

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SEAN BARNETT,  
  
Plaintiffs,

v.

SAL MARTINEZ, #782; LEVY BARNES,  
#820; CASEY TINLOY, #587; JUSTIN  
GEBB, #111; ROBERT ANDERSON, #787;  
CYNTHIA VERBIS, #800,  
  
Defendants.

No. C 09-5605 CW

ORDER DENYING  
PLAINTIFF'S MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT AND  
GRANTING DEFENDANTS'  
CROSS-MOTION FOR  
SUMMARY JUDGMENT  
(Docket Nos. 47 and  
52)

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Plaintiff Sean Barnett alleges that Defendants Sal Martinez, Casey Tinloy, Justin Gebb, Robert Anderson and Cynthia Verbis violated his civil rights by arresting him without probable cause.<sup>1</sup> Plaintiff moves for partial summary judgment. Defendants oppose his motion and cross-move for summary judgment. Plaintiff opposes Defendants' motion with respect to his section 1983 claim against Martinez, Gebb and Anderson for his alleged arrest without probable cause and his related state law claims against them. Plaintiff does not oppose summary judgment on his section 1983 claim against Martinez, Gebb and Anderson, to the extent it was based on other grounds, or his claims against Tinloy and Verbis. The motions were heard on June 23, 2011. Having considered oral argument and the papers submitted by the parties, the Court DENIES Plaintiff's motion for partial summary judgment and GRANTS Defendants' cross-motion for summary judgment.

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<sup>1</sup> On May 25, 2011, Plaintiff dismissed with prejudice his claims against Levy Barnes. (Docket No. 51.)

BACKGROUND

1  
2 On the evening of August 16, 2008, Plaintiff was holding "Club  
3 Flirt," his adult-oriented event, at 1188-1190 Folsom Street in San  
4 Francisco. Plaintiff worked as the doorman for the event, greeting  
5 patrons and collecting admission fees. At around 10:25 p.m.,  
6 California Department of Alcoholic Beverage Control (ABC) District  
7 Administrator Gebb, along with two other ABC investigators, began  
8 an undercover investigation into potential alcoholic beverage  
9 license violations in the building in which Club Flirt was being  
10 held. As District Administrator, Gebb was the ranking officer.  
11 ABC Investigators Martinez, Anderson and Tinloy were stationed  
12 outside, awaiting orders from Gebb.

13 After observing purported violations, at approximately 12:30  
14 a.m., Gebb directed Martinez, Anderson and Tinloy to enter the  
15 building. Martinez, Anderson and Tinloy wore jackets or vests  
16 marked "POLICE" on the back. Anderson detained Plaintiff and  
17 escorted him up a flight of stairs to the second floor of the  
18 building. Plaintiff asserts that he was frisked at the bottom and  
19 at the top of the stairs. He does not contend, however, that it  
20 was Anderson who frisked him.

21 Anderson took Plaintiff to a room located in the front of the  
22 second floor, in which Plaintiff and other individuals waited until  
23 they were called for an interview with Tinloy in another room.  
24 Anderson directed Plaintiff to sit in a chair that was placed up  
25 against a wall and at a ninety-degree angle to a sofa. The sofa  
26 was flush against the corner of the room. Anderson was the only  
27 ABC investigator assigned to watch the room. After placing  
28 Plaintiff in the room, Anderson left for approximately thirty

1 seconds to one minute.<sup>2</sup> He then returned with another individual  
2 under investigation, Patrick Au, whom Anderson instructed to sit in  
3 a corner opposite to where Plaintiff sat. Anderson then left for a  
4 second time, leaving Plaintiff and Au unattended. Upon returning,  
5 Anderson saw Plaintiff out of his chair and speaking Au. Anderson  
6 instructed Plaintiff to return to his assigned corner.

7       Thereafter, Tinloy called Plaintiff for his interview and  
8 escorted him to the interview room. As they were walking,  
9 Plaintiff asked to use the restroom. Tinloy permitted him to do so  
10 after searching him. Plaintiff left the premises after his  
11 interview.

