E-Filed 8/23/10

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JAMES A. BUSH,

Plaintiff,

v.

MICHAEL O'BRIEN, et al.,

Defendants.

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No. C 09-0947 RS (PR)

ORDER GRANTING DEFENDANT O'BRIEN'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This is a federal civil rights action brought by a pro se state prisoner pursuant to 42 U.S.C. § 1983 in which plaintiff alleges that defendant O'Brien, a police officer with the San Jose Police Department, violated his right to due process by having his car towed, impounded for over two months, which resulted in the towing company selling the vehicle to cover the storage costs. Defendants move for summary judgment. For the reasons stated herein, defendants' motion for summary judgment is GRANTED as to all claims against all served defendants.

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BACKGROUND

The following facts are undisputed unless specifically noted otherwise. In 2007,[1] the San Jose Police Department ("SJPD") seized plaintiff's vehicle on the belief that it had been involved in a hit-and-run accident. On May 18, 2007, defendant O'Brien, a police officer with the SJPD, was assigned to investigate the possible hit-and-run involving plaintiff's vehicle. Soon after, on May 20, plaintiff reported to defendant that his vehicle had been stolen.

Defendants contend that on May 22, plaintiff called SJPD to report that he lent his vehicle to John Martinez, who was later identified as Roberto Diaz, who was the hit-and-run suspect. Defendants contend that this report to SJPD conflicted with the information plaintiff gave defendant O'Brien on May 20.

Plaintiff asserts that during the investigation, he demanded the return of his vehicle under Cal. Veh. Code § 22655(b), which mandates the release of an impounded vehicle within forty-eight hours. Defendants refused his request on grounds that he was pursuing a criminal investigation beyond the scope of the possible hit-and-run. Plaintiff asserts that defendant O'Brien unlawfully detained his vehicle for roughly two and a half months without conducting an investigation, thereby causing plaintiff to incur $4,500 in towing and storage charges. According to the complaint, plaintiff was notified by Leo's Towing that his car would be sold at auction if plaintiff could not pay the entire fee by the requisite time. Plaintiff could not afford to pay the fee, and consequently his vehicle was sold. Plaintiff asserts that defendant O'Brien failed to investigate with the knowledge that a botched investigation would permit the continued retention of the vehicle, leading to excessive storage fees which plaintiff could not afford. According to plaintiff, by so doing, defendants unlawfully seized and held the car, and in the end, allowed the towing company to commit conversion by selling the vehicle.

[1] The parties give differing dates for when the alleged accident occurred, or when it was towed. Plaintiff says that defendants believe the accident occurred in March 2007, whereas defendants assert that the accident and seizure took place in May 2007.

According to defendant O'Brien, during his investigation for grand theft auto, he received a report that plaintiff had lent the vehicle to the hit-and-run suspect. Because of the conflicting reports from his investigation — that the vehicle was a loan, that the vehicle was stolen — O'Brien began to investigate the potential false report of a crime. O'Brien concluded that plaintiff or his vehicle, or both, were "potentially involved in a number of possible crimes, including a hit-and-run, grand theft auto, and/or a false crime report to a police officer based on the conflicting reports provided by [p]laintiff." (Defs.' Mot. for Summ. J. ("MSJ"), Decl. O'Brien ¶ 9.) O'Brien asserts that he closed his investigation on June 14, and released the vehicle to Century Tow on June 15.

STANDARD OF REVIEW

Summary judgment is proper where the pleadings, discovery and affidavits demonstrate that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id*.

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Cattrett,* 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue for which the opposing party by contrast will have the burden of proof at trial, as is the case here, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Id*. at 325.

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The court is only concerned with

disputes over material facts and "factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. It is not the task of the court to scour the record in search of a genuine issue of triable fact. *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996). The nonmoving party has the burden of identifying, with reasonable particularity, the evidence that precludes summary judgment. *Id*. If the nonmoving party fails to make this showing, "the moving party is entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323.

DISCUSSION

The Court construes plaintiff's claims to allege that the seizure and selling of his vehicle violated his Fourth (protection from unlawful seizures), Fifth (protection from a government taking without due process), and Fourteenth Amendment (due process) rights.

