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June 4, 2008

VIA E-MAIL AND FIRST CLASS MAIL

Mark H. Cheung
Wu & Cheung, LLP
98 Discovery
Irvine, CA 92618-3105

Re: Charlie Abujudeh, Cross-Complainant v. City of Lake Forest, et al.,
Cross-Defendants
USDC Case No. SACV08-00551 DOC (MLGx)
Our Client: Cross-Defendant County of Orange

Dear Mr. Cheung:

This office will be representing the County of Orange in the above matter. I have tried without success to reach you by telephone to discuss your client's cross-complaint filed against the County of Orange. This letter is being sent to you in accordance with the Central District Local Rule 7-3, which requires that we meet and confer prior to the filing of a motion to dismiss. Please be advised that under Rule 7-3, Defendants' motion to dismiss may be filed five days following this meet and confer correspondence.

1. 42 U.S.C. § 1983 Claim

Mr. Abujudeh's first claim for relief is, apparently, for constitutional violations and is brought under section 1983. There are several problems with this claim. First, Mr. Abujudeh has failed to identify any constitutional violation upon which this claim for relief is premised.

Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any ... person ... 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..."

Section 1983 creates no substantive civil rights itself but is only a procedural means for the enforcement of such rights. (See, Martinez v. County of Los Angeles (1996) 47 Cal. App. 4th 334, 342, fn. 3) A plaintiff seeking recovery from a government

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official under section 1983 must show the official violated a “clearly established” constitutional right. (See, Saucier v. Katz (2001) 533 U.S. 194, 201; see also, Venegas v. County of Los Angeles (2004) 32 Cal. 4th 820, 840)

Mr. Abujudeh must identify which constitutional provision he claims the County violated. Mr. Abujudeh’s cross-complaint is devoid of any such allegation. Such lack subjects his cross-complaint to dismissal by the Court.

Second, Mr. Abujudeh’s allegation that the County conducted a warrantless “raid” of his business establishment is insufficient to establish a constitutional violation. It is well established that certain exceptions exist to the requirement that a warrant be obtained before entering and searching a business establishment. One such exception is known as the “closely regulated” business exception. This exception, which was articulated in New York v. Burger (1987) 482 U.S. 691, applies when a business is “closely” or “pervasively” regulated and the search is reasonable because there is a “substantial” government interest” underlying the inspection scheme. Such warrantless inspections are “necessary to further [the] regulatory scheme,” and the inspection program, “in terms of the certainty and regularity of its application, [provides] a constitutionally adequate substitute for a warrant.” (Id. at 702-703)

The rationale for the “closely regulated” business exception is that the owner or operator of such a business has a “reduced expectation of privacy” and, consequently, “the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a governmental search ... have lessened application in this context.” (Id. at 702, citation omitted) Therefore, “a warrantless inspection of a [closely regulated business] may well be reasonable within the meaning of the Fourth Amendment.” (Ibid.)

For example, in California, the “closely regulated” business exception has been applied in People v. Firstenberg (1979) 92 Cal. App. 3d 570, *cert. den.*, 444 U.S. 1012 (nursing homes); Betchart v. Department of Fish and Game (1984) 158 Cal. App. 3d 1104 (preservation of fish and game); People v. Harbor Hut Restaurant (1983) 147 Cal. App. 3d 1151 (wholesale fish dealers); and Kim v. Dolch (1985) 173 Cal. App. 3d 736 (**massage parlors**). (See, Terry York Imports, Inc. v. Department of Motor Vehicles (1987) 197 Cal. App. 3d 307, 320) Closely regulated businesses ordinarily share a common circumstance: they engage in transactions or sales of products which directly affect the public health and safety. (Ibid.)

In Kim v. Dolch, *supra*, the court specifically found that the massage parlor industry is pervasively regulated and has a history of regulation. Further, the Kim court the regulation of the massage parlor industry is sufficiently pervasive and defined that

the owner of such a facility cannot help but be aware that he will be subject to effective inspection. (Kim v. Dolch, *supra*, (1985) 173 Cal. App. 3d at 743-744)

The Kim court also looked at whether there is a strong governmental interest in warrantless searches of the industry in question. Such governmental interest exists where the legislation reaches important ends and frequent unannounced inspections are necessary to the attainment of those ends. The court concluded that in the case of massage parlors, important governmental interests include controlling prostitution, minimizing the danger of injury to a customer from an ill-trained masseuse, and regulating other health and safety concerns. (Id. at 744)

Finally, the Kim court noted that effective enforcement of a massage parlor ordinance, such as the one in that case, is contingent upon “unannounced, even frequent, inspections” and, correspondingly, a warrant requirement would frustrate the purposes of the ordinance. This is because important requirements of the ordinance could easily be concealed or corrected in a short time. For example, the use of unlicensed masseurs could easily go undiscovered absent unannounced and frequent inspections.” (Id. at 745)

Here, Lake Forest Municipal Code section 5.07.240 provides for such warrantless inspections. That section states:

“Any and all investigating officials of the City shall have the right to enter massage establishments from time to time during regular business hours to make reasonable inspections to observe and enforce compliance with building, fire, electrical, plumbing or health regulations, and to ascertain whether the compliance is with the provisions of this chapter.”

Based on the above, a warrantless “raid” of Mr. Abujudeh’s massage parlor does not, without more, constitute a constitutional violation.

Third, and finally, Mr. Abujudeh alleges in his cross-complaint that his license for the massage parlor was revoked in June 2007, and that Mr. Abujudeh sold his business establishment that same month. Therefore, for any alleged constitutional violations occurring after June 2007, Mr. Abujudeh lacks standing.

2. The State Law Claims

Mr. Abujudeh’s second, third and fourth claims for relief are state law claims subject to state law procedural requirements. Because Mr. Abujudeh has failed to comply with the tort claim requirements, his state law claims are barred.

California Government Code section 945.4 provides that no suit for money or damages may be brought against a public entity unless a claim is first presented to and acted upon by the public entity in accordance with Government Code section 900, et seq. Failure to timely file a proper claim is fatal to a cause of action in a lawsuit on the same issue. (City of San Jose v. Superior Court (1974) 12 Cal. 3d 447, 457)

In Fall River Joint Unified School District v. Superior Court (1988) 206 Cal. App. 3d 431, 434, the court stated:

“If a plaintiff relies on more than one theory of recovery ... each cause of action must have been reflected in a timely claim. ... The factual circumstances set forth in the written claim must correspond with the facts alleged in the complaint; even if the claim were timely, the complaint is vulnerable to a demurrer ... if it alleges a factual basis for recovery which is not fairly reflected in the written claim.”

Under Government Code section 911.2, a claim for injury to a person or personal property must be presented within six months after the accrual of the cause of action. All other claims must be presented within one year after the cause of action accrues. Further, as a class, cross-complainants are not exempt from the claims presentation requirements. (See, Greyhound Lines, Inc. v. County of Santa Clara (1986) 187 Cal. App. 3d 480, 488; and State of California v. Superior Court (1983) 143 Cal. App. 3d 754, 757 [“the cross-complaint here in essence states a claim for ‘money or damages,’ against the state ... and hence is subject to the requirement that a claim be presented”])

Here, Mr. Abujudeh’s cross-complaint is an action for money or damages and, as such, is subject to the requirements of the Tort Claims Act. As such, Mr. Abujudeh was required to serve the County with a tort claim within six months of being served with the City of Lake Forest’s complaint. His failure to do so and to allege in his cross-complaint that he has done so renders his cross-complaint subject to a motion to dismiss and bars this action against the County.

Please contact me at your earliest possible convenience so that we can discuss this matter further. If I do not hear from you, this office will proceed to file a motion to dismiss on behalf of Cross-Defendant County of Orange based on the above legal discussion. This motion will be filed by no later than Monday, June 9, 2008.

Mark H. Cheung
June 4, 2008
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I look forward to hearing from you so that we may discuss this matter further.

Cordially,

WOODRUFF, SPRADLIN & SMART
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ROBERTA A. KRAUS

cc: Daniel K. Spradlin, Esq.