UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 23-55499

ORDER
ISSUED 06/29/2023

EVELYN NEWEY, Plaintiff-Appellant,
v.
COUNTY OF ORANGE; et al; Defendant-Appellees.

D.C. No. 8:18-cv-01118-DOC-KES
Central District of California, Santa Ana

Before: SILVERMAN, R. NELSON, and BUMATAY, Circuit Judges,

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the June 6, 2023 notice of appeal was not filed within 30 days after the district court's judgment entered on January 18, 2019. *See* 28 U.S.C. § 2107(a); *United States v Sadler,* 480 F.3d 932, 937 (9th Cir. 2007) (requirement of timely notice of appeal is jurisdictional). Consequently, this appeal is dismissed for lack of jurisdiction.

DISMISSED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORIA
CASE NO. 8:18-CV-01118-DOC-KES

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE
ISSUED 12/10/18

EVELYN NEWEY, Plaintiff
v.
THE COUNTY OF ORANGE, et al. Defendants.

The Report and Recommendation is submitted to the Honorable David O. Carter, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

In April 2018, pro se Plaintiff Evelyn Newey ("Plaintiff") initiated this lawsuit in Orange County Superior Court. (Dkt.1-2.) Plaintiff's Complaint asserted a single cause of action for negligence against Defendant County of Orange ("County"). (Id.) In June 2018, Plaintiff filed her First Amended Complaint ("FAC"), dropping her negligence claim and adding civil rights claims. (Dkt.1-5.) The County removed the action to federal court. (Dkt.1.)

Once in federal court, the County moved to dismiss the FAC. (Dkt.15.) Plaintiff offered to amend, and the Court granted her leave to file a Second Amended Complaint

("SAC"). (Dkt. 14, 25)

On August 29, 2018, Plaintiff filed the operative SAC. (Dkt.26.) The SAC sues four defendants for negligence and Fourth Amendment violations under 42 U.S.C. § 1983[1]: (1) the County, (2) the City of Dana Point ("City"), (3) Orange County Sheriff's Deputy Victoria Ditrih ("Ditrih") and (4) Orange County Sheriff's Deputy Sergeant Jonathan Daruvala (SAC ¶¶ 3-6).

On September 19, 2018, the County moved to dismiss the SAC. (Dkt. 40.) Defendants Ditrih and Daruvala also moved to dismiss the SAC (Dkt. 42) and to strike Plaintiff's prayer to recover punitive damages from them (Dkt. 41.) Finally, the City moved to dismiss the SAC. (Dkt. 54.) Plaintiff opposed each of the motions (Dkt. 47, 48, 49, 61.) Each Defendant replied. (Dkt. 55, 56, 57, 58, 62.) Plaintiff then filed a surreply to the City's reply. (Dkt. 63.)

For the reasons stated below, Plaintiff's § 1983 claims should be dismissed without further leave to amend. The Court further recommends declining to exercise supplemental jurisdiction over the remaining state-law claims.

II.
SUMMARY OF PLAINTIFF'S FACTUAL ALLEGATIONS

Plaintiff is 75 years old. (SAC ¶ 85.) Plaintiff alleges that on April 1, 2017, she was driving southbound on

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[1] Plaintiff also cites 42 U.S.C. § 1981. (SAC at 1.) That statute provides that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." This statute has no apparent bearing on the SAC. Thus, the Court disregards this citation.

Pacific Coast Highway through the City and observed a police car "parked diagonal [across the southbound lanes], lights on, appearing to be an abrupt stop." (SAC ¶ 12.) She "cautiously edged around the rear left corner of the police car", staying on the southbound side of the double yellow lines. (SAC ¶ 14.) When Plaintiff heard a female voice shout, "You nearly hit me," she turned around, saw Deputy Ditrih standing by the trunk of the police car, and stopped her car. (SAC ¶¶ 17-19.) Ditrih issued her an infraction citation for violating California Vehicle Code ("CVC") § 21806(a)(1), failure to yield. (SAC ¶ 21; Dkt. 1-2 at 16[2] [copy of citation].) Ditrih subsequently issued a corrected citation alleging that Plaintiff violated CVC § 21460(a), crossing double yellow lines. (SAC ¶¶ 135-36; Dkt. 1-2 at 49.) Ditrih also caused Plaintiff to receive in the mail a "Notice of Priority Re-Examination of Driver (Driver Incapacity)" (the "Exam Notice" [Dkt. 1-2 at 18]) directing Plaintiff to re-take the California driver's license examination. (SAC ¶¶ 30-31.)

