SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA Dept. No. 16

Date: 6/13/2019 Hon. MICHAEL MARKMAN, Judge Ana Liza Tumonong, Clerk

KIMBERLEE SANCHEZ, JAMES LEONE, PATRICIA MOORE, on behalf of themselves and all others similarly situated, HOMELESS ACTION CENTER, WESTERN REGIONAL ADVOCACY PROJECT, SUSAN HALPERN, and NATALIE LEIMKUHLER,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF TRANSPORTATION, MALCOLM DOUGHERTY, and DOES 1-50,

Defendants.

Case No. RG16842117

ORDER RE CLASS CERTIFICATION

I. Overview

On May 16, 2017, Plaintiffs filed their First Amended Complaint ("FAC"). The FAC remains the operative pleading. Plaintiffs allege nine claims. Plaintiffs' Motion for Class Certification relates to four of them, which are highlighted in bold:

(1) A 42 U.S.C. § 1983 claim for violation of the right to be secure from unreasonable seizures of property (U.S. Const., 4th Amend. and Cal. Const., art. I, § 13);

(2) A 42 U.S.C. § 1983 claim for violation of the right to due process of law (U.S. Const., 14th Amend., § 1 and Cal. Const., art. I, § 7);

(3) Loss and return of property (Civ. Code § 2080 *et seq*);

(4) Maintenance of property when taken from owner for temporary safekeeping (Civ. Code § 2080.10);

(5) Violation of civil rights: interference by threat, intimidation or coercion (Civ. Code, § 52.1, also known as the Bane Act);

(6) Conversion and trespass to chattels;

(7) Violation of Streets and Highways Code section 720;

(8) Negligent infliction of emotional distress; and

(9) A taxpayer action under Code of Civil Procedure section 526a to prevent illegal expenditure of funds.

Plaintiffs Kimberlee Sanchez, James Leone, Scott Russell, and Patricia Moore filed this Motion for Class Certification back on July 3, 2017. Defendants' original Answer to the FAC, filed on August 25, 2017, was superseded by an Amended Answer filed on January 26, 2018. The Amended Answer raised a general denial, specifically denied every allegation except Paragraphs 13, 14, 15, and 38 plus any paragraph forming part of a cause of action already disposed of by demurrer, and pleaded 37 affirmative defenses.

The intervening years saw much litigation, which caused the parties and the Court to repeatedly defer the question of class certification. That litigation has somewhat narrowed the claims at issue. After two demurrers, a petition for writ of mandate, and a motion for judgment on the pleadings, it is undisputed that only the first, second, fifth, sixth and ninth causes of action in the FAC remain active. Of those five causes of action, the instant Motion now seeks class certification only as to the first, second, fifth, and sixth causes of action.

After a stipulated dismissal of two plaintiffs on April 23, 2018, the current moving parties seeking appointment as class representatives are plaintiffs Sanchez, Leone, and Moore (collectively, "Plaintiffs"). The named defendants are the California Department of Transportation ("Caltrans") and its director Malcolm Dougherty ("Dougherty") (collectively, "Defendants")).

Plaintiffs propose the following class definition: "All persons in the Cities of Berkeley, Oakland, and Emeryville who were or are homeless, without residence, and whose personal belongings have been unlawfully taken and destroyed by one or more of the Defendants, from December 13, 2014 through the date of judgment or settlement approval, whichever is later."

II. Legal Standards for Class Certification

Before the Court may certify a class, Plaintiffs must establish "the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.) "In turn, the 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Id.*) The Court will consider "the totality of the evidence in making [the] determination" of whether a "plaintiff has presented substantial evidence of the class action requisites." (*Quacchia v. DaimlerChrysler Corp.* (2004) 122 Cal.App.4th 1442, 144.)

