IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DENNIS R. HOOPER,

Plaintiff,

v.

NORTH BEND CITY/COOS-CURRY HOUSING AUTHORITIES; LISA LUCERO, in her Official Capacity and as an Individual; LARRY SCARBROUGH, in his Official Capacity and as an Individual; et al.,

Defendants.

Civ. No. 6:16-cv-00005-MC

OPINION AND ORDER

MCSHANE, Judge:

In December of 2013, employees of the North Bend/ Coos-Curry Housing Authority (Housing Authority) entered plaintiff's dwelling without notice following a power shut off to his unit. They were acting pursuant to a policy of the Housing Authority that treats power shut offs as an "emergency." Plaintiff, in his complaint, alleges that the entry into his unit violates his civil rights under 42 U.S.C. § 1983 (unreasonable search and First Amendment). He also brings numerous tort claims (invasion of privacy, trespass, infliction of emotional distress) and a claim for breach of contract. Because the individual defendants are entitled to qualified and discretionary immunity, they are entitled to Summary Judgment as to the civil rights claim and

the tort claims. Plaintiff's contract claim falls outside of the statute of limitations and must be dismissed. Finally, plaintiff has failed to plead compensable injury.

FACTUAL BACKGROUND

The facts in this case are undisputed. Plaintiff was under a residential lease with Housing Authority. Matthews Decl. Ex. 1 pages 6 and 21, ECF No. 67. As part of the lease, plaintiff was obligated to pay his own electricity bill. *Id*., page 7. The lease also allowed the Housing Authority, as Landlord, to "enter the dwelling unit at any time without advance notice when there is reasonable cause to believe an emergency exists." *Id*., pages 8 and 23.

As a result of plaintiff's unpaid electricity bills, the utility company turned off the electricity to plaintiff's rental unit on December 18 or 19, 2013. *Id*., pages 8-10. After his electricity was turned off, plaintiff remained at his rental unit for a few days, and then left without informing anyone at the Housing Authority about the shut off. He did not return until January 2, 2014. *Id*., pages 11-14.

On December 23, 2013, Larry Scarbrough, a Housing Authority maintenance employee, noticed that the meter at plaintiff's unit had been red tagged, indicating the electricity had been turned off. Scarbrough Decl., ¶ 3, ECF No. 21. Mr. Scarbrough knew that plaintiff was out of town and reported the electricity shut off to Housing Authority management that day. *Id*., ¶¶ 4-5.

After learning what had happened, Lisa Lucero, the public housing manager for Housing Authority, contacted the electric utility to confirm that the electricity to the unit had been shut off. Ms. Lucero then directed Mr. Scarbrough to enter and inspect plaintiff's unit. Lucero Decl. ¶ 4; ECF No. 22. He did so on December 24, 2013. Scarbrough Decl. ¶¶ 5-6; ECF No. 21. Finding nothing that required immediate attention, he closed the unit, posted a notice of his entry on the front door, and left. *Id*., ¶¶ 6-7.

Housing Authority has a standard policy and practice to inspect a unit when it learns that electricity has been turned off for non-payment. Lucero Decl. ¶ 7; ECF No. 22. The purpose of the policy and practice is to address concerns that may result from the disconnection of utilities, often associated with a tenant's abandonment of the unit. Turner Decl. ¶ 6; ECF No. 20. These concerns range from frozen or burst water pipes, rotting food stuffs, vermin infestations, distressed pets, deterioration of living areas, and vandalism. Turner Decl. ¶ 6; Lucero Decl. ¶ 7. Housing Authority considers the need to immediately assess and remedy these types of problems an emergency. Turner Decl. ¶ 7.

The Housing Authority's decision to treat all electric power disconnections as an emergency was made by the Housing Authority's executive director by delegation of authority from the Housing Authority's Board of Directors. Newman Decl. ¶ 3; ECF No. 69. The Housing Authority's policy of treating a power disconnect as an emergency and conducting an inspection does not allow staff to make any exceptions. *Id*. ¶ 7.

Plaintiff alleges compensatory damages in the amount of $3,327.00. Second Amend. Compl. 6; ECF No. 50. Plaintiff's economic damages claim consists of the twenty dollars that he paid to a friend to cover gas for a ride to attend a veteran's group meeting. Matthews Decl. II, Ex. 1; ECF No. 68. Plaintiff's purpose in attending the meeting was to poll group members to find out if any of them had experienced privacy issues in public housing similar to what plaintiff experienced. *Id*. The remaining $3,307 in damages claimed by plaintiff is for emotional distress, pain, and suffering. *Id*. Plaintiff chose that dollar amount simply because he wanted a number that was "legitimate"—more than insignificant, but less than overzealous. *Id*.

During the same time period for which plaintiff alleges emotional distress in this case, plaintiff also alleges mental and emotional distress, duress, pain and suffering, stress and anxiety,

angst and mental anguish, resulting from no fewer than six different tortious sources unrelated to this the December 2013 entry into his dwelling. *Id*. For example plaintiff has filed a complaint alleging mental and emotional distress as the result of the activities of his neighbors from April 2013 through February 2017. *Id*.; *Dennis Hooper v. United States Dep't. of Hous. and Urban Dev.*, No. 6:17-cv-00031-MC, Opinion & Order, Dkt No. 28 (D. Or. May 31, 2017).