12       After all non-ABC personnel had left the building, Gebb  
13 instructed Martinez to conduct a final sweep of the building.  
14 Martinez searched the front room in which Plaintiff and the other  
15 individuals waited. Upon moving the sofa adjacent to the chair in  
16 which Plaintiff sat, Martinez discovered a .25 caliber pistol in an  
17 ankle holster. Martinez believed that the ankle holster made "it  
18 easier for somebody to conceal" the gun. Gower Decl., Ex. J,  
19 Martinez Depo. 80:4-8. The gun was located between the wall and  
20 the sofa, and Anderson informed Martinez that Plaintiff sat near  
21 that area. Martinez asked the other ABC investigators whether they  
22 had dropped a gun. Everyone responded, "no." Martinez conducted a  
23 search of the gun's serial number, which revealed that it was

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25       <sup>2</sup> At the hearing on the motion, Plaintiff asserted that an ABC  
26 officer was always present in the front room. This contention is  
27 not supported. Plaintiff testified at his deposition that  
28 unidentified ABC officers accompanied him into the room. However,  
there is no evidence that the ABC officers remained in the room at  
all times. Thus, Anderson's testimony that Plaintiff was left  
unattended at times is undisputed.

1 registered to Plaintiff.

2         Gebb instructed Martinez and Anderson to arrest Plaintiff, who  
3 was located outside the building. Anderson handcuffed Plaintiff  
4 and brought him back to the second floor. Anderson searched  
5 Plaintiff, and Martinez advised Plaintiff of his Miranda rights.  
6 Plaintiff indicated that he was willing to talk.

7         Martinez asked Plaintiff whether he owned a gun. Plaintiff  
8 responded, "yes," and stated that, the last time he saw it, it was  
9 in his duffel bag, which he had placed on his desk at the top of  
10 the stairs. Plaintiff also indicated that he did not know how his  
11 gun came to be in the front room, that he did not permit anyone  
12 that night to borrow his gun and that he did not know if anyone  
13 knew that he had a gun in his duffle bag.

14         At around 3:30 a.m. on August 17, 2008, Martinez transported  
15 Plaintiff to the San Francisco County Jail. Plaintiff was booked  
16 for carrying a concealed weapon in violation of California Penal  
17 Code section 12025(a)(2). The San Francisco District Attorney's  
18 Office declined to charge Plaintiff.

19         At his deposition, Plaintiff testified that Defendants did not  
20 physically injure him. He claims, however, that he suffered  
21 emotional distress.

22                                 LEGAL STANDARD

23         Summary judgment is properly granted when no genuine and  
24 disputed issues of material fact remain, and when, viewing the  
25 evidence most favorably to the non-moving party, the movant is  
26 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.  
27 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);  
28 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.

1 1987).

2 The moving party bears the burden of showing that there is no  
3 material factual dispute. Therefore, the court must regard as true  
4 the opposing party's evidence, if supported by affidavits or other  
5 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815  
6 F.2d at 1289. The court must draw all reasonable inferences in  
7 favor of the party against whom summary judgment is sought.  
8 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
9 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d  
10 1551, 1558 (9th Cir. 1991).

11 Material facts which would preclude entry of summary judgment  
12 are those which, under applicable substantive law, may affect the  
13 outcome of the case. The substantive law will identify which facts  
14 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
15 (1986).

16 Where the moving party does not bear the burden of proof on an  
17 issue at trial, the moving party may discharge its burden of  
18 production by either of two methods:

19 The moving party may produce evidence negating an  
20 essential element of the nonmoving party's case, or,  
21 after suitable discovery, the moving party may show that  
22 the nonmoving party does not have enough evidence of an  
23 essential element of its claim or defense to carry its  
24 ultimate burden of persuasion at trial.

25 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d  
26 1099, 1106 (9th Cir. 2000).

27 If the moving party discharges its burden by showing an  
28 absence of evidence to support an essential element of a claim or  
defense, it is not required to produce evidence showing the absence  
of a material fact on such issues, or to support its motion with

1 evidence negating the non-moving party's claim. Id.; see also  
2 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.  
3 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the  
4 moving party shows an absence of evidence to support the non-moving  
5 party's case, the burden then shifts to the non-moving party to  
6 produce "specific evidence, through affidavits or admissible  
7 discovery material, to show that the dispute exists." Bhan, 929  
8 F.2d at 1409.

