Court of Appeal, Fourth Appellate District, Division Two - No. E068838

S256784

IN THE SUPREME COURT OF CALIFORNIA

En Banc

OCTAVIO DIAZ, Plaintiff and Appellant,

v.

COUNTY OF SAN BERNARDINO et al., Defendants and Respondents.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

OCTAVIO DIAZ, Plaintiff and Appellant, v. COUNTY OF SAN BERNARDINO et al., Defendants and Respondents.	E068838 (Super.Ct.No. CIVDS1417767) OPINION

APPEAL from the Superior Court of San Bernardino County. Wilfred J. Schneider, Jr., Judge. Affirmed.

Aviles & Associates and Moises A. Aviles for Plaintiff and Appellant.

Michelle D. Blakemore, County Counsel, and Adam L. Miederhoff, Deputy County Counsel, for Defendants and Respondents.

In January 2014, plaintiff and appellant Octavio Diaz was arrested after an altercation, during which Diaz discharged a handgun. He was charged with attempted

murder and assault with a firearm and remained incarcerated pending trial. In June 2014, a jury found Diaz not guilty and he was released.

In this lawsuit, Diaz asserts various claims against defendants and respondents County of San Bernardino (the County), its Sheriff, and several members of the San Bernardino County Sheriff's Department, arising from his arrest—which he contends was made without probable cause and motivated by racial discrimination—and alleged mistreatment while he was incarcerated pending trial.[1] Diaz here challenges the trial court's order sustaining in part respondents' demurrer to the first amended complaint and denying leave to amend certain claims, and its later order granting summary judgment to respondents on the claims asserted against them in the second amended complaint.

We affirm the judgment.

I. BACKGROUND

On January 13, 2014, Diaz went to a rental house he owns in Joshua Tree, California, where Brian Stumreiter and his girlfriend resided. The landlord-tenant relationship had been contentious and, according to Diaz, sometimes violent in the previous months. On December 12, 2013, Diaz had served Stumreiter and his girlfriend

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[1] Respondents include the County, San Bernardino County Sheriff John McMahon, and the following employees of the San Bernardino County Sheriff's Department: Deputies Robert Oakleaf, Jeff Casey, Steve Wilson, Scott Leach, Cathy MacKewen, and Matthew Izquierdo; Sergeant Steve Wilson; and Detective Corey Emon. Several other defendants sued by Diaz, but unrelated to the County, are not party to this appeal.

with a 30-day notice to quit. When Diaz came to the house on January 13, 2014, he encountered Stumreiter in front of the house, and they again argued.

Diaz's account of how the altercation with Stumreiter turned physical differs from Stumreiter's. According to Diaz, he was walking back to his truck when Stumreiter let his dogs out to attack him. Diaz shot a handgun at the dogs—he had been attacked by the dogs before, so he came prepared to defend himself—and they ran away. Stumreiter then came at Diaz holding a tire iron. Diaz fired one or two warning shots, but Stumreiter "kept on coming." Stumreiter and Diaz then "collided," Diaz hit Stumreiter with the gun, and the gun went off, but "no bullet entered Stumreiter's head." Diaz then put his gun back in his pickup truck and drove to the house of a neighbor, whom he asked to "call the Sheriff's." He then went back to his truck and parked on the street to wait for law enforcement to arrive.

In contrast, Stumreiter told law enforcement that Diaz initiated the physical violence. According to Stumreiter, Diaz came to the property demanding rent, and Stumreiter told him that he was prepared to pay, but that Diaz needed to get his receipt book first. Stumreiter told Diaz that if he did not get his receipt book, he needed to leave the property. Diaz responded by pulling a handgun out from behind his back and shooting at Stumreiter three times. As Diaz fired the first two rounds, Stumreiter ran back toward the front door of the house. The third round struck him in the back of the head. Stumreiter managed to get inside the house and call 911. While Stumreiter did so,

Diaz drove away quickly, back to his own residence, which was two houses down on the same street.

The first responding Sheriff's deputy contacted Stumreiter, who had a laceration on the back of his head. Stumreiter provided a description of Diaz's truck, and told the deputy that Diaz lived two doors down. As the deputy was speaking with Stumreiter, he observed a truck exiting from the house two doors down and heading towards them. Stumreiter confirmed to the deputy that it was Diaz's truck, and that Diaz was the person driving. A second deputy pulled Diaz's truck over by activating his patrol vehicle's lights and sirens, and the first deputy went to assist after grabbing his shotgun from his patrol vehicle.

