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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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ROBERT MANN SR., et al.,
Plaintiffs,
v.
CITY OF SACRAMENTO, et al.,
Defendants.

No. 2:17-cv-01201 WBS DB

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

Following the Ninth Circuit's remand of this matter (Mann v. City of Sacramento, 748 F. App'x 112 (9th Cir. 2018)), this court gave plaintiffs leave to amend their complaint. (See Docket No. 57.) In order to overcome the Ninth Circuit's holding that adult, non-cohabitating siblings do not enjoy a constitutional right to intimate association, plaintiffs have now amended their complaint to set forth the facts in support of their contention that they were "cohabitating" with decedent. (Docket No. 59)

The First Amended Complaint makes several allegations about decedent's housing situation in the months preceding his

1 death. First, it alleges that decedent's California
2 identification card, valid until 2019, listed decedent's
3 residence as plaintiff Robert Mann Sr.'s home address (FAC ¶ 31).
4 Second, it alleges that in the period "right up until" decedent's
5 death, the plaintiffs provided decedent housing "either with
6 plaintiffs Robert Mann Sr. or with plaintiffs Vern Murphy-Mann or
7 Deborah Mann." (Id. ¶ 33.) Third, it alleges that decedent
8 "kept his clothes and personal belongings at Plaintiffs Robert
9 Mann Sr., Vern Murphy-Mann, and Deborah Mann's homes and received
10 mail and listed their residences as his own addresses." (Id. ¶
11 34.) Fourth, it alleges that during the last six months of
12 decedent's life, decedent would "stay out, at times for several
13 days," and that plaintiffs would "search for him at places he
14 habitually frequented, and would bring him back home to bathe,
15 rest, and eat." (Id. 35.) Finally, it alleges that despite
16 decedent's absences, the plaintiffs were "in constant contact
17 with [him] and made sure that he knew he was welcome in their
18 homes." (Id.) At the hearing on March 11, 2019, plaintiff's
19 counsel clarified that in the period immediately preceding his
20 death, decedent was spending "the majority" of his time staying
21 at the home of one or another of the three plaintiffs, without
22 further detail.

23 Defendants have moved to dismiss the First Amended
24 Complaint under Rule 12(b)(6) of the Federal Rules of Civil
25 Procedure, arguing that these allegations are insufficient to
26 establish cohabitation and that plaintiffs thus may not bring
27 this action for deprivation of their right of intimate
28 association with the decedent.

1 As plaintiffs correctly note, "there is no controlling
2 definition of 'cohabitation' in the context of the constitutional
3 claims at issue in this case." (Pls.' Mem. in Opp. to Defs.' Mot.
4 to Dismiss at 5 (Docket No. 66).) Further complicating the
5 court's effort to define "cohabitation" is the fact that many
6 treatments of the term are concerned with "cohabitation" as a
7 term of art referring, specifically, to cohabitation "like a
8 spouse." See e.g., United States v. Costigan, 2000 WL 898455 (D.
9 Me. 2000), aff'd, 18 F. App'x 2 (1st Cir. 2001) (observing that
10 in light of the dictionary definition of "cohabit" as "to live
11 together in a sexual relationship when not legally married," the
12 term "cohabit as a spouse" is somewhat redundant and then
13 proceeding to discuss the meaning and definition of "cohabit as a
14 spouse."). Those authorities are of no assistance when
15 considering whether parties are cohabitating siblings.

16 Accordingly, in the absence of controlling case law
17 defining "cohabitation," in the context of this case, the court
18 will turn to the popular definition of the word, which the
19 California Supreme Court correctly noted is "living with or
20 together, from the Latin 'co-' (co[-]signifies in general with,
21 together, in conjunction, jointly) and habitare, to dwell, to
22 have possession of (a place)." See Kusior v. Silver, 54 Cal. 2d
23 603, 611-12 (1960) (citations and quotations omitted). In
24 evaluating whether decedent cohabitated with plaintiffs in the
25 period immediately preceding his death, the court assumes it
26 should consider such factors as (1) whether decedent spent all or
27 most of his time residing in the same dwelling as any given
28 plaintiff; (2) whether he shared living expenses associated with

1 a plaintiff's dwelling; (3) whether he had keys to a dwelling and
2 could come and go as he pleased; and (4) whether he kept clothes
3 and personal affairs in the dwelling.¹

4 The allegations of the First Amended Complaint do not
5 establish any of the first three factors. Rather, the First
6 Amended Complaint paints decedent not as a cohabitant but more a
7 transient who was a frequent, and welcome, invitee in plaintiffs'
8 respective homes. Decedent would "stay out, at times for several
9 days" and then plaintiffs would "search for him at places he
10 habitually frequented and would bring him back home to bathe,
11 rest, and eat." (FAC ¶ 35.)

12 The only other relevant factual allegation is that
13 decedent "kept his clothes and personal belongings at
14 [p]laintiffs Robert Mann Sr., Vern Murphy-Mann, and Deborah
15 Mann's homes and received mail and listed their residences as his
16 own addresses." (Id. ¶ 34.) If accompanied by allegations that
17 Joseph Mann spent all or most of his time residing in one or more
18 of plaintiffs' homes, had a key and independent access to one or


19 ¹ These factors are informed by case law applying or
20 interpreting the term "cohabitation." See, e.g., Marcum v.
21 McWhorter, 308 F.3d 635, 637 (6th Cir. 2002) (describing,
22 offhandedly, cohabitation as beginning on the date when two
23 parties "rented a townhouse and began living together" with each
24 party "paying their share of the costs"); United States v.
25 Ladouceur, 578 F. App'x 430, 434 (5th Cir. 2014) (considering the
26 definition of "cohabitation" in the context of a federal statute
27 that proscribed the possession of a firearm by those subject to a
28 domestic violence protective order, and finding "cohabitation"
where "over the span of several months, [defendant] stayed over
at [applicant']s apartment most or often all days out of the
week; he kept clothing and personal effects there to go directly
to work in the mornings; he had a key to her apartment and was
able to come and go as he pleased; and he rarely visited an
apartment leased under his own name").

1 more of plaintiffs' homes, contributed to the maintenance of one
2 or more of plaintiffs' homes, and rarely slept outside one or
3 more of plaintiffs' homes, this allegation might support a
4 plausible inference that decedent cohabitated with one or more of
5 the plaintiffs. Absent that type of accompanying allegation,
6 however, the mere facts that decedent stored belongings in
7 plaintiffs' homes, used their addresses for mail, and
8 periodically bathed and rested in their homes, do not make him
9 plaintiffs' "cohabitant."

10 The court assumes that plaintiffs have set forth all
11 the available facts to support their claim of cohabitation, and
12 that granting further leave to amend would be futile.

13 IT IS THEREFORE ORDERED that the individual defendants'
14 Motion to Dismiss (Docket No. 59) be, and the same hereby is,
15 GRANTED. The First Amend Complaint and action herein are hereby
16 DISMISSED.

17 Dated: March 12, 2019



WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE