United States District Court,
E.D. California.
Pamela KINCAID, et al., Plaintiff,
v.
CITY OF FRESNO, et al., Defendants.
No. CV-F-06-1445 OWW.

May 12, 2008.

Michael Temple Risher, American Civil Liberties Union of Northern California, San Francisco, CA, Paul Alexander, Heller Ehrman, LLP, Menlo Park, CA, for Plaintiff.

James B. Betts, Betts & Wright, Fresno, CA, David Paul Harris, Caltrans Legal Division, Navtej Singh Bassi, California Department of Transportation, Sacramento, CA, for Defendants.

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY AGAINST THE CITY DEFENDANTS (Doc. 212)

OLIVER W. WANGER, District Judge.

***1** Before the Court is Plaintiffs' motion for summary judgment as to liability against Defendants City of Fresno; Chief of Police Jerry Dyer; Fresno Police Department Captain Greg Garner; Fresno Police Officer Reynaud Wallace; John Rogers, Manager of the Community Sanitation Division of the City of Fresno; and Phillip Weathers, employee of the Community Sanitation Division of the City of Fresno.

Plaintiffs' motion was argued on April 25, 2008 and orally granted in part and denied in part from the bench. This Memorandum Decision is intended to amplify the Court's oral rulings made on April 25, 2008.[FN1]

> FN1. Plaintiffs' motion for summary judgment against the Caltrans Defendants and the Caltrans Defendants' motions for summary judgment are resolved by separate Memorandum Decision.

This action concerns a number of clean-up operations (sweeps) conducted by Defendants. The certified class is comprised of "[a]ll persons in the City of Fresno who were or are homeless, without residence, after October 17, 2003, and whose personal belongings have been unlawfully taken and destroyed in a sweep, raid, or clean up by any of the Defendants. For more than a year, Defendants implemented a policy of seizing and immediately destroying personal property of homeless individuals in an effort to clean up the City of Fresno. A number of these clean up efforts occurred on property belonging to Caltrans. The SAC alleges nine claims for relief:

1. First Claim for Relief-Denial of Constitutional Right Against Unreasonable Search and Seizure in violation of the Fourth Amendment pursuant to 28 U.S.C. § 1983;

2. Second Claim for Relief-Denial of Constitutional Right to Due Process of Law in violation of the Fourteenth Amendment pursuant to 28 U.S.C. § 1983;

3. Third Claim for Relief-Denial of Constitutional Right to Equal Protection of the Laws in violation of the Fourteenth Amendment pursuant to 28 U.S.C. § 1983;

4. Fourth Claim for Relief-Denial of Constitutional Right Against Unreasonable Search and Seizure in violation of California Constitution, Article I, § 13;

5. Fifth Claim for Relief-Denial of Constitutional Right to Due Process of Law in violation of California Constitution Article I, § 7(A);

6. Sixth Claim for Relief-Denial of Constitutional Right to Equal Protection of the Laws in violation of California Constitution, Article I, § 7(A);

7. Seventh Claim for Relief-Violation of California Civil Code § 2080 *et seq.* and California Government Code § 815.6;

8. Eighth Claim for Relief-Violation of California Civil Code § 52.1;

9. Ninth Claim for Relief-Common Law Conversion.

The SAC prays for injunctive relief enjoining Defendants from continuing or repeating the alleged unlawful policies, practices and conduct; for declaratory relief that Defendants' alleged policies, practices and conduct were in violation of Plaintiffs' rights under the United States and California Constitutions and the laws of the United States and California; for return of Plaintiffs' property; for damages according to proof but no less than $4,000 per incident under California Civil Code §§ 52 and 52.1 and California Government Code § 815.6; for punitive and exemplary damages; and for attorneys' fees and costs of suit.

A. *GOVERNING STANDARDS.*

***2** Summary judgment is proper when it is shown that there exists "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. A fact is "material" if it is relevant to an element of a claim or a defense, the existence of which may affect the outcome of the suit. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987). Materiality is determined by the substantive law governing a claim or a defense. *Id.* The evidence and all inferences drawn from it must be construed in the light most favorable to the nonmoving party. *Id.*

The initial burden in a motion for summary judgment is on the moving party. The moving party satisfies this initial burden by identifying the parts of the materials on file it believes demonstrate an "absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden then shifts to the nonmoving party to defeat summary judgment. *T.W. Elec.*, 809 F.2d at 630. The nonmoving party "may not rely on the mere allegations in the pleadings in order to preclude summary judgment," but must set forth by affidavit or other appropriate evidence "specific facts showing there is a genuine issue for trial."*Id.* The nonmoving party may not simply state that it will discredit the moving party's evidence at trial; it must produce at least some "significant probative evidence tending to support the complaint."*Id.* As explained in *Nissan Fire & Marine Ins. Co. v. Fritz Companies*, 210 F.3d 1099, 1102-1103 (9th Cir.2000):

> The vocabulary used for discussing summary judgments is somewhat abstract. Because either a plaintiff or a defendant can move for summary judgment, we customarily refer to the moving and nonmoving party rather than to plaintiff and defendant. Further, because either plaintiff or defendant can have the ultimate burden of persuasion at trial, we refer to the party with and without the ultimate burden of persuasion at trial rather than to plaintiff and defendant. Finally, we distinguish among the initial burden of production and two kinds of ultimate burdens of persuasion: The initial burden of production refers to the burden of producing evidence, or showing the absence of evidence, on the motion for summary judgment; the ultimate burden of persuasion can refer either to the burden of persuasion on the motion or to the burden of persuasion at trial.
>
> A moving party without the ultimate burden of persuasion at trial-usually, but not always, a defendant-has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment ... In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial ... In order to carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact ....
>
> ***3** If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial ... In such a case, the nonmoving party may defeat the motion for summary judgment without producing anything ... If, however, a moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense ... If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment ... But if the nonmoving party produces enough evidence to create a genuine issue of material fact, the nonmoving party defeats the motion.