As the deputies were attempting to detain Diaz by giving him instructions to exit the vehicle and walk backwards towards them, the neighbor Diaz had asked to "call the Sheriff's" came to the scene. She approached Diaz's truck and took some paperwork from him. As Diaz was being detained, he was uncooperative, turning around multiple times and "continually yelling" to the neighbor to record the incident and grab the paperwork. Additional deputies arrived on scene and assisted in detaining Diaz and interacting with the neighbor. A Sheriff's sergeant and a detective then came to assist with the investigation.

The investigation at Stumreiter's residence revealed a "clear set of tire tracks" matching Diaz's truck, showing that "the vehicle left the location at a high rate of speed." Sheriff's deputies also found a .32-caliber bullet lodged in the wall of Stumreiter's

residence and two .32-caliber spent casings on the ground about 45 feet from the house. An initial search of Diaz's truck did not reveal any firearms, and a search of his home pursuant to a warrant was also fruitless. Diaz eventually pointed deputies to the location of his .32-caliber semi-automatic handgun, which was hidden under the floor carpet and padding of his truck.

Diaz was placed under arrest and transported to jail. He remained in custody pending trial on charges of attempted murder and assault with a firearm.

Diaz alleges that he suffered several injuries while incarcerated. On the night of March 9, 2014, while trying to sleep in his bunk, he felt a cockroach crawl into his ear. He received medical treatment, but during attempts to remove the cockroach, his eardrum was ruptured. He contends that the ruptured eardrum caused ongoing symptoms. On April 19, 2014, even though he was still suffering from "dizziness, vertigo, tinnitus, and other ear related damage," he was assigned to a top bunk. He asserts that this bunk assignment was in violation of an order by the judge presiding over his criminal case. During the night, he fell and "permanently disabled his right leg, requiring him to wear a brace."

In June 2014, a jury found Diaz not guilty of the charged offenses and he was released from custody.

Diaz filed this lawsuit in November 2014. The exhibits attached to the original verified complaint included the police reports relating to his altercation with Stumreiter. These documents were not attached to subsequent amended complaints.

The first amended complaint, at issue in this appeal, included three causes of action asserting claims under section 1983 of title 42 of the United States Code (section 1983 claims) against individual members of the Sheriff's Department. The trial court sustained a demurrer to the section 1983 claims without leave to amend, finding that Diaz had not successfully "pled around" qualified immunity. In so ruling, the trial court took judicial notice of the police reports that had been attached to Diaz's original complaint, commenting as follows: "I am taking judicial notice of the documents themselves because they were filed in the case, not the contents per se, other than to the extent that the case law requires that . . . . I consider the contents of the exhibits attached to a pleading."

Diaz's verified second amended complaint asserted the following causes of action against some or all of respondents: the first, second, and third causes of action for violation of sections 1985(2), 1985(3), and 1986 of title 42 of the United States Code[2]; the fourth cause of action for violation of the Americans with Disabilities Act (ADA); the fifth cause of action for invasion of privacy; the sixth cause of action for false imprisonment; the ninth cause of action for intentional infliction of emotional distress;

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[2] 42 U.S.C. section 1985 creates civil liability for several different kinds of conspiracy to interfere with civil rights, while 42 U.S.C. section 1986 creates a cause of action for knowingly neglecting to prevent violations of 42 U.S.C. section 1985.

the tenth cause of action for violation of Civil Code section 51.7[3]; and the eleventh cause of action for violation of Civil Code section 52.1[4]. Respondents filed a motion for summary judgment or, in the alternative, summary adjudication. The trial court granted summary judgment to respondents. The trial court explained its reasoning as follows: (1) on the first, second, and third causes of action, "no respondeat superior liability lies to impose liability" on the County or its Sheriff, and there was no evidence of "conduct motivated by animus related to Diaz belonging to some protected class"; (2) on the fourth cause of action, there was no evidence that the County had "denied the use of a lower bunk to Diaz as a means to discriminate against Diaz because of his hearing loss"; (3) on the fifth cause of action, the search warrant obtained to search Diaz's home "did not invade the privacy interest in his home"; (4) on the fifth, sixth, ninth, tenth, and eleventh causes of action, there was probable cause to arrest Diaz on suspicion of assault, battery, and/or attempted murder; (5) on the ninth cause of action, "Defendants did not direct any cockroach infestation toward Plaintiff, and instead took steps to remedy the problem"; (6)

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[3] As relevant here, Civil Code section 51.7 provides that "[a]ll persons within [California] have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property" because of race.

