason of being a Latino male as guaranteed by" Civil Code section 51.7.

2. *Procedural History*

The City and Perez demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against them. (Code Civ. Proc., § 430.10, subd. (e).) The trial court sustained the demurrer without leave to amend. Subsequently, the City and Perez filed a motion to dismiss. In an order dated October 31, 2011, the trial court granted the motion. Plaintiff filed a timely notice of appeal of this order (Case No. B237951).[4]

On February 28, 2012, the trial court entered a judgment in favor of the City and Perez and against plaintiff. Plaintiff filed a timely notice of appeal of the judgment (Case No. B242960). We consolidated the two appeals.

DISCUSSION

A. *Standard of Review*

On appeal of an order of dismissal or judgment following a ruling sustaining a general demurrer, we determine de novo whether the complaint alleges facts sufficient to state a cause of action. (*Maxton*, *supra*, 203 Cal.App.4th at p. 87.) We assume the truth of the factual allegations in the complaint, liberally construed, as well as facts that can be reasonably inferred from those expressly pleaded. (*Glen Oaks Estates Homeowners Assn. v. Re/Max Premier Properties* (2012) 203 Cal.App.4th 913, 919; *Maxton*, at p. 87.) We do not, however, accept as true plaintiff's contentions, deductions or conclusions of law. (*Maxton*, at p. 87.)

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[4] The signed order of dismissal constituted an appealable judgment. (Code Civ. Proc., §§ 581d, 904.1, subd. (a)(1).)

B. *The Negligence Cause of Action*

"The elements of a cause of action for negligence are: duty; breach of duty; legal cause; and damages." (*Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 463.) The existence of a duty is the "threshold element" of a negligence cause of action (*ibid.*) and a question of law for the court. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 (*Ann M.*), disapproved on other grounds by *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527.) For reasons we shall explain, the complaint fails to state sufficient facts supporting the element of duty.

Duty is " ' " 'an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' " ' " (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1189.) "Foreseeability of harm is a ' "crucial factor" ' in determining the existence and scope of that duty." (*Ibid.*)

In addition to foreseeability, other factors the court considers include "[2] the degree of certainty that the plaintiff suffered injury, [3] the closeness of the connection between the defendant's conduct and the injury suffered, [4] the moral blame attached to the defendant's conduct, [5] the policy of preventing future harm, [6] the extent of the burden to the defendant and [7] consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113 (*Rowland*).) We shall refer to these factors as the "*Rowland* factors."

Although courts often use the *Rowland* factors in determining duty, sometimes they take a different analytical approach. "When analyzing duty in the context of third party acts, courts distinguish between 'misfeasance' and 'nonfeasance.' " (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 531 (*Melton*).) Misfeasance arises from affirmative misconduct by the defendant, i.e. when the defendant's conduct makes the plaintiff's position worse or creates a risk for the plaintiff. (*Ibid.*) Nonfeasance exists when the defendant fails to take action that would have benefited the plaintiff. (*Ibid.*)

This is a nonfeasance case because defendants allegedly failed to do certain things, namely they failed to provide adequate security at the park and warn plaintiff of

the dangers there. As a general rule, nonfeasance does not give rise to a legal duty. (*Melton*, *supra*, 183 Cal.App.4th at p. 531.) Also, generally no one has the duty to control the conduct of another or to warn those who may be endangered by such conduct. (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 806 (*Peterson*).) A duty may arise, however, when there is a special relationship between the defendant and the plaintiff that creates a duty to act. (*Ibid.*; *Melton*, at pp. 531-532; *Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1202 (*Seo*) ["Liability for nonfeasance is limited to situations in which there is a special relationship that creates a duty to act"].)

A special relationship may arise out of a statutory or contractual duty. (*Seo*, *supra*, 97 Cal.App.4th at p. 1203.) Under the common law, the courts have also found that a special relationship exists in light of the particular nature of the relationship between the parties. Examples of special relationships include the relationships between common carriers and passengers, innkeepers and guests, and psychotherapists and patients. (*Ibid.*)

1. *Defendants Did Not Have a Special Relationship With Plaintiff*

Plaintiff contends he had a special relationship with Perez and the City. We disagree.

