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

PHILLIP PLEVIN and TERESITA TORRES,
Plaintiffs,
v.
CITY AND COUNTY OF SAN FRANCISCO and
S.A. NAVARRO,
Defendants.

No. C 11-02359 CW
ORDER GRANTING
DEFENDANT CITY
AND COUNTY OF SAN
FRANCISCO'S
MOTION TO
DISMISS, DENYING
AS MOOT DEFENDANT
CITY AND COUNTY
OF SAN
FRANCISCO'S ANTI-
SLAPP MOTION TO
STRIKE AND
DENYING WITHOUT
PREJUDICE
DEFENDANT CITY
AND COUNTY OF SAN
FRANCISCO'S ANTI-
SLAPP MOTION FOR
ATTORNEYS' FEES
(Docket Nos. 13
and 16)

United States District Court
For the Northern District of California

Plaintiffs Phillip Plevin and Teresita Torres bring claims under federal and state law against Defendants City and County of San Francisco and S.A. Navarro based on alleged violations of their constitutional rights. The City moves to dismiss Plaintiffs' claims. Additionally, pursuant to California Code of Civil Procedure section 425.16, commonly known as California's anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) statute, the City moves to strike Plaintiffs' state law claims. Navarro has not appeared in this action and it appears that he has not been served. The motions were taken under submission on the papers. Having considered the papers submitted by the parties, the

1 Court GRANTS the City's motion to dismiss, DENIES as moot the
2 City's anti-SLAPP motion to strike and DENIES without prejudice the
3 City's anti-SLAPP motion for attorneys' fees.

4 BACKGROUND

5 The following allegations are contained in Plaintiffs'
6 complaint, unless stated otherwise.¹

7 On December 18, 2009, a hit-and-run driver collided with
8 Plaintiffs, who were riding a motorcycle. Navarro, the responding
9 police officer, "failed to record information identifying" the
10 driver in order to prevent Plaintiffs from seeking redress for
11 their injuries. Compl. at 4. He did so because Plevin wore
12 "clothing identifying him as a member of a motorcycle club." Id.
13 at 5. The City has "a policy to persecute, harass, and intimidate
14 citizens who are members of a motorcycle club." Id. at 4.

15 Plaintiffs charge Defendants with negligence, "intentional
16 tort," violation of California Civil Code section 52.3 and
17 violation of 42 U.S.C. section 1983. Plaintiffs contend that
18 Defendants violated their First, Fourth and Fourteenth Amendment
19 rights under the United States Constitution.

20 As noted above, Navarro has not appeared in this action, and
21 the City contends that he has not been served. Plaintiffs offer
22 proof that they served Officer R. Ortiz, who they contend is a

23 _____
24 ¹ In their opposition to the City's motion to dismiss,
25 Plaintiffs discuss various allegations they would make in an
26 amended complaint. They also include declarations along with their
27 opposition to the City's anti-SLAPP motion. Because these
28 allegations do not appear in an amended pleading, the Court
disregards them for the purposes of the City's motion to dismiss.
Schneider v. Cal. Dep't of Corr., 151 F.3d 1194, 1197 n.1 (9th Cir.
1998).

1 "Court Liaison" authorized to accept service on behalf of Navarro.
2 Navarro states that Ortiz "is not now and has never been authorized
3 by me to act as my authorized agent to accept service of summons
4 for a civil complaint in which I am a defendant." Navarro Decl. in
5 Support of Mot. to Strike ¶ 4.

6 DISCUSSION

7 I. Motion to Dismiss

8 A complaint must contain a "short and plain statement of the
9 claim showing that the pleader is entitled to relief." Fed. R.
10 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a
11 claim is appropriate only when the complaint does not give the
12 defendant fair notice of a legally cognizable claim and the grounds
13 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
14 (2007). In considering whether the complaint is sufficient to
15 state a claim, the court will take all material allegations as true
16 and construe them in the light most favorable to the plaintiff. NL
17 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).
18 However, this principle is inapplicable to legal conclusions;
19 "threadbare recitals of the elements of a cause of action,
20 supported by mere conclusory statements," are not taken as true.
21 Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009)
22 (citing Twombly, 550 U.S. at 555).

