UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

ALONZO PARKER,

Plaintiff,

v.

CITY OF PITTSBURG, et al.,

Defendants.

Case No. 17-cv-01563-LB

ORDER GRANTING THE DEFENDANT'S MOTION TO DISMISS

Re: ECF No. 10

INTRODUCTION

This civil rights case involves the placement and removal of protest signs on private property.[1] The plaintiff, Alonzo Parker, proceeding pro se, sued the City of Pittsburg and the Pittsburg Police Department, under 42 U.S.C. § 1983.[2] The city moves to dismiss the complaint under Rule 12(b)(6) for failure to state a claim.[3] The court can decide the matter without oral argument, *see* Civ. L.R. 7-1(b), and grants the motion, because the complaint does not provide adequate notice of the legal theories supporting the claims.

[1] *See generally* Compl. – ECF No. 1. Record citations refer to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of documents.

[2] *Id.* ¶ 5k.

[3] Mot. to Dismiss Pl.'s Compl. – ECF No. 10.

STATEMENT

Mr. Parker lives in the City of Pittsburg in Contra Costa County, California.[4] He alleges that from 2011 to 2014, he "was [a] victim of malicious and illegal prosecution . . . allowed by attorneys and judges," resulting in the "illegal seizure of [his] real property and financial accounts."[5] A final judgment was issued in Mr. Parker's favor in late 2014, though he did not recover the cost of his defense.[6] After "exhaust[ing] all avenues of complaints" for the "illegal seizure of [his] property and money," including the "bar association, new lawyers, etc.," Mr. Parker decided to "wage a protest any way he could."[7]

In April 2016, Mr. Parker hung two signs on his property.[8] The signs read: "FREEDOM WITH NO RIGHTS EQUALS SLAVERY" and "YOU CAN HANG A NIGGER FROM A TREE EQUAL RIGHTS HE'LL NEVER SEE."[9] Mr. Parker displayed the signs to protest against the lawsuits brought against him in 2011.[10] That day, the Pittsburg Police Department asked Mr. Parker to cover the word "NIGGER."[11] Though Mr. Parker explained that the signs were "his right under the first amendment to protest a wrong-doing by [the] justice system," he acquiesced.[12] But he removed the covering one day later, upon "realizing that he considers himself a 'NIGGER,' and "is proud of it."[13] He wanted the word uncovered to preserve "the meaning of the content" and "his right to free speech and protest."[14] After two days, Mr. Parker received a citation ordering

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[4] Compl. ¶¶ 1(a), 3.
[5] *Id.* ¶ 5a.
[6] *Id.*
[7] *Id.* ¶ 5b.
[8] *Id.* ¶ 5c.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* ¶ 5d.
[14] *Id.*

removal of the sign within 30 days or, otherwise, the imposition of a $100 fine.[15] Mr. Parker removed the signs.[16]

In the following months, Mr. Parker displayed signs in his front yard, and protested at the courthouse, police station, downtown area, and Pittsburg High School.[17] In August, he put up a new sign: "BORN A SLAVE MY MASTER IS A JEW."[18] About a week later, he met with Hector Rojas, a Senior Planner, regarding the signs.[19] Mr. Rojas promised to "determine whether a permit was needed for [Mr. Parker's] signs."[20] Later, Mr. Parker learned "that he will 'never' be given a permit for ANY signs."[21]

In mid-August, Mr. Parker received a citation for "unpermitted sign."[22] The next day, Pittsburg police officers presented a court order to Mr. Parker.[23] Then, they "forcibly remove[d] signs from the property after covering up cameras showing their actions."[24] The officers "damaged" his property and took the signs "without compensation or reimbursement."[25]

One month later, "unknown individuals" removed the "BORN A SLAVE MY MASTER IS A JEW" sign.[26] The city issued another "unpermitted sign" citation for $500.[27]

On March 23, 2017, Mr. Parker sued the city and its police department for violations of his rights to free speech and protection from unreasonable seizure of property.[28] The city moves to

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[15] *Id.* ¶ 5e.

[16] *Id.*

[17] *Id.* ¶ 5f.

[18] *Id.* ¶ 5g.

[19] *Id.* ¶ 5h.

[20] *Id.*

[21] *Id.*

[22] *Id.* ¶ 5i.

[23] *Id.* ¶ 5j.

[24] *Id.*

[25] *Id.*

[26] *Id.* ¶ 5k.

[27] *Id.*

[28] Compl. – ECF No. 1.

dismiss the complaint.[29] Mr. Parker's opposition was due June 14, 2017, but he did not file one.[30] The court gave him a 9-day extension to file a response.[31] Mr. Parker filed an opposition on June 23, 2017.[32]

GOVERNING LAW

Under Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for "failure to state a claim upon which relief can be granted." A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief" to give the defendant "fair notice" of what the claims are and the grounds upon which they rest. *See* Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint does not need detailed factual allegations, but "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a claim for relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555 (internal citations omitted).