The complaint alleges virtually no facts regarding Perez's acts or omissions or his job responsibilities. In particular, it does not allege that he had anything to do with the contents posted on the City's website. Although the complaint vaguely states Perez was a "staff person" at Calas Park "in charge of the Samoan team," it does not state facts indicating he was responsible for security at the park or anywhere else, or that he was present on day of the attack. The complaint also does not allege that Perez ever communicated with plaintiff or had any dealings with him in any capacity. In short, there are simply no facts indicating plaintiff had a special relationship, or a relationship of any kind, with Perez.

The sole basis for plaintiff's claim that he had a special relationship with the City are the contents of its website. Plaintiff argues that the website "invited" the general public, including plaintiff, to Calas Park, and falsely represented that it was "safe" there. This characterization of the website is not accurate. The website "welcomes" readers to the website; it does not invite them to the City's parks. While the website makes a general statement about providing "fun, safe, quality recreational programs," it does not include any statements about the event plaintiff attended or softball games at Calas Park.

Moreover, even assuming the website included an invitation to the general public to attend the softball game plaintiff attended, it did not create a special relationship between plaintiff and the City. In *Melton*, the court addressed a similar issue. The defendant in *Melton* posted on his social networking site an open invitation for people to attend a party at his residence featuring live music and alcoholic beverages. (*Melton*, *supra*, 183 Cal.App.4th at p. 527.) Upon arriving at the party, the plaintiffs were attacked, beaten, and stabbed by a group of unknown individuals. (*Ibid.*) The court held that there was no special relationship between the plaintiffs and the defendant. (*Id.* at p. 536.) Likewise, there was no special relationship between the City and plaintiff in this case based on the City's alleged invitation to the general public.

Plaintiff's reliance on *Peterson* is misplaced. In *Peterson*, the plaintiff was a student enrolled in the defendants' college. She sustained injuries after being attacked by a third party in the stairway of the college's parking structure. (*Peterson*, *supra*, 36 Cal.3d at p. 805.) The plaintiff had been issued a parking permit by the college in return for a fee. (*Ibid.*) No similar facts exist here. Plaintiff did not pay the City to attend the softball game, and had no relationship with the City similar to the relationship between a student and a college. This case therefore is factually distinguishable from *Peterson*.

2. *Defendants Did Not Owe a Duty to Plaintiff Under the* Rowland *Factors*

Having determined that defendants did not have a special relationship with plaintiff in this nonfeasance case, we need not weigh the traditional factors set forth in

Rowland. (*Seo*, *supra*, 97 Cal.App.4th at p. 1203 [Because the *Rowland* weighing process " 'has already been done by courts over the centuries in formulating the "no duty to aid" rule' in the context of liability for nonfeasance, it is not necessary to engage in the weighing process in a particular case"].) Nonetheless, if we do consider these factors, we come to the same conclusion—defendants had no duty to plaintiff.

a. *Foreseeability*

In the case of criminal conduct by a third party, an " 'extraordinary high degree of foreseeability is required to impose a duty on the landowner, in part because "it is difficult if not impossible in today's society to predict when a criminal might strike." ' " (*Melton*, *supra*, 183 Cal.App.4th at p. 532.) Although the complaint states plaintiff is "informed and believes" that "prior assaults had taken place in the same general area under similar circumstances," it does not include any specific allegations, such as the dates, number, specific locations and particular circumstances of the prior alleged assaults. The complaint therefore does not state sufficient facts to meet the extraordinary high degree of foreseeability required to impose liability on defendants.

b. *Certainty That Plaintiff Suffered Injury*

For purposes of appellate review, we must accept as true that plaintiff suffered injury as alleged in the complaint.

c. *Closeness of Connection Between Defendant's Conduct and the Harm Suffered*

As stated *ante*, the complaint does not state any facts regarding Perez's conduct. The only affirmative alleged conduct of the City was that it posted general statements about its recreational programs on its website. Defendants' alleged conduct thus has no close connection to the injury plaintiff suffered.

d. *Moral Blame*

" 'Moral blame has been applied to describe a defendant's culpability in terms of the defendant's state of mind and the inherently harmful nature of the defendant's acts. To avoid redundancy with the other *Rowland* factors, the moral blame that attends ordinary negligence is generally not sufficient to tip the balance of the *Rowland* factors in

favor of liability. [Citation.] Instead, courts have required a higher degree of moral culpability such as where the defendant (1) intended or planned the harmful result [citation]; (2) had actual or constructive knowledge of the harmful consequences of their behavior [citation]; (3) acted in bad faith or with a reckless indifference to the results of their conduct [citations]; or (4) engaged in inherently harmful acts [citation].' " (*Martinez v. Bank of America* (2000) 82 Cal.App.4th 883, 896 (*Martinez*).) Here, there are no allegations in the complaint that defendants' conduct fell within any of these four exceptional circumstances.