III. Class Certification Analysis

A. Ascertainability

The requirement of ascertainability "goes to the heart of the question of class certification, which requires a class definition that is 'precise, objective and presently ascertainable.'" (*Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 858.) Without that, it is impossible "to give adequate notice to class members or to determine after the litigation has concluded who is barred from relitigating." (*Id.*)

Since the class definition itself is the focus of this requirement, Plaintiffs did not have to explain how they will locate, identify, or notify individual class members. (*Aguirre v. Amscan Holdings, Inc.* (2015) 234 Cal.App.4th 1290, 1301.) It is sufficient if the class definition "convey[s] 'sufficient meaning to enable persons hearing it to determine whether they are members of the class plaintiffs wish to represent.'" (*Id.*)

The cases cited by Defendants in opposition to class certification turn on the grossly over-inclusive nature of the class definitions at issue in those cases. Overbreadth "may be cured by modifying the class definition[], adding a more precise description, or using subclasses." (*Marler v. E.M. Johansing, LLC* (2011) 199 Cal.App.4th 1450, 1461.) It is permissible to include a reference to an ultimate issue in the case in order to make the class definition sufficiently precise. (*Id.* at 1462.)

Here, the Court finds it must modify the class definition to avoid overbreadth. First, the word "unlawfully" will be stricken. Use of that term unnecessarily ties to the ultimate merits of Plaintiffs' claims, which seems to make the class definition somewhat circular. (See *Brinker*, 53 Cal.4th at 1024-1025.) While at least one prior case involving similar claims in Fresno, California included the word "unlawfully" in the class definition, that court never explained why. (See *Kinkaid v. City of Fresno*, 244 F.R.D. 597, 601 (E.D. Cal. 2007).

Second, the Court will more precisely tailor the class definition to the actual scope of Plaintiffs' claims as narrowed during the litigation to date. Plaintiffs are challenging the allegedly unreasonable manner in which Defendants take and destroy personal property belonging to trespassers on public property. The issue is one of process rather than a blanket attack on any effort to remove a trespasser's personal property on CalTrans land. Further, Plaintiffs do not purport to represent people who insist on improperly borrowing public land as their storage space even when they are housed. Plaintiffs also do not purport to represent unhoused persons who happened to reside in the cities of Berkeley, Oakland, and Emeryville at some point in time during the class period but whose personal belongings were improperly seized by Defendants elsewhere in California.

The Court therefore modifies the class definition to be: "All persons whose personal belongings were unreasonably taken from them by the Defendants in the Cities of Berkeley, Oakland, or Emeryville and later destroyed, and who were homeless at the time, from December 13, 2014 through the date of judgment or settlement approval, whichever is later." As modified, the Court finds this class to be ascertainable.

B. Numerosity

"No set number" of putative class members "is required as a matter of law for the maintenance of a class action," but classes of more than 30 to 40 class members are usually sufficient because at that point, joinder is not practical. (*Hendershot v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1222; see also *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934.)

It is undisputed that the class here would be sufficiently numerous. Plaintiffs have presented evidence of at least fifty-three administrative claims denied by CalTrans and numerous sweeps of homeless encampments in Alameda County. During the hearing, the parties' discussion of the Court's suggestion of subclasses confirmed that there are a great many encampments, sweeps, and affected homeless persons potentially at issue.

C. Community of Interest and Assessing Predominance of Common Questions

Plaintiffs must show that common issues predominate in order to establish a community of interest. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal. 4th 1096, 1108.) It is not enough to show that some common issues exist. The "ultimate question" in evaluating commonality is whether "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Brinker,* 53 Cal.4th at 1021.)

The Court "must examine the issues framed by the pleadings and the law applicable to the causes of action alleged ... [and] determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence. (*Id.* at 1024.) The Court must focus on whether Plaintiffs have shown each element is amenable to common proof, not whether Plaintiffs have proven or will prove the element on the merits. (See *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 533.) The Court will refrain from resolving disputed legal or factual issues except as needed. (See *Brinker,* 53 Cal.4th at 1024-1025.) Only elements that go to liability are relevant; the necessity for individual proof of damages will not prevent class certification. (*Id.* at 1022.)

1. Section 1983 Claims

Commonality requires the Court to examine -- though not necessarily determine -- the legal and factual issues that the trier of fact will need to address in order to resolve Defendants' liability for Plaintiffs' claims.

In order to maintain a Section 1983 claim, Plaintiffs must prove: "(1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States." As the Court recognized in its April 26, 2017 order sustaining Defendants' demurrer with leave to amend, this type of claim is proper against Dougherty only, at least to the extent that Plaintiffs are bringing an official-capacity claim seeking injunctive relief. (*Pierce v. San Mateo County Sheriff's Dept.* (2014) 232 Cal.App.4th 995, 1009 n.4.)