[4] The "essence" of a claim under Civil Code section 52.1 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.* (2007) 149 Cal.App.4th 860, 883.)

on the tenth and eleventh causes of action, "no evidence exists of Defendants' alleged conduct motivated by hatred toward Latinos."

II. DISCUSSION

Diaz argues here that the trial court's rulings sustaining without leave to amend respondents' demurrer to his section 1983 claims in the first amended complaint, and granting summary judgment in favor of respondents on the claims asserted against them in the second amended complaint, were erroneous. We are not persuaded.

A. *Applicable Standards of Review*

On appeal from a judgment based on an order sustaining a demurrer, we assume all the facts alleged in the complaint are true. (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 528.) In addition, we consider judicially noticed matters. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42 (*Committee for Green Foothills*).) We accept all properly pleaded material facts but not contentions, deductions, or conclusions of fact or law. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

We determine de novo whether the complaint alleges facts sufficient to state a cause of action under any legal theory. (*Committee for Green Foothills*, *supra*, 48 Cal.4th at p. 42.) "'Where the complaint's allegations or judicially noticeable facts reveal the existence of an affirmative defense, the "plaintiff must 'plead around' the defense, by alleging specific facts that would avoid the apparent defense. Absent such allegations, the complaint is subject to demurrer for failure to state a cause of action . . . ."'" (*Doe II*

v. MySpace, Inc. (2009) 175 Cal.App.4th 561, 566.) We read the complaint as a whole and its parts in their context to give the complaint a reasonable interpretation. (*Evans v. City of Berkeley, supra*, 38 Cal. 4th at p. 6.)

When a trial court has sustained a demurrer without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "The burden of proving such reasonable possibility is squarely on the plaintiff." (*Ibid.*) "[U]nless failure to grant leave to amend was an abuse of discretion, the appellate court must affirm the judgment if it is correct on any theory." (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.)

We independently review an order granting summary judgment. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) "In ruling on the motion, the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

A defendant moving for summary judgment bears the burden of showing that one or more elements of the cause of action cannot be established by the plaintiff to the degree of proof that would be required at trial, or that there is a complete defense to the cause of action. (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009)

175 Cal.App.4th 1306, 1331; Code Civ. Proc., § 437c, subd. (o).) To be "material" for summary judgment purposes, a fact must relate to some claim or defense and it must be essential to the judgment in that, if proved, it could change the outcome of the case. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926.)

B. *Analysis*

1. *Probable Cause*

Diaz contends that the trial court should have overruled respondents' demurrer to the section 1983 claims asserted in the first amended complaint because the arrest was not supported by probable cause. He also contends that summary judgment in favor of respondents on his remaining claims was inappropriate for the same reason. We disagree, finding that the both the allegations of the complaint and the evidence presented at summary judgment do not support Diaz's contentions.

The respondent members of the Sheriff's Department have qualified immunity from liability on Diaz's section 1983 claims unless they "violated a 'clearly established' constitutional right." (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 840.) "'A right is clearly established only if its contours are sufficiently clear that "a reasonable official would understand that what he is doing violates that right."'" (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 385.) The inquiry "must be undertaken in light of the specific context of the case, not as a broad, general proposition . . . ." (*Saucier v. Katz* (2001) 533 U.S. 194, 201.) Put another way, the "crucial question" is "whether the official acted reasonably in the particular circumstances that he or she

faced." (*Plumhoff v. Rickard* (2014) 572 U.S. 765, 779.) "When properly applied, [qualified immunity] protects 'all but the plainly incompetent or those who knowingly violate the law.'" (*Ashcroft v. al-Kidd* (2011) 563 U.S. 731, 743; see *Marshall v. County of San Diego* (2015) 238 Cal.App.4th 1095, 1108 [same].)