STANDARD OF REVIEW

The court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is "genuine" if a reasonable jury could return a verdict in favor of the non-moving party. *Rivera v. Phillip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A fact is "material" if it could affect the outcome of the case. *Id.* The court reviews evidence and draws inferences in the light most favorable to the non-moving party. *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 988 (9th Cir. 2006) (quoting *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999)). When the moving party has met its burden, the non-moving party must present "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (quoting Fed. R. Civ. P. 56(e)).

DISCUSSION

I. Qualified Immunity on Plaintiff's federal claims against individual defendants

The Individual Defendants in this case have raised the defense of qualified immunity. Qualified immunity hinges on whether the Individual Defendants violated a clearly established constitutional right in their individual capacities. An official's conduct will only violate a "clearly established" right when "at the time of the challenged conduct, the contours of a right

are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034 (1987)) (internal bracketing and quotations omitted). Existing precedent "must have placed the statutory or constitutional question beyond debate." *Id.* at 741. The Supreme Court, in analyzing qualified immunity and the "clearly established" requirement, looks to whether precedent that directly establishes a right exists, and does not account for emergent or theoretical rights. *Id.* "Clear established" law is not defined "at a high level of generality" but rather must be "particularized" to the facts of the case. *Id*. at 742.

In this case, for purposes of qualified immunity analysis, plaintiff must show that the defendant's violated a clearly established constitutional right by inspecting the dwelling under the circumstances presented; specifically, by inspecting the dwelling without notice under a policy that defines a power shut off to the unit as an emergency. Because there is no law indicating that the conduct of the defendants under these circumstances violates a clearly established constitutional right, plaintiff's federal claims against the individual defendants are dismissed.

II. Compensable Injury

Compensatory damages cannot be presumed from a violation of a claimant's constitutional rights. *Watson v. City of San Jose*, 800 F.3d 1135, 1141 (9th Cir. 2015), *citing Carey v. Piphus*, 435 U.S. 247 (1978). Plaintiff has the burden of proving he suffered actual distress because of the alleged constitutional violation. *Id*. Plaintiff is required to establish the causal connection between the alleged violation and the resulting distress. *Id*.

I find that no reasonable juror would be able to distinguish the emotional distress plaintiff alleges he suffered as a result of one tortious activity from the emotional distress plaintiff alleges he suffered during the same time from the six other tortious activities, absent pure speculation. I also find that the twenty dollars paid by plaintiff to a friend for gas money is not a compensable economic injury. Because plaintiff has not sustained any damages related to his federal claim, his federal claims are dismissed.

III. Immunity on Plaintiff's state tort claims against individual defendants

Oregon public bodies and their employees are immune from tort liability except to the extent immunity is waived by the Oregon Tort Claims Act. ORS 30.265(2). Unless the amount of damages alleged exceeds the statutory limit of liability for public entities, the sole cause of action for tort liability is against the public entity and not against the entity's employees. ORS 30.265(3). The liability limit for local public bodies for the state tort claims in this case is $633,300. ORS 30.271(2)(e). Plaintiff's alleged damage is in the amount of $3,327. Second Amend. Compl. 6, ECF No. 50. Because plaintiff's claimed damage amount does not exceed the statutory cap for claims against local public entities, the Individual Defendants are entitled to immunity from tort liability on plaintiff's state claims.

IV. Discretionary Immunity on Plaintiff's state tort claims against Housing Authority

Public entities are immune from tort liability for "[a]ny claim based on the performance of . . . a discretionary function or duty, whether or not the discretion is abused." ORS 30.265(6)(c). The decision of a government official or public entity is entitled to discretionary immunity if a governmental person or entity made the policy choice among alternatives, with the authority to make that choice. *Westfall v State of Oregon Dept. of Corrections*, 355 Or. 144 (2014); *see also Timberlake ex rel. Estate of Lyon v. Washington County*, 228 Or. App. 607

(2009) (A public entity is protected from liability for decisions that require a policy judgment by a person or body with governmental discretion.)

Here, Housing Authority Executive Director's decision to treat all power disconnections as an emergency was made through delegation of policy-making authority from the Housing Authority's Board of Directors. That policy level decision was the result of the Housing Authority's concern for tenant health and safety in the event of a power shut off. Newman Decl., Ex. 2 & Ex. 3; ECF No. 69. Because Housing Authority was exercising discretionary policy decision making when it determined to treat all power disconnections as an emergency, and because the entry into plaintiff's unit on December 24, 2013 was done pursuant to that policy, Housing Authority is entitled to discretionary immunity. The state tort claims against Housing Authority are dismissed.

V. Statute of limitations as applied to Plaintiff's breach of contract claim

The limitations period for claims arising under a rental agreement is one year. ORS 12.125. Plaintiff's breach of contract claim accrued on or about January 2, 2014. Because plaintiff's complaint was not filed until January 4, 2016, after the one year statute of limitations has expired, plaintiff's breach of contract claim is time barred and dismissed.

CONCLUSION

For the reasons above, Defendants' Motion for Summary Judgment (ECF No. 67) is GRANTED.

IT IS SO ORDERED.

Dated this 18th day of July, 2017.

_____/s/Michael J. McShane_____
Michael J. McShane
United States District Judge