Plaintiffs did not address the first element in their moving papers, but it is objectively susceptible to common proof. Plaintiffs only need to show that Dougherty exercised power which he possessed by virtue of state law and that such exercise was possible only because he was "clothed with the authority of state law." (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1063.)

The second element requires the Court to examine the legal rights that Plaintiffs allege were violated. The first cause of action alleges an unreasonable warrantless seizure of property in violation of the Fourth Amendment. The second cause of action alleges an unreasonable deprivation of property without due process in violation of the Fourteenth Amendment.

A seizure of property is actionable when "there is some meaningful interference with an individual's possessory interests in that property." (See *People v. Bennett* (1998) 17 Cal.4th 373, 385.) The measure of constitutionality in this context is reasonableness, and involves "balancing the intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests." (*Id.*)

Procedural due process generally requires notice and an opportunity to be heard before a person is deprived of a protected property interest. (*Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 308.) Notice means "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*D & M Financial Corp. v. City of Long Beach* (2006) 136 Cal.App.4th 165, 174.) The opportunity to be heard means "the right to be heard at a meaningful time and in a meaningful manner." (*Id.*)

Exceptions to this general rule must be justified by "important governmental interests," and even then, "the cases have stressed that an opportunity to be heard may only be postponed, not entirely eliminated." (*Kash Enterprises, Inc.*, 19 Cal.3d at 308.) In the absence of an emergency, it is a violation of due process to summarily destroy a person's property. (*D & M Financial*, 136 Cal.App.4th at 184.) The government bears the burden of proving the existence of a genuine emergency in the form of an "immediate hazard and danger to the public." (*Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 719.)

The Court finds that the essential elements of both causes of action are susceptible to common proof in this case. Plaintiffs presented substantial evidence that the government agency led by Dougherty in his official capacity has a pattern and practice of summarily seizing and destroying the personal belongings of homeless people, without giving them adequate notice or an opportunity to be heard. In the context of lawsuits against state government agencies, "pattern and practice evidence" of Defendants' classwide conduct is enough to show the predominance of common issues, especially where, as here, plaintiffs are seeking "declaratory and injunctive relief . . . to remedy allegedly illegal practices and policies[.]" (*Capitol People First v. State Dept. of Developmental Services* (2007) 155 Cal.App.4th 676, 695.)

The evidence presented by Defendants of various countervailing interests -- namely, that the homeless encampments encountered by Caltrans invariably turn out to be extremely unsanitary firetraps as well as sources of environmental pollution -- was consistent enough to support an inference that Defendants' legitimate or important governmental interests are also

susceptible to common proof and can be balanced in the aggregate against Plaintiffs' property interests. Defendants did not submit evidence of drastic variability in the negative attributes of homeless encampments. The Court does not need to find that homeless encampments invariably pose an immediate danger to life and property to certify a class. The question on class certification is really whether the particular hazards justifying emergency demolition of particular camps vary so dramatically from one to the next that proof of reasonability would be predominantly focused on individual issues. (Cf. *Hefczyc v. Rady Children's Hospital-San Diego* (2017) 17 Cal.App.5th 518, 541-544 and *Hataishi v. First American Home Buyers Protection Corp.* (2014) 223 Cal.App.4th 1454, 1468.) Defendants failed to rebut Plaintiffs' showing for class certification purposes.

The Court need not go through every issue raised by Defendants in opposition. Those arguments generally go to merits issues or individualized proof of damages, which may be addressed through effective case management. (*Brinker,* 53 Cal.4th at 1022-1025.)

2. Claims Under the California Constitution

No party separately addressed the essential elements of Plaintiffs' first and second causes of action to the extent that they seek to enforce the California Constitution. In any event, the constitutional provisions cited (Cal. Const., art. I, §§ 7, 13) appear to be enforceable by a private right of action for injunctive relief. (See *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 307.) Accordingly, the Court finds that the first and second causes of action are both susceptible to common proof as to both federal and state constitutional claims.

3. The Bane Act Claim

Plaintiffs' fifth cause of action pleads a Bane Act claim (Civ. Code, § 52.1) against Caltrans only. In order to prevail on a Bane Act claim, Plaintiffs must prove the "(1) intentional interference or attempted interference" by Caltrans "with a state or federal constitutional or legal right, and (2) the interference or attempted interference was by threats, intimidation or coercion." (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 67.)

