

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse, Department 20

JUDICIAL OFFICER: HONORABLE KARIN SCHWARTZ

Courtroom Clerk: Dazimon Kinney

CSR: None

24CV091288

March 5, 2025

3:00 PM

DENNISON, et al.

vs

CITY OF BERKELEY, A MUNICIPAL ENTITY

MINUTES

APPEARANCES:

Plaintiff Kathy Dennison represented by Ilan Wurman appearing for Michael Coleman via virtual conference.

Plaintiff Jeffrey Geier represented by Ilan Wurman appearing for Michael Coleman via virtual conference.

Plaintiff ACME Scenery Company, Inc. represented by Ilan Wurman appearing for Michael Coleman via virtual conference.

Plaintiff Chaim LLC represented by Ilan Wurman appearing for Michael Coleman via virtual conference.

Plaintiff Rio Mobility LLC represented by Ilan Wurman appearing for Michael Coleman via virtual conference.

Plaintiff Far West brewing LLC represented by Ilan Wurman appearing for Michael Coleman via virtual conference.

Plaintiff Bavarian Professionals represented by Ilan Wurman appearing for Michael Coleman via virtual conference.

Plaintiff Emily Winston represented by Ilan Wurman appearing for Michael Coleman via virtual conference.

Plaintiff KJD Investments LLC represented by Ilan Wurman appearing for Michael Coleman via virtual conference.

Defendant City of Berkeley, a municipal entity represented by Marc Shapp and Haley De Genova appearing for Brendan O Darrow via virtual conference.

NATURE OF PROCEEDINGS: Hearing on Demurrer Demurrer to plaintiff's complaint; filed by City of Berkeley, a municipal entity (Defendant) filed by City of Berkeley, a municipal entity (Defendant) on 10/18/2024

The Demurrer filed by City of Berkeley, a municipal entity on 10/18/2024 is Overruled.

The demurrer of the City of Berkeley (City) to the Complaint is OVERRULED.

The City does not dispute that the erection of structures that impeded roads and sidewalks, accumulation of debris, and maintenance of public health and safety hazards described (and

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pictured) in the Complaint amount to public and private nuisances. The City has not demonstrated that the relief sought in the Complaint requires control of prosecutorial or regulatory discretion. In reviewing the demurrer, the Court has focused mainly on those allegations relating to obstruction of streets and sidewalks and accumulation of apparently discarded debris and fecal matter and does not reach the question of whether all of the conditions described in the Complaint represent a public or private nuisance.

BACKGROUND

Plaintiffs are owners of residential and commercial properties in the vicinity of three “public encampments” of unhoused individuals, denoted in the complaint as the “Harrison Encampment,” the “Codornices Encampment,” and the “Lower Dwight Encampment.” The Complaint asserts two causes of action against the City: (1) enjoinder of public nuisance, and (2) enjoinder of private nuisance.

Plaintiffs contend that the encampments obstruct streets and walkways, impede traffic, and present a substantial risk to public health and safety. (Complaint, *passim*.) As to the latter, the Complaint cites the accumulation and/or proliferation of, *inter alia*, drug paraphernalia, dead animals, rat burrows, open food sources and spoiled food, combustible materials, human feces and bottled urine, and other waste products. (Complaint, ¶¶ 55, 57, 59, 66, 75-82, 85, 93, 116, 123-125, 132, 138, 168, 170, 208-211.) Citing findings from the Fire Prevention Inspector, the Complaint also alleges that structures close to lot lines are code violations that present a risk of severe injury or death from fire. (Complaint, ¶ 72.)

Plaintiffs contend that the City “invited” two of the encampments “knowing they would be public nuisances.” (Complaint, ¶ 7.) The Complaint is otherwise replete with references to the City “consenting” to, “allowing,” or “permitting” the alleged nuisances.

Plaintiffs assert financial and sanitary impacts specific to them as distinct from the public at large, including loss of business and tenants, loss of income and customers, reduced rents, and urine, feces and other waste on their property. (Complaint, ¶¶ 91, 96, 105, 108, 117, 118, 121, 129-130, 134, 160-161, 173, 215-216.)

The prayer seeks, *inter alia*, (1) a declaration of public and private nuisance as to specified areas; and (2) a permanent injunction requiring the City to “undertake remedial measures to mitigate the effects” of the alleged nuisances, which, “[a]t a minimum . . . ensure[s] that the Defendant remediates, maintains, and clears these public rights of way of tents and RVs.” (Complaint, p. 37.)

The City demurs to the Complaint on the grounds that (1) the “only alleged conduct of the City is the failure to prosecute individual occupants of public encampments and RVs, which is an act of prosecutorial discretion that cannot form the basis for liability and cannot be the subject of injunctive relief,” and (2) Civil Code (CC) § 3482 is a “complete defense” to the action because the City’s regulation and maintenance of the public right of way and its prosecutorial discretion are “expressly authorized” by statute.

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LAW

A demurrer tests the legal sufficiency of factual allegations in a complaint. (*Title Ins. Co. v. Comerica Bank-California* (1994) 27 Cal.App.4th 800, 807.) A court may not sustain a general demurrer unless the complaint liberally construed fails to state a cause of action on any theory. (*Kramer v. Intuit Inc.* (2004) 121 Cal.App.4th 574, 578.) A plaintiff must plead facts as are necessary to acquaint a defendant with the nature, source and extent of her claims to provide defendant with notice of the issues sufficient to enable preparation of a defense. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 570.)

The Civil Code defines a “nuisance” as “[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway.” (CC § 3479.)

A public nuisance is “one which affects at the same time an entire community or neighborhood . . . although the extent of the annoyance or damage inflicted upon individuals may be unequal.” (CC § 3480.) “Blocking a public sidewalk constitutes a public nuisance per se. (*Kempton v. City of Los Angeles* (2d Dist. 2008) 165 Cal.App.4th 1344, 1348.) A private nuisance is every nuisance not included in the definition of public nuisance. (CC § 3481.) Its essence is “an interference with the use and enjoyment of land.” (*Friends of H Street v. City of Sacramento* (3d Dist. 1993) 20 Cal.App.4th 152, 169.)

A private person may only seek to abate a public nuisance if the nuisance also constitutes a private nuisance as to that person. (*Friends of H Street, supra*, 20 Cal.App.4th at p. 159.)

Civil Code § 3482 provides that nothing “done or maintained under the express authority of a statute can be deemed a nuisance.” This statutory defense to nuisance does not exist “unless the acts complained of are authorized by the *express terms* of the statute under which the justification is made, *or by the plainest and most necessary implication* from the powers expressly conferred, *so that it can fairly be stated that the legislature contemplated the doing of the very act which occasions the injury.*” (*Friends of H Street, supra*, 20 Cal.App.4th at p. 160 [citation and internal quotations omitted, emphasis in original].) In analyzing the applicability of a defense under § 3482, the Court looks to the substantive statute to see if there is an “unequivocal legislative intent to sanction a nuisance . . . while avoiding the uncertainty that would result were every generally worded statute to be a source of undetermined immunity from nuisance liability.” (*Id.*, citation and internal quotations omitted.)

ANALYSIS

The City’s papers do not dispute that the circumstances described constitute both public and private nuisances private persons may seek to abate. (See *Friends of H Street, supra*, 20 Cal.App.4th at p. 159.) That is, the City does not dispute that plaintiffs allege harm that is “specially injurious” to them, meaning of a “different and kind, not merely degree,” from that

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suffered by the public at large. (*Kempton v. City of Los Angeles* (2d Dist. 2008) 165 Cal.App.4th 1344, 1349.) Rather, the City contends that, notwithstanding any nuisance, the Complaint must fail as a matter of law because (1) plaintiffs seek to premise the City's liability on acts of prosecutorial discretion that cannot be the basis for injunctive relief; and (2) the City's conduct maintaining and regulating a right of way are "expressly authorized" such that § 3482 provides a complete defense.

The Complaint Does Not Compel the Exercise of Governmental Discretion in a Specific Manner

The City's first argument fails at this juncture because, contrary to the City's contentions, the Complaint does not seek to compel the City to enforce state or law in a particular manner. Rather, the Complaint seeks to compel the City to abate public and private nuisances, without specifying the precise steps that the City must take to do so. That the City may have enforcement *options* that are not directly available to private persons who are sued for maintaining a nuisance does not convert the case to one about control of prosecutorial discretion or regulatory authority. The City's brief erects a few strawmen for the purposes of destroying them. (MPA, pp. 2-4.) The prayer for relief contains no mention of forcing the City to charge anyone with a criminal offense or enact particular laws/ordinances.

Friends of H Street v. City of Sacramento, relied heavily upon by the City, is inapposite on its facts. There, plaintiffs sought specific action that was legislative in nature and delegated specifically by statute to a city: to force the city to reduce traffic speed and volume on a street. In rejecting that this result could be obtained through a nuisance theory, the Court noted that the "Legislature delegates to local governments the authority to regulate traffic within their jurisdictions by specified means, including the use of traffic controls devices." (20 Cal.App.4th at p. 161 [citing Veh. Code, § 21100 and other authorities].) The Court found that this authority was the "*express terms*" that CC § 3482 requires. Accordingly, the Court held that "the City's decisions regarding the routing of traffic are a legislative function beyond our power to control." (*Id.* at p. 165.)

More apposite is a case upon which Plaintiffs heavily rely: *Kempton v. City of Los Angeles* (2d Dist. 2008) 165 Cal.App.4th 1344. *Kempton* held that homeowners could state a nuisance claim against a City for failing to remove a fence erected on public property by their neighbors that obstructed ingress to and from a public street and posed a hazard by blocking sightlines. Similarly, in the present case, Plaintiffs seek to state a nuisance claim against the City for, inter alia, failing to abate structures erected by third parties that block sidewalks, streets, and access to parking. Thus, the nuisance action here "would not force the City to prosecute others for nuisance on private property, but rather require the City to take such action as is necessary so that it no longer suffers a nuisance on its own property." (*Kempton*, 165 Cal.App.4th at p. 1349.)

Civil Code Section 3482 Is Not an Absolute Bar

Relying heavily on *Friends of H Street v. City of Sacramento*, the City asserts that its conduct in maintaining the conditions at the three encampments is done pursuant to the express authority of a statute and therefore not a nuisance for which it may be held liable. As noted above, the present case, however, *Friends of H Street* is factually inapposite. The only statutory authority

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that the City cites as support for this argument is its prosecutorial discretion under Government Code section 26500 and 26501. However, also as noted above, the Complaint does not purport to mandate the means to be used by the City to abate any nuisance, let alone that it exercise its prosecutorial or regulatory discretion in any particular manner. Further, these Government Code provisions do not relate to obstruction of sidewalks and roads, the accumulation of debris therein, or governmental response to public health and safety challenges. Rather, they are generally worded provisions that are insufficient to demonstrate an “unequivocal legislative intent to sanction a nuisance” and holding otherwise would invite the “uncertainty that would result were every generally worded statute to be a source of undetermined immunity from nuisance liability.” (*Friends of H Street*, supra, 20 Cal.App.4th at p. 160.)

Causation Is Adequately Pleaded

Finally, the City asserts that the complaint lacks factual allegations sufficient to establish that the City caused the complained of conditions to exist. (MPA, p. 5.) However, the Complaint asserts that, at least as to two of the encampments, that the City “invited” two encampments, “knowing they would be public nuisances.” (Complaint, ¶ 7.) On demurrer, this allegation is adequate to state a claim. Further, the City’s failure to take action as to structures erected and detritus left by third parties impeding streets and sidewalks is factually analogous to the circumstances *Kempton v. City of Los Angeles* (2d Dist. 2008) 165 Cal.App.4th 1344 that were held to state a claim.

CONCLUSION

The City’s demurrer is overruled. The City shall file an Answer to the Complaint by 3/17/25 (C.R.C. Rule 3.1320(j).)

The Court orders counsel to obtain a copy of this order from the eCourt portal.



By: D. Kinney, Deputy Clerk
Minutes of: 03/05/2025
Entered on: 03/05/2025