23 When granting a motion to dismiss, the court is generally
24 required to grant the plaintiff leave to amend, even if no request
25 to amend the pleading was made, unless amendment would be futile.
26 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
27 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment

1 would be futile, the court examines whether the complaint could be
2 amended to cure the defect requiring dismissal "without
3 contradicting any of the allegations of [the] original complaint."
4 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).
5 Leave to amend should be liberally granted, but an amended
6 complaint cannot allege facts inconsistent with the challenged
7 pleading. Id. at 296-97.

8 Plaintiffs indicate that, in any amended pleading, they do not
9 intend to assert state law claims. Accordingly, the Court need not
10 decide whether Plaintiffs sufficiently allege the state law claims
11 in their complaint.

12 Plaintiffs' Monell claim fails. A municipality may be liable
13 under section 1983 when the enforcement of a municipal policy or
14 custom was the moving force behind the violation of a
15 constitutionally protected right. Monell v. Dep't of Social
16 Servs., 436 U.S. 658, 663-64 (1978). To state a claim under
17 Monell, a plaintiff must plead "a constitutional right violation
18 resulting from (1) an employee acting pursuant to an expressly
19 adopted official policy; (2) an employee acting pursuant to a
20 longstanding practice or custom; or (3) an employee acting as a
21 final policymaker." Delia v. City of Rialto, 621 F.3d 1069, 1081-
22 82 (9th Cir. 2010) (citation and internal quotation marks omitted).
23 As explained further below, with one exception, Plaintiffs do not
24 allege cognizable violations of their constitutional rights. Even
25 if they plead violations, their Monell claim would nevertheless
26 fail because they do not allege a factual basis for their assertion
27 that Navarro was acting pursuant to a policy expressly adopted by
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1 the City or a longstanding practice or custom.

2 A. Violation of First Amendment Rights

3 Plaintiffs contend that Navarro violated their First Amendment
4 rights to freedom of association and to petition by failing to
5 record the license plate number of the driver's vehicle.

6 The First Amendment protects a right to freedom of expressive
7 association.² Villegas v. City of Gilroy, 484 F.3d 1136, 1141 (9th
8 Cir. 2007) (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18
9 (1984)). To assert a claim for infringement of this right, a
10 plaintiff must be part of a group that engages "in some form of
11 expression, whether it be public or private." Villegas, 484 F.3d
12 at 1141 (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 648
13 (2000)). Such expressive activities are those "explicitly stated
14 in the amendment: speaking, worshiping, and petitioning the
15 government." Villegas, 484 F.3d at 1142 (quoting IDK, Inc. v.
16 Clark Cnty., 836 F.3d 1185, 1192 (9th Cir. 1988)). Here,
17 Plaintiffs have not plead any facts regarding the motorcycle club
18 of which Plevin is a member. They do not suggest that it engages
19 in any activity explicitly enumerated in the First Amendment.
20 Thus, their freedom-of-association theory fails.

21 The First Amendment also protects the "right of meaningful
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23 ² Plaintiffs do not state whether their First Amendment theory
24 concerns their rights to intimate or expressive association. See
25 Freeman v. City of Santa Ana, 68 F.3d 1180, 1188 (9th Cir. 1995)
26 (explaining First Amendment's protection of "certain intimate
27 relationships" and the "right to associate for the purpose of
engaging in those expressive activities otherwise protected by the
Constitution"). Plaintiffs, however, do not allege facts or make
arguments that implicate their First Amendment right to intimate
association.

1 access to the courts." Delew v. Wagner, 143 F.3d 1219, 1222 (9th
2 Cir. 1998). This right may be infringed if police conduct
3 "effectively covers-up evidence and actually renders any state
4 court remedies ineffective." Id. (citing Swekel v. City of River
5 Rouge, 119 F.3d 1259, 1262 (6th Cir. 1997)). Plaintiffs contend
6 that Navarro had information identifying the driver who hit them,
7 but failed to record it. This allegation suggests a constitutional
8 violation because it indicates that Navarro prevented Plaintiffs
9 from obtaining evidence that he had, which precluded them from
10 seeking relief in state court against the driver. However,
11 Plaintiffs do not plead facts to support their claim that Navarro
12 did this pursuant to an official policy or practice. As a result,
13 although Plaintiffs state an individual section 1983 claim against
14 Navarro, they do not state a Monell claim against the City based on
15 this ground.

