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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ESTATE OF AUGUSTA MILLENDER, deceased, BRENDA MILLENDER, WILLIAM JOHNSON,)	Case No. CV 05-02298 DDP (RZx)
)	
Plaintiffs,)	ORDER GRANTING IN PART AND
)	DENYING IN PART PLAINTIFFS'
v.)	MOTION FOR SUMMARY ADJUDICATION,
)	AND DENYING PLAINTIFFS' MOTION
)	FOR RECONSIDERATION
COUNTY OF LOS ANGELES, et al.,)	[Docket Nos. 150 & 151]
)	
Defendants.)	
)	
_____)	

Presently before the court are Plaintiffs' Motion for Summary Adjudication ("MSA Motion") and Motion for Reconsideration ("MTR Motion"). Having reviewed the parties' moving papers and heard oral argument, the court grants in part and denies in part the Motion for Summary Adjudication, denies the Motion for Reconsideration, and adopts the following Order.

I. BACKGROUND

A. Summary Judgment Order

The facts and procedural history of this case are well-known and largely set forth in the court's March 15, 2007 Order

1 addressing the parties' cross-motions for summary judgment ("MSJ
2 Order"). Relevant here, the court held as to Plaintiffs' claims
3 under 42 U.S.C. § 1983 that: 1) the search warrant at issue was
4 overbroad in authorizing the seizure of all firearms and any gang-
5 related evidence, but not overbroad with regard to evidence of who
6 controlled the premises, and the participating Defendants were not
7 entitled to qualified immunity for this violation; 2) Defendants
8 had probable cause to believe that the suspect, Jerry Bowen, would
9 be at the Millenders' home, and had sufficient cause for nighttime
10 service of the warrant; 3) Defendants' detention of Plaintiffs was
11 not unreasonable, and Defendants were therefore entitled to
12 qualified immunity on this claim; 4) there were genuine disputes of
13 material fact as to Defendants' forced entry and destruction of
14 property during the SWAT raid, although the individual non-SWAT
15 team Defendants were entitled to qualified immunity on this claim;
16 and 5) Plaintiffs had provided insufficient evidence to support
17 their Monell claims, but the court would defer ruling on these
18 claims given outstanding discovery. Also relevant here, the court
19 held that: 1) Plaintiffs could seek monetary damages under article
20 I, section 13 of the California Constitution, and the court's
21 analysis of Plaintiffs' § 1983 claims applied equally to this state
22 law claim; and 2) the County of Los Angeles could be held liable
23 under California Civil Code section 52.1 and respondeat superior,
24 depending on the constitutional violations ultimately proven.

25 **B. Ninth Circuit and Supreme Court Decisions**

26 Defendants appealed from the court's holding that they were
27 not entitled to qualified immunity as to the overbroad search
28 warrant. The Ninth Circuit upheld the court's determination, en

1 banc. The Circuit agreed that: 1) "there was no probable cause for
2 the broad categories of firearm- and gang-related items listed in
3 the search warrant," and the warrant therefore "violated the
4 Millenders' constitutional rights"; and 2) "the warrant was so
5 facially invalid that no reasonable officer could have relied on
6 it," such that "the deputies [were] not entitled to qualified
7 immunity." Millender v. County of Los Angeles, 620 F.3d 1016,
8 1031, 1035 (9th Cir. 2010). The Supreme Court, however, then
9 reversed in part, as to qualified immunity. See Messerschmidt v.
10 Millender, 132 S. Ct. 1235, 1250-51 (2012) ("The judgment of the
11 Court of Appeals denying the officers qualified immunity must
12 therefore be reversed.").

13 Specifically, the Supreme Court held that the officers were
14 entitled to qualified immunity because "it would not have been
15 entirely unreasonable for an officer to believe, in the particular
16 circumstances of this case, that there was probable cause" to
17 search for the materials at issue. Id. at 1246 (internal quotation
18 marks omitted); see also id. at 1249 ("The officers' judgment that
19 the scope of the warrant was supported by probable cause may have
20 been mistaken, but it was not plainly incompetent." (internal
21 quotation marks omitted)). In making this determination, the Court
22 emphasized the serious danger involved, as the alleged crime was a
23 "spousal assault and an assault with a deadly weapon," by a "known
24 Mona Park Crip gang member." Id. at 1247 (internal quotation marks
25 omitted). The Court also emphasized that "the warrant had been
26 reviewed and approved by the officers' superiors, a deputy district
27 attorney, and a neutral magistrate." Id. at 1249. As the Court
28 explained, a neutral magistrate judge's issuance of a warrant

1 confers a "shield of immunity," with an exception where "it is
2 obvious that no reasonably competent officer would have concluded
3 that a warrant should issue." Id. at 1245 (internal quotation
4 marks omitted); see also id. ("The shield of immunity . . . will be
5 lost, for example, where the warrant was based on an affidavit so
6 lacking in indicia of probable cause as to render official belief
7 in its existence entirely unreasonable." (internal quotation marks
8 and citation omitted)).