In *Carmen v. San Francisco Unified School District, supra,* 237 F.3d at 1031, the Ninth Circuit held:

> [T]he district court may determine whether there is a genuine issue of material fact, on summary judgment, based on the papers submitted on the motion and such other papers as may be on file and specifically referred to and facts therein set forth in the motion papers. Though the court has discretion in appropriate circumstances to consider other materials, it need not do so. The district court need not examine the entire file for evidence establishing a genuine issue of material fact, where the evidence is not set forth in the opposing papers with adequate references to that it could conveniently be found.

The question to be resolved is not whether the "evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *United States ex rel. Anderson v. N. Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir.1995). This requires more than the "mere existence of a scintilla of evidence in support of the plaintiff's position"; there must be "evidence on which the jury could reasonably find for the plaintiff."*Id.* The more implausible the claim or defense asserted by the nonmoving party, the more persuasive its evidence must be to avoid summary judgment." *Id.*

B. *STATEMENT OF ADMITTED FACTS.*

At the hearing on the motion for summary judgment, the City Defendants conceded that the City conducted 14 clean up efforts in which the residents of a temporary encampment were asked to relocate themselves and their personal property before the area was cleared by City crews:

A. February 4, 2004-Santa Clara Avenue;

B. August 4, 2004-Golden State and Ventura Street off ramp;

C. January 2005-E Street, F Street and the Monterey Street overpass;

D. June 27, 2005-California Street and Golden State, near Highway 41;

E. October 15, 2005-Santa Clara and G or E Streets;

F. January 11, 2006-Santa Clara and G or E Streets;

G. January 18, 2006-Santa Clara and G or E Streets;

H. February 12, 2006-Monterey Street overpass;

I. March 2006-H Street and Monterey Street overpass;

***4** J. April 6, 2006-Santa Clara and G or E Streets;

K. May 3, 2006-E Street;

L. May 25, 2006-Santa Clara and G or E Streets;

M. June 22, 2006-E Street and Santa Clara;

N. August 26, 2006-E Street

The City Defendants conceded at the hearing that the clean ups on these 14 days were conducted pursuant to the City's policy previously found to be unlawful by the Court during the preliminary injunction proceedings.

With the exception of the professional job titles and duties of the individual City Defendants and certain other admitted facts, the balance of the facts in this action are disputed and will be resolved at trial. Because the parties' respective statements of undisputed facts and responses thereto are voluminous, comprising more than one hundred pages, this Memorandum Decision does not describe them in any further detail.

C. *PLAINTIFFS' MOTION AGAINST CITY DEFENDANTS.*

Plaintiffs move for summary judgment against the City Defendants on all claims alleged in the SAC.

1. *Federal Constitutional Claims.*

a. *Fourth Amendment.*

The Fourth Amendment to the United States Constitution protects against unreasonable searches

and seizures. *Menotti v. City of Seattle*, 409 F.3d 1113, 1152 (9th Cir.2005). A seizure is unreasonable if the government's legitimate interests in the seizure outweigh the individual's legitimate expectations of privacy. *See Maryland v. Buie*, 494 U.S. 325, 331, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). A seizure for Fourth Amendment purposes may also occur when there is some meaningful interference with an individual's possessory interest in property. *Soldal v. Cook County, Ill.*, 506 U.S. 56, 63, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992). Seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Fourth Amendment has taken place. *Id.* at 68.An officer who comes across an individual's property in a public area may seize it only if Fourth Amendment standards are satisfied-for example, if the items are evidence of a crime or contraband. *Id.*

The City Defendants do not respond to the merits of Plaintiffs' motion that the seizure and immediate destruction of unattended personal property of homeless persons violates the Fourth Amendment. Defendants did not dispute this argument at the hearing.

Because the City Defendants have not responded to their claim of violation of the Fourth Amendment, Plaintiffs contend. that they are entitled to summary judgment on their Fourth Amendment claim.

If Plaintiffs establish facts at trial that the City Defendants seized and immediately destroyed the personal property of Plaintiffs, Plaintiffs will have established a violation of the Fourth Amendment as a matter of law.

b. *Fourteenth Amendment Due Process Clause.*

The Second Claim for Relief alleges that Defendants' alleged policies, practices and conduct violate plaintiffs' right to due process of law under the Fourteenth Amendment.

Plaintiffs' Fourteenth Amendment Due Process Clause claim is grounded on procedural due process.

***5** The Plaintiffs' personal possessions constitute property for purposes of the Fourteenth Amendment. *See Fuentes v. Shevin*, 407 U.S. 67, 84, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).“The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard at a meaningful time and in a meaningful manner.” *Orloff v. Cleland*, 708 F.2d 372, 379 (9th Cir.1983). As explained in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433-434, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982):

> As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that ‘*some* form of hearing’ is required before the owner is finally deprived of a protected property interest ... And that is why the Court has stressed that, when a ‘statutory scheme makes liability an important factor in the State's determination ..., the State may not, consistent with due process, eliminate consideration of that factor in its prior hearing ... To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.

“We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in ‘ “extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.” ’ ” *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). When a protected property interest is threatened, three factors must be considered to determine whether the basic requirements of procedural due process have been met:

> “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirement would entail.”

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Plaintiffs argue that they are entitled to summary judgment that the City Defendants violated their right

to procedural due 10 process. Plaintiffs do not discuss the adequacy of notice but, rather, focus solely on the immediate destruction of property following the seizures during the clean ups. Plaintiffs contend that the record in this action establishes that this immediate destruction prevented Plaintiffs from any opportunity to present a claim of entitlement to the property destroyed.

The City Defendants do not address the factual or legal merits of Plaintiffs' Fourteenth Amendment procedural due process claim. Rather, the City Defendants refer to the Fifth Amendment's takings clause, a claim not pled by Plaintiffs. The City Defendants cite *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir.1996) in contending that "Plaintiff's [sic] more generalized takings claim premised on a violation of the Fourteenth Amendment's Due Process Clause is subsumed by his [sic] more particular takings claim premised on a violation of the Fifth Amendment's Just Compensation Clause."

***6** The City Defendants make this argument because, under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), a takings claim against a public entity is not ripe if a property owner has an adequate remedy under state law for obtaining just compensation and the property owner has not availed himself of that process. Until the property owner has been denied just compensation, no constitutional violation occurs. In *Williamson*, a successor in interest to developers brought an action against the planning commission, alleging that the application of government regulations involving a county zoning ordinance for the cluster development of residential areas affected a taking of property for which the Fifth Amendment required just compensation. The Supreme Court, assuming that the government regulation may affect a taking within the Fifth Amendment and that the Fifth Amendment required payment of money damages to compensate for the taking, any award of damages was premature where the developer had not yet obtained a final decision regarding the application of the ordinance and its regulations to its property and had not yet utilized state law procedures for obtaining just compensation.

"Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular source of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

The Fifth Amendment provides that "[n]o person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation."[FN2]

> FN2."The Due Process Clause of the Fifth Amendment ... appl[ies] only to actions of the federal government-not to those of state or local governments." *Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir.2001), citing *Schwieker v. Wilson*, 450 U.S. 221, 227, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981).

In *Armendariz*, owners of low-income housing properties brought a Section 1983 damages action against city officials, alleging that conducting sweeps and overenforcing a housing code to relocate criminals violated substantive due process. The Ninth Circuit explained:

> What plaintiffs allege is a scheme by defendants to evict tenants, deprive the plaintiffs of rental income that could have been used to bring the buildings into compliance, prevent owners from learning what repairs were necessary to come into compliance, and invent new violations after plaintiffs had conducted repairs that would bring their properties into compliance. The alleged purpose of this scheme was to deprive the plaintiffs of their property, either by forced sale, driving down the market value of the properties so a shopping-center developer could buy them at a lower price, or by causing the plaintiffs to lose their properties by foreclosure ... If the plaintiffs can prove their allegations, the defendants' actions would constitute a taking of the property.

Id. at 1321.The Ninth Circuit held that "since the Takings Clause 'provides an explicit textual source of constitutional protection' against 'private takings,' the Fifth Amendment (as incorporated by the Fourteenth), 'not the more generalized notion of "substantive due process," must be the guide' in

reviewing the plaintiffs' claim of a "private taking" ...' and that "[b]ecause the conduct that the plaintiffs allege is the type of government action that the Fourth and Fifth Amendments regulate, *Graham* precludes their substantive due process claim." *Armendariz, supra*, 75 F.3d at 1324.[FN3]

> FN3.*Armendariz* has been limited by the Ninth Circuit in *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020 (9th Cir.2007), based on the Supreme Court's decision in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). In *Lingle*, the Supreme Court held an arbitrary and irrational deprivation of real property, although it would no longer constitute a taking, might be "so arbitrary or irrational that it runs afoul of the [substantive] Due Process Clause." 544 U.S. at 542. The Ninth Circuit held: "Given that holding, it must be true that the *Armendariz* line of cases can no longer be understood to create a 'blanket prohibition' of all property-related substantive due process claims.'*Squaw Valley*, 375 F.3d at 949. After *Lingle*,'the Fifth Amendment does not invariably preempt a claim that land use action lacks any substantial relation to the public health, safety, or general welfare.'*Crown Point*, at 856, regardless of anything *Squaw Valley* said to the contrary ... We see no difficulty in recognizing the alleged deprivation of rights in real property as a proper subject of substantive due process analysis." 509 F.3d at 1025-1026.

***7** The City Defendants cite a number of cases for the proposition that a Fourteenth Amendment procedural due process claim is subsumed in a Fifth Amendment takings claim.

The City Defendants cite *Miller v. Campbell County*, 945 F.2d 348 (10th Cir.1991).

In *Miller*, homeowners brought a suit for damages suffered when their village was declared uninhabitable by county commissioners. Plaintiffs brought both a Fifth Amendment takings claim and procedural and substantive due process claims. The Tenth Circuit held:

> Because the Just Compensation Clause of the Fifth Amendment imposes very specific obligations upon the government when it seeks to take private property, we are reluctant in the context of a factual situation that falls squarely within that clause to impose new and potentially inconsistent obligations upon the parties under the substantive or procedural components of the Due Process Clause. It is appropriate in this case to subsume the more generalized Fourteenth Amendment due process protections within the more particularized protections of the Just Compensation Clause.

945 F.2d at 348.

In *Rocky Mountain Materials & Asphalt, Inc. v. Bd. of County Comm'rs of El Passo County*, 972 F.2d 309 (10th Cir.1992), also cited by the City Defendants, a mining company brought a civil rights action against a county and its board of commissions, claiming that its property had been taken without just compensation in violation of the Fifth Amendment and in violation of procedural due process under the Fourteenth Amendment. The Tenth Circuit held:

> When a plaintiff alleges that he was denied a property interest without due process, and the loss of that property interest is the same loss upon which the plaintiff's takings claim is based, we have required the plaintiff to utilize the remedies applicable to the takings claim ... [U]ntil a plaintiff has resorted to the condemnation procedures to recover compensation for the alleged taking, the procedural due process claim is likewise not ripe because it is in essence based on the same deprivation.

972 F.2d at 311.

The City Defendants cite *Bateman v. City of West Bountiful*, 89 F.3d 704 (10th Cir.1996). In *Bateman*, a property owner brought a civil rights action against the city alleging that a city official's filing of a certificate of noncompliance after an alleged waiver of zoning requirements violated the Fifth Amendment's takings clause, due process and equal protection. "The Tenth Circuit repeatedly has held that the ripeness requirement of *Williamson* applies to due process and equal protection claims that rest upon the same facts as a concomitant takings claim." *Id.* at 709.