To survive a motion to dismiss, a complaint must contain sufficient factual allegations, accepted as true, "'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted

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[29] Mot. – ECF No. 10.

[30] Order – ECF No. 15.

[31] *Id.*

[32] Opp'n to Mot. to Dismiss – ECF No. 17.

unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

If a court dismisses a complaint, it should give leave to amend unless the "the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss and Liehe, Inc. v. Northern California Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).

ANALYSIS

1. First Amendment Claim

Mr. Parker asserts a "violation of civil rights" and later says that the defendants "violated his right to free speech."[33] The city moves to dismiss the claim because it was only enforcing its municipal code, which requires permits for certain signs, and Mr. Parker does not allege any facts "to show that the city removed his signs for an improper or unlawful purpose."[34]

The court is not convinced that the complaint is so devoid of improper-purpose allegations. Contrary to the city's assertions, Mr. Parker does allege facts supporting the conclusion that it removed his signs for an improper purpose. He alleges that: (1) he was protesting at the time of the incident, (2) police officers asked him to cover the word "NIGGER," (3) he received a citation two days after uncovering it, (4) a municipal employee told him that he would never receive a permit for his signs, (5) police officers told him to take down the signs, and (6) when he continued to display the signs, they were removed by police officers and "unknown persons." These allegations may support a theory of retaliation or censorship. *See Ariz. Students Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (noting that content-based limits on expression are "presumptively invalid"). The Supreme Court has emphasized that residential signs are a significant and affordable means of disseminating protected

[33] Compl. ¶¶ 5k, 5m.

[34] Mot. at 5 (emphasis omitted).

speech. *See City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (holding residential-sign ordinance unconstitutional).

The problem, however, is that Mr. Parker inadequately identifies the legal theory supporting his claim. It is unclear, for example, if he is challenging (1) the city's request to cover the word "NIGGER," (2) the citations, (3) the refusal to issue permits, (4) the removal of his signs, or (5) the municipal permit requirement, generally — and if so, for its unequal or improper application, any content-based impacts, or its financial burden. This is important because the complaint must give adequate notice of the claim for the defendant to have a chance to respond. *Twombly*, 550 U.S. at 555.

In his opposition, Mr. Parker appears to clarify his theory, and adds supporting factual allegations. For example, he says: (1) his signs should have been exempt under PMC 19.12.040(N), which exempts noncommercial signs; (2) Rojas informed him that a permit would cost $900, an "exorbitant amount"; and (3) Chief Brian Addington and Captain Ron Raman "clearly stated" that the court order was granted to remove his signs because "some of the language and/or the message it contained was offensive."[35] These allegations suggest possible challenges to the city's enforcement of the permit requirement, or, potentially, to the permit requirement itself (*i.e.* because it is overbroad and burdensome).[36] *See, e.g.*, *Berger v. City of Seattle*, 569 F.3d 1029, 1037–40 (9th Cir. 2009) (holding municipal permit requirement unconstitutional).

But he cannot raise these new theories and facts in his opposition. *See Nat'l Union of Healthcare Workers v. Kaiser Foundation Health Plan, Inc.*, No. 10-CV-03686-WHA, 2013 WL 1616103, at *5 (N.D. Cal. Apr. 15, 2013) ("[T]he opposition is not the proper arena in which to raise a critical new legal theory. [The plaintiff] should have addressed this proposition in the complaint . . . ."); *Patino v. Franklin Credit Mgmt. Corp.*, No. 16-CV-02695-LB, 2016 WL

[35] Opp'n at 2.

[36] The court grants the city's request for judicial notice (ECF No. 11) of sections 19.08.010 through 19.08.050 of the Pittsburg Municipal Code. Its argument, on reply, that section 19.12.040 is irrelevant because it merely enforced the permitting requirement in section 19.08.010 is not persuasive. Section 19.08.010 explicitly excludes signs exempt under section 19.12.040 from the permit requirement.

4549001, at *7 (N.D. Cal. Aug. 29, 2016) ("The court . . . cannot consider material outside of the complaint."). He must include these in the complaint.

The court therefore dismisses Mr. Parker's First Amendment claim but grants him leave to amend, so that he can add these — and any additional — legal theories and factual allegations.

2. Fourth/Fourteenth Amendment Claim

Mr. Parker's second claim reads: "Violation of Civil Rights (4th and 14th Amendments/42 U.S.C. § 1983)."[37] The city argues that the complaint "fails to allege facts to establish how the removal of [the] signs was unreasonable or otherwise forms a basis for an unlawful seizure claim."[38] Mr. Parker does not address and arguably concedes this point. *See, e.g.*, *Jibreel v. Hock Seng Chin*, No. 13-CV-03470 LB, 2014 WL 12600278, at *5 (N.D. Cal. Apr. 17, 2017) (compiling cases).