9 The Supreme Court, however, did not reverse the holding by
10 this court and the Ninth Circuit that the warrant was overbroad.
11 See id. at 1244 ("The validity of the warrant is not before us.
12 The question instead is whether Messerschmidt and Lawrence are
13 entitled to immunity from damages, even assuming that the warrant
14 should not have been issued."); id. at 1250 ("The question in this
15 case is not whether the magistrate erred in believing there was
16 sufficient probable cause to support the scope of the warrant he
17 issued. It is instead whether the magistrate so obviously erred
18 that any reasonable officer would have recognized the error.").
19 This distinction between the constitutional violation and qualified
20 immunity for the officers is critical, because the Court's decision
21 has already been cited incorrectly by the government in cases
22 before this court, including this case. (See Defs.' Opp'n to MSA
23 Mot. at 6 ("[T]he Supreme Court implicitly found there was probable
24 cause for the issuance of the warrant . . ."). Again, the
25 Supreme Court held only that the officers were entitled to
26 qualified immunity. Thus, the Ninth Circuit's en banc holding that
27 the warrant was unconstitutionally overbroad remains the law. In
28 short, the Supreme Court's holding as to reasonableness in the

1 qualified immunity context cannot be bootstrapped into the probable
2 cause analysis for a warrant's constitutionality, so as to move the
3 law into the unacceptable territory of general warrants.

4 **II. DISCUSSION**

5 In their Motion for Summary Adjudication, Plaintiffs make
6 three arguments: 1) although the court previously deferred ruling
7 on the issue, Plaintiffs are now entitled to summary adjudication
8 on the County's Monell liability; 2) likewise, Plaintiffs are now
9 entitled to summary adjudication on their respondeat superior claim
10 under California Civil Code section 52.1 ("Section 52.1"); and 3)
11 Plaintiffs are entitled to summary adjudication for the alleged
12 violations of article I, section 13 of the California Constitution.
13 In their Motion for Reconsideration, Plaintiffs further contend
14 that intervening law and new representations by Defendants
15 establish that, contrary to the court's prior MSJ Order, Defendants
16 lacked sufficient cause for nighttime service of the warrant.

17 Defendants respond that nothing has changed to disturb this
18 court's finding that Plaintiffs have provided insufficient evidence
19 of Monell liability. Defendants also argue that the warrant's
20 overbreadth cannot be the basis for Plaintiffs' Section 52.1 claim,
21 because it lacks the required "threats, intimidation, or coercion."
22 Defendants further insist, contrary to the court's MSJ Order, that
23 there is no private cause of action for damages under article 1,
24 section 13 of the California Constitution, and that the court has
25 not yet ruled on the merits of this claim. Last, Defendants
26 contend that no new facts or law justify reconsideration of the
27 court's ruling on nighttime service.

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1 **A. Monell Liability**

2 As discussed, this court held in its prior MSJ Order that
3 Plaintiffs had not provided sufficient evidence of a County custom
4 or policy for Monell liability. The court, however, deferred
5 granting summary adjudication to Defendants, in light of
6 Plaintiffs' contention that outstanding discovery would support
7 their Monell claims.

8 Plaintiffs' only basis for a different outcome now is that
9 Defendants allegedly have made certain admissions and
10 representations since the MSJ Order. The court finds that none of
11 Defendants' post-Order statements change the Monell analysis. In
12 particular, Defendants' contention on appeal that the warrant was
13 supported by probable cause and therefore not overbroad is
14 irrelevant, as this was a legal argument, not an admission of any
15 County custom or policy. On the other hand, defense counsel's
16 dialogue with Chief Judge Kozinski on appeal may have some
17 evidentiary value, as counsel arguably suggested that it was still
18 the County's position that the officers had acted appropriately.
19 Likewise, that Officer Messerschmidt testified in deposition that
20 he acted in accordance with his training, and that the County
21 allegedly never reprimanded the officers or took any remedial
22 steps, may provide some evidence of a County custom or policy.
23 However, this evidence is still not sufficient to establish
24 Plaintiffs' Monell claims as a matter of law. The court therefore
25 denies Plaintiffs' Motion as it relates to Monell liability.

26 **B. California Civil Code Section 52.1**

27 As discussed, this court also deferred ruling on Plaintiffs'
28 Section 52.1 claim against the County for respondeat superior

1 liability, because it would turn on the constitutional violations
2 ultimately proven. Plaintiffs argue, however, that they previously
3 requested summary adjudication of this claim "based on the entry
4 and search," and now instead seek summary adjudication because the
5 unconstitutionally overbroad warrant "was accompanied by threats,
6 intimidation and coercion in the form of the SWAT team breaking
7 into the Millender home." (Pls.' Reply in Supp. of MSA Mot. at 8.)
8 Regardless, the court again finds that Plaintiffs are not entitled
9 to summary adjudication on this claim. As the court explained in
10 its MSJ Order, material facts are in dispute as to the lawfulness
11 of Defendants' actions during the SWAT team's forcible entry. If
12 the entry was lawful, it cannot constitute the "threats,
13 intimidation, or coercion" required by Section 52.1.