On April 3, 2017, Plaintiff went to the Dana Point Police Station and spoke to Defendant Daruvala. She told him that Deputy Ditrih was "unhinged," but he turned his back to her. (SAC ¶¶ 38-39.) Plaintiff submitted a written complaint describing Ditrih's conduct during the traffic stop. (Dkt.1-2 at 125-28.)

On April 4, 2017, Plaintiff took the written portions

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[2] The SAC incorporates by reference exhibits to the original complaint which can be found at Dkt. 1-2. This is generally not permissible. See C.D. L.R. 15-2 ("Every amended pleading filed as a matter of right or allowed by order of the Court shall be complete including exhibits. The amended pleading shall not refer to the prior, superseded pleading."). Nonetheless the Court will consider these exhibits in deciding the motions. See Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir.2005) (noting that under "incorporation by reference" doctrine, courts may review documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading").

of the California driver's license examination and passed. (SAC ¶¶ 42-43.) On April 6, 2017, she took the road test and failed. (SAC ¶¶ 46-48.) As a result, the California Department of Motor Vehicles ("DMV") suspended Plaintiff's driver's license effective April 11, 2017, and advised her of her right to request a hearing. (SAC ¶ 49; Dkt. 1-2 at 53 [order of suspension].) She apparently requested a hearing, because one was set for April 27, 2017. (Dkt. 1-2 at 71 [email referring to hearing date].)

On April 11, 2017, Plaintiff drove to the Dana Point Police Station seeking assistance and again encountered Defendant Daruvala. (SAC ¶¶ 53-54.) Plaintiff told him, "I have a suspension." (SAC ¶ 57.) He turned his back to her again and instructed the volunteer receptionists not to schedule an appointment for her with the commander, as she was requesting. (SAC ¶¶ 53-54, 57.)

Plaintiff walked out of the station and "sat in her car [in the station's parking lot] and planned to park on adjacent residential street to assess her options." (SAC ¶¶ 65-66.) Plaintiff saw Daruvala exit the station and enter a police car "parked adjacent to the wall behind her." (SAC ¶ 66.) When she "reversed from her space, he "moved behind her applying his lights," and she stopped. (SAC ¶ 67.) He told her, "you have a suspension." (SAC ¶ 68.) He directed her to exit her car and sit on the curb, which she did. (SAC ¶ 70.) He issued her a misdemeanor citation for driving with a suspended license. (SAC ¶ 71; Dkt. 1-2 at 58 [copy of citation].) He confiscated her license. (SAC ¶¶73-74; Dkt. 1-2 at 60 [DMV form completed by Daruvala indicating license confiscated and mailed to DMV].)

Daruvala asked Plaintiff what she wanted from her car, and she responded, "my two purses and my laptop." (SAC ¶¶ 75-76.) Daruvala "searched her possessions [i.e., her purses] for contraband/weapons but found nothing leaving them on the curb" for her. (SAC ¶ 77.) Daruvala

caused Plaintiff's car to be towed and impounded by S&K Towing ("S&K"). (SAC ¶¶ 80, 82; Dkt. 1-2 at 67 [impound notice].) Neither Daruvala nor S&K gave Plaintiff a receipt for the towed car, but S&K gave her a business card. (SAC ¶¶ 78-81.)

Plaintiff alleges that she experienced "extreme emotional distress" because there were multiple officers present carrying guns (i.e., Daruvala and officers from two other cars); as she sat on the curb, one male deputy stood directly over Plaintiff "in a menacing position." (SAC ¶¶ 83-86.)

Daruvala later wrote a police report describing this incident, and Plaintiff alleges that he included false statements in that report. (SAC ¶¶ 40, 87.) Plaintiff does not allege in the SAC what statements in the report were false or why, but she previously filed a letter with such allegations. (Dkt. 1-2 at 116-23.) Plaintiff alleges that the report reveals Daruvala's acrimony" towards her, because the report states that Plaintiff was repeatedly "complaining." (SAC ¶¶ 148-53.)

A passerby helped Plaintiff check into a nearby Marriott. (SAC ¶ 89.) She lived at the Marriott until July 8, 2017, then moved to a hotel closer to the DMV until July 14, 2017, spending approximately $11,500 on hotels between April and July. (SAC ¶ 89; Prayer ¶ 7.) Plaintiff had been temporarily living in her car because she had just moved to Orange County. (Dkt. 1-2 at 92, 119.)