The City Defendants cite *Taylor Inv., Ltd. v. Upper Darby Tp.*, 983 F.2d 1285 (3rd Cir.1993) (owners brought civil rights action against township arising from zoning hearing officer's revocation of tenant's use permit, alleging violations of substantive due process, procedural due process, and equal protection. The Third Circuit held:

> ***8** Defendants contend that the finality rule applies regardless of the theory on which plaintiffs attack a land-use decision-even where the attack is premised on substantive due process, procedural due process, and equal protection. We believe the finality rule applies to each of plaintiffs' claims.

983 F.2d at 1292. *Accord Bigelow v. Michigan Department of Natural Resources*, 970 F.2d 154, 159-160 (6th Cir.1992), where commercial fishermen brought an action against the state, alleging, *inter alia*, a taking without just compensation and denial of equal protection and procedural due process arising from the state's support of a plan, approved by the federal court, in which Indians were given exclusive rights to fish in certain state waters; *John Corporation v. City of Houston*, 214 F.3d 573, 585-586 (5th Cir.2000), where owners of demolished buildings brought an action against the city, alleging that the city demolished the property without a public purpose and without just compensation in violation of the Fifth Amendment, as well as their rights under the Eighth and Fourteenth Amendments.

Relying on these cases, the City Defendants contend:

> When a plaintiff alleges that it was denied a property interest without due process, and the loss of that property interest is the same loss upon which the plaintiff's [sic] takings claim is based, it [sic] must utilize the remedies applicable to the takings claim in order to satisfy the ripeness requirement. In this case, because Plaintiffs' procedural due process claim is premised on the same allegations as their unlawful taking, it too is premature. The unripe takings claim renders the ancillary due process claim unripe as well. Thus, until Plaintiffs have pursued their remedies in state court, a federal court cannot make a complete determination as to the allegations of procedural due process.

Plaintiffs reply that they have not alleged a Fifth Amendment takings claim in the SAC. They further note that the cases upon which the City Defendants rely all involve zoning or similar regulatory situations. Plaintiffs note that in *Williamson County*, a successor in interest to developers brought an action against the planning commission alleging the taking of property.

Plaintiffs argue that these cases have no application to this action in which Plaintiffs claim that the total and immediate destruction of their personal possessions violated procedural due process under the Fourteenth Amendment. Plaintiffs cite *San Bernardino Physicians' Services Medical Group, Inc. v. County of San Bernardino*, 825 F.3d 1404 (9th Cir.1987). There, an incorporated physicians' group, whose contract to supply medical services to the county was terminated, brought an action against the county, alleging deprivation of property interest without due process of law. In *dicta*, the Ninth Circuit noted:

> Appellees argue that even if Physicians' Group has a protectible interest under state and federal law, no harm is done until plaintiffs exhaust their state court remedies. *Cf. Williamson County Regional Planning v. Hamilton Bank*, 473 U.S. 172, 194-95, 105 S.Ct. 3108, 87 L.Ed.2d 126 ... (1985).*Williamson*, however, dealt with a situation where there could be no requirement of predeprivation due process. *See also Hudson v. Palmer*, 468 U.S. 517, 532-33, 104 S.Ct. 3194, 82 L.Ed.2d 393 ... (1984); *Parratt v. Taylor*, 451 U.S. 527, 541, 101 S.Ct. 1908, 68 L.Ed.2d 420 ... (1981). Here, Physicians' Group alleges planned, non-random behavior on the part of the state. In such circumstances, a section 1983 case for violation of due process may lie without regard to, or use of, the state's postdeprivation remedies. *Logan [v. Zimmerman Brush Co.]*, 455 U.S. at 435-37... The district court ruled correctly on this issue.

***9** 825 F.2d at 1410 n. 6.

In *Pottinger v. City of Miami*, 810 F.Supp. 1551 (S.D.Fla.1992), the District Court granted declaratory and injunctive relief in a bifurcated trial in which homeless plaintiffs alleged that the seizure and destruction of their personal property violated their constitutional rights. The *Pottinger* Court found that

the City of Miami's seizure and destruction of the plaintiffs' personal property violated the Fifth Amendment Takings Clause. *Id.* at 1570 n. 30.The District Court stated:

> The City argues that plaintiffs' fifth amendment claim must fail because they have not shown that their property was taken for a 'public use.' However, the United States Supreme Court has defined 'public use' broadly. *See* *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240, 104 S.Ct. 2321, 81 L.Ed.2d 186 ... (1984). In *Midkiff*, the Court stated that '[t]he 'public use' requirement is ... coterminous with the scope of a sovereign's police powers,'*id.*, and that the proper test is whether the 'exercise of the eminent domain power is rationally related to a conceivable public purpose,'*id.* at 241... In rejecting the argument that the government must use or possess the condemned property, the Court stated that 'it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.'*Id.* at 244... Similarly, under the *Midkiff* analysis, the fact that the City does not actually use or possess the property taken from the homeless does not mean that there is no 'public use,' and therefore no taking under the fifth amendment.
>
> Although the evidence does substantiate plaintiffs' claim that there have been 'takings' of class members' property, the more difficult question in this case is how plaintiffs may be 'justly compensated.' The Supreme Court has defined 'just compensation' as placing the property owner in the same position monetarily as he would have been if his property had not been taken. *United States v. Reynolds*, 397 U.S. 14, 16, 90 S.Ct. 803, 25 L.Ed.2d 12 ... (1970). The court is unable to address this issue based on the evidence presented. Consequently, the issue of 'just compensation' will have to be the subject of a separate evidentiary hearing.

Id.