14 **C. California Constitution, Article I, Section 13**

15 Plaintiffs further ask for a ruling as a matter of law that
16 the County violated article I, section 13 of the California
17 Constitution. As Plaintiffs explain, granting this request would
18 simply clarify the prior MSJ Order, where the court held that: 1) a
19 private action for damages was available for this claim; 2) as the
20 parties agreed, the court's "findings on the probable cause and
21 unreasonable search and seizure claims in regard to the federal
22 constitutional claims should apply equally to the state claims";
23 and 3) Defendants did in fact violate the U.S. Constitution,
24 through their overbroad warrant. (MSJ Order at 84-85, 49.) In
25 response, Defendants largely attempt to reargue the issue of
26 whether a private action for damages is available. The court has
27 already ruled in the affirmative. Accordingly, because Defendants
28 violated the U.S. Constitution through the overbroad warrant, they

1 thereby violated the California Constitution as well.¹ Plaintiffs
2 are therefore entitled to summary adjudication on this claim.

3 **D. Nighttime Service**

4 Finally, in their Motion for Reconsideration, Plaintiffs argue
5 that the court should reconsider its MSJ Order and find the
6 nighttime service of the warrant unconstitutional. First,
7 Plaintiffs contend that the Ninth Circuit recently set forth a new
8 standard for nighttime SWAT service, in Bravo v. City of Santa
9 Maria, 665 F.3d 1076 (9th Cir. 2011). Assuming that Bravo
10 established new law, the court has already held that Bravo's
11 standard was met here. Specifically, after explaining that
12 nighttime SWAT service requires "a heightened standard of
13 justification," Bravo applied the same "exigent circumstances"
14 standard as for a "no-knock entry." Id. at 1084-86; see also id.
15 at 1085 ("A nighttime incursion by a SWAT force is a far more
16 serious occurrence than an ordinary daytime intrusion pursuant to a
17 regular warrant and therefore requires higher justification beyond
18 mere probable cause to search."). Exigent circumstances "include
19 when officers 'have a reasonable suspicion that knocking and
20 announcing their presence [or, presumably, executing a search
21 during the day], under the particular circumstances, would be
22 dangerous or futile, or that it would inhibit the effective
23 investigation of the crime by, for example, allowing the
24 destruction of evidence.'" Id. at 1085-86 (quoting Richards v.
25 Wisconsin, 520 U.S. 385, 394 (1997)).

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27 ¹ As the court previously explained, qualified immunity does
28 not apply to Plaintiffs' state law claims, because they are alleged
only against the County, not against any of the individual
Defendants. (See MSJ Order at 35 n.8, 37 n.9.)

1 Here, this court held in its prior MSJ Order that nighttime
2 service was justified because: "The facts in the affidavit, that
3 Bowen physically assaulted his girlfriend, shot at his girlfriend
4 with a black sawed-off shotgun, had violent tendencies, had
5 assaulted his girlfriend in the past, and was a member of the Mona
6 Park Crip gang, were sufficient to show the likelihood that he
7 would also use violence against officers." (MSJ Order at 40.) The
8 court concluded that these specific facts showed a necessity for
9 service of the warrant at night, rather than during the day. (Id.)
10 Given the legitimate and particularized concern for officer safety,
11 the court concludes that these facts also satisfy the exigent
12 circumstances standard set forth in Bravo for nighttime service.

13 Finally, the court declines to reconsider its ruling on the
14 basis of Defendants' alleged arguments on appeal "that the warrant
15 was justified because the location searched was Bowen's
16 'residence.'" (Mot. at 14.) The court has already addressed in
17 detail whether Defendants had probable cause to believe Bowen could
18 be found at the Millender residence, considering, in particular,
19 the alleged misrepresentations in and omissions from the warrant
20 affidavit. (See MSJ Order at 23-37.) Defendants' arguments on
21 appeal do not change the court's analysis or conclusion that
22 Officer "Messerschmidt acted reasonably as a matter of law . . . ,
23 such that there was no constitutional violation." (Id. at 34.)

24 **III. CONCLUSION**

25 For all of these reasons, the court hereby DENIES Plaintiffs'
26 Motion for Summary Adjudication as to their claims under Monell and
27 California Civil Code section 52.1. The court also DENIES
28 Plaintiffs' Motion for Reconsideration. The court, however, GRANTS

1 Plaintiffs' Motion for Summary Adjudication as to their claim
2 against the County under article I, section 13 of the California
3 Constitution.


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5 IT IS SO ORDERED.

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8 Dated: August 24, 2012


DEAN D. PREGERSON
United States District Judge

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