In any event, Mr. Parker does not allege facts to support a plausible claim. He alleges that the police officers took his signs pursuant to a court order, which he attaches to his complaint.[39] That court order — a warrant signed by a California Superior Court judge — authorized the "remov[al] [of] the temporary obscene/vulgar sign, in accordance with Pittsburg Municipal Code Chapter 19.04."[40] In his opposition, Mr. Parker asserts he does not believe that his signs are obscene, potentially casting doubt on the authority of the warrant for removal of "obscene" or "vulgar" signs.[41] Even so, he does not allege the warrant was improper or not supported by probable cause in the complaint.

[37] Compl. ¶ 5k.

[38] Mot. at 6.

[39] Compl. ¶ 5j; *id*. at 10.

[40] *Id*. at 10 (emphasis omitted).

[41] Opp'n at 3.

Mr. Parker also alleges that the police harmed his property in the process of removing his signs.[42] The complaint, however, is silent as to any property beyond the removed signs. This allegation does not provide notice as to the nature of Mr. Parker's claim.

The city also requests dismissal of a due process claim.[43] Section 1983 "'is not itself a source of substantive rights,' but merely provides "'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Here, Mr. Parker identifies his infringed constitutional right as that protected by the Fourth Amendment, and the court reviews such, in lieu of a general due process claim.

Mr. Parker's complaint fails to state a claim for a violation of the Fourth Amendment. The court dismisses the Fourth Amendment claim without prejudice.

3. *Monell* Claim

The complaint alleges civil rights claims against the city and the Pittsburg Police Department.[44] The assignment of municipal liability can only be achieved using the framework established in *Monell v. Dep't of Soc. Svcs.*, 436 U.S. 658 (1978). Therefore, the court considers the sufficiency of the claims under the standard in *Monell*. The city argues that the complaint's allegations are insufficient in this regard. Mr. Parker does not address this issue.

Liability against a government entity starts from the premise that there is no respondeat superior liability under § 1983; *i.e.*, no entity is liable simply because it employs a person who has violated a plaintiff's rights. *See, e.g.*, *Monell*, 436 U.S. at 691; *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Local governments can be sued directly under § 1983 only if the public entity maintains a policy or custom that results in a violation of the plaintiff's constitutional rights. *Monell*, 436 U.S. at 690–91. To impose *Monell* entity liability under § 1983 for a violation of constitutional rights, a plaintiff must show that: (1) the plaintiff possessed a constitutional right of

[42] Compl. ¶ 5j.

[43] Mot. at 6–7.

[44] Compl. ¶ 1.

which he or she was deprived; (2) the municipality had a policy; (3) this policy amounts to deliberate indifference to the plaintiff's constitutional rights; and (4) the policy is the moving force behind the constitutional violation. *See Plumeau v. School Dist. # 40 County of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997). The Ninth Circuit has explained how a policy may be proved:

> There are three ways to show a policy or custom of a municipality: (1) by showing "a longstanding practice or custom which constitutes the 'standard operating procedure' of the local government entity;" (2) "by showing that the decision-making official was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said to represent official policy in the area of decision;" or (3) "by showing that an official with final policymaking authority either delegated that authority to, or ratified the decision of, a subordinate."

Menotti v. City of Seattle, 409 F.3d 1113, 1147 (9th Cir. 2005) (quoting *Ulrich v. City and Cnty. of San Francisco*, 308 F.3d 968, 984-85 (9th Cir. 2002)). The practice or custom must consist of more than "random acts or isolated events" and instead, must be the result of a "permanent and well-settled practice." *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443–44 (9th Cir. 1988) overruled on other grounds by *Bull v. City and Cnty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010); *see City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). Thus, "a single incident of unconstitutional activity is not sufficient to impose liability under Monell unless" there is proof that the incident "was caused by an existing, unconstitutional municipal policy . . . ." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823–24 (1985).

Here, as noted above, Mr. Parker's legal theories are unclear. The court points out, however, that whatever theory he intends — *e.g.* retaliation based on prior litigation, the removal of his signs for content, or the permit requirement for signs — he has not adequately pled a custom or policy to claim liability against the city. In any future amended complaint alleging *Monell* liability, Mr. Parker must present factual allegations that establish the existence of a policy or custom.

Mr. Parker's complaint fails to state a *Monell* claim. The court dismisses his claims against the city without prejudice.

CONCLUSION

Mr. Parker's complaint fails to state any claims, and the court dismisses the complaint without prejudice and with leave to amend. He must file any amended complaint within 28 days from the date of this order.

IT IS SO ORDERED.

Dated: July 13, 2017

LAUREL BEELER
United States Magistrate Judge

United States District Court
Northern District of California