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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JERRY LUM, et al.,

NO. CIV. S-10-1807 LKK/DAD

Plaintiffs,

v.

O R D E R

COUNTY OF SAN JOAQUIN,
et al.,

Defendants.

_____ /

This case arises from the death of Jeremy Lum, whose body was discovered in the San Joaquin River shortly after being released from San Joaquin County jail. Pending before the court is a motion by defendants for a stay pending appeal, ECF No. 114.

I. Procedural Background

Defendants in this case filed a motion for summary judgment on January 30, 2012. A hearing was held on February 27, 2012. Shortly thereafter, the court ordered additional briefing on two questions related to Monell liability. This court then issued an order on March 23, 2012, granting in part and denying in part a

1 motion for summary judgment by defendants. ECF No. 107. That order
2 did not address the issue of whether any entity has Monell
3 liability for the arresting officer defendants' conduct. The
4 supplemental briefing on that question has been submitted by the
5 parties, but the court has not yet ruled on that issue. The case
6 is set for trial on August 28, 2012.

7 On April 27, 2012, the defendants filed a Notice of
8 Interlocutory Appeal. ECF No. 108. The Notice is on behalf of the
9 individual defendants and relates to those portions of the court's
10 March 23, 2012 order denying summary judgment on the issues of
11 qualified immunity and state law immunity. The defendants also
12 appeal other portions of the order, relying on the doctrine of
13 pendent appellate jurisdiction. On May 7, 2012, defendants filed
14 a motion with this court to stay all proceedings in this case
15 pending resolution of the interlocutory appeal. Plaintiffs oppose
16 the motion. For the reasons stated herein, the Motion for a Stay
17 is reluctantly GRANTED.

18 **II. Standard for a Motion to Stay Pending Appeal of Denial of**
19 **Qualified Immunity**

20 In determining whether to stay proceedings pending appeal of
21 a denial of qualified immunity, district courts must weigh the
22 interests of the defendants claiming immunity from trial with the
23 interest of the other litigants and the judicial system. "During
24 the appeal memories fade, attorneys' meters tick, judges' schedules
25 become chaotic (to the detriment of litigants in other cases).
26 Plaintiffs' entitlements may be lost or undermined." Apostol v.

1 Gallion, 870 F.2d 1335, 1338-1339 (7th Cir. 1989). Nonetheless, a
2 stay is automatic so long as the appeal is not frivolous, Chuman
3 v. Wright, 960 F.2d 104, 105 (9th Cir. 1992), and turns on an issue
4 of law, Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).¹

5 **III. Analysis**

6 **A. Defendants' Qualified Immunity and State-Law Immunity Appeals**

7 "A district court's denial of a claim of qualified immunity,
8 to the extent that it turns on an issue of law, is an appealable
9 'final decision' within the meaning of 28 U.S.C. § 1291
10 notwithstanding the absence of a final judgment." Mitchell v.
11 Forsyth, 472 U.S. 511, 530 (1985). This is because it has been held
12 that qualified immunity is immunity from suit, and not just a
13 defense to liability. Knox v. Southwest Airlines, 124 F.3d 1103,
14 1107 (9th Cir. 1997). "The filing of a notice of appeal is an event
15 of jurisdictional significance -- it confers jurisdiction on the
16 court of appeals and divests the district court of its control over
17 those aspects of the case involved in the appeal." Griggs v.
18 Provident Consumer Discount Co., 459 U.S. 56, 58 (1982). See also,
19 Small ex rel. NLRB v. Operative Plasterers' & Cement Masons' Int'l
20 Ass'n Local 200, AFL-CIO, 611 F.3d 483 (9th Cir. 2010) (applying
21 Griggs).

22 In the context of interlocutory appeals based on qualified
23

24 ¹ The court must express its wonder at the balancing of
25 interests that led to this result, and cannot but wonder what the
26 post-Civil War congress that passed § 1983 would think of the
result. Obviously, however, whether personally dismayed or not,
this court is bound by the decisions of the Supreme Court.

1 immunity, the district court is automatically divested of
2 jurisdiction to proceed with trial pending appeal unless the
3 district court finds that the defendants' claim of qualified
4 immunity is frivolous or has been waived, and certifies such in
5 writing. Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992). This
6 approach has been endorsed by the Supreme Court. Behrens v.
7 Pelletier, 116 S. Ct. 834 (1996).

8 A qualified immunity appeal is frivolous if it is "unfounded"
9 and "baseless." Marks v. Clarke, 102 F.3d 1012 (9th Cir. 1997). The
10 power to certify that a claim of qualified immunity is "frivolous,"
11 and thus does not invoke appellate jurisdiction, is intended to
12 protect against defendants who would use the appeal process to
13 delay trial and injure the "legitimate interests of other litigants
14 and the justice system." Apostol v. Gallion, 870 F.2d 1335, 1339
15 (7th Cir. 1989). Thus "if the claim of immunity is a sham. . . the
16 notice of appeal does not transfer jurisdiction to the court of
17 appeals, and so does not stop the district court in its tracks."
18 Id. The power to certify a qualified immunity claim as frivolous,
19 however, "must be used with restraint." Id.

20 The Chuman rule that an appeal of a denial of immunity, unless
21 frivolous, divests the district court of jurisdiction applies to
22 state-law immunities that function as immunities from suit, as
23 opposed to a defense from liability. Liberal v. Estrada, 632 F.3d
24 1064 (9th Cir. 2011). The state-law immunities at issue in this
25 case are 845.8(a) and Government Code 855.8(a). Plaintiff has not
26 cited, and the court is not aware of any cases holding that those

1 immunities are merely defenses to liability.² Accordingly, the
2 court assumes for the purposes of this motion that they are
3 immunities from suit. Thus, the court assumes that it is divested
4 of jurisdiction over defendants' claims of state-law immunity
5 unless they are frivolous.

