Motion for Summary Judgment (Judge Marc Marmaro)

Case Number: BC588933 **Hearing Date:** September 13, 2017 **Dept:** 37

CASE NAME: Segura v. De Sylva, et al.

CASE NO.: BC588933

HEARING DATE: 9/13/17

DEPARTMENT: 37

CALENDAR NO.: 10

TRIAL DATE: 10/17/17

NOTICE: OK

PROCEEDING: Motion for Summary Judgment, or in the alternative, Summary Adjudication

MOVING PARTY: Defendant City of Pasadena

OPPOSING PARTY: Plaintiff Omar Segura

COURT'S TENTATIVE RULING

Defendant City of Pasadena's motion for summary judgment, or in the alternative, summary adjudication is GRANTED with respect to the issue of vicarious liability and Plaintiff's third cause of action under the Bane Civil Rights Act. The motion is DENIED with respect to Plaintiff's direct theories of liability as to the first and second causes of action under the Ralph Act and the fourth cause of action for

false arrest. Counsel for Defendant the City of Pasadena to give notice.

STATEMENT OF THE CASE

In the complaint, Plaintiff asserts the following ten causes of action against Defendant the City of Pasadena (the "City"): (1) Violation of the Ralph Act – Acts of Violence; (2) Violation of the Ralph Act – Threats of Violence; (3) Violation of the Bane Act – Interference with Civil Rights; (4) False Arrest; (5) Malicious Prosecution; (6) Abuse of Process; (7) Assault; (8) Battery; (9) Intentional Infliction of Emotional Distress ("IIED"); and (10) Negligent Infliction of Emotional Distress ("NIED").

The United States District Court for the Central District of California granted De Sylva's unopposed motion to dismiss plaintiff's fifth cause of action for malicious prosecution. (*Segura v. De Sylva* (C.D.Cal. 2016) 2:15-cv-08302-CAS(Ex), at p. 2.) Plaintiff has indicated in his opposition brief that he did not oppose the City's motion as to the sixth, seventh, eighth, ninth, and tenth causes of action, and the court GRANTED the City's motion for summary adjudication as to these causes of action on August 11, 2017. Only the first, second, third, and fourth causes of action remain against the City.

The City now moves for summary judgment, or in the alternative, summary adjudication on the following three issues:[1]

1. Issue 1: "As to the Complaint in its

entirety, all of plaintiff's causes of action against the City fail as a matter of law as DeSylva was not in the course and scope of employment; thus, there is no vicarious liability";

2. Issue 2: "Plaintiff's First and Second Causes of Action for violations of the Ralph Civil Rights Act fail as a matter of law as there is no evidence DeSylva deprived plaintiff of his civil rights based on plaintiff's African American race"; and
3. Issue 3: "Plaintiff's Third Cause of Action for violation of the Bane Civil Rights Act fails as a matter of law because Freedom of Speech can only be violated by a government actor and DeSylva was acting as a private citizen."

On August 11, 2017, the court continued the hearing on the City's subject motion for summary judgment, or in the alternative, summary adjudication based on its grant of Plaintiff's "Pitchess" motion. The court now considers this motion based on the parties' briefs and further briefs filed in this action.

REQUEST FOR JUDICIAL NOTICE

Defendant City requests that the Court take judicial notice of (1) the map depicting the geographical distance between Pasadena, California and Defendant De Sylva's home in Santa Clarita, California, attached as Exhibit A to the request for judicial notice; and (2) the National Oceanic and Atmospheric Administration (NOAA) sunrise/sunset calculator print-out depicting the time of the sunset in Santa Clarita, California on January 2, 1015 as 4:56 p.m., attached as

Exhibit B to the request for judicial notice. Plaintiff does not oppose Defendants' request. The requests are granted. (Evid. Code, § 452, subd. (h).)

Plaintiff Segura requests the court take judicial notice of the demographic findings of the U.S. Census Bureau with respect to the City of Santa Clarita, California, as of July 1, 2016, which indicates that the city is 70.9% Caucasian and 3.2% Black or African American. The request is granted. (Evid. Code, § 452, subd. (c).)