"Probable cause to arrest exists where facts known to the arresting officer would be sufficient to persuade a person of 'reasonable caution' that the individual arrested committed a crime." (*People v. Spencer* (2018) 5 Cal.5th 642, 664.) "[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . . ." (*Hill v. California* (1971) 401 U.S. 797, 804; see *People v. Thompson* (2006) 38 Cal.4th 811, 820 [same].)

Here, the facts alleged in the first amended complaint, even viewed in the light most favorable to Diaz, do not demonstrate that the deputy who arrested him lacked probable cause to do so. Quite the contrary. Diaz alleged, among other things, that (1) he was involved in a physical altercation with Stumreiter; (2) during the course of the altercation, Diaz discharged a gun multiple times, including by shooting at Stumreiter's dogs, firing a "warning shot at the side of Stumreiter," and another, unintentional shot when he and Stumreiter "collided"; (3) Stumreiter was struck in the head (whether by the gun itself, or by a glancing blow from a fired bullet, is immaterial for present purposes); (4) Diaz eventually pointed out to law enforcement investigators where his gun was located, concealed beneath the carpet and padding of his truck; (5) Diaz did not otherwise tell his side of the story to investigating members of the Sheriff's Department, at first

because they "refused to ***LISTEN***" (while attempting to detain him), then because he could not get their attention, and then because he "wanted to see a lawyer"; and (6) Stumreiter did speak to the deputies, and a police report describing Stumreiter as the "complaining witness" was prepared. Thus, based solely on facts alleged in the first amended complaint and reasonable inferences from those facts, the deputy who arrested Diaz was aware that there had been an altercation between Stumreiter and Diaz, that Diaz had discharged a firearm during the altercation, and that Stumreiter was injured, albeit not seriously. And the deputy had in Stumreiter a cooperating victim who contended that Diaz was the aggressor. On these facts, the trial court correctly concluded that Diaz had not "pled around" qualified immunity by alleging facts demonstrating his arrest was made without probable cause.[5]

Diaz asserts that "there was no probable cause to arrest [him] for the attempted murder of Stumreiter, since [he] acted in self-defense." (Capitalization and bolding omitted.) This reasoning, however, is flawed. There are no facts pleaded in the first amended complaint showing that the investigating members of the Sheriff's Department even knew Diaz's side of the story, let alone that Diaz's version of events was so compelling as to dispel their otherwise reasonable belief that Diaz probably had

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[5] Given our reasoning here, relying only on the allegations in the first amended complaint, we need not resolve Diaz's contention that the trial court erred by taking judicial notice of police reports attached to his initial complaint, or by giving those judicially noticed documents more weight than appropriate on demurrer. We here review de novo the trial court's ruling, and need not address its reasoning. (See *Committee for Green Foothills*, *supra*, 48 Cal.4th at p. 42.)

committed a crime. And, particularly since Diaz alleges that he "wanted to see a lawyer," it was appropriate for the investigators not to ask him any further questions about his side of the story. (See *People v. Soto* (1984) 157 Cal.App.3d 694, 705 ["a request for an attorney automatically invokes the right to have questioning cease"].) The circumstance that a criminal jury may later have accepted Diaz's claim he acted in self-defense (the record here does not include evidence of the basis for the acquittal) has nothing to do with whether the arresting officer had probable cause to make the arrest.

Diaz's comparison of this case to *Manuel v. City of Joliet* (2017) ___ U.S. ___ [137 S.Ct. 911, 197 L.Ed.2d 312] and similar authority is unpersuasive. In *Manuel*, the plaintiff alleged that the arresting officer made false statements in his report that pills discovered in the plaintiff's possession were ecstasy, when in fact a field test conducted by the officer and a later laboratory test had shown the pills contained no controlled substances. (*Id.* at p. 915.) The Supreme Court found these allegations sufficient for a section 1983 claim based on unlawful detention to survive a motion to dismiss, even if a claim for wrongful arrest might have been time barred. (*Manuel*, *supra*, at pp. 919-920.) Here, in contrast, Diaz pleaded no facts supporting the conclusion that any of the police reports filed in his case were falsified. He asserts that the investigators did not include his side of the story in their reports, and that Stumreiter's account of events was false. But he does not allege, for example, that Stumreiter did not actually report to the deputies that he had been attacked by Diaz, or that the deputies knew that Stumreiter was not telling them the truth, or that the physical evidence discovered on the scene was a