In *Wong v. City and County of Honolulu*, 333 F.Supp.2d 942 (D.Hawai'i 2004), the District Court addressed qualified immunity from liability under Section 1983 based on the seizure and destruction of derelict vehicles pursuant to statutes that did not provide for notice and an opportunity to be heard prior to the destruction, thereby violating Plaintiff's rights under the Fourth Amendment, the Fourteenth Amendment Due Process Clause, and the Fifth Amendment's Takings Clause. With regard to the Fifth Amendment takings claim, the District Court held:

> Plaintiff alleges that the removal and destruction of the motorcycles from the area around his shop represented an unlawful taking without just compensation, in violation of the Fifth Amendment. However, 'it was recognized [long ago] that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.' *Keystone Bituminous Coal Assn' v. DeBenedictis*, 480 U.S. 470, 491-92, 107 S.Ct. 1232, 94 L.Ed.2d 472 ... (1987)...; *see also* *Miller v. Schoene*, 276 U.S. 272, 279-80, 48 S.Ct. 246, 72 L.Ed. 568 ... (1928) (noting that 'where the public interest is involved[,] preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property').
>
> ***10** Although removal and immediate disposition under H.R.S. §§ 290-8 and 290-9 would be in substantial advancement of legitimate state interests, and cannot be considered a violation of the Takings Clause, *see* *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022-24, 112 S.Ct. 2886, 120 L.Ed.2d 798 ... (1992), genuine issues of material fact exist as to whether the motorcycles were properly designated as derelict under H.R.S. § 290-8, and whether Defendant Penarosa acted arbitrarily and capriously by removing and destroying the motorcycles on May 1, 2001 after providing a disputed deadline of May 7 ... The Court is accordingly precluded from granting qualified immunity as to Plaintiff's Fifth Amendment Claim against Defendant Penarosa.

Id. at 955.

Neither *Pottinger* or *Wong* constitute persuasive authority that Plaintiffs are required by *Graham v. Connor* and *Armendariz* to plead and prove a Fifth

Amendment Takings Claim in lieu of a Fourteenth Amendment procedural due process claim. *Williamson* assumed that a taking had occurred and that just compensation was required. *Armendariz* did not involve a claim for violation of procedural due process but, rather, substantive due process, and did not involve facts similar to those before the Court. Other than the statements in *Pottinger* and *Wong*, no authority is cited or has been located holding that a plaintiff alleging that his or her personal property has been seized and destroyed by police action sweeps or clean ups is limited to a Fifth Amendments Takings Claim.

The City Defendants' contention that Plaintiffs' motion for summary judgment must be denied on the ground that they have not complied with the requirements of the Fifth Amendments Takings Clause is without merit.

Plaintiffs' motion for summary judgment on their of violation of the Fourteenth Amendment procedural due process claim is DENIED because issues of fact exist as to the fact and adequacy of notice and the amount of any damages.

c. *Equal Protection.*

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)."The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons ... We have attempted to reconcile the principle with reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

Plaintiffs assert that there is no dispute that the Clean-up policy and practice at issue applied only to homeless persons. Plaintiffs cite *City of Cleburne, supra:*"[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." 473 U.S. at 448. Plaintiffs assert that "[t]argeting homeless people without any permissible justification strongly indicates that 'the decisionmaker ... selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group' ", citing *Wayte v. United States*, 470 U.S. 598, 610, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). Plaintiffs contend that the City's policy "requires summary destruction of homeless people's belongings, not because they are trash, or because it is necessary to keep the City clean, but because the City wanted the homeless to 'move along.' "

***11** The City Defendants do not respond to the merits of Plaintiffs' equal protection claim. If Plaintiffs establish 22 facts at trial that homeless persons' personal property was immediately destroyed after seizure while the personal property of others who are not within the class was not, Plaintiffs will have established a violation of equal protection under the Fourteenth Amendment.

d. *Policy or Practice.*

A municipality cannot "be held liable under § 1983 on a respondeat superior theory." *Monell v. Dep't of Soc. Serv. of New York*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Liability may attach to a municipality only where the municipality itself causes the constitutional violation through "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy. *Id.* at 694;*see also Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-480, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) ("The 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make it clear that municipal liability is limited to action for which the municipality is actually responsible."). As explained in *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir.2005):

There are three ways to show a policy or custom of a municipality: (1) by showing 'a longstanding

practice of 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.'

In moving for summary judgment, Plaintiffs refer to the December 8, 2007 Memorandum Decision granting preliminary injunction, pages 13-14, setting forth the City's policy. Plaintiffs contend that the facts set forth in the December 8, 2007 Memorandum Decision "have all now been confirmed" and that "the City does not-indeed cannot-dispute them."

The City does not respond directly to this ground for summary judgment. However, in the City Defendants' opposition, it is argued that Plaintiffs confuse episodes of the City's authorized clean ups of areas involving the construction of temporary shelters with "isolated and unauthorized episodes of alleged misconduct" and that "[s]uch a distinction is of critical importance."The City refers to evidence that it conducts litter removal on a daily basis, including accumulations of garbage in the area of temporary shelters; that the City's authorized clean up efforts are conditioned upon receipt of a citizen's complaint ro matters affecting the public's health and safety; and evidence that the City's authorized clean up efforts were preceded by written and oral notice of the impending clean up, as well as oral notice immediately preceding the clean up. The City contends that, during discovery, the City confirmed the dates and locations of authorized clean ups since early 2004, which total 14 dates. The City argues that these 14 dates are the entirety of clean up efforts that involved the collaborative efforts of the FPD and the CSD. The City contends: "Any episode involving the alleged harassment of the City's homeless, or the corresponding destruction of personal property, which fall outside these dates was not conduct undertaken pursuant to any City policy at issue in this case."

***12** From this argument, the absence of any direct response to Plaintiffs' ground for summary judgment under *Monell*, and the City Defendants' concession at the hearing, the City concede that the clean ups conducted on these 14 dates were conducted pursuant to recognized City policy and practice. However, whether the seizures and destruction of personal property on dates other than these 14 dates were pursuant to the City's official policy and practice present questions of fact for the jury to decide. The same is true with regard to the liability of the individual City Defendants.