EVIDENTIARY OBJECTIONS

Defendant the City objects to certain statements made in the Deposition of Omar Segura ("Segura Deposition") that have been introduced as evidence in Plaintiff's Separate Statement and further Separate Statement in support of his opposition to the subject motion.[2]

Overruled: Segura Deposition at 116:10-11, 120:15-16, 86:1-11, 63:6-8, 71:10, 73:2-4, 111:14-112:2, 112:10-13, and 51:22 and pages 14, 128, and 129.

Sustained: Segura Deposition at 14:6-19, 84:10-11, 84:6-15.

The City additionally objects to Exhibit 5, the County of Los Angeles-Sheriff's Department Incident Report by J. Cacic, and Exhibit 6, the County of Los Angeles-Sheriff's Department Supplementary Brief by Detective E. Harrold. The City's objections are overruled.

The City also objects to certain statements made in the Deposition of Sam De Sylva ("DeSylva Deposition").

Overruled: De Sylva Deposition at 251:16-23

Sustained: De Sylva Deposition at 111:9-112:25

The City further objects to certain statements made in the Deposition of Deputy Jeffrey Cacic ("Cacic Deposition").

Overruled: Cacic Deposition at 156:9-10, pages 20-28.

The City also objects to the United States Census Data for the City of Santa Clarita, California, from July 1, 2016. The objection is overruled.

FACTUAL BACKGROUND

The following facts are largely undisputed and provide context for the subsequent discussion about the merits of the parties' respective contentions in connection with the motion for summary judgment.

Plaintiff Omar Segura is a 35-year-old African-American male. (Defendant City's Further Separate Statement ("DSS") ¶ 1.) On January 2,

2015, Segura was selling security systems door-to-door in Santa Clarita. (DSS ¶ 3.) Segura contends that he had a permit issued by the State of California to sell security systems. (Plaintiff's Further Separate Statement ("PSS") ¶ 3.)

Defendant De Sylva was employed as a police officer by the City of Pasadena and lived in Santa Clarita. (DSS ¶¶ 6-7.) Santa Clarita is at least 35 miles away from the City of Pasadena and the Pasadena Police Department ("PPD"). (DSS ¶ 9) On January 2, 2015, around 5:45 p.m., Segura knocked on De Sylva's front door; it was past sunset and getting dark at this time. (DSS ¶ 10.) De Sylva was off-duty and at home with his family, and he was not wearing his uniform; Plaintiff had never met De Sylva in his official capacity as an officer, and Plaintiff did not know and De Sylva did not identify himself as a police officer during Segura's interactions with De Sylva leading up to the incident. (DSS ¶¶ 12, 14.) After De Sylva answered the door, he told Segura to get off his property, using profanity. (DSS ¶¶ 15-16.)

Segura left De Sylva's property after De Sylva indicated that he was not interested. (PSS ¶ 14.) As he walked toward De Sylva's neighbor's house, De Sylva came back outside and threatened to call the police on him. (PSS ¶ 15.) Segura contends that De Sylva told him that he "didn't belong" in the neighborhood—the City contends that De Sylva told him he didn't belong "here." (PSS ¶ 16; Defendant's Responsive Statement ("DRS") ¶ 16.) The neighborhood is predominately Caucasian. (PSS ¶ 17, 7/18/17 Opp. Ex. 8.) Segura asserts that he understood De Sylva's earlier use of profanity to have been made with racial animus. (PRS ¶¶ 18-19.) Segura has been sworn at by other potential clients many times, but on those occasions he did not think the profanity was racially motivated. (DSS ¶ 17.) Segura asserts that he told De Sylva that he had a permit to sell security systems, at which point De Sylva instructed him to return to

his property to show his permit. (PSS ¶ 18-19; 7/18/17 Opp. Ex. 5, at 4.) Segura asserts that De Sylva then took the permit out of his hand and retreated into his house while still holding the permit. (PSS ¶ 20.)