On April 20, 2017, an Orange County Sheriff's captain sent Plaintiff a letter in response to her initial personnel complaint against Ditrih; it advised her of a determination that while "I do not believe the deputy violated any policy or procedure, I do feel the situation may have been handled better." (Dkt. 1-2 at 79-80.) The County sent a similar letter responded to Plaintiff's later complaints. (Id. At 109.)

On May 1, 2017, Plaintiff paid $292.00 to satisfy the corrected citation for violating CVC § 21460(a). (SAC ¶ 139.)

On May 5, 2017, Plaintiff retained a DMV attorney to assist her in responding to the misdemeanor citation. (SAC ¶ 92.) An arrest warrant was issued for her failure to appear at the Harbor Justice Center on May 12, 2017, even though her attorney appeared on her behalf. (SAC ¶ 93; Dkt. 1-2 at 107). The County District Attorney's Office later dropped the charges. (SAC ¶ 95.)

It appears that the DMV reinstated her driver's license on July14, 2017. (Dkt. 1-2 at 127 [letter referring to reinstatement order].)

On September 25, 2017, Plaintiff filed a government claim with the County. (SAC ¶ 98.) It was rejected by operation of law. (Dkt.1-2 at 130.)

III.

LEGAL STANDARDS

Under Federal Rule of Civil Procedure 12(b)(6) a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts which, if true, would entitle the complainant to relief. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); Ashcroft v. Iqbal. 556 U.S. 662, 679 (2009) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the rights to relief beyond the speculative level; a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly. 550 U.S. at 555 (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). On a motion to dismiss, a court accepts a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. See Manzarek v. St. Paul

Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required to accept as true legal conclusions couched as factual allegations. Iqbal. 556 U.S. at 678.

When a motion to dismiss is granted, the court must decide whether to grant leave to amend. The Ninth Circuit has a liberal policy favoring amendments and, thus, leave to amend should be freely granted. See, e.g., DeSoto v. Yellow Freight System, Inc., 957 F.2d 655, 658 (9th Cir. 1992). However, a court need not grant leave to amend when permitting a plaintiff to amend would be an exercise in futility. See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

Federal Rule of Civil Procedure12(f) permits a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983). Motions to strike are generally disfavored and "should not be granted unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation." Platte Anchor Bolt, Inc. v. IHI, Inc., 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004). "With a motion to strike, just as with a motion to dismiss, the court should view the pleading in the light most favorable to the nonmoving party." Id.

IV.

DISCUSSION

A. Elements of § 1983 Liability.

Every person who, under color of state law, subjects another to the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ..." 42 U.S.C. § 1983. For purposes of liability under § 1983, a person "subjects" "another to the deprivation of a constitutional right "if he does an affirmative act, participates in another's affirmative acts or omits to perform an act which he is legally required to do that causes the deprivation ..." Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

Plaintiff alleges that Defendants deprived her of rights guaranteed by the Fourth Amendment to the United States Constitution. The Fourth Amendment prohibits unreasonable searches and seizures. Assessing the reasonableness of a particular search or seizure requires balancing the nature and quality of the seizure against the governmental interest at stake. See, e.g., Liberal v. Estrada, 632 F.3d 1064, 1079 (9th Cir. 2011).

Traffic stops are investigatory stops that must be based on reasonable suspicion that a traffic law violation occurred. Id. At 1077; United States v. Willis, 431 F.3d 709, 714 (9th Cir. 2005). Reasonable suspicion consists of "specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity." Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1496 (9th Cir.1996). In contrast, a California traffic citation is considered an "arrest" for which an officer must have probable cause. Id, at 1498 (citing Cal. Pen. Code § 853.5.) Probable cause exists when, at the time of arrest, the officer knows "reasonably trustworthy information sufficient to warrant a prudent person in believing that the accused had committed or was committing an offense." Id.

The use of excessive force can also render a search or

seizure unconstitutional. Such claims are analyzed under the "reasonableness" standard set forth in Graham v. Connor, 490 U.S. 386 (1989). Ward v. City of San Jose, 967 F.2d 280, 284 (9th Cir. 1992) (as amended). That standard is objective; "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Graham, 490 U.S. at 397.

B. Plaintiff's § 1983 Claims against Defendant Ditrih.

Much of the wrongdoing of which Plaintiff accuses Ditrih (e.g., shouting at Plaintiff, failing to explain the traffic citation process, citing Plaintiff despite her age, emotional distress, and need to drive to make a living) does not constitute a violation of Plaintiff's Fourth Amendment rights, or any rights secured by the U.S. Constitution., Liberally construing the SAC, Plaintiff alleges that Ditrih violated her Fourth Amendment rights by issuing the failure-to-yield citation, the corrected citation for crossing double yellow lines, and the DMV Notice, because these documents contain false information. (SAC ¶ 100-06.) The Court considers each allegation in turn per the bullet-point list, below.