16 For these reasons, Plaintiffs' Monell claim against the City
17 is dismissed to the extent it rests on a violation of their First
18 Amendment rights.

19 B. Violation of Fourth Amendment Rights

20 The Fourth Amendment protects "against unreasonable searches
21 and seizures." U.S. Const., Amend. IV. Plaintiffs do not allege
22 in their complaint that Navarro committed any conduct falling
23 within the scope of Fourth Amendment protections. In their
24 opposition, they argue that Navarro violated the Fourth Amendment
25 by attempting to take Plevin's jacket "as a trophy." Opp'n at
26 16:14. Even if this were alleged in their complaint, it would not
27 be sufficient to state a Fourth Amendment claim for an unreasonable
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1 seizure. Plaintiffs do not suggest that Navarro meaningfully
2 interfered with Plevin's possessory interests in his jacket. See
3 United States v. Jefferson, 566 F.3d 928, 933 (9th Cir. 2009).
4 Further, there is no indication that Torres had a possessory
5 interest in the jacket on which she could base a Fourth Amendment
6 claim against Defendants.

7 Consequently, Plaintiffs' Monell claim against the City is
8 dismissed to the extent it rests on a violation of their Fourth
9 Amendment rights.

10 C. Violation of Fourteenth Amendment Rights

11 Plaintiffs assert that Navarro infringed their Fourteenth
12 Amendment rights to equal protection and due process.

13 "The Equal Protection Clause of the Fourteenth Amendment
14 commands that no State shall 'deny to any person within its
15 jurisdiction the equal protection of the laws,' which is
16 essentially a direction that all persons similarly situated should
17 be treated alike." City of Cleburne v. Cleburne Living Ctr., 473
18 U.S. 432, 439 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216
19 (1982)). To state a claim for relief under the Equal Protection
20 Clause, a plaintiff "must plead intentional unlawful discrimination
21 or allege facts that are at least susceptible of an inference of
22 discriminatory intent." Monteiro v. Tempe Union High Sch. Dist.,
23 158 F.3d 1022, 1026 (9th Cir. 1998). Plaintiffs do not allege
24 sufficient facts to support their assertion that, pursuant to an
25 official policy or practice, Navarro discriminated against them
26 because of their membership in a motorcycle club. Nor do
27 Plaintiffs plead that they were not treated the same as similarly-

1 situated individuals. Further, because they do not allege that
2 they are members of a suspect class, they must plead facts
3 demonstrating that Navarro's conduct was without a rational basis.
4 See Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895,
5 907 (9th Cir. 2007). They do not do so.

6 Plaintiffs' due process theory appears to have two grounds.
7 To the extent that Plaintiffs' claim under the Fourteenth
8 Amendment's Due Process Clause is based on the abridgement of their
9 fundamental right to access to the courts, it is subsumed under
10 their First Amendment claim for the infringement of this right.
11 See Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir.
12 1989). As explained above, although they state a claim against
13 Navarro for violation of this right, they fail to state a Monell
14 claim against the City on this ground because they do not plead
15 facts showing that Navarro acted pursuant to an official policy or
16 practice. Plaintiffs' theory of liability based on the alleged
17 deprivation of their property interest in a potential lawsuit
18 against the driver fails because "a party's property right in any
19 cause of action does not vest 'until a final unreviewable judgment
20 is obtained.'" Ileto v. Glock, Inc., 421 F. Supp. 2d 1274, 1299
21 (C.D. Cal. 2006) (quoting In re Consol. U.S. Atmospheric Testing
22 Litig., 820 F.2d 982, 989 (9th Cir. 1987)).

23 Accordingly, Plaintiffs' Monell claim against the City is
24 dismissed to the extent it rests on a violation of their Fourteenth
25 Amendment rights.

26 II. Anti-SLAPP Motion to Strike

27 California's anti-SLAPP statute provides,
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1 A cause of action against a person arising from any act
2 of that person in furtherance of the person's right of
3 petition or free speech under the United States
4 Constitution or the California Constitution in connection
5 with a public issue shall be subject to a special motion
6 to strike, unless the court determines that the plaintiff
7 has established that there is a probability that the
8 plaintiff will prevail on the claim.

9 Cal. Civ. Proc. Code § 425.16(b)(1). California anti-SLAPP motions
10 to strike are available to litigants proceeding in federal court.
11 Thomas v. Fry's Elecs., Inc., 400 F.3d 1206, 1206 (9th Cir. 2005).

12 Courts analyze these motions in two steps. "First, the
13 defendant must make a prima facie showing that the plaintiff's suit
14 arises from an act in furtherance of the defendant's rights of
15 petition or free speech." Mindys Cosmetics, Inc. v. Dakar, 611
16 F.3d 590, 595 (9th Cir. 2010) (citation and internal quotation
17 marks omitted). "Second, once the defendant has made a prima facie
18 showing, the burden shifts to the plaintiff to demonstrate a
19 probability of prevailing on the challenged claims." Id.

20 Generally, "a prevailing defendant on a special motion to
21 strike shall be entitled to recover his or her attorney's fees and
22 costs." Cal. Civ. Proc. Code § 425.16(c); see also Bernardo v.
23 Planned Parenthood Fed. of Am., 115 Cal. App. 4th 322, 360-367
24 (2004) (explaining policy behind mandatory fees and costs provision
25 of anti-SLAPP statute). A defendant may be deemed a prevailing
26 party entitled to attorneys' fees, even if a plaintiff voluntarily
27 dismisses the claims that were subject to an anti-SLAPP motion to
28 strike. See Coltrain v. Shewalter, 66 Cal. App. 4th 94, 107
(1998); Clear Channel Outdoor, Inc. v. Lee, 2009 WL 57110, at *1-*2
(N.D. Cal.); Pandora Jewelry, LLC v. Bello Paradiso, LLC, 2009 WL

1 1953468, at *3-*4 (E.D. Cal.). In determining whether to exercise
2 their discretion to deem a defendant a prevailing party, courts
3 must consider the "critical issue" of "which party realized its
4 objectives in the litigation." Coltrain, 66 Cal. App. 4th at 107.
5 A plaintiff "may try to show it actually dismissed because it had
6 substantially achieved its goals through a settlement or other
7 means, because the defendant was insolvent, or for other reasons
8 unrelated to the probability of success on the merits." Id.

9 The City's anti-SLAPP motion to strike is directed solely at
10 Plaintiffs' state law claims. As noted above, Plaintiffs do not
11 intend to assert these claims in an amended complaint, and the
12 City's motion to strike them is denied as moot. The City, however,
13 may seek attorneys' fees under the anti-SLAPP statute.

14 Accordingly, the City's anti-SLAPP motion for attorneys' fees
15 is DENIED without prejudice. The City may move for attorneys' fees
16 under the statute after judgment enters. Civil L.R. 54-5(a).

17 CONCLUSION

18 For the foregoing reasons, the Court GRANTS the City's motion
19 to dismiss (Docket No. 13), DENIES as moot the City's anti-SLAPP
20 motion to strike and DENIES without prejudice the City's anti-SLAPP
21 motion for attorneys' fees (Docket No. 16). Plaintiffs' Monell
22 claim against the City is dismissed with leave to amend. Except
23 for Navarro's purported infringement of their right to access to
24 the courts, Plaintiffs do not plead facts suggesting that their
25 other constitutional rights were violated. If they intend to
26 assert a Monell claim against the City, Plaintiffs must plead
27 factual bases for the alleged violations of their constitutional

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1 rights and the existence of an official policy or longstanding
2 practice that led to these violations.

3 If Plaintiffs intend to file an amended complaint, they shall
4 do so within fourteen days of the date of this Order and serve it
5 on Navarro by September 9, 2011. Fed. R. Civ. P. 4(m). Defendants
6 shall answer or otherwise respond to Plaintiffs' amended complaint
7 within twenty-one days of the date they serve Navarro. If counsel
8 for the City ultimately represents Navarro, any motion to dismiss
9 by the City and Navarro shall be filed jointly. Any motion to
10 dismiss will be taken under submission on the papers.

11 The case management conference, presently set for August 23,
12 2011, is continued to October 18, 2011 at 2:00 p.m.

13 IT IS SO ORDERED.

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15 Dated: 7/29/2011



CLAUDIA WILKEN
United States District Judge

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