e. *Preventing Future Harm, the Burden to Defendants and the Consequences to the Community of Imposing a Duty to Exercise Care with Resulting Liability*

Plaintiff contends that defendants had a duty to (1) provide "adequate security" at Calas Park and (2) warn plaintiff of the potential danger there. If we impose a duty on the City to take these measures, however, the burden on the City and negative consequences on the community would be considerable.

Plaintiff does not specify what defendants should do to provide adequate security against criminal attacks in Calas Park. Presumably the City can station police officers or private security guards at the park during the hours it is open, or during every organized recreational event. But this would impose a substantial financial burden on the City at a time when pressures on the public fisc are greater than ever. (See *Ann M.*, *supra*, 6 Cal.4th at p. 679 ["The monetary costs of security guards is not insignificant"].) "Moreover, the obligation to provide patrols adequate to deter criminal conduct is not well defined. 'No one really knows why people commit crime, hence no one really knows what is "adequate" deterrence in any given situation.' " (*Ibid.*) Accordingly, imposing a duty on the City to provide "adequate security" in public parks would be very burdensome.

Plaintiff's claim that the City had a duty to warn him of potential criminal activity is equally unpersuasive. A similar argument was rejected in *Hayes v. State of California* (1974) 11 Cal.3d 469 (*Hayes*). There, the plaintiffs were attacked and beaten by unknown persons on a beach in the campus of the University of California at Santa Barbara. (*Id.* at p. 471.) The plaintiffs argued that the university had a duty to warn them against potential criminal conduct.

The California Supreme Court rejected this argument for three reasons. The first was that a warning would have served little purpose because the public is aware of the incidence of violent crime, particularly in unlit and little used places. (*Hayes, supra*, 11 Cal.3d at pp. 472-473.) The court further stated that "determining and regulating the use of public property are better left to legislative and administrative bodies, rather than to the judiciary." (*Id.* at p. 473.) Finally, the court noted that "the disquieting spectre of warning signs hanging in areas where crime has occurred – not unlike the leper's bell – manifests the unreasonableness of the duty sought to be imposed by plaintiffs on their government." (*Ibid.*)

The holding and reasoning of *Hayes* control here. A warning on the City's website or on on-site signs stating that crime may occur in public parks would serve little purpose because the public is aware of this unfortunate problem. Further, to the extent a warning serves a purpose, it is better to leave that decision to the City's governing and administrating bodies. Finally, providing ominous warnings about crime at public parks, to the extent they keep the general public away, could unnecessarily discourage the beneficial use of an important public asset.

After analyzing and weighing the *Rowland* factors, we hold that defendants had no duty to plaintiff. The absence of duty ends the analysis of liability. (*Martinez, supra*, 82 Cal.App.4th at p. 897.) We therefore conclude the trial court correctly sustained defendants' demurrer to plaintiff's negligence cause of action without leave to amend.

C. *The Violation of Civil Rights Cause of Action*

Under the Unruh Civil Rights Act (Civ. Code, § 51) and related statutes in the Civil Code, all persons in this state have certain civil rights. Civil Code section 51.7, subdivision (a) provides that "[a]ll persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property" by reason of their national origin. (Civ. Code, § 51.7, subd. (a); see also Civ. Code, § 51, subd. (b).) Whoever denies, or aids or incites a denial, of this right is liable for resulting damages. (Civ. Code, § 52, subd. (a).)

The complaint makes the conclusionary allegation that the City and Perez violated plaintiff's rights under Civil Code section 51.7, subdivision (a). It does not allege, however, that these defendants committed violence against plaintiff, threatened to do so, or aided or incited violence against him. The complaint therefore fails to state facts sufficient to constitute a violation of civil rights cause of action against the City and Perez.

DISPOSITION

The judgment dated February 28, 2012, and the order of dismissal dated October 31, 2011, are affirmed. Defendants are awarded costs on appeal.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.