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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSEPH CUVIELLO, et al.,
Plaintiffs,

No. C 06-5517 MHP

v.

**ORDER ADOPTING MAGISTRATE
JUDGE'S REPORT AND
RECOMMENDATION**

CITY OF OAKLAND, et al.,
Defendants.

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This matter was referred to Magistrate Judge Edward M. Chen for the purpose of providing a Report and Recommendation containing findings and conclusions regarding plaintiffs' motion for partial summary judgment, City defendants' motion for summary judgment or alternatively for partial summary judgment, and County defendants' and SMG defendants' motion for partial summary judgment. The Magistrate Judge filed his Report and Recommendation on July 20, 2009. The parties filed objections and replies to the Report and Recommendation. The court has reviewed the Report and Recommendation, and the parties objections, and finds that the Report and Recommendation is supported by the facts and record in this case and by the relevant case law relied upon by the Magistrate Judge. The following discussion elaborates on two specific issues raised in the parties' objections to the Report and Recommendation.

United States District Court
For the Northern District of California

1 I. Punitive Damages and Civil Penalty under California Civil Code Section 52.1

2 In his Report and Recommendation, the Magistrate Judge correctly found that a violation of
3 California Civil Code section 52.1 based upon a content-neutral regulation could give rise to a civil
4 penalty and punitive damages under section 52(b), but does not do so as a matter of law in this case.
5 See Docket No. 218 (Report and Recommendation) at 39. The language of section 52.1 provides
6 that damages are available under section 52, but does not clearly state whether such damages are
7 pursuant to section 52(a), section 52(b) or both. See Cal. Civ. Code §52.1. The Magistrate Judge
8 found that a plaintiff who prevails on a section 52.1 claim could obtain damages under both
9 subsections but that recovery under section 52(b), which includes punitive damages and a civil
10 penalty, is not automatic. See Cal. Civ. Code § 52(b). Because damages are more substantial under
11 section 52(b) and because that section specifically compensates for serious offenses such as threats
12 or violence based upon protected characteristics such as race and gender, the Magistrate Judge held
13 that section 52(b) is intended to provide compensation only for serious violations. See Report and
14 Recommendation at 38-39. Because of the greater quantum of damages and penalties available
15 under this subsection, the Magistrate Judge found that plaintiffs should have to prove a certain level
16 of severity in defendants' violation of section 52.1. *Id.* The Magistrate Judge made clear, however,
17 that plaintiffs' content-based restriction claims and other claims implicating section 52 could warrant
18 damages under both sections 52(a) and 52(b). *Id.* at 39.

19 Plaintiffs argue that the Magistrate Judge construed sections 52.1 and 52 incorrectly and that
20 plaintiffs are entitled to civil penalties and punitive damages for defendants' violation of section
21 52.1. Plaintiffs are correct that courts have held a violation of section 52.1 itself not to require any
22 heightened severity. See *Venegas v. County of Los Angeles*, 32 Cal. 4th 820 (2004) (holding section
23 52.1 not to require showing of actual intent to discriminate). However, plaintiffs have not provided,
24 and the court has not found, clear authority in either legislation or case law suggesting that every
25 violation of section 52.1 gives rise to damages under both subsections of section 52. The court
26 finds the Magistrate Judge's conclusion that penalties and punitive damages under section 52(b) are
27 not automatic for a violation of section 52.1 to be the most reasonable interpretation of the statute.

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1 II. Equal Protection Analysis

2 In denying defendants' motion for summary judgment on plaintiffs' equal protection claims,
3 the Magistrate Judge found that a genuine dispute of material fact existed as to whether defendants
4 intentionally discriminated against plaintiffs in order to suppress their political viewpoint. *See*
5 Report and Recommendation at 57. The violation of the First Amendment right to free speech in the
6 form of content-based discrimination may serve as the basis for an Equal Protection claim. In some
7 cases free speech and Equal Protection analyses work in tandem, but if a restriction burdens the
8 fundamental right to free speech, that restriction is subject to heightened scrutiny and can be the
9 basis for an Equal Protection violation. *See Rubin v. City of Santa Monica*, 308 F.3d 2008 (9th Cir.
10 2002) (finding rational basis review appropriate for Equal Protection claim unless restriction
11 unconstitutionally burdened fundamental right to free speech); *see also Prince v. Jacoby*, 303 F.3d
12 1074 (9th Cir. 2002) (finding violation of fundamental right to free speech could implicate Equal
13 Protection violation). In the present case, if it is found that defendants intentionally discriminated
14 against plaintiffs in violation of plaintiffs' rights to free speech, an Equal Protection claim could be
15 successful. For this reason, the Magistrate Judge correctly reserved this issue for trial.

16 III. Issues Remaining for Trial

17 Based upon the Magistrate Judge's findings, the court holds the following issues require
18 determination at trial: (1) As to both plaintiffs' claims that the speech restrictions were content
19 neutral but violated free speech rights, actual damages must be determined against the following
20 defendants under California Civil Code section 52.1: defendant individual police officers, City, Ellis,
21 Joint Venture, and SMG; (2) As to both plaintiffs' claims that the speech restrictions were content-
22 based in violation of plaintiffs' free speech rights under California Civil Code section 52.1, both
23 damages and liability must be determined for defendant individual police officers, City, Ellis, Joint
24 Venture, and SMG; (3) As to both plaintiffs' section 1983 claims based on the assertion that speech
25 restrictions were content-neutral, defendant City's liability based upon a delegation theory must be
26 determined, and liability must be determined as to defendants County and SMG; (4) As to both
27 plaintiffs' section 1983 claims based on the assertion that speech restrictions were content-based,
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1 liability as to all defendants must be determined, except for defendant City, which may only be held
2 liable on a delegation theory; (5) As to both plaintiffs' Equal Protection claims under California
3 Civil Code section 52.1 and section 1983, liability must be determined as to all defendants; (6) As to
4 plaintiff Cuiello's claim of an unlawful seizure in violation of California Civil Code section 52.1,
5 damages must be determined as to defendants Ellis, Joint Venture, and SMG; (7) As to plaintiff
6 Cuiello's claim of an unlawful seizure in violation of section 1983, (a) liability for defendant
7 individual officers should be determined to the extent that the officers were aware of viewpoint
8 discrimination against Cuiello when they arrested him, (b) defendants Joint Venture and SMG's
9 liability must be determined, and (c) damages for defendant Ellis's violation of section 1983 must be
10 determined; (8) As to plaintiff Cuiello's section 1983 claim for malicious prosecution, liability of
11 defendant individual police officers and defendant Ellis must be determined; (9) As to plaintiff
12 Bolbol's claim of assault and battery, liability of defendants Joint Venture and SMG must be
13 determined; and (10) As to plaintiff Bolbol's claim under California Civil Code section 51.7,
14 liability of defendants Joint Venture and SMG must be determined.

15 IV. Conclusion

16 In accordance with the foregoing, the Magistrate Judge's Report and Recommendation is
17 adopted in its entirety subject to the above rulings.

18 IT IS SO ORDERED.

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20 Dated: November 3, 2009



MARILYN HALL PATEL
United States District Court Judge
Northern District of California

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