- Ditrih issued a "false" citation (or a citation without probable cause) for failure to yield, because Plaintiff did not violate CVC § 21806(a)(1). Plaintiff cannot allege facts showing that this citation caused her damages, because it was replaced by a corrected citation within days.
- Ditrih issued a "false" citation for crossing the double yellow lines, because Plaintiff did not do so. State traffic court would have provided Plaintiff a forum to adjudicate whose account of Plaintiff's driving on April 1, 2017 was truthful, but Plaintiff did not contest this citation; she pleaded guilty or no contest and paid the

fine. (SAC ¶ 138.) Plaintiff cannot now bring a § 1983 claim that, if successful, would necessarily imply or demonstrate the invalidity of her conviction. See CVC § 13103 (defining a guilty or no contest plea to a traffic citation as a conviction). "[I]f a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be dismissed." Smithhart v. Towery, 79 F.3d 951, 952 (9th Cir. 1996) (citing Heck v. Humphrey, 512 U.S. 477, 486-87 (1994).

- Ditrih gave false reasons for requiring Plaintiff to re-take the driver's license examination, i.e., she claimed Plaintiff had crossed double yellow lines when Plaintiff did not. Again, under the Heck doctrine, Plaintiff cannot challenge in a § 1983 action the truthfulness of allegations to which she has already pleaded guilty or no contest.
- On April 1, 2017, Ditrih conducted a traffic stop without reasonable suspicion. Again, since Plaintiff paid a citation resulting from the traffic stop, Plaintiff's contention that Ditrih lacked reasonable suspicion to stop her (or lacked probable cause to issue a citation) is Heck-barred.
- Ditrih used excessive force to effect the traffic stop. Plaintiff does not allege any application of force by Ditrih other than Ditrih shouting at her, which is not excessive force as a matter of law. Cf. Gaut v. Sunn. 810 F.2d 923, 925 (9th Cir. 1987) (noting that it trivializes Eighth Amendment to believe verbal threats constitute constitutional wrongs).

C. Plaintiff's § 1983 Claims against Defendant Daruvala.

Plaintiff alleges that Daruvala violated her Fourth Amendment rights by citing her for driving on a suspended

license, confiscating her license, seizing her car, searching her purses, and drafting a false police report. (SAC ¶¶ 107-08, 112; Dkt. 1-2 at 91-92 [excerpts from police report].) He allegedly further violated her Fourth Amendment rights by failing to advise her that "S&K Impound would demand proof of her current insurance liability before releasing her car" and "demand exorbitant impound fees." (SAC ¶¶ 109, 111.) Through his access to DMV records, he "knew Plaintiff insurance expired on April 20, 2017," and once expired, the pending citation would "place at risk renewal insurance and her ability to retrieve her car from impound." (SAC ¶ 110.)

Again, much of the wrongdoing of which Plaintiff accuses Defendant (e.g., turning his back on her, describing her in his police report as prone to complaining, failing to explain the impound process, and refusing to schedule an appointment for her with the commander) does not rise to the level of violating Plaintiff's constitutional rights. Liberally construing the SAC, the court considers below each of Plaintiff's potential § 1983 claims against Daruvala.

- Daruvala issued Plaintiff a "false" citation (or a citation without probable cause) for driving with a suspended license. Plaintiff admits that (1) her driver's license was suspended as of April 11, 2017, (2) she told Daruala she had a suspension, and that (3) Daruvala later saw her driving in reverse. (SAC ¶¶ 50, 57, 67.) These admissions establish probable cause for Daruvala to cite Plaintiff for driving with a suspended license.
- Daruvala searched her purses for "weapons/contraband" without her consent after retrieving them from the car and before placing them on the curb beside her.[3]

[3] To the extent Plaintiff alleges that Daruvala unlawfully searched her car to retrieve her purses and laptop, inventory searches of vehicles

Plaintiff may contend that this search occurred incident to her arrest. (Dkt. 1-2 at 121 ["My attorney advised I had been arrested but without handcuffs."].) It is well established that an arrested person and the belongings under his/her immediate control may be searched without a warrant as incident to the arrest. See Chimel v. California. 395 U.S. 752, 773 (1969). "The search incident to arrest exception [to the warrant requirement] rests not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody." Riley v. California, ___ U.S. ___, 134 S. Ct. 2473, 2488 (2014) (citing with approval lower court decisions upholding the constitutionality of searching purses incident to arrest).