2. *State Law Claims.*

a. *California Civil Code § 2080; California Government Code § 815.6.*

Plaintiffs move for summary judgment on the Seventh Claim for Relief.

California Civil Code § 2080 provides in pertinent part:

Any person who finds a thing lost is not bound to take charge of it, unless the person is otherwise required to do so by contract or law, but when the person does take charge of it he or she is thenceforward a depository for the owner, with the rights and obligations of a depository for hire. Any person or any public or private entity that finds and takes possession of any money, goods, things in action, or other personal property ... shall, within a reasonable time, inform the owner, if known, and make restitution without compensation, except a reasonable charge for saving and taking care of the property.

California Civil Code § 2080.1 provides:

(a) If the owner is unknown or has not claimed the property, the person saving or finding the property shall, if the property is of the value of one hundred dollars ($100) or more, within a reasonable time turn the property over to the police department of the city ... and shall make an affidavit, stating when and where he or she found or saved the property, particularly describing it ....

(b) The police department ... shall notify the owner, if his or her identity is reasonably ascertainable, that it possesses the property and where it may be claimed. The police department ... may require payment by the owner of a reasonable charge to

defray costs of storage and care of the property.

California Civil Code § 2080.2 provides that "[i]f the owner appears within 90 days, after receipt of the property by the police department ..., proves his ownership of the property, and pays all reasonable charges, the police department ... shall restore the property to him."

Plaintiffs contend that, until the preliminary injunction was issued, the City Defendants made no effort to comply with these provisions. Plaintiffs cite California Government Code § 815.6:

> Where a public entity is under a mandatory duty imposed by enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

***13** Plaintiff assert that, because the City failed to discharge its statutory duties, the City is liable for the damage caused by the failure to store Plaintiffs' property after the clean ups.

The City opposes summary judgment on this claim, contending that Plaintiffs have not established that there is (1) a private right of action for violation of Section 2080; (2) that the individual Defendants took possession of Plaintiffs' property; or (3) that the individual Defendants knew the identities of the owners of the lost property.

A private right of action against the City of Fresno for violation of Section 2080 exists via California Government Code § 815.6. In *Haggis v. City of Los Angeles*, 22 Cal.4th 490, 499-500, 93 Cal.Rptr.2d 327, 993 P.2d 983 (2000), the California Supreme Court held:

> We cannot agree with the City and amici curiae that liability under section 815.6 requires that the enactment establishing a mandatory duty *itself* manifest an intent to create a private right of action, for their position is directly contrary to the language and function of section 815.6. When an enactment establishes a mandatory governmental duty and is designed to protect against the particular kind of injury the plaintiff suffered, section 815.6 provides that the public entity 'is liable' for an injury proximately caused by its negligent failure to discharge the duty. *It is section 815.6, not the predicate enactment, that creates the private right of action.*If the predicate enactment is of a type that supplies the elements of liability under section 815.6-if it places the public entity under an obligatory duty to act or refrain from acting, with the purpose of preventing the specific type of injury that occurred-then liability lies against the agency under section 815.6, regardless of whether private recovery liability would have been permitted, in the absence of section 815.6, under the predicate enactment alone.

There remains an issue of the applicability of Section 2080 to Plaintiffs' claims in this action. It is questionable that Plaintiffs' personal property that was seized and destroyed could have been considered lost or saved by someone. The scope of this statute is also of concern because of the possibility of imposing liability under these statutes could make the City legally responsible to keep every item left on the ground in Fresno, because of the possibility that it might be property of a homeless person who might want it back.

With these provisos and based on the facts established at trial, Plaintiffs are entitled to summary adjudication that Section 2080 imposes a private right of action against the City of Fresno for damages. Proof of what property was lost and its value remains in dispute.

b. *Bane Act, California Civil Code § 52.1*.

California Civil Code § 52.1(b) provides:

> Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with [by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion], may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under section 52, injunctive relief, and other appropriate

equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured.

***14** In *Jones v. Kmart Corp.*, 17 Cal.4th 329, 334, 70 Cal.Rptr.2d 844, 949 P.2d 941 (1998), the California Supreme Court explained that "section 52.1 does require an attempted or completed act of interference with a legal right, accompanied by a form of coercion."*See also Venegas v. County of Los Angeles*, 32 Cal.4th 820, 843, 11 Cal.Rptr.3d 692, 87 P.3d 1 (2004) ("the language of section 52.1 provides remedies for 'certain misconduct that interferes with' federal or state laws, if accompanied by threats, intimidation, or coercion, and whether or not state action is involved."). In *Venegas*, the California Supreme Court explained:

In *Jones v. Kmart Corp....*, we acknowledged that Civil Code section 52.1 was adopted 'to stem a tide of hate crimes.'But contrary to the County's position, our statement did not suggest that section 52.1 was limited to such crimes, or required plaintiffs to demonstrate that County or its officers had a discriminatory purpose in harassing them, that is, that they committed an actual hate crime. We continued in *Jones* by simply observing that the language of section 52.1 provides remedies for 'certain misconduct that interferes with' federal or state laws, if accompanied by threats, intimidation, or coercion, and whether or not state action is involved.

Id. at 843, 11 Cal.Rptr.3d 692, 87 P.3d 1. "The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., 'threats, intimidation or coercion'), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law." *Austin B. v. Escondido Union School Dist.*, 149 Cal.App.4th 860, 883, 57 Cal.Rptr.3d 454 (2007).

Plaintiffs concede that the California Supreme Court has not defined the terms "threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion."Plaintiffs refer to a decision by the Massachusetts Supreme Judicial Court, construing language in a statute that formed the model for the Bane Act:

[A] 'threat' consists of the intentional exertion of pressure to make another fearful or apprehensive of injury or harm. 'Intimidation' involves putting in fear for the purpose of compelling or deterring conduct. 'Coercion' is the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done.

