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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CECILIA PORTILLO,

Plaintiff,

v.

CITY OF NATIONAL CITY,

Defendants

Case No.: 20-cv-2429 W (MDD)

**ORDER GRANTING DEFENDANT’S
REQUEST FOR JUDICIAL NOTICE
AND MOTION TO DISMISS [DOC.
12] WITH LEAVE TO AMEND**

Pending before the Court is Defendant’s motion to dismiss the First Amended Complaint (“FAC”) under Federal Rule of Civil Procedure 12(b)(6). Along with the motion, Defendant has filed a request for judicial notice. Plaintiff opposes the motion, but not the request for judicial notice.

The Court decides the matter on the papers submitted and without oral argument. See Civ. L.R. 7.1(d.1). For the following reasons, the Court **GRANTS** Defendant’s request for judicial notice and motion to dismiss [Doc. 12] **WITH LEAVE TO AMEND.**

1 **I. BACKGROUND**

2 In late October and early November 2019, Plaintiff Cecilia Portillo was a
3 “homeless vagrant living on the streets of the [Defendant] City of National City.” (*FAC*
4 [Doc. 1] ¶ 9.) The City was “performing a sweep in which they first notify the homeless
5 population in a specific area that the City will be coming by and removing all items from
6 the area permanently.” (*Id.*) The notice provided a date certain by when “the homeless
7 population was to have their belongings removed or risk losing them....” (*Id.*)

8 Portillo alleges that “[d]uring the ‘notice’ stage of the sweep,” an unknown City
9 worker taunted and harassed her with the specific intent to cause emotional distress.
10 (*FAC* ¶ 12.) Specifically, the employee threatened to take Portillo’s “property which
11 included a live pet dog” and taunted her about her mental illness. (*Id.*) He also followed
12 Portillo when she tried to get away from his taunts. (*Id.*)

13 The removal of items was to occur in approximately the beginning of November.
14 (*FAC* ¶ 13.) On the specific day, Portillo and the “unknown City worker became
15 engaged in the taunting and harassing behaviors over her property and her pet dog.” (*Id.*)
16 The worker made specific threats against her dog, which caused Portillo to suffer severe
17 emotional distress, resulting in her hospitalization and separation from her dog. (*Id.*)

18 On December 14, 2020, Portillo filed this lawsuit against the City. (*See Compl.*
19 [Doc. 1].) The original Complaint alleged that on November 5, 2019, the unknown City
20 employee sexually assaulted Portillo by groping her breasts, vaginal area, and buttocks
21 before she was able to fight him off and report the incident to the police. (*Id.* ¶ 9.) Based
22 on this conduct, the Complaint asserted the City was liable under the doctrine of
23 respondeat superior for: (1) violation of Civil Rights under 42 U.S.C. § 1983;
24 (2) intentional infliction of emotional distress; (3) gender violence in violation of
25 California Civil Code § 52.4; and (4) sexual battery. (*Id.* ¶¶ 15, 22, 27, 32.)

26 On April 19, 2021, the City filed a motion to dismiss the Complaint under Federal
27 Rule of Civil Procedure 12(b)(6). (*See MTD I* [Doc. 6].) The City argued, among other
28 things, that respondeat superior did not apply because the unknown City employee was

1 not acting within the scope of his employment when the alleged sexual assault occurred.
2 (*MTD P&A II* [Doc. 6-1] 5:5–11:22.) Portillo opposed the motion. (*See Opp’n* [Doc. 7].)
3 On November 2, 2021, this Court granted the motion to dismiss finding that because the
4 Complaint failed to allege facts about the unknown employee’s role or duties with the
5 City, there “are no facts suggesting the City employee’s assault occurred as an
6 ‘outgrowth’ of the employment or that the risk of tortious injury was ‘inherent in the
7 working environment’ or ‘typical of or broadly incidental to the enterprise the employer
8 has undertaken.” (*MTD Order* [Doc. 10] 5:22–28, citing Lisa M. v Henry Mayo Newhall
9 Mem’l Hosp., 12 Cal. 4th 291, 298 (1995).) The order granted Portillo leave to amend.
10 (*Id.* 6:15–18.)

