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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VALLEY SURGICAL CENTER LLC.,) Case No. CV 13-02265 DDP (AGRx)
a California Limited)
Liability Company,)
Plaintiff,) **ORDER GRANTING DEFENDANTS'**
v.) **MOTIONS FOR SUMMARY JUDGMENT**
COUNTY OF LOS ANGELES, a) [Dkts 483, 492]
government entity, et al.,)
Defendants.

Presently before the court are two motions for summary judgment, one filed by Defendant Selma Calmes and the other filed by Defendants Lakshmanan Sathyavagiswaran, Adrian Marinovich, Raffi Djabourian, Denis C. Astarita, John Kades, and Ed Winter. Having considered the submissions of the parties and heard oral argument, the court grants the motions and adopts the following Order.

I. Legal Standard

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show "that there is no genuine dispute as to any material fact and the movant is entitled

1 to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party
2 seeking summary judgment bears the initial burden of informing the
3 court of the basis for its motion and of identifying those portions
4 of the pleadings and discovery responses that demonstrate the
5 absence of a genuine issue of material fact. See Celotex Corp. v.
6 Catrett, 477 U.S. 317, 323 (1986). All reasonable inferences from
7 the evidence must be drawn in favor of the nonmoving party. See
8 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242 (1986). If the
9 moving party does not bear the burden of proof at trial, it is
10 entitled to summary judgment if it can demonstrate that "there is
11 an absence of evidence to support the nonmoving party's case."
12 Celotex, 477 U.S. at 323.

13 Once the moving party meets its burden, the burden shifts to
14 the nonmoving party opposing the motion, who must "set forth
15 specific facts showing that there is a genuine issue for trial."
16 Anderson, 477 U.S. at 256. Summary judgment is warranted if a
17 party "fails to make a showing sufficient to establish the
18 existence of an element essential to that party's case, and on
19 which that party will bear the burden of proof at trial." Celotex,
20 477 U.S. at 322. A genuine issue exists if "the evidence is such
21 that a reasonable jury could return a verdict for the nonmoving
22 party," and material facts are those "that might affect the outcome
23 of the suit under the governing law." Anderson, 477 U.S. at 248.
24 There is no genuine issue of fact "[w]here the record taken as a
25 whole could not lead a rational trier of fact to find for the
26 nonmoving party." Matsushita Elec. Indus. Co. v. Zenith Radio
27 Corp., 475 U.S. 574, 587 (1986).

1 It is not the court's task "to scour the record in search of a
2 genuine issue of triable fact." Keenan v. Allan, 91 F.3d 1275,
3 1278 (9th Cir. 1996). Counsel have an obligation to lay out their
4 support clearly. Carmen v. San Francisco Sch. Dist., 237 F.3d
5 1026, 1031 (9th Cir. 2001). The court "need not examine the entire
6 file for evidence establishing a genuine issue of fact, where the
7 evidence is not set forth in the opposition papers with adequate
8 references so that it could conveniently be found." Id.

9 **II. Discussion**

10 **A. Background**

11 This matter has been litigated extensively, and the parties
12 are familiar with the factual background. As explained in detail
13 in this Court's prior Orders, this case arises out of an
14 investigation conducted by the Los Angeles County Coroner's Office
15 (the "Coroner's Office") into the death of Paula Rojeski
16 ("Rojeski"). Although many of the facts are in dispute, the
17 parties agree that on September 8, 2011, Rojeski died after
18 undergoing laparoscopic Lap-Band surgery at Plaintiff Valley
19 Surgical Center LLC ("Valley")'s facility. The Coroner's Office
20 performed an autopsy on September 12, 2011, which revealed a
21 perforation of Rojeski's aorta. Valley alleges that although
22 Defendants had no reason to suspect homicide as the cause of
23 Rojeski's death, Defendants nevertheless "created a false homicide
24 investigation and leaked information regarding [the Coroner's
25 Office's] false homicide investigation to the media . . . ," thus
26 violating Valley's constitutional rights. (Third Amended Complaint
27 ("TAC") ¶ 32.) Defendants now move for summary judgment.

28 **B. Factual Basis of Plaintiff's Constitutional Claims**

1 Defendants challenge the legal basis of Plaintiff's various
2 constitutional claims, and also argue that summary judgment is
3 warranted because Plaintiff has not put forth any facts to support
4 its theories of constitutional harm. Before this Court can address
5 the question whether Defendants' conduct violated a constitutional
6 right, the court must first determine whether there is a triable
7 issue of fact as to what that underlying conduct was. See, e.g.,
8 United States v. Sandoval-Lopez, 122 F.3d 797, 802 n.9 (9th Cir.
9 1997) ("We avoid constitutional questions when an alternative basis
10 for disposing of the case presents itself.").

11 Plaintiff's arguments are predicated on the assertion, largely
12 unsupported by citation to the record, that Defendants "created a
13 false Autopsy Report claiming an extreme departure from the
14 standard of care, which is the medico-legal term for homicide, and
15 a false homicide investigation which was designed to and did 'shut
16 [Valley] down.'" (Opp. to Calmes MSJ at 4:26-28; Opp. to County MSJ
17 at 4:21-23.) Plaintiff also makes frequent references to a "false
18 homicide determination" throughout its oppositions to Defendants'
19 motions.

20 The evidentiary support for Plaintiff's assertions is unclear
21 to the court. The court notes that neither of Plaintiff's
22 memoranda in opposition to the instant motions includes a statement
23 or recitation of the relevant facts. Instead, in an apparent
24 attempt to circumvent the local rules of this district, Plaintiff
25 refers to the "Declaration of the Statement of the Facts by
26 Declarant Brian Oxman." The Oxman declaration, prepared by a non-
27 attorney "litigation coordinator," in turn recounts 23 pages of
28 "facts" that, although purportedly within Oxman's personal

1 knowledge, are, in many cases, characterizations of what "the
2 record shows." (Dkt. 553.) See C.D. Cal. L.R. 11-6.
3 Notwithstanding threshold questions about the admissibility of the
4 Oxman declaration, the court proceeds to examine Plaintiff's
5 factual contentions.

6 1. Homicide Determination

7 Plaintiff's Third Amended Complaint and oppositions to the
8 instant motions are replete with references to a false homicide
9 determination. Defendants argue, however, that there is no
10 evidence that any Defendant ever made a homicide determination,
11 false or otherwise. It appears that Plaintiff relies upon
12 paragraph 22 of the Oxman Declaration to establish that Defendants
13 did, in fact, determine that Rojeski's death resulted from a
14 homicide. (Opp. to County motion at 6:25.) The Oxman Declaration
15 quotes and cites to an exhibit that Plaintiffs represent was
16 obtained from a criminal matter before another judge of this
17 district. That exhibit consists of a declaration by Roger Jon
18 Diamond, an attorney with no apparent connection to this matter,
19 who purports to attach an excerpted portion of a Food and Drug
20 Administration "Report of Investigation." That excerpt states that
21 "[Defendant] Ed Winter . . . advised [FDA agents] Hadley and
22 [Kelley that Mrs. Paula Rojeski's death will be ruled a homicide."
23 (Oxman Decl. ¶ 22 (citing Madison Decl., Ex. 13.)).

24 Even assuming that the Oxman Declaration is admissible, there
25 is no basis to admit Winter's statement that Rojeski's death "will
26 be ruled a homicide." There is no declaration or testimony from
27 the FDA agents to whom Winter allegedly made the statement, nor is
28 there any indication from the Oxman or any other declaration as to

1 who authored the FDA report, how Diamond came to possess it, or
2 whether it is authentic.¹

3 Furthermore, and more fundamentally, even if Winter's
4 statement were admitted, it does not establish that Defendants
5 concluded that Rojeski's death was a homicide. Indeed,
6 notwithstanding Winter's supposed statement that the Coroner's
7 Office intended, at some point in the future, to determine that
8 Rojeski's death was a homicide, there is no evidence that such a
9 determination was ever made. Even the initial autopsy report,
10 which was supplemented before it was ever released, stated,
11 "Certifying the manner of death as homicide vs. accident would
12 require knowledge of whether or not this death resulted from a
13 conscious disregard for the patient's safety. The currently
14 available information does not allow for [such] a conclusion . . .
15 . The manner of death thus could not be determined." (Madison
16 Decl., Ex. 1 at 15.) The amended supplemental report, which was
17 ultimately released, clarified further, "If any future
18 investigations clarify that there definitely was or was not a
19 conscious disregard for patient safety, the manner can be revised
20 to homicide or accident, respectively. As of now, the manner of
21 death is undetermined" (Id. at 17.) Thus, even
22 considering Winter's inadmissible statement, there is no evidence
23 that Defendants ever explicitly concluded that Rojeski's death was
24 a homicide.

25
26 ¹ The court notes that Plaintiff's counsel, in a response to
27 Defendants' objections, attempts to authenticate the report with
28 the declaration of counsel from a separate criminal proceeding, who
in turn purports to quote a statement from an Assistant United
States Attorney involved in those criminal proceedings.

1 Plaintiffs appear to suggest that, notwithstanding the lack of
2 any evidence that any Defendant made a determination of "homicide,"
3 Defendants effectively made a homicide determination by "calling
4 the Rojeski death an extreme departure from the standard of care,
5 which is the medico-legal term for homicide" (Opp. to
6 County MSJ at 9:27-28.) Plaintiff does not provide any citation to
7 support either of the two components of its assertion.