Per the SAC, Plaintiff had requested her purses, and Daruvala searched them before giving them to her, i.e., before placing them back in her immediate control. Under such circumstances, searching the purses for weapons was consistent with the interests underlying the search-incident-to-arrest exception to the warrant requirement.

Even if the search-incident-to-arrest exception does not apply to the April 11, 2017 search, Plaintiff still fails to plead facts showing that Daruvala acted objectively unreasonably. The reasonableness of this search is judged based on the circumstances known to Daruvala at the time. Plaintiff alleges that she had interacted with Daruvala twice at the police station. The first time she accused another officer of being "unhinged." (SAC ¶38.) The second time, she sought an appointment with

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prior to impounding them are constitutional. Colorado v. Bertine, 479 U.S. 367, 374 (1987).

the commander. (SAC ¶ 53.) By the time Daruvala searched her purse, Daruvala knew that he had refused Plaintiff's requests for assistance, cited her for driving on a suspended license, and ordered her car (in which she was temporarily living) towed – all actions that might provoke anger. Plaintiff admits she was severely emotionally distressed. (SAC ¶ 81). These allegations could not support a finding that Daruvala acted objectively unreasonable by searching her purses for a weapon (such as a pepper spray, which some women carry in their purses for self-defense) before handing them to her.

- Daruvala wrote a false police report. This allegation fails to state a claim because Plaintiff fails to allege which statements in the report were false. But even if Plaintiff amended the SAC to allege the same false statements she listed in her earlier letter (see Dkt. 1-2 at 116-23), Plaintiff would fail to allege a civil rights violation. The alleged misrepresentations by Daruvala (e.g. that Plaintiff "appeared frustrated" when she was not, that she told him she was "homeless" when she actually told him she was only temporarily living in her car, that certain documents were by certified mail rather than first class mail) are not material to Daruvala's determination that he had probable cause to cite Plaintiff for driving with a suspended license. As a result, Plaintiff cannot show that the alleged misrepresentations caused her injuries (i.e., being cited, losing her car, and paying a lawyer). See Medeiros v. City & Cty. of Honolulu, 2013 U.S. Dist. LEXIS 199740, at *17 (D. Haw. Apr. 19, 2013) ("These cases make clear that a false police report by itself is insufficient to state a § 1983 claim; rather, there must be some constitutional deprivation that flows from the report."); Walker v. City of Fresno, 2010 U.S. Dist. LEXIS 86562,

at *16 (E.D. Cal. Aug. 23, 2010) ("Defendant Robles' alleged conduct of ... filing a false report regarding Robles' observation at the hospital of Plaintiff's injuries does not represent a deprivation of Plaintiff's Fourth Amendment rights.")

- Daruvala confiscated Plaintiff's suspended driver's license. The SAC references a DMV form that Daruvala completed; it instructs officers, "Please obtain any suspended ... driver license and forward to the [DMV] pursuant to the authority set forth in sections 4460 and 13550 [CVC]." (See SAC ¶ 73; Dkt. 1-2 at 60.) Plaintiff fails to allege facts suggesting that these code sections are unconstitutional. Plaintiff also fails to allege how the confiscation caused her any damages, since she was not permitted to drive while her license was suspended and ultimately re-tested and re-obtained from the DMV. (See Dkt. 1-2 at 122.)
- Daruvala had Plaintiff's car towed and impounded. California law permitted him to do this, and Plaintiff fails to allege facts suggesting these code sections are unconstitutional. See CVC §§ 13102, 14602.6, 22651(p), 22655.5. While a civil rights claim may arise if an officer impounds a car with deliberate indifference to stranding a motorist in an obviously dangerous situation, causing injury, see Wood v. Ostrander, 879 F.2d. 583, 589-90 (9th Cir. 1989), Plaintiff can allege no such facts here.
- Daruvala subjected Plaintiff to excessive force by using backup officers and having one stand "menacingly" near her. (SAC ¶¶ 84-85.) Plaintiff does not allege that any of the officers drew their service weapons or pointed a gun at her. It is understandable that Plaintiff felt intimidated under the circumstances. However, the fact that police officers at a police station were carrying service weapons while interacting with her or standing

over her while she sat on the curb does not allege a civil rights violation.