11 On November 4, 2021, Portillo filed the FAC, which asserts three causes of action
12 for: (1) violation of Civil Rights under 42 U.S.C. § 1983; (2) intentional infliction of
13 emotional distress; and (3) negligence. (*See FAC.*) The City now moves to dismiss the
14 FAC. (*See MTD II* [Doc. 12].) Portillo opposes the motion. (*See Opp’n II* [Doc. 13].)
15

16 **II. LEGAL STANDARD**

17 The Court must dismiss a cause of action for failure to state a claim upon which
18 relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
19 tests the legal sufficiency of the complaint. See Parks Sch. of Bus., Inc. v. Symington, 51
20 F.3d 1480, 1484 (9th Cir. 1995). A complaint may be dismissed as a matter of law either
21 for lack of a cognizable legal theory or for insufficient facts under a cognizable theory.
22 Balisteri v. Pacifica Police Dep’t., 901 F.2d 696, 699 (9th Cir. 1990). In ruling on the
23 motion, a court must “accept all material allegations of fact as true and construe the
24 complaint in a light most favorable to the non-moving party.” Vasquez v. L.A. Cnty.,
25 487 F.3d 1246, 1249 (9th Cir. 2007).

26 A complaint must contain “a short and plain statement of the claim showing that
27 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Supreme Court has
28 interpreted this rule to mean that “[f]actual allegations must be enough to raise a right to

1 relief above the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 554, 555
2 (2007). The allegations in the complaint must “contain sufficient factual matter, accepted
3 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556
4 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570).

5 Well-pled allegations in the complaint are assumed true, but a court is not required
6 to accept legal conclusions couched as facts, unwarranted deductions, or unreasonable
7 inferences. See Papasan v. Allain, 478 U.S. 265, 286 (1986); Sprewell v. Golden State
8 Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

9 10 **III. REQUEST FOR JUDICIAL NOTICE**

11 Federal Rule of Civil Procedure 201 permits a court to take judicial notice of an
12 adjudicative fact if it is “not subject to reasonable dispute.” Fed. R. Evid. 201(b). A fact
13 is “not subject to reasonable dispute” if it is “generally known,” or “can be accurately and
14 readily determined from sources whose accuracy cannot reasonably be questioned.” Id.
15 201(b)(1)-(2). Under this rule, a court may “take judicial notice of matters of public
16 record without converting a motion to dismiss into a motion for summary judgment,” but
17 it “cannot take judicial notice of disputed facts contained in such public records.” Khoja
18 v. Orexigen Therapeutics, Inc., 899 F.3d 988, 999 (9th Cir. 2018).

19 The City requests judicial notice of Portillo’s government claim form filed under
20 the California Tort Claims Act. Judicial notice of the document is appropriate. See
21 Clarke v. Upton, 703 F.Supp.2d 1037, 1042 (E.D. Cal. 2010) (“taking judicial notice of
22 the filing date and content of the Tort Claims and their rejection by the County, on the
23 grounds that the documents are matters of public record and sets forth facts ‘capable of
24 accurate and ready determination by resort to sources whose accuracy cannot be
25 reasonably questioned.’”); Davis v. Zimmerman, 2018 WL 1806101, at *6, n.5 (S.D. Cal.
26 2018) (taking judicial notice of claim and rejection); Placencia v. United States, 2017 WL
27 3017708, at *2 (S.D. Cal. 2017) (taking judicial notice of claim).

1 **IV. DISCUSSION**

2 The City argues the FAC must be dismissed because Portillo’s causes of action are
3 based on conduct that was not raised in her government claim form. (*MTD P&A II* [Doc.
4 12-1] 11:21–14:22.) The City also argues the FAC fails to plead a section 1983 cause of
5 action because Portillo fails to allege a constitutional violation and the claim is based on
6 respondeat superior liability. (*Id.* 20:1–21:28.)