Plaintiffs have not established that their Bane Act claim is susceptible to common proof. Plaintiffs effectively conceded that there is no evidence of a regular pattern and practice of threats, intimidation, and coercion on the part of Defendants. Otherwise there would have been no need for Plaintiffs to argue that the second element can be addressed through individual hearings. The Court also finds that in the absence of such evidence, trial concerning individualized threats, intimidation, and coercion would be unmanageable. (*Koval v. Pacific Bell Telephone Co.* (2014) 232 Cal.App.4th 1050, 1063.) What constitutes a threat is often highly dependent upon context, especially when taking place against the backdrop of serious public health and safety concerns. (*See, e.g., People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 744-750 [holding trial court improperly excluded expert testimony going to homeless defendant's perception of threat of imminent harm].)

4. Conversion and Trespass to Chattels

Plaintiffs' sixth cause of action is a hybrid claim for both conversion and trespass to chattels against Caltrans only. In order to prevail on a claim for conversion, Plaintiffs must prove "(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." (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208.) Trespass to chattels lies when "intentional interference with the possession of personal property has proximately caused injury," but the defendant did not actually convert the property. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1350-1351.)

The Court finds that Plaintiffs have shown that the essential elements going to liability for both conversion and trespass to chattels are susceptible of common proof. Where Defendants can show that property was not destroyed and was eventually returned to its rightful owners, that fact would affect the individualized determination of damages but would not vitiate common proof of the fact of damage. In that situation, Defendants would merely have shown that particular plaintiffs actually sustained trespass to chattels, rather than conversion. Individualized questions of damages could be managed with the use of a Special Master or other techniques.

D. Typicality

The named plaintiffs must be generally typical of the members of the putative class even though each plaintiff's specific factual situation is not the same as the specific factual situation of all the other class members. (*Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 99; *Wershba v. Apple Computer* (2001) 91 Cal.App.4th 224, 238; *Daniels v. Centennial Group, Inc.* (1993) 16 Cal.App.4th 467, 473.)

Plaintiffs have shown they are homeless persons whose personal belongings were taken by Defendants' agents and/or employees during the class period at locations in the Cities of Berkeley and Oakland. The Court finds that Plaintiffs are typical members of the proposed class.

E. Adequacy

The Court finds that Plaintiffs have established they are adequate class representatives, though the issue is a close one because of the bare-bones nature of the relevant statements in their declarations. (See *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 155.)

Defendants have not challenged the qualifications of proposed class counsel. The Court finds that proposed class counsel can adequately represent the proposed class. (*Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 12.)

F. Superiority

The Court finds that Plaintiffs have shown "by a preponderance of the evidence that the class action proceeding is superior to alternate means for a fair and efficient adjudication of the litigation." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 332.) The Court

has carefully weighed the "respective benefits and burdens" and finds that "substantial benefits [would] accrue both to [the] litigants and the courts" from allowing this action to proceed as a class action. (*Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1333, citing Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (Rutter Group 2008) at ¶ 14:16 p. 14-13 (rev. #1 2008) [listing factors].)

Given the nature of the proposed class, each putative class member would have a minimal interest in controlling his or her case personally. The proposed class is homeless, and faces substantial challenges just living day-to-day without attempting to control or meaningfully participate in ongoing litigation. Were the proposed class to attempt to litigate their claims in limited jurisdiction or small claims matters, the process could be overwhelming. Claims and defenses amenable to common proof could then have to be litigated dozens if not hundreds of times over. In the context of possible settlement, class treatment could well foster meaningful discussion of injunctive relief across the class in a way that a multiplicity of individual small claims actions could never accomplish. Common rather than individualized approaches to issues facing the putative class and the community at large, in terms of public health and safety, would likely be promoted by the use of a class mechanism.

G. Manageability

The Court "conclude[s] that litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently." (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 29.)

Having already explained why Plaintiffs' claims are manageable in the context of its commonality analysis, the Court turns to Defendant's affirmative defenses. In opposition, Defendants specifically pointed to their fifth, sixth, ninth, fourteenth, and thirty-fourth affirmative defenses. (See Amended Answer, filed 1/26/18.)

