

Selected docket entries for case 17-15205

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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 20 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

HEATHER MARLOWE,

Plaintiff-Appellant,

v.

CITY AND COUNTY OF SAN
FRANCISCO, a governmental entity; et al.,

Defendants-Appellees.

No. 17-15205

D.C. No. 3:16-cv-00076-MMC

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Submitted February 15, 2019**
San Francisco, California

Before: McKEOWN and W. FLETCHER, Circuit Judges, and EZRA,*** District
Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

Heather Marlowe appeals the district court's dismissal, as time-barred and for failure to state a claim, of her claims under 42 U.S.C. § 1983. Because the parties are familiar with the facts, we do not recite them here. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

We need not decide whether Marlowe's *Monell* claim against the City and County of San Francisco accrued upon incurring her injury or when she knew, or reasonably should have known, that an official custom or policy caused her injury, because, in any event, her claim had accrued by October 2012. By that time, she had experienced a delay of more than two years in testing her rape kit (the injury), and the San Francisco Police Department had informed her that the delay and backlog resulted from prioritizing "more important crimes" (the custom or policy). Marlowe's *Monell* claim had accrued following this injury, value judgment, and prioritization. Applying California's two-year statute of limitations, the *Monell* claim was time-barred when Marlowe filed suit in January 2016. *Lukovsky v. City & Cty. of S.F.*, 535 F.3d 1044, 1048 (9th Cir. 2008) (claims under § 1983 adopt the forum state's statute of limitations for personal injury actions); Cal. Civ. Proc. Code § 335.1 (two-year statute of limitations).

Equitable estoppel does not bar San Francisco from relying on the statute of limitations. For equitable estoppel to apply, a plaintiff must actually and reasonably rely on a defendant's misleading conduct. *Lantzy v. Centex Homes*, 73

P.3d 517, 533–34 (Cal. 2003), *as modified* (Aug. 27, 2003); *see Butler v. Nat'l Cmty. Renaissance of Cal.*, 766 F.3d 1191, 1198 (9th Cir. 2014) (claims under § 1983 borrow the forum state's equitable defenses to the statute of limitations). Marlowe does not allege that she relied, in delaying filing suit, on the San Francisco Police Department's May 2013 statement that all rape kits had been tested. Nor would any such reliance have been reasonable, because the status of rape kit testing in May 2013 was irrelevant to Marlowe's claim that San Francisco's policy or custom violated her constitutional rights between 2010 and 2012.

Even if timely, Marlowe's other claims fail on the merits. Apart from several conclusory allegations, which we do not consider, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), the second amended complaint fails to allege facts that plausibly suggest a failure to train caused the alleged equal protection violation. The allegations against Police Commission President Suzy Loftus, Police Chief Greg Suhr, and Deputy Police Chief Mikail Ali, are similarly conclusory, and they do not plausibly suggest that these officials violated the Constitution through their "own individual actions." *Id.* at 676; *see Starr v. Baca*, 652 F.3d 1202, 1205–07 (9th Cir. 2011) (distinguishing between supervisory liability and vicarious liability).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings**Judgment**

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)**Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)****(1) A. Purpose (Panel Rehearing):**

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

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- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 10. Bill of Costs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 17-15205

D.C. No. 3:16-cv-00076-MMC
U.S. District Court for Northern
California, San Francisco

MANDATE

The judgment of this Court, entered February 20, 2019, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Craig Westbrooke
Deputy Clerk
Ninth Circuit Rule 27-7