9 If the moving party discharges its burden by negating an  
10 essential element of the non-moving party's claim or defense, it  
11 must produce affirmative evidence of such negation. Nissan, 210  
12 F.3d at 1105. If the moving party produces such evidence, the  
13 burden then shifts to the non-moving party to produce specific  
14 evidence to show that a dispute of material fact exists. Id.

15 If the moving party does not meet its initial burden of  
16 production by either method, the non-moving party is under no  
17 obligation to offer any evidence in support of its opposition. Id.  
18 This is true even though the non-moving party bears the ultimate  
19 burden of persuasion at trial. Id. at 1107.

20 DISCUSSION

21 Because Plaintiff does not oppose it, summary judgment is  
22 granted in favor of Tinloy and Verbis on Plaintiff's claims against  
23 them. Additionally, Defendants' motion is granted with respect to  
24 Plaintiff's section 1983 claim against Gebb, Martinez and Anderson,  
25 to the extent it is based on alleged misconduct other than his  
26 purported arrest without probable cause.

27 Plaintiffs' remaining claims are against Gebb, Martinez and  
28 Anderson for: (1) deprivation of his Fourth Amendment rights

1 through his alleged arrest without probable cause, in violation of  
2 42 U.S.C. § 1983; (2) false imprisonment; (3) intentional  
3 infliction of emotional distress; (4) negligence; (5) assault and  
4 battery; and (6) violation of California Civil Code section 52.1.  
5 Plaintiff does not dispute that, to avoid summary judgment on these  
6 claims, he must demonstrate a genuine issue of material fact with  
7 respect to whether Gebb, Martinez and Anderson had probable cause  
8 to arrest him.

9       The Fourth Amendment requires law enforcement officers to have  
10 probable cause to make warrantless arrests. Ramirez v. City of  
11 Buena Park, 560 F.3d 1012, 1023 (9th Cir. 2008). "Probable cause  
12 to arrest exists when officers have knowledge or reasonably  
13 trustworthy information sufficient to lead a person of reasonable  
14 caution to believe that an offense has been or is being committed  
15 by the person being arrested." Id. (citation and internal  
16 quotation marks omitted). "While conclusive evidence of guilt is  
17 not necessary to establish probable cause, mere suspicion, common  
18 rumor, or even strong reason to suspect are not enough." Id.  
19 (citation and internal quotation and editing marks omitted).

20       Gebb, Martinez and Anderson claim that they have qualified  
21 immunity from Plaintiff's claims because reasonable officers  
22 confronted with the same situation would have believed that  
23 probable cause existed to arrest him. "The qualified immunity  
24 inquiry asks two questions: (1) was there a violation of a  
25 constitutional right, and, if so, then (2) was the right at issue  
26 'clearly established' such that it would have been clear to a  
27 reasonable officer that his conduct was unlawful in that  
28 situation?" Brooks v. City of Seattle, 599 F.3d 1018, 1022 (9th

1 Cir. 2010) (citing Saucier v. Katz, 533 U.S. 194, 201-02 (2001)).  
2 If officers' "actions reflected a reasonable mistake about what the  
3 law requires, they are entitled to qualified immunity." Brooks,  
4 599 F.3d at 1022 (citing Blankenhorn v. City of Orange, 485 F.3d  
5 463, 471 (9th Cir. 2007)).

6 Plaintiff was arrested pursuant to California Penal Code  
7 section 12025(a)(2), which provides that a "person is guilty of  
8 carrying a concealed firearm when he or she . . . [c]arries  
9 concealed upon his or her person any pistol, revolver, or other  
10 firearm capable of being concealed upon the person." At the time  
11 Martinez and Anderson arrested Plaintiff, they and Gebb knew the  
12 following facts. First, the gun was registered to Plaintiff.  
13 Second, the gun was in an ankle holster, which Martinez believed  
14 made it easier to conceal the gun. Third, the gun was found  
15 adjacent to where Plaintiff was sitting as he awaited his  
16 interview. Fourth, Plaintiff was handling money as the doorman for  
17 an adult-oriented event, which led Anderson to believe that  
18 Plaintiff was armed. Fifth, Plaintiff was escorted from room-to-  
19 room inside the premises, but was left unattended for certain  
20 periods while he waited in the front room. These undisputed facts,  
21 when viewed together, permit a reasonable inference that Plaintiff  
22 carried a concealed weapon. Thus, probable cause supported his  
23 arrest.

24 Plaintiff insists that these facts were consistent with his  
25 innocence. He complains that Gebb, Martinez and Anderson did not  
26 first investigate whether the front room had been searched before  
27 he was placed in it or whether he had been frisked. However, the  
28 test for probable cause "is not whether the conduct under question



1 is consistent with innocent behavior; law enforcement officers do  
2 not have to rule out the possibility of innocent behavior.'"  
3 Ramirez, 560 F.3d at 1024 (quoting United States v. Thomas, 863  
4 F.2d 622, 627 (9th Cir. 1988)). Plaintiff does not identify any  
5 facts, ignored by Gebb, Martinez and Anderson, that tended to  
6 suggest that he did not commit the crime. That these Defendants  
7 could have investigated further does not vitiate probable cause.  
8 See John v. City of El Monte, 515 F.3d 936, 941-42 (9th Cir. 2008).

9 Because Gebb, Martinez and Anderson did not commit a  
10 constitutional violation, they are qualifiedly immune from  
11 liability on Plaintiff's section 1983 claim. Even if they violated  
12 Plaintiff's constitutional rights, Gebb, Martinez and Anderson  
13 nevertheless would enjoy qualified immunity because they did not  
14 act unreasonably. The facts that the gun was registered to  
15 Plaintiff, that it was found in an ankle holster that could have  
16 facilitated the gun's concealment on a person, that it was secreted  
17 adjacent to where he was sitting, that he was serving in a role  
18 that made it likely he was armed, and that he was left unattended  
19 for some period of time would have led reasonable officers to  
20 believe they had probable cause to arrest him.

21 Accordingly, there is not a material factual dispute as to  
22 whether Gebb, Martinez and Anderson had probable cause to arrest  
23 Plaintiff, and summary judgment in their favor is appropriate on  
24 his claims against them under section 1983 and California Civil  
25 Code section 52.1, which prohibits interference with an  
26 individual's constitutional rights. Further, because there is no  
27 material factual dispute regarding whether there was a  
28 constitutional violation, Gebb, Martinez and Anderson are entitled

1 to qualified immunity. Even if there were a triable issue, Gebb,  
2 Martinez and Anderson would nevertheless enjoy qualified immunity  
3 because a reasonable officer could have believed that their actions  
4 were lawful under the circumstances. Summary judgment in Gebb's,  
5 Martinez's and Anderson's favor is likewise appropriate on  
6 Plaintiff's claims for false imprisonment, negligence and assault  
7 and battery. See Salazar v. Upland Police Dep't, 116 Cal. App. 4th  
8 934, 947-48 (2004) (concluding that summary judgment is appropriate  
9 on such claims in the absence of a triable issue with respect to  
10 probable cause); see also Cal. Pen. Code § 847(b)(1) (precluding  
11 liability for false imprisonment when officer "had reasonable cause  
12 to believe arrest was lawful"). Because there is no evidence that  
13 Gebb, Martinez and Anderson engaged in extreme and outrageous  
14 conduct or that Plaintiff suffered severe or extreme emotional  
15 distress, summary judgment in their favor is also warranted on  
16 Plaintiff's claim for intentional infliction of emotional distress.  
17 See Catsouras v. Dep't of Cal. Highway Patrol, 181 Cal. App. 4th  
18 856, 874 (2010) (listing elements for tort).

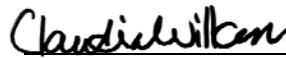
19 CONCLUSION

20 For the foregoing reasons, the Court DENIES Plaintiff's motion  
21 for partial summary judgment (Docket No. 47) and GRANTS Defendants'  
22 cross-motion for summary judgment (Docket No. 52).

23 The Clerk shall enter judgment accordingly and close the file.  
24 The parties shall bear their own costs.

25 IT IS SO ORDERED.

26  
27 Dated: 6/24/2011



CLAUDIA WILKEN  
United States District Judge