Defendants' fifth affirmative defense is that they:

> have the statutory right to immediately remove from any state right-of-way any encroachment that is not removed after written notice, or obstructs or prevents the use of the right-of-way by the public, or consists of refuse or waste. It is within Defendants' discretion to remove and [sic] encroachments, including illegal homeless encampments, as part of its statutory right to maintain its right-of-way (see, e.g., California Streets and Highways Code), and to ensure the public health, safety and well-being, and to ensure that its right-of-way is used exclusively for highway purposes (see, e.g., 23 CFR 1.23). This also includes conforming to state and federal environmental, stormwater and Cal-OSHA requirements to ensure that refuse and other pollutants from illegal encampment sites are not discharged into adjacent storm drain and sewer systems, and do not otherwise contaminate air quality, among other requirements.

(*Id.* at 6-7.)

The fifth affirmative defense is not likely to impact manageability. Statutory authorization is not a license to violate the federal or state constitutions. (*Consulting Engineers & Land Surveyors of California, Inc. v. Professional Engineers in California Government* (2007) 42 Cal.4th 578, 588.) Additionally, Defendants' compliance with statutory mandates appears amenable to common proof.

The sixth affirmative defense is that "Caltrans did not own, control and/or maintain certain property alleged in the FAC at which the alleged illegal or unconstitutional conduct occurred, and thus cannot be held liable." (*Id.* at 7.) That defense should not impact manageability because it could be litigated on an encampment-by-encampment basis; people who lost property at encampments not on property owned, controlled, and/or maintained by Caltrans, and where Caltrans was not involved with the removal of property, would not be a part of the class.

The ninth affirmative defense goes to Plaintiffs' Bane Act claim, and contends "Defendants have the statutory right to immediately remove any encroachment on any state highway. Plaintiffs do not have the right to trespass on a state highway and Defendants did not prevent Plaintiffs from doing something that they had the right to do under the law." (*Id.* at 8-9.) The Court has declined to certify the Bane Act claim for class treatment based on its common interest analysis. Manageability is a further reason not to certify a class to litigate the Bane Act claim.

The fourteenth and thirty-fourth affirmative defenses concern Plaintiffs' inability to "prove that they owned or were in possession of personal property that was illegally and/or unconstitutionally seized and destroyed by Defendants," and whether property was abandoned for purposes of the conversion and trespass to chattels claim. Those defenses concern the difficulty of individual proof of damages. Case management techniques, including but not limited to the potential use of a Special Master, could address such issues. Further, damages issues would not prevent Plaintiffs from obtaining injunctive relief on behalf of the proposed class, if appropriate.

IV. Evidentiary Issues

The Court OVERRULES all the parties' evidentiary objections. The Court is mindful of the fact that Defendants have been unable to depose putative class members and declarants Raymond Kaczmarek, Steven Malnik, Joel Stevenson, and John Thompson. Although the Court denied Defendants' motion to strike, the Court is aware of the unfairness in relying upon declarations by third-party witnesses whom Defendants have not been able to cross-examine in deposition. In any event, the record submitted by Plaintiffs through other declarants is sufficient in and of itself. The Court has not relied upon the declarations of Kaczmarek, Malnik, Stevenson, and Thompson in ruling on the instant Motion.

V. ORDERS

1. Class Certification

The Court CERTIFIES a class defined as follows: "All persons whose personal belongings were unreasonably taken from them by the Defendants in the Cities of Berkeley, Oakland, or

Emeryville and later destroyed, and who were homeless at the time, from December 13, 2014 through the date of judgment or settlement approval, whichever is later." The class is certified to prosecute Plaintiffs' first, second, and sixth causes of action. The Court DENIES certification of a class as to Plaintiffs' fifth cause of action (the Bane Act claim).

2. Class Notice

The Court ORDERS that within 10 court days of the date on which this Order was filed, Plaintiffs must file a motion for class notice or a stipulation regarding class notice. (Cal. Rules of Court, rule 3.766(b).)

IT IS SO ORDERED.

June 13, 2019

Michael M. Markman
Judge, Superior Court of California
Alameda County

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number : RG16842117
Case name: Sanchez vs California Department of Transporation

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the **Order Re Class Certification** filed on June 13, 2019 was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1221 Oak Street, Oakland, California.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 13, 2017.

Chad Finke, Executive Officer/Clerk of the Superior Court

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