7
8 **A. Government Tort Claims Act**

9 Before suing a public entity, the California Tort Claims Act (CTCA) requires “the
10 timely presentation of a written claim and the rejection of the claim in whole or in part.”
11 Mabe v. San Bernardino County, Dept. of Public Social Services, 237 F.3d 1101, 1111
12 (9th Cir. 2001) (quotation omitted). Failure to comply with the CTCA’s requirements
13 precludes a plaintiff from bringing suit against an entity. Hacienda La Puente Unified
14 Sch. Dist. of Los Angeles v. Honig, 976 F.2d 487, 495 (9th Cir. 1992). The threshold
15 notice requirements of claim submission include the name and address of the claimant;
16 “the date, place and other circumstances of the occurrence or transaction which gave rise
17 to the claim asserted”; a general description of the injury, damage or loss; the names of
18 the public employees causing the injury, damage, or loss; and the amount claimed if less
19 than \$10,000. Cal. Gov’t Code § 910.

20 The CTCA bars “actions alleging matters not included in the CTCA claim filed
21 with the public entity.” State of California ex rel Dept. of Transportation v. Superior
22 Court, 159 Cal. App. 3d 331, 336 (1984). “Courts have consistently interpreted the Tort
23 Claims Act to bar actions alleging matters not included in the claim filed with the public
24 entity.” *Id.* “In other words, the factual content of the plaintiff’s claim [is] viewed by the
25 trial court as operating to proscribe the limits of any later action for which filing the claim
26 is a precondition.” Williams v. Braslow, 179 Cal. App. 3d 762, 770 (1986).

27 A claim, however, “need not contain the detail and specificity required of a
28 pleading but need only ‘fairly describe what [the] entity is alleged to have done.’”

1 Stockett v. Ass'n of Cal. Water Agencies Joint Powers Ins. Auth., 34 Cal. 4th 441, 446
2 (2004). In Stockett, the California Supreme Court described the requirement as follows:

3 The claim, however, need not specify each particular act or omission later
4 proven to have caused the injury. [Citation omitted.] A complaint's fuller
5 exposition of the factual basis beyond that given in the claim is not fatal, so
6 long as the complaint is not based on an "entirely different set of facts."
7 [Citation omitted.] Only where there has been a "complete shift in
8 allegations, usually involving an effort to premise civil liability on acts or
9 omissions committed at different times or by different persons than those
10 described in the claim," have courts generally found the complaint barred.
11 [Citation omitted.] Where the complaint merely elaborates or adds further
12 detail to a claim, but is predicated on the same fundamental actions or
13 failures to act by the defendants, courts have generally found the claim fairly
14 reflects the facts pled in the complaint. [Citation omitted.]

15 Id. at 447.

16 Here, Portillo's CTCA claim contains virtually no factual details. And the few
17 factual allegations relate to Portillo's sexual assault by an unidentified employee.
18 Question 4 on the form asks: "How did the DAMAGE or INJURY occur? Give full
19 particulars." (*RJN* [Doc. 12-2], Ex. 1 at p. 7 of 14.) Portillo's response states that on two
20 separate occasions she "was accosted and assaulted by an National City employee." (*Id.*)
21 Question 7 then asks: "What particular ACT or OMISSION do you claim caused the
22 injury or damage? Give names of City employees causing the injury or damage, if
23 known[.]" (*Id.* at p. 8 of 14.) In response, Portillo states: "Sex assault. Assault &
24 Battery." (*Id.*) There is no mention of Portillo's property, much less that her property
25 was threatened or taken by the unknown City employee. (*See id.*)

26 Attached to Portillo's CTCA claim is a report by the National City Police
27 Department. (*See RJN* Ex. 1 at p. 9 of 14.) Consistent with the claim form's allegations,
28 the police report confirms Portillo's claim was based entirely on sexual assault. (*Id.* at p.
9 of 14.) And again, there is no mention of Portillo's property, much less that her
property was threatened or taken by the unknown City employee. (*See id.*)

1 In her opposition, Portillo argues that the “claims” in the FAC “match the claims as
2 noticed in her Government Immunity Notice” because the form referred to “accosted,”
3 “assaulted,” and “assault and battery.” (*Opp’n* [Doc. 13] 4:26–5:4.) Portillo then appears
4 to argue that the terms “accosted” and “assault and battery” are broad enough to
5 encompass the allegations in the FAC. (*Id.* 5:5–19.) The Court disagrees.