I. Seizure and Detention of the Vehicle under the Fourth Amendment

The Fourth Amendment proscribes "unreasonable searches and seizures." U.S. Const. amend. IV; *Allen v. City of Portland*, 73 F.3d 232, 235 (9th Cir. 1995). Warrantless seizure of an automobile which officers have probable cause to believe was used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, does not violate the Fourth Amendment. *See Florida v White*, 526 US 559, 565–66 (1999). Probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief . . . that certain items may be contraband or stolen property or useful as evidence of a crime;" it does not demand any showing that such a belief be correct or more likely true than false. *U.S. v. Dunn*, 935 F2d 1053, 1057 (9th Cir. 1991).

Defendants have provided evidence, by way of sworn declarations, that they had probable cause that the car was involved in a crime or crimes to seize and impound, and later to detain, the vehicle. Plaintiff, however, offers only conclusory allegations, but no evidence to indicate that the SJPD lacked probable cause to impound plaintiff's car. Given the lesser expectation of privacy accorded to searches and seizures of vehicles, *see New York v. Class*,

475 U.S. 106, 112 (1986), and the fact the vehicle is highly mobile, and therefore capable of being easily put beyond the reach of the police, *see California v. Carney*, 471 U.S. 386, 393 (1985), plaintiff has not offered evidence that his Fourth Amendment rights were violated by defendants' seizure of his vehicle. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322–23. The record shows no evidence that a factual dispute exists as to whether defendants had probable cause to seize the vehicle. Therefore, summary judgment is GRANTED in favor of defendants on this claim.

II. Fifth and Fourteenth Amendment

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. To state a claim under the Takings Clause, a plaintiff must first demonstrate a constitutionally protected property interest. Only after such a showing will the court inquire whether expropriation of that interest constitutes a constitutional "taking." *Id.*

Ordinarily, due process of law requires notice and an opportunity for some kind of hearing prior to the deprivation of a significant property interest. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978). According to plaintiff's statement of the facts, he was provided with adequate procedural process before and after the alleged taking occurred. He knew the vehicle had been impounded, and was informed prior to the final deprivation of plaintiff's interest in the property, that it was available for release, and that it would be sold if he did not pay the fee. That plaintiff did not take advantage of the opportunity available to him does not lead to the conclusion that he was deprived of due process. In sum, plaintiff has not brought forward evidence that his Fifth or Fourteenth Amendment rights were violated by defendants' seizure and sale of his vehicle. Furthermore, plaintiff has not alleged or shown that his property was taken by the government for public use as the money received for the sale of the vehicle went to the towing company, not the government. Therefore, the Takings Clause is not applicable to plaintiff's claim. *See Vance v. Barrett*, 345 F.3d 1083,

1089 (9th Cir. 2003). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322–23. Therefore, summary judgment is GRANTED in favor of defendants on this claim.

III. Plan to Deprive Plaintiff of His Vehicle

Plaintiff has failed to support his claim that defendant O'Brien acted intentionally to deprive him of his vehicle permanently. Other than offering conclusory allegations, plaintiff has failed to rebut defendants' showing "that there is an absence of evidence to support the nonmoving party's case" that defendants are liable for intentionally depriving plaintiff of his vehicle permanently, and therefore he is not entitled to relief regarding the loss of his vehicle.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment (Docket No. 16) is GRANTED as to all claims against Officer Flores and the San Jose Police Department. Leo's Towing was never served with the complaint, and is hereby TERMINATED from this action, and all claims against it are DISMISSED. It is unnecessary to consider defendants' qualified immunity defense, as the claims are dismissed on other grounds.

Plaintiff's motion for an extension of time to file an opposition (Docket No. 24) is DENIED. Plaintiff had notice of defendants' MSJ on February 2, 2010, the date of its filing. Plaintiff did not move for an extension of time until June 2, 2010, some four months after the MSJ was filed, and three months after plaintiff's opposition was due. Plaintiff, having had both notice and time to file an opposition and having failed to so, his motion for an extension of time is DENIED.

This order terminates Docket Nos. 16 & 24.

The Clerk shall enter judgment in favor of all defendants, terminate the pending motions, and close the file. Plaintiff shall take nothing by way of his complaint.

IT IS SO ORDERED.

DATED: August 23, 2010

RICHARD SEEBORG
United States District Judge