8 With respect to the first part, that Defendants called
9 Rojeski's death "an extreme departure from the standard of care,"
10 the assertion is repeated in the Oxman declaration, without further
11 citation or attribution. (Oxman Decl., Ex. 21.) Although the
12 court's own review reveals that the initial autopsy report does
13 recognize an "extreme deviation from the standard of care," the
14 final, publicly released report specifically deleted that
15 conclusion, stating instead that "significant lapses in diagnosis
16 in judgment [] at least constitute simple negligence and may
17 constitute gross negligence or incompetence by the physicians,"
18 before continuing to explain, as stated above, that there was
19 insufficient evidence to support a homicide determination.
20 (Madison Decl., Ex. 1 at 15,17.)

21 Furthermore, even if the final autopsy report had made a
22 finding of extreme deviation from the standard of care, and
23 notwithstanding the report's explicit refusal to reach a homicide
24 conclusion, Plaintiff cites to no support for the second part of
25 the "effective homicide determination" argument, that "extreme
26 deviation" is the "medico legal" equivalent of homicide. In an
27 uncited footnote, the Oxman Declaration does cite what appears to
28 be some sort of academic article written by Defendant Lakshmanan,

1 in which Defendant Lakshmanan observes, "More severe than gross
2 negligence is extreme medical negligence. This is one of the
3 criteria that defines medical homicide." (Oxman Decl., n. 1.)
4 Even if admissible, however, this opinion hardly establishes that
5 Defendants effectively determined Rojeski's death to be a homicide.
6 As discussed above, the report explicitly disclaimed such a
7 conclusion. Furthermore, even assuming that the initial report's
8 reference to an "extreme deviation from the standard of care" is
9 equivalent to a finding of "extreme medical negligence," the final
10 report specifically deleted that conclusion. Lastly, Dr.
11 Lakshmanan's article states only that extreme negligence is "one of
12 the criteria that defines medical homicide." (Id. (emphasis
13 added)) The court is not aware of any evidence in the record
14 regarding the remaining criteria or whether satisfaction of a
15 single criterion would constitute "homicide" in the "medico legal"
16 sense.

17 2. Shutdown

18 In addition to the supposed homicide determination, Plaintiff
19 points to Defendants' alleged wrongful "shutdown" of Valley's
20 business as a basis for Plaintiff's constitutional claims.
21 Plaintiff again fails, in most instances, to cite to any evidence
22 in the record of such a "shutdown." There appears to be no
23 evidence in the record that Defendants took any action to
24 officially close down Valley's business, such as by revoking a
25 permit or license. In some cases, however, other arbitrary
26 government action may rise to the level of a constitutional
27 violation where it is undertaken "for the purpose of harassment and
28 interference," including for the purpose of forcing someone out of

1 business. Benigni v. City of Hemet, 879 F.2d 473, 478 (9th Cir.
2 1988). Apparently pursuing such a theory, Plaintiff, to the extent
3 it does cite to the record, again relies solely upon the Oxman
4 declaration for evidentiary support.

5 Paragraphs 25 and 27 of the Oxman Declaration, cited by
6 Plaintiff, attribute Valley's shutdown to the "false homicide
7 determination." As discussed above, there is no evidence of such a
8 determination. In paragraph 22 of his declaration, however, Oxman
9 takes a slightly different position. Although continuing to
10 reference a "determination of homicide," Oxman also states that a
11 representative of Allergan, Inc., the manufacturer of the LapBand
12 product that Valley implanted in Rojeski and other patients, told
13 Oxman that Allergan would not sell LapBand products to Valley
14 because of Defendants' investigation. (Oxman Decl. ¶ 22:20-22.)
15 Although the court is skeptical that any reasonable trier of fact
16 could conclude that the mere initiation of a homicide investigation
17 in the wake of a patient death could constitute "arbitrary" or
18 "harassing" conduct, the court need not reach that question because
19 there is no admissible evidence that Defendants' conduct had any
20 effect on Allergan's decision to stop dealing with Valley. Oxman's
21 recitation of what an Allegan representative told him is obvious
22 hearsay, to which no exception applies. There is simply no
23 admissible evidence that Defendants did anything to "shut Valley
24 down," officially or otherwise.

25 **III. Conclusion**

26 Plaintiff alleges that Defendants violated Plaintiff's
27 constitutional rights by making a false homicide determination and
28 by shutting down Plaintiff's business. On the record before the

1 court, however, no trier of fact could conclude that either of
2 those factual predicates occurred. Accordingly, Defendants'
3 motions for summary judgment are GRANTED.

11 IT IS SO ORDERED.

13 Dated: October 29, 2019

A handwritten signature in blue ink, reading "Dean D. Pregerson". The signature is fluid and cursive, with the first name "Dean" and last name "Pregerson" clearly legible.

DEAN D. PREGERSON
United States District Judge