D. **Plaintiff's 1983 Claims against the City and the County.**

A municipality may be liable under § 1983 where the municipality itself causes the constitutional violation through a "policy or custom, whether made by its lawmakers or those whose edicts or acts may fairly be said to represent official policy." Monell v. Department of Social Services. 436 U.S. 658, 694 (1978). Municipal liability in a § 1983 case may be premised upon: (1) an official policy; (2) a "longstanding practice or custom which constitutes the standard operating procedure of the local government entity"; (3) the act of an "official whose acts fairly represent official policy such that the challenged action constituted official policy"; or (4) where "an official with final policy-making authority delegated that authority to, or ratified the decision of, a subordinate." Price v. Serv. 513 F.3d 962, 966 (9th Cir. 2008). "To sufficiently plead a Monell claim and withstand a Rule 12(b)(6) motion to dismiss, allegations in a complaint 'may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively.'" Johnson v. Shasta County, 83 F.Supp.3d 918, 930 (E.D. Cal. 2015) (quoting AE ex rel. Hernandez v. City of Tulare, 666 F.3d 631, 637 (9th Cir. 2012)).

Plaintiff alleges, "Defendants County of Orange and City of Dana Point were aware of its deputies inadequate training and supervision. Additionally, Defendants County of Orange and City of Dana Point were aware of their deputies' tendency to not follow proper procedure. Despite this knowledge, Defendants County of Orange and City of Dana Point failed to take steps to correct these problems." (SAC ¶ 116.)

Plaintiff alleges that the City and County were aware of Daruvala's need for better training and supervision because he was previously sued, citing Central District Case no. 8:08-cv-01203-CJC-E (the "2008" case). (SAC ¶ 118.) In that case, Daruvala was accused of wrongfully arrested Dominic Prietto (who was videotaping the arrest of his friends) and then confiscating the videotape which allegedly depicted excessive force. (2008 case, Dkt. 19, ¶ 21.) The jury found that Daruvala had probable cause to arrest Prietto and did not use excessive force to do so. (Id. Dkt. 111 at 2.)

As discussed above, Plaintiff has failed to allege facts showing that Ditrih or Daruvala engaged in actionable wrongdoing. Plaintiff therefore fails to state a § 1983 claim against the County or the City.

E. **Plaintiff's Claims under California Law**.

Plaintiff generally alleges that Ditrih and Daruvala acted unreasonably by engaging in the same misconduct that violated Plaintiff's civil rights and failing to advise her of the potential consequences of the citations. (SAC ¶ 127-55). Essentially, Plaintiff alleges that the officers unreasonable exercised their discretion in deciding to act as they did. Plaintiff believes that they should have exercised their discretion not to enforce the CVC against her because of her good driving record, her advanced age, her recent move to Orange County, and her need to drive to work. Plaintiff alleges that Daruvala "libelous and defamatory statements in his Police Report dated April 11, 2011." (SAC ¶ 156.) Plaintiff also refers to "intentional infliction of emotional distress" (see, e.g., SAC ¶ 103).

Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statues that it describes." Baker v.

McCollan, 443 U.S. 137, 144 n.3 (1979). A claim for violation of state law is not cognizable under § 1983. Barry v. Fowler, 902 F.2d 770, 772 (9th Cir. 1990). Thus, the Court's jurisdiction over Plaintiff's state-law claims is supplemental in nature. See 28 U.S.C. § 1367(a). A district court may decline to exercise supplemental jurisdiction over remaining state-law claims if the court has "dismissed all claims over which it has original jurisdiction." Id. § 1367(c)(3). Given that the Court recommends dismissing Plaintiff's § 1983 claims, the Court recommends declining to exercise supplemental jurisdiction over Plaintiff's state-law claims. See 28 U.S.C. § 1367(c)(3).

F. Motion to Strike

Given the recommendations above, the Court recommends denying the motion to strike as moot.

VI.

RECOMMENDATION

This is the third version of Plaintiff's complaint. Plaintiff's allegations are detailed and thorough, and she has provided a variety of documentary evidence related to her claims. The core of Plaintiff's allegations is that Defendants overreacted to her minor mistakes and treated her discourteously, but Plaintiff fails to allege facts showing that Defendants exercised their law enforcement discretion in a manner that transgressed constitutional bounds. The Court concludes that it is absolutely clear, therefore, that the deficiencies above could not be rectified by further amendment.

In removal actions, district courts that have declined to exercise supplemental jurisdiction have remanded the state law claims to state court rather than dismissed those claims. See, e.g., McConnell v. Genetech, Inc., No. C 11-

4976 SBA, 2012 WL 851190, at *2 (N.D. Cal. Mar. 13, 2012) (declining to retain supplemental jurisdiction and remanding to the state court); Wellisch v. Penn. Higher Educ. Assistance Agency, No. 17-cv-00213-BLF, 2018 WL 2463088, at *3 (N.D. Cal. June 1, 2018) (same).