6 The conduct in the CTCA claim form stemmed solely from the unidentified
7 employee’s alleged sexual assault of Portillo. There was no mention of Portillo’s
8 property. In contrast, the FAC omits any reference to Portillo’s sexual assault and shifts
9 the entire basis of the lawsuit to the City employee’s assault of Portillo’s pet and removal
10 of her property. (*FAC* ¶¶ 12, 13.) In short, the FAC does not simply elaborate or add
11 detail to Portillo’s CTCA claim, but instead changes the basis for the City’s liability to
12 entirely different conduct. Thus, Portillo’s intentional infliction of emotional distress and
13 negligence causes of action are barred.¹

14
15 **B. The Section 1983 cause of action is insufficiently pled.**

16 The City argues Portillo’s section 1983 cause of action must be dismissed for two
17 reasons: (1) the FAC is based on alleged violations of tort law, not the violation of a
18 constitutional right; and (2) the City’s liability is improperly based on the doctrine of
19 respondeat superior. (*MTD P&A II* 20:1–21:28.) The Court agrees.

20 “Section 1983 imposes liability for violations of rights protected by the
21 Constitution, not for violations of duties of care arising out of tort law.” Baker v.
22 McCollan, 443 U.S. 137, 146, n. 3 (1979). Additionally, a municipality can only be
23 liable under §1983 “if the governmental body itself ‘subjects’ a person to a deprivation of
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26 ¹ “[T]he claim provision of section 911.2 is inoperative in an action brought under section 1983. Thus
27 the fact that plaintiffs in the case at bar did not allege compliance with this provision is irrelevant to their
28 claim under the Civil Rights Act.” Williams v. Horvath, 16 Cal.3d 834, 842 (1976) Accordingly,
despite Portillo’s failure to raise the issue, her failure to comply with the CTCA is not a basis to dismiss
the section 1983 claim.

1 rights or ‘causes’ a person ‘to be subjected’ to such deprivation.” Connick v. Thompson,
2 563 U.S. 51, 60 (2011) (quoting Monell v. Dep’t of Soc. Servs. of City of New York, 436
3 U.S. 658, 690 (1978)). A municipality cannot be held vicariously liable for its
4 employees’ conduct under the doctrine of respondeat superior. Monell, 436 U.S. at 691.

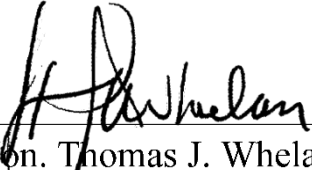
5 Here, Portillo’s section 1983 cause of action is based on the City’s alleged
6 violation of “plaintiff’s right to be free from mental abuse, taunts, jeers, insults, and the
7 loss of her pet companion by a City worker.” (FAC ¶ 17.) Because the 1983 claim is
8 based on general tort theories and arises from the unknown City employee’s conduct, the
9 FAC fails to state a section 1983 cause of action.

10
11 **IV. CONCLUSION & ORDER**

12 For the foregoing reasons, the Court **GRANTS** Defendant’s request for judicial
13 notice and motion to dismiss [Doc. 12]. Because the previous dismissal order did not
14 address the deficiencies with Portillo’s section 1983 cause of action, the Court will grant
15 Portillo **LEAVE TO AMEND** that cause of action. However, this is Portillo’s final
16 opportunity to amend the FAC. The second amended complaint is due on or before **April**
17 **18, 2022.**

18 **IT IS SO ORDERED.**

19 Dated: April 4, 2022

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21 
22 Hon. Thomas J. Whelan
United States District Judge