Haufler v. Zotos, 446 Mass. 489, 845 N.E.2d 322, 335-336 (Mass.2006).

Plaintiffs refer to the evidence that FPD officers were present in uniform with weapons during the clean ups and to the law that citizens have a duty to obey police officers, *see Mary M. v. City of Los Angeles*, 54 Cal.3d 202, 206, 285 Cal.Rptr. 99, 814 P.2d 1341 (1991). Plaintiffs contend that the authority granted to government officials means that their actions are inherently coercive. *See Cole v. Doe I thru 2 Officers of City of Emeryville*, 387 F.Supp.2d 1084, 1103-1104 (N.D.Cal.2005) and cases cited therein (*Cole* allowed a Section 52.1 claim based on Cole's claim that he was coerced into consenting to a search of his vehicle when the officers made an unjustified traffic stop of his vehicle and threatened to keep him handcuffed).

***15** Plaintiffs refer to evidence that the police presence at the clean ups was intended to convince the homeless that they meant business and to get the homeless to do what the City wanted them to do, and to evidence threatening persons with going to jail. Plaintiffs argue that "[i]t was the Defendants' actions that forced them to do 'something [they] would not otherwise have done,'*i.e.*, to lose their property with no chance to recover it. Plaintiffs contend:

For purposes of the Bane Act, it does not matter whether it was the presence of a FPD and CSD workers and equipment, the implicit threat of arrest if anyone objected, or the economic coercion inherent in having all of their belongings destroyed that prompted Plaintiffs to give up their rights to preserve or to reclaim their property. Any of these alternatives constitutes a Bane Act violation.

The City Defendants argue that Plaintiffs are not entitled to summary judgment.

The City Defendants cite *Cabesuela v. Browning-*

Ferris Industries of California, Inc., 68 Cal.App.4th, 101, 110-111, 80 Cal.Rptr.2d 60 (1998).*Cabesuela* relied on *Boccato v. City of Hermosa Beach*, 29 Cal.App.4th 1797, 1809, 35 Cal.Rptr.2d 282 (1994), in ruling that Civil Code § 52.1 must be read in conjunction with Civil Code § 52.7 and that, in order to state a claim under Section 52.1, "there must be violence or intimidation by threat of violence [and] the violence or threatened violence must be due to plaintiff's membership in one of the specified classifications set forth in Civil Code § 51.7 or a group similarly protected by constitution or statute from hate crimes." *Id.* at 111, 35 Cal.Rptr.2d 282.

However, because the California Supreme Court in *Venegas, supra*, 32 Cal.4th at 842, 11 Cal.Rptr.3d 692, 87 P.3d 1, expressly rejected *Boccato*, *Cabesuela* no longer correctly interprets Section 52.1's requirements. *See Moreno v. Town of Los Gatos*, 2008 WL 467777 (9th Cir.2008).

The City Defendants refer to evidence that each location at which a clean up was conducted involved the construction of temporary shelters on property owned by someone other that Plaintiffs; that each clean up was triggered by a citizen complaint regarding the temporary shelters; that affected individuals were given advance notice of the need to relocate themselves and their personal possessions; that, on the day of the clean up, individuals who remained on the site were advised to relocate off the property; that, when individuals requested time to remove their belongings, the request was granted even if it meant delaying the clean up; that Officer Wallace did not wear a police uniform to the clean ups; that no arrests were made; and that Plaintiffs were not threatened, coerced or intentionally intimidated at any of the clean ups. The City Defendants argue:

> The gravamen of Plaintiffs' action is their assertion that the constitutional rights interfered with by Defendants was the right to be free from the unlawful seizure of personal property. In opposition to

Plaintiffs' motion, Defendants have raised substantial disputed issues of material fact regarding whether Defendants threatened or committed violent acts which interfered with Plaintiffs' right to possess property. Specifically, Defendants have presented evidence that the conduct of the clean up efforts did not involve seizing property from individuals. Moreover, Defendants have submitted competent evidence that they never refused an individual's request at a clean up effort for an opportunity to remove or relocate their personal property. In fact, the evidence establishes that the only materials collected and discarded were unattended materials left at a clean up site. There is no evidence that any individual's purported absence from the clean up site (resulting in the alleged loss of personal property) was the result of any threatening or violent act by Defendants.

***16** Plaintiffs' motion for summary judgment on this claim for relief is DENIED. Issues of fact exist which preclude summary judgment concerning the use of force or intimidation by each of the individual City Defendants during the sweeps or clean ups. In addition, to the extent that Plaintiffs' claim is based on the removal and destruction of personal property unattended by its owner, there is a question that the Bane Act applies by its terms, *i.e.*, if the owner of the personal property was not present during the seizure and destruction of the property, could that owner have been coerced or intimidated from doing something he or she was entitled to do?

c. *Conversion.*

Plaintiffs move for summary judgment on their claim for conversion.

As explained in *Burlesci v. Petersen*, 68 Cal.App.4th 1062, 1066, 80 Cal.Rptr.2d 704 (1998):

> Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. Conversion is a strict liability tort. The foundation for the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial.

The City Defendants oppose summary judgment on

this claim.

First, they argue that there is no evidence to support that Defendants Dyer, Garner, Rogers or Weathers ever touched a single piece of property owned or possessed by the Plaintiffs.

Plaintiffs reply that this is immaterial to liability. Plaintiffs cite *Gruber v. Pacific States Savings & Loan Co.*, 13 Cal.2d 144, 148, 88 P.2d 137 (1939):

> Nor do we think that a manual taking or destruction is essential to a conversion. In 2 Tiffany, Landlord and Tenant, page 1673, the following appears: 'The landlord is, it has been held, guilty of conversion if he refuses to allow the tenant to remove his goods during the tenancy, or at a subsequent time when the latter has a legal right to do so ....'