6 Plaintiffs here argue that the appeal with respect to the
7 Fourth Amendment claim is frivolous because defendants are
8 appealing this court's denial of qualified immunity based on a
9 factual question and not a legal one. Whether defendants' appeal
10 of the denial of qualified immunity "turns on an issue of law," and
11 is thus ripe for appeal, is a question for the court of appeals to
12 determine based on arguments made by the parties in that forum.
13 This court based its denial of qualified immunity upon a
14 determination that "drawing all inferences in favor of the non-
15 moving party, the court cannot conclude, on the record before it,
16 that this was a reasonable [arrest] under the circumstances."
17 Summary Judgment Order at 9. Relying on Ninth Circuit case law,
18 this court concluded that defendants were entitled to summary
19 judgment on qualified immunity only if "the evidence permits only
20 one reasonable conclusion. Where 'conflicting inferences may be
21 drawn from the facts, the case must go to the jury.'" Id. quoting
22 Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1087 (9th
23

24 ² During the court's time as a California practitioner and
25 state court judge, the undersigned would have assumed, without
26 more, that in accordance with state law generally, the immunity was
to liability. Nonetheless, as explained elsewhere, judicial
economy requires a stay of the state issues.

1 Cir. 2000). Defendants have not indicated any *legal* conclusions
2 drawn by this court's Summary Judgment Order that they are
3 appealing. Instead, defendants insist that they are entitled to
4 qualified immunity because "the evidence on the summary judgment
5 motion showed that the Individual Defendants believed, based on
6 multiple objective criteria, that Jeremy Lum was drunk and
7 therefore subject to arrest." Defs.' Mot. to Stay 6:1-3, ECF No.
8 114.

9 This court maintains that qualified immunity for the arresting
10 officers turns on a resolution of the factual dispute of whether,
11 given the witness testimony and other evidence, it was objectively
12 reasonable for the officers to believe that Lum was intoxicated.
13 However, as noted, "the filing of a notice of appeal . . . confers
14 jurisdiction on the court of appeals and divests the district court
15 of its control over those aspects of the case involved in the
16 appeal." Griggs, 459 U.S. at 58 (1982). While the Ninth Circuit
17 may deny the appeal because it does not turn on a legal question,
18 this court is automatically divested of jurisdiction unless it
19 finds that the appeal is frivolous; while a close question, the
20 court finds that it is not.

21 Plaintiffs assert that defendants' appeal of the court's
22 denial of qualified immunity on Plaintiffs' Fourteenth Amendment
23 claim is frivolous because this court's order was based on clearly
24 established law regarding "danger-creation, special relationship,
25 and failure-to-render-medical-care." Pls.' Opp'n 6. That very
26 question (defendants' potential liability under those theories) is

1 what defendants appeal. Plaintiffs appear to argue that since the
2 court based its decision on what appears to the court to be clearly
3 established law, the appeal is frivolous. But any district court
4 order denying qualified immunity would rest on a conclusion about
5 "clearly established" law, and such a basis rendering the decision
6 unappealable would be contrary to the Supreme Court's holding in
7 Mitchell that rulings on qualified immunity are eligible for
8 interlocutory appeal.

9 Accordingly, the court cannot find that the appeal is
10 frivolous.

11 **B. Pendant Appellate Jurisdiction**

12 Defendants assert that the Ninth Circuit has pendent appellate
13 jurisdiction over the claims against the entity defendants. Courts
14 of appeals are not required to "confine review to the precise
15 decision independently subject to appeal." Swint v. Chambers County
16 Comm'n, 514 U.S. 35, 51 (1995). When a ruling that is not
17 independently appealable is "inextricably intertwined" with one
18 that is, the appellate court may exercise pendent appellate
19 jurisdiction, divesting the district court of jurisdiction. "A
20 pendent appellate claim can be regarded as inextricably intertwined
21 with a properly reviewable claim on collateral appeal only if the
22 pendent claim is coterminous with, or subsumed in, the claim before
23 the court on interlocutory appeal - that is, when the appellate
24 resolution of the collateral appeal necessarily resolves the
25 pendent claim as well." Huskey v. City of San Jose, 204 F.3d 893,
26 905 (9th Cir. 2000). Here, defendants assert that the Ninth Circuit

1 has pendent appellate jurisdiction over the claims against the
2 entity defendants because the viability of those claims depends on
3 whether the Ninth Circuit finds that the individual defendants are
4 entitled to qualified immunity. Whether that is true or not, there
5 is a practical question: should the court bifurcate the trial of
6 what are essentially similar questions. Judicial economy requires
7 a negative answer.


8 With respect to plaintiffs' ADA claim, it seems clear that the
9 appeal does not effect the claim. Again, however, judicial economy
10 requires a stay. It is for the Ninth Circuit to decide whether to
11 exercise pendent appellate jurisdiction. This court merely
12 concludes that the appeal on qualified immunity is not frivolous
13 as that term is defined.

14 **IV. Conclusion**

15 For the reasons stated herein, defendants' motion to stay
16 is GRANTED in its entirety. The entire matter is STAYED pending
17 resolution of defendants' appeal. All dates previously set in
18 this case are VACATED.

19 IT IS SO ORDERED.

20 DATED: June 7, 2012.

21 
22 LAWRENCE K. KARLTON
23 SENIOR JUDGE
24 UNITED STATES DISTRICT COURT
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