fabrication. Similarly, Diaz does not allege any facts showing that deputies detained him even though they had determined that he had acted in self defense and therefore had committed no crime. (Cf. *Sialoi v. City of San Diego* (9th Cir. 2016) 823 F.3d 1223, 1232-1233 [police lacked probable cause to arrest three teens after determining what appeared to be a weapon that one of them had was in fact a toy, and the teens did not match the description of the individuals the officers had been dispatched to find]; *People v. Espino* (2016) 247 Cal.App.4th 746, 760 [police lacked probable cause to keep defendant under arrest for drug possession after determining object in his pocket was a diamond, rather than crack cocaine].)

Furthermore, the lack of facts supporting Diaz's contention that he was arrested without probable cause was not just a pleading problem. The evidence submitted at the summary judgment stage also did not support his contention. Respondents presented declarations from the arresting deputy and other members of the Sheriff's department who assisted in detaining Diaz and investigating what had happened, establishing a prima facie showing that the arrest was supported by probable cause. Specifically, respondents submitted evidence that Stumreiter told the arresting deputy that Diaz had pulled out a handgun and shot at him, hitting him in the head; the deputy observed a laceration on the back of Stumreiter's head; physical evidence collected at the scene, including tire tracks, spent bullet casings on the ground, and a bullet lodged in the wall of Stumreiter's residence tended to corroborate Stumreiter's account; and a gun of the same caliber as the bullet and bullet casings was recovered from Diaz's truck, where it had been concealed

under the truck's floor carpet and padding. In opposition, Diaz submitted no evidence that the arresting deputy knew Diaz *contended* he had been acting in self-defense, let alone evidence that the deputy was aware of facts that would have compelled him to accept Diaz's version of events over Stumreiter's.

In short, Diaz failed to plead facts showing that he was arrested without probable cause, so the trial court correctly sustained the demurrer to the section 1983 claims in the first amended complaint. Because Diaz has not attempted to demonstrate that he could cure these pleading defects by amendment, the trial court did not abuse its discretion by denying leave to amend. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.) Similarly, on summary judgment, Diaz did not present evidence sufficient to raise a triable issue of material fact as to whether he was arrested without probable cause. As such, the causes of action of the second amended complaint that depend on the proposition that Diaz was wrongfully arrested—specifically, the fifth, sixth, ninth, tenth, and eleventh causes of action—were properly resolved on summary judgment.

2. *Racial Discrimination*

Diaz contends that his arrest was the product of invidious racial discrimination. The trial court found that he had produced no evidence that the individual members of the Sheriff's Department involved in his arrest acted out of discriminatory motives. We conclude Diaz has demonstrated no error in the trial court's finding.

It is well established that a law enforcement officer's "discretion in deciding whom to arrest is . . . broad," but it "cannot be exercised in a racially discriminatory

fashion." (*Elliot-Park v. Manglona* (9th Cir. 2010) 592 F.3d 1003, 1006.) Here, the arresting officer mentions in his police report, among other routine observations, that Diaz and the neighbor who got involved as Diaz was being detained were both Hispanic, and that Stumreiter was white. But there is no evidence supporting Diaz's assertion that race had any bearing on either the decision to arrest Diaz or the investigation that preceded it. Each of the respondent individual members of the Sheriff's Department expressly disclaimed any such motive in their declarations submitted in support of the motion for summary judgment. And Diaz conceded that it was "[u]ndisputed" that he "does not know of any statements made by the Deputies that were discriminatory."

Diaz's arguments in support of the notion that his arrest was the product of racial discrimination boil down to the assertion that Stumreiter and his girlfriend are bad people in various respects, Diaz is not, and the only reason "[a]ny reasonable peace officer" would have "listened to two White criminals" instead of the "Latino property owner" must be racism. This assertion is unsupported by law, logic, or evidence. As discussed above, there was ample probable cause to support Diaz's arrest, including both Stumreiter's account of the events and physical evidence gathered during the investigation. And there is no *evidence*, as distinguished from conclusory assertions and speculation, that any part of the law enforcement response to the altercation between Diaz and Stumreiter was motivated by race. The trial court correctly determined that Diaz had failed to show any disputed issue of material fact on the issue. The first, second, third,

and tenth causes of action of the second amended complaint were therefore properly resolved on summary judgment.[6]

3. *Disability Discrimination*

Diaz's fourth cause of action for violation of the ADA is based on allegations that (1) he suffered a disability, in that his hearing was damaged by the attempts of jail medical staff to remove the cockroach from his ear, and he suffered ongoing dizziness and vertigo; (2) the judge in his criminal case ordered that he be assigned to a bottom bunk; (3) he was "excluded from using, and denied use of a bottom bunk due to his lack of hearing"; and (4) he was injured by a fall from the top bunk to which he was assigned. Several of these allegations, however, are unsupported by evidence.