Plaintiffs also cite *Tide Water Associated Oil Co. v. Superior Court*, 43 Cal.2d 815, 827, 279 P.2d 35 (1955) ("It is settled that where there is a common plan or design to commit a tort, all who participate are jointly liable whether or not they do the wrongful acts.").

The City Defendants further oppose summary judgment on Plaintiffs' conversion claim on the ground that there is no evidence that Plaintiffs Randy Johnson, Sandra Thompson, Alfonzo Williams or Jeannine Nelson filed tort claims with the City.

This contention is without merit. A consolidated claim was submitted on behalf of these named plaintiffs on December 12, 2006. *See* PUDF 218.

The City Defendants oppose summary judgment on Plaintiffs' conversion claim on the ground that Plaintiffs' various tort claims fail to identify either Defendants Wallace or Rogers as City employees responsible for any injury or loss purportedly sustained.

***17** California Government Code § 945.4 provides in pertinent part:

> [N]o suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division.

Section 950.2 provides in pertinent part:

> [A] cause of action against a public employee or former public employee for injury resulting from an act or omission in the scope of his employment as a public employee is barred under Part I (commencing with Section 900) of this division or under Chapter 2 (commencing with Section 945) of Part 4 of this division. This section is applicable even though the public entity is immune from liability for the injury.

Section 910 sets forth the contents of a claim and provides in pertinent part:

> A claim shall be presented by claimant or a person acting on his or her behalf and shall show all of the following:
>
> (a) The name and post office address of the claimant.
>
> (b) The post office address to which the person presenting the claim desires notices to be sent.
>
> (c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted.
>
> (d) A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim.
>
> (e) The name or names of the public employee or employees causing the injury, damage, or loss, if known.
>
> (f) The amount claimed if it totals less than ten thousand dollars ($10,000) as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed. If the amount

> claimed exceeds ten thousand dollars ($10,000), no dollar amount shall be included in the claim. However, it shall indicate whether the claim would be a limited civil case.

Section 915(a) provides that a claim against a local public entity shall be presented to the local public entity by delivering it or mailing it "to the clerk, secretary or auditor thereof".

The failure to comply with state imposed procedural conditions to sue bars the maintenance of a cause of action based upon those pendant State claims. *State v. Superior Court (Bodde)*, 32 Cal.4th 1234, 1243, 13 Cal.Rptr.3d 534, 90 P.3d 116 (2004) ("[A] plaintiff must allege facts demonstrating or excusing compliance with the claim presentation requirement. Otherwise, his complaint is subject to a general demurrer for failure to state facts sufficient to constitute a cause of action."). In *City of San Jose v. Superior Court*, 12 Cal.3d 447, 455, 115 Cal.Rptr. 797, 525 P.2d 701 (1974), the California Supreme Court explained:

> ***18** It is not the purpose of the claims statutes to prevent surprise. Rather, the purpose of these statutes is to provide the public entity sufficient information to enable it to adequately investigate claims and settle them, if appropriate, without the expense of litigation ... It is well-settled that claims statutes must be satisfied even in the face of the public entity's actual knowledge of the circumstances surrounding the claim. Such knowledge-standing alone-constitutes neither substantial compliance nor basis for estoppel....

The Supreme Court further held that in determining a contention that there has been substantial compliance with the claim filing requirements of the California Government Tort Claims Act, "*two* tests shall be applied: Is there *some* compliance with *all* of the statutory requirements; and, if so, is this compliance sufficient to constitute *substantial* compliance." *Id.* at 456-457, 115 Cal.Rptr. 797, 525 P.2d 701. *Loehr v. Ventura County Community College Dist.*, 147 Cal.App.3d 1071, 195 Cal.Rptr. 576. 1083 (1983), holds:

> Under [the test of substantial compliance], the court must ask whether sufficient information is disclosed on the face of the filed claim 'to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit.'

As Plaintiffs contend, the tort claims filed in connection with this action "which listed the individual defendants, at least as witnesses, gave more than enough information to allow the City to investigate, and therefore satisfied any requirement."

The claim filing requirement is satisfied.

However, as the City Defendants contend, summary judgment as to the individual defendants is not appropriate because issues of fact exist regarding their statutory immunities.

3. *Injunctive Relief and Declaratory Relief.*

Plaintiffs' motion for summary judgment granting permanent injunctive and declaratory relief is DENIED. Whether those remedies are available and necessary cannot be determined until after trial.

CONCLUSION

For the reasons stated above:

A. Plaintiffs' motion for summary judgment as to liability against the City Defendants is GRANTED IN PART AND DENIED IN PART:

1. Plaintiffs' motion is GRANTED as to Defendant the City of Fresno to the extent that the clean-ups conducted on the 14 dates set forth at pages 6-7 of this Memorandum Decision were conducted pursuant to the unlawful policy of the City of Fresno;

2. Plaintiffs' motion is GRANTED as to Defendant the City of Fresno to the extent that, if Plaintiffs' establish at trial that the City Defendants seized and immediately destroyed the personal property of Plaintiffs, Plaintiffs will have established a violation of the Fourth Amendment as a matter of law;

3. Plaintiffs' motion is GRANTED as to Defendant the City of Fresno to the extent that, if Plaintiffs establish at trial that homeless persons' personal property was immediately destroyed after seizure

while the personal property of others who are not within the class was not, Plaintiffs will have established a violation of equal protection under the Fourteenth Amendment;

***19** 4. Plaintiffs' motion is GRANTED as to Defendant the City of Fresno to the extent that California Civil Code § 2080.2 imposes a private right of action against Defendant City of Fresno;

5. In all other respects, Plaintiffs' motion is DENIED.

B. Counsel for Plaintiffs shall prepare and lodge a form of order that the rulings set forth in this Memorandum Decision within five (5) days following the date of service of this decision.

IT IS SO ORDERED.

E.D.Cal.,2008.
Kincaid v. City of Fresno
Not Reported in F.Supp.2d, 2008 WL 2038390 (E.D.Cal.)

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