De Sylva tried to close his front door, and Segura put his hand on the door and pushed with enough force to prevent De Sylva from closing the door. (DSS ¶ 21.) Segura asserts that he told De Sylva to return the permit during this exchange. (PSS ¶ 27.) The exchange continued for approximately 30 seconds, at which point De Sylva pulled out a gun, pointed it at Segura, and told him to "freeze" and get down on the ground. (DSS ¶¶ 22-23.) De Sylva then called 9-1-1 and told the operator that he was an off-duty officer and that Segura had attempted to commit burglary. (DSS ¶ 24; DRS ¶ 35.) The local police responded and investigated the matter. (DSS ¶ 25.) Detective E. Harrold wrote in his Supplementary Report concerning the incident that, during the 9-1-1 call, De Sylva appeared to ask Segura why he tried to stop De Sylva from closing the door, and Segura appeared to respond that De Sylva had taken his personal belongings and that Segura was not trying to assault De Sylva. (PSS ¶ 36; 7/18/17 Opp. Ex. 6.)

Segura was handcuffed as soon as the police arrived. (PSS ¶ 37.) The City asserts that these police arrested Segura after interviewing him, while Segura asserts that De Sylva arrested him and transferred custody to the local police before he was ever interviewed. (DSS ¶ 25, PRS ¶ 25.) The police told Segura he was going to jail for burglary. (PSS ¶ 39.) Segura's only physical injury was a small bruise on his wrist as a result of the handcuffs he was placed in by the responding officers. (DSS ¶ 26.) Segura asserts that he was in jail for approximately 24 hours and that bail was set at $50,000, which cost him $4,000. (PSS ¶ 42.) When Segura appeared for his arraignment, his case was dismissed as the District Attorney did not file charges against

him. (DSS ¶ 27.) Immediately following the incident, De Sylva was questioned by Los Angeles County Sheriff Deputy Jeffrey Cacic about the incident. (PSS ¶ 45.) Cacic testified in his deposition that, to paraphrase what De Sylva said, he said: "Nobody wants you in the neighborhood, you know, I don't want you in my house, nobody wants you in the neighborhood." (Cacic Depo. at 156:6-12.)

DISCUSSION

I. Legal Standard

The law of summary judgment provides courts "a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) In reviewing a motion for summary judgment, courts employ a three-step analysis: "(1) identify the issues framed by the pleadings; (2) determine whether the moving party has negated the opponent's claims; and (3) determine whether the opposition has demonstrated the existence of a triable, material factual issue." (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 294 (*Hinesley*).) "A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty," and "[a] motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1).)

A moving defendant bears the initial burden of production to show that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action, at which point the burden shifts to the plaintiff to make a prima facie showing of the existence of a triable issue. (Code Civ. Proc., § 437c, subd. (p)(2).) The opposing party may not rely on the mere allegations or denials of the pleadings, but instead must set forth the specific facts showing that a triable issue exists as to that cause of action or a defense thereto. (*Aguilar*,*supra*, at p. 849.) Courts "liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389 (*Dore*); see also *Hinesley*, *supra*, 135 Cal.App.4th at p. 294 [The court must "view the evidence in the light most favorable to the opposing party and accept all inferences reasonably drawn therefrom."].)

II. Plaintiff's Direct Theories of Liability and Summary Judgment

In reviewing a motion for summary judgment, the court must first "identify the issues framed by the pleadings." (*Hinesley*, *supra*, 135 Cal.App.4th at p. 294.) Plaintiff brings suit against the City on two categories of theories of liability: 1) vicarious liability and respondeat superior, and 2) the City's direct liability for allegedly condoning and ratifying Defendant De Sylva's actions or for the City's alleged negligence in the recruitment, training, management, and the equipping of De Sylva. (Compl. ¶ 14.) As the moving party, the City bears the initial burden to dispose of each of the causes of action or issues of duty asserted in the Complaint by either demonstrating with substantive evidence that one or more

elements of each cause of action or issue of duty cannot be established or that it has a complete defense. (See Code Civ. Proc., § 437c, subd. (f)(1); see also *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258 ["The complaint limits the issues to be addressed at the motion for summary judgment. The rationale is clear: It is the allegations in the complaint to which the summary judgment motion must respond."].) "The moving party must 'support[]' the 'motion' with evidence including 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.' " (*Aguilar*, *supra*, 25 Cal.4th at p. 843.)