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting the Report and Recommendation; (2) GRANTING the motions to dismiss in part; (3) DENYING the motion to strike as moot; (4) dismissing Plaintiff's § 1983 claims with prejudice; and (5) REMANDING all further proceedings in this case to the Orange County Superior Court of California.

DATED: December 10, 2018

/s/
KAREN E. SCOTT
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to timely file objections as provided in the Federal Rules of Civil Procedure and the instructions attached to this Report. This Report and any objections will be reviewed by the District Judge whose initials appear in the case docket number.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORIA
CASE NO. 8:18-CV-01118-DOC-KES

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ISSUED 01/18/19

EVELYN NEWEY, Plaintiff
v.
THE COUNTY OF ORANGE, et al.
Defendants.

Pursuant to 28 U.S.C. § 636, the Court has reviewed the pleadings and all the records and files herein, along with the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court accepts the findings, conclusions, and recommendations of the United States Magistrate Judge.

IT IS THEREFORE ORDERED that Judgment be issued dismissing Plaintiff's 42 U.S.C. § 1983 claims with prejudice and remanding all further proceedings to the Orange County Superior Court of California

DATED: January 18, 2019

/s/
David O. Carter
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORIA
CASE NO. 8:18-CV-01118-DOC-KES

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE
ISSUED 06/16/2023

EVELYN NEWEY, Plaintiff
v.
THE COUNTY OF ORANGE, et al., Defendants.

This Report and Recommendation ("R&R") is submitted to the Honorable David O. Carter, United States District Judge, pursuant to the provisions of 28 U.S.C.§ 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.
BACKGROUND

In April 2018, pro se Plaintiff Evelyn Newey ("Plaintiff") initiated this lawsuit in Orange County Superior Court. (Dkt1-2.) Plaintiff's Complaint asserted a single cause of action for negligence against Defendant County of Orange ("County") (Id.) In June 2018, Plaintiff filed her First Amended Complaint ("FAC"), dropping her negligence claim and adding civil rights claims. (Dkt.1-5.)

The County removed the action to federal court (Dkt.1) and moved to dismiss the FAC. (Dkt.15.) Plaintiff offered to amend, and the Court granted her leave to file a Second Amended Complaint ("SAC"). (Dkt. 14, 25.)

In August 2018, Plaintiff filed the operative SAC. (Dkt. 26.) The SAC sues four defendants for negligence and Fourth Amendment violations under 42 U.S.C. § 1983: (1) the County, (2) the City of Dana Point ("City"), (3) Orange

County Sheriff's Deputy Victoria Ditrih and (4) Orange County Sheriff's Deputy Sergeant Jonathan Daruvala. (SAC ¶¶ 3-6.) In September 2018, Defendants moved to dismiss the SAC. (Dkt. 40, 41, 42, 54.) Plaintiff opposed each of the motions. (Dkt. 47, 48, 49, 61, 63.)

In December 2018, the Magistrate Judge issued a report and recommendation ("R&R") that the motions to dismiss be granted. (Dkt. 65.) Plaintiff filed objections the R&R (Dkt. 66), as well as a response to Defendants' objections to the R&R (Dkt. 68). On January 18, 2019, the District Judge accepted the R&R and entered judgment for Defendants. (Dkt. 70, 71.)

More than four years later, on June 6, 2023, Plaintiff filed the instant motion for leave to file a late notice of appeal. (Dkt. 73.) The District Judge referred the motion to the Magistrate Judge. (Dkt. 76)[4] For the reasons explained below, the motion should be denied.

II.
LEGAL STANDARD

Generally, parties must file a notice of appeal within 30 days of entry of the judgment being appealed. Fed. R. App. P. 4(a)(1)(A); 28 U.S.C. § 2107(a). "[T]he taking of an appeal within the prescribed time is 'mandatory and jurisdictional,'" and "[d]courts have limited authority to grant an extension of the 30-day time period." Bowles v. Russell, 551 U.S. 205, 208-09 (2007). The district court may *extend* the time to file a notice of appeal, but only if

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[4] An R&R is issued because motions to reopen the time to appeal are dispositive matters under Federal Rule of Civil Procedure 72 and 28 U.S.C, § 636, N. S. v. Rockett, No. 19-35955, 2021 WL 1984900 at *1, 2021 U.S. App. LEXIS 4590 at *2 (9th Cir. Feb. 17, 2021) (dismissing appeal for lack of jurisdiction, despite magistrate judge's order granting motion to reopen time to appeal, "because the magistrate lacked authority to enter a dispositive post-judgment order where all parties had not consented to the magistrate judge's jurisdiction pursuant to 28 U.S.C. § 636(c)(1)").

asked to do so "no later than 30 days after the time prescribed by this Rule 4(a) expires." Fed. R. App. P. 4(a)(5)(A)(i); 28 U.S.C. § 2107(c). The party must also demonstrate excusable neglect or good cause. Fed. R. App. P. 4(a)(5)(A)(ii); 28 U.S.C. § 2107(c).

Additionally, a district court may *reopen* the time for filing an appeal, "but only if the following conditions are satisfied";

> (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
>
> (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
>
> (C) the court finds that no party would be prejudiced.

Fed. R. App. P. 4(a)(6); see also 28 U.S.C. § 2107(c).

III.
DISCUSSION

The Court may not extend the time to appeal under Federal Rule of Appellate Procedure 4(a)(5) because the motion is untimely. It was filed more than 60 days after entry of judgment. As noted above, it has been more than 4 years since judgment was entered in this case on January 18, 2019. (Dkt. 71.)

The Court may not reopen the time to appeal under Federal Rule of Appellate Procedure 4(a)(6). Plaintiff has not shown that the conditions in that rule are satisfied, because she does not allege that she failed to receive notice of entry of the judgment within 21 days after entry (i.e., by February 8, 2019). She appears to admit that she received

timely notice of the judgment, explaining that she needed "three (3) plus years to examine and articulate" her grounds for appeal due to her pro se status and a series of unfortunate events in her personal life. (Dkt. 73 at 3.)[5] She also filed this motion more than 180 days after entry of judgment.

To the extent Plaintiff is arguing that the Magistrate Judge should have recused herself from this action under 28 U.S.C. § 455, it is not clear whether Plaintiff is describing this as a possible ground for appeal, or whether she is arguing that the Magistrate Judge should recuse herself now. (Dkt. 73 at 17-18.) If the latter, Plaintiff would need to file a separate motion to recuse the Magistrate Judge, which would be decided by the District Judge.

IV.
RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting this R&R; and (2) denying Plaintiff's motion to extend or reopen the time to appeal (Dkt.73).

DATED: June 16, 2023

/s/
KAREN E. SCOTT
United States
Magistrate Judge

[5] To the extent Plaintiff is arguing that she was confused about how and when to appeal because there were "no instructions attached" to the R&R and she "assumed [the] Magistrate Judge had [the] final word" (Dkt. 73 at 13-14), the Court notes that she did file timely objections to the R&R, as well as a response to Defendants' objections. (Dkt. 66, 68.)

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals but are subject to the right of any party to timely file objections as provided in the Federal Rules of Civil Procedure and the instructions attached to this Report. This Report and any objections will be reviewed by the District Judge whose initials appear in the case docket number.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORIA
CASE NO. 8:18-CV-01118-DOC-KES

ORDER ACCEPTING REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE ISSUED 07/11/23

EVELYN NEWEY, Plaintiff
v.
THE COUNTY OF ORANGE, et al.
Defendants.

Pursuant to 28 U.S.C. § 636, the Court has reviewed the pleadings and all the records and files herein, along with the Report and Recommendation of the United States Magistrate Judge (Dkt.77). Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections (Dkt.79) have been made. The Court accepts the findings, conclusions, and recommendations of the United States Magistrate Judge.

IT IS THEREFORE ORDERED that Plaintiff's motion to extend or reopen the time to appeal (Dkt.73) is **denied**.

DATED: July 11, 2023

/s/
DAVID O. CARTER
UNITED STATES
DISTRICT JUDGE

DESCRIPTIONS CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S. Code § 242. Deprivation of Rights Under Color of Law.

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; ...

18 US Code § 1001. Statements or Entries Generally.

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully-(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, ..."

18 US Code § 1503. Influencing or Injuring Officer or Juror Generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or

property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection.

18 U.S. Code § 1621. Perjury Generally

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

28 U.S. Code § 455(a). Disqualification of Justice, Judge or Magistrate Judge.

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.(b) He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

28 U.S. Code § 1746. Unsworn declarations under penalty

of perjury.

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form: If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

42 U.S. Code § 1983. Civil Action for Deprivation of Rights

Every person who under color of any statute, ordinance, regulation custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia

Fed.R.Civ.P.2. On motion or its own, the court may at any time, on just terms, add or drop a party.