First, there is no cognizable evidence that the judge in Diaz's criminal case ordered that he be assigned to a bottom bunk. Diaz testified during his deposition that he understood the court to make such an order on April 9, 2014. There is no transcript of the oral proceedings on that date in our record, however, and the court's minutes do not reflect any such order. The court did grant a defense request that Diaz receive medical

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[6] The trial court also cited the lack of evidence of conduct motivated by racially discriminatory animus as a basis for dismissing the eleventh cause of action. This reasoning was erroneous. (See *Austin B. v. Escondido Union School Dist.*, *supra*, 149 Cal.App.4th at p. 882 ["To obtain relief under Civil Code section 52.1, a plaintiff need not allege the defendant acted with discriminatory animus or intent; a defendant is liable if he or she interfered with the plaintiff's constitutional rights by the requisite threats, intimidation, or coercion."] Nevertheless, Diaz's eleventh cause of action was properly dismissed on summary judgment, because it was based on the notion that his arrest was unlawful and, as discussed above, the arrest was not unlawful.

attention, apparently for treatment of his ear, but there is nothing memorializing any court order regarding bunk assignment.

More fundamentally, however, to maintain his ADA claim, Diaz would have to show, among other things, that he was denied use of a bottom bunk "by reason of his disability." (*Duvall v. County of Kitsap* (9th Cir. 2001) 260 F.3d 1124, 1135; see *In re M.S.* (2009) 174 Cal.App.4th 1241, 1252 [same].) In his briefing on appeal, Diaz points to no evidence in support of that proposition, citing only his own deposition testimony regarding the purported April 9, 2014 court order, discussed above. Our review of the record also reveals no evidence from which it is reasonably inferred Diaz's bunk assignment had anything to do with his disability. Diaz's ADA claim was therefore properly resolved on summary judgment.

4. *Invasion of Privacy*

As pleaded, Diaz's invasion of privacy claim is based on his arrest, which he contended was "unlawful," and the search of his home, which he alleged was made without a warrant. At the summary judgment stage, however, he conceded that the search warrant was in fact obtained before the search. Here, Diaz has not argued that the search warrant was obtained without probable cause. And we rejected above his arguments that his arrest was not justified by probable cause. Diaz therefore has demonstrated no error with respect to the trial court's ruling on his invasion of privacy claim.

5. *Intentional Infliction of Emotional Distress.*

Diaz's intentional infliction of emotional distress claim rests on the proposition that he was injured not only physically, but also emotionally by being arrested without probable cause and then injured in several respects while incarcerated pending trial. Again, as discussed above, Diaz's arrest was justified by probable cause. In opposition to summary judgment on this cause of action, Diaz presented evidence to support his contention that he was injured by a cockroach crawling into his ear, and that he subsequently complained about the cockroach infestation to jail officials. He failed, however, to present any evidence from which it could be inferred that respondents intended to inflict this injury on him, or that they engaged in any conduct with the realization that such an injury would result. (See *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051 [to support intentional infliction of emotional distress claim, defendant's conduct "must be """"intended to inflict injury or engaged in with the realization that injury will result""""].) There is no evidence, for example, that respondents knew that they were assigning him to a cell that had been infested with cockroaches. Diaz's intentional infliction of emotional distress claim was therefore properly resolved on summary judgment.

III. DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAPHAEL
J.

We concur:

RAMIREZ
P. J.

MILLER
J.

I, Kevin J. Lane, Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby Certify that the preceding and annexed is a true and correct copy of the original on file in my office.

WITNESS, my hand and the seal of the Court this 8/27/19

KEVIN J. LANE, CLERK/EXECUTIVE OFFICER

By Michelle Parlapiano
Deputy Clerk