In its moving papers, the City only presents factual evidence and arguments in support of three issues with respect to the following claims: (1) De Sylva was not acting in the course and scope of his employment such that the City is not vicariously liable for his actions; (2) Plaintiff's first and second causes of action for violations of the Ralph Act fail because there is no evidence De Sylva deprived Plaintiff of his civil rights based on Plaintiff's race; and (3) Plaintiff's third cause of action for violation of the Bane Act fails because De Sylva was acting as a private citizen and the asserted right can only be violated by a government actor.

As noted above, in paragraph 14 of the Complaint, Plaintiff alleges direct theories of liability based on (1) ratification and (2) that the City's negligence in the recruitment, training, management, and its equipping of De Sylva proximately caused his damage. The City's motion does not show that Plaintiff cannot establish this aspect of his claims. The City does not present any arguments concerning Plaintiff's direct liability theories, as alleged in paragraph 14, nor does the City assert any material facts which would relate to or negate these theories of liability in its separate statement. Accordingly, the City fails to meet its initial burden to negate Plaintiff's direct

theories of liability. Similarly, the City did not separately present any arguments and evidence against Plaintiff's fourth cause of action for false arrest.

On reply, the City contends that Plaintiff's "ratification" theory fails for two reasons: (1) there is no evidence of an agent/principal relationship that coincides with the theory of ratification; and (2) Plaintiff has not alleged a *Monell*cause of action against the City. (Reply 5-6.) And on further reply, the City additionally contends that the fourth cause of action fails because Plaintiff does not have a *Monell* claim against the City. (Further Reply 9-10.) Plaintiff, however, did not state these arguments or facts in support of these arguments in its moving papers. "Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) Furthermore, "[w]hile the code provides for reply papers, it makes no allowance for submitting additional evidence or filing a supplemental separate statement. (§ 437c, subd. (b).) This is consistent with the requirement supporting papers and the separate statement be served with the original motion. (§ 437c, subd. (a).)" (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 313.)

The City's argument, on reply, is that Plaintiff's direct theories of liability and fourth cause of action fail because Plaintiff does not meet his burden to prove the necessary elements of ratification or false arrest. (Reply 5-6; Further Reply 9-10.) The reply only addresses the negligent recruitment, training, management, and equipping theory by stating that Plaintiff does not raise a negligent hiring and retention claim, however, the City does not otherwise address why these allegations do not constitute a basis for a direct theory of liability on Plaintiff's existing claims. (Reply

8; Further Reply 3.) And furthermore, these arguments are made in reply for the first time and not in the City's moving papers.

In making these arguments on reply, the City reverses the parties' burdens of proof on the subject motion for summary judgment. (See *Hinesley*, *supra*, 135 Cal.App.4th at p. 294.) As the moving party, the City bears the initial burden of production with respect to this issue of duty, and Plaintiff bears no burden of proof until the City has first met its burden to negate Plaintiff's claims. (See *ibid.*) As the City has not presented these arguments or supporting facts in its moving papers, Plaintiff was not required to raise factual issues regarding the elements of his direct theories of liability or his fourth cause of action. Accordingly, the court DENIES the motion for summary judgment as to Plaintiff's direct theories of liability with respect to all claims. The court likewise DENIES the motion as to Plaintiff's fourth cause of action.

III. Vicarious Liability

The City asserts that all of Segura's causes of action fail as a matter of law because the City is not vicariously liable for the acts of an off-duty police officer at his home during a personal altercation not engendered by his workplace. As an initial matter, the court recognizes that a grant of summary adjudication on this issue will only dispose of Plaintiff's vicarious liability theory of liability, and not Plaintiff's entire claims, because the City has not met its burden with respect to Plaintiff's direct theories of liability.

Under the doctrine of respondeat superior, an employer may only be held vicariously liable for torts committed by an employee within the scope of employment. (See *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208 (*Mary M.*).) The plaintiff bears the burden to prove that the employee's tortious conduct was committed within the scope of employment. (*Id.* at p. 209.) "A risk arises out of the employment when 'in the context of that particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." (*Ibid.*) "[T]he inquiry should be whether the risk was one 'that may fairly be regarded as typical of or broadly incidental' to the enterprise undertaken by the employer. [Citation.]" (*Ibid.*)

The doctrine of respondeat superior applies to public and private employers alike. As stated in subdivision (a) of Government Code, section 815.2: "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (Gov. Code, § 815.2.) "By this language, the Legislature incorporated 'general standards of tort liability as the primary basis for respondeat superior liability of public entities. . . .' " (*Mary M.*, *supra*, 54 Cal.3d at pp. 209-210.) Courts have construed the term "scope of employment" as broadly in section 815.2 public entity liability as in private tort litigation. (*Id.* at p. 210.) With regard to the police, specifically, the Supreme Court has noted:

[S]ociety has granted police officers great power and control over criminal suspects. Officers may detain such persons at gunpoint, place them in handcuffs, remove them from their residences, order them into police cars and in some

> circumstances, may even use deadly force. The law permits police officers to ensure their own safety by frisking persons they have detained, thereby subjecting detainees to a form of nonconsensual touching ordinarily deemed highly offensive in our society. [Citation.] In view of the considerable power and authority that police officers possess, it is neither startling nor unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct. The precise circumstances of the assault need not be anticipated, so long as the risk is one that is reasonably foreseeable.

(*Id*. at pp. 217-218.)

> Tortious conduct that violates an employee's official duties or disregards the employer's express orders may nonetheless be within an employee's scope of employment, as may be acts that do not benefit the employer or are willful or malicious in nature. (*Mary M.*, *supra*, 54 Cal.3d at p. 209.) However, "[a]n act serving only the employee's personal interest is less likely to arise from or be engendered by the employment than an act that, even if misguided, was intended to serve the employer in some way." (*Lisa M. v. Henry May Newhall Mem'l Hosp.* (1995) 12 Cal.4th 291, 301 (*Lisa M.*).) Similarly, "[n]onsexual assaults that were not committed to further the employer's interests have been considered outgrowths of employment if they originated in a work-related dispute. [Citations.]" (*Lisa M.*, *supra*, at pp. 300-301.) "Conversely, vicarious liability [has been] deemed inappropriate where the misconduct does not arise from the conduct of the employer's enterprise but instead arises out of a personal dispute [citation] or is the result of a personal compulsion [citation]." (*Id.* at p. 301.)

> "Ordinarily, the determination of whether an employee has acted within the scope of employment presents a question of fact; however, it becomes

a question of law when "the facts are undisputed and no conflicting inferences are possible." (*Mary M.*, *supra*, 54 Cal.3d at p. 213.) "In some cases, the relationship between an employee's work and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment." (*Ibid.*) In the case at hand, the material facts about the incident are undisputed.

The City contends that De Sylva's altercation was a purely personal issue that did not contain any of the factors considered critical prior cases, and the City argues that (1) the incident did not occur during working hours, (2) was not accomplished by use of De Sylva's authority as a police officer, (3) did not occur in the course of acts that De Sylva was carrying out under his employer's instructions or on his employer's behalf, (4) did not arise due to alcohol provided to De Sylva by the City or permitted by the City on its premises, and (5) the 'relationship' between De Sylva and Segura did not arise out of the employment relationship. This evidence is sufficient for the City to meet its initial burden to demonstrate the nonexistence of a triable issue of material fact.

In response, Segura contends that that the City should be held liable under respondeat superior because De Sylva's actions constituted misuse of power he possessed by state law.[3] Segura asserts that De Sylva was acting as a police officer and abusing his power and police authority when he effected the arrest. (7/18/17 Opp. 11.) The undisputed facts of the case indicate otherwise.

It is undisputed that after Segura prevented De Sylva from closing his front door, De Sylva pulled out a gun, pointed it at Segura, and told him to get down on the ground. (DSS ¶¶ 21-23.) It is also undisputed that De Sylva subsequently identified himself as an off-duty

officer to the 9-1-1 operator—after the parties' dispute had concluded with Segura on the ground. (DSS ¶¶ 23-24.) Plaintiff does not contend that De Sylva identified himself as an off-duty police officer at any time prior to the 9-1-1 call or that Plaintiff was aware of De Sylva's occupation or authority at any time during their altercation before Plaintiff mentioned this fact to the 9-1-1 operator. Furthermore, although Plaintiff asserts that De Sylva pointed his service weapon at Segura during the incident, Plaintiff produces no evidence that he was aware at the time that this weapon was, in fact, De Sylva's service weapon.[4]

Plaintiff contends that the facts of this case are similar to those of *Graham v. City of New York* (2003) 770 N.Y.S.2d 92. There, a jury held the City of New York liable for the actions of an off-duty police officer who was involved in a minor automobile accident that led to a physical altercation in which the officer identified himself as a police officer after he was hit by the plaintiff. (*Id.* at p. 93.) *Graham* is a decision by a New York court involving a determination of New York law and does not control here. Furthermore, the facts of that case are distinguishable. In*Graham*, the off-duty officer in question specifically identified himself as a police officer to the plaintiff before arresting him and asking a bystander to call 9-1-1 and ask for backup police officers. (*Ibid.*) In contrast, here, De Sylva never asserted his status as a police officer to Segura, and instead only mentioned it to the 9-1-1 operator after their altercation had concluded. (DSS ¶¶ 23-24; cf. *Inouye v. County of Los Angeles* (1994) 30 Cal.App.4th 278, 280, 284 [finding that an off-duty police officer who identified himself as a police officer, told the defendant to "freeze," and then drew his gun was acting within the scope of his employment]; cf. also *Jocks v. Tavernier* (2d Cir. 2003) 316 F.3d 128, 134 (*Jocks*) [finding that an off-duty police officer had acted under color of law where he displayed his shield and identified himself as a police officer *before* he restrained the plaintiff

with his service pistol].)

Segura contends that the manner in which De Sylva allegedly presented himself and confronted Plaintiff, including the alleged sense of authority with which De Sylva allegedly questioned Segura, De Sylva's possession and use of the service revolver firearm, and his alleged instruction for Segura to "freeze" and to lay down on the ground, all indicate that he was acting as a police officer and "doing what police officers do." (7/18/17 Opp. 10-11.)[5] Plaintiff, however, recognizes that all citizens may under certain circumstances have the authority to effect a "citizen's arrest." (7/18/17 Opp. 10-11.) And unlike in *Graham* and *Jocks*, Plaintiff neither asserts nor presents evidence to indicate that he was aware of De Sylva's occupation at any time before De Sylva made the 9-1-1 call after the altercation had concluded and after he had forced Segura to the ground at gunpoint. Accordingly, Plaintiff has not demonstrated that a triable issue of material fact exists that De Sylva exercised his authority as a police officer during the parties' altercation.

Plaintiff additionally contends that the City is vicariously liable because its own policy allows off-duty officers to intervene whenever "desirable." (7/18/17 Opp. 11; citing *id.*, Ex. 7 ("Off-Duty Law Enforcement Actions) at ¶ 386.4.) Courts have held police departments liable for the off-shift actions of police officers when the cities have had policies that officers are considered "always on duty" and are "to be armed at all times." (See, e.g., *Brown v. Gray* (10th Cir. 2000) 227 F.3d 1278, 1285-1286, 1291.) Here, however, the City's policy states that "[i]nitiating law enforcement action while off-duty is generally discouraged" and that "[o]fficers should not attempt to initiate enforcement action when witnessing minor crimes, such as suspected intoxicated drivers, reckless driving or *minor property crimes*." (*Id.*, Ex. 7, at ¶ 386.2, emphasis added.) Furthermore, the

policy states that "should officers decide to intervene, they must evaluate whether the action is necessary or desirable" and that "[o]fficers should consider waiting for on-duty uniformed officers to arrive, and gather as much accurate intelligence as possible instead of immediately intervening." (*Id.* at ¶ 386.4.) The policy provides that "[i]f involvement is reasonably necessary, the officer should attempt to call or have someone else call 9-1-1 to request immediate assistance," and that "[w]henever practicable, the officer should loudly and repeatedly identify him/herself as an [sic] Pasadena Police Department officer until acknowledged." (*Id.* at ¶386.4.1.) Furthermore, the policy states that "[o]fficers should refrain from handling incidents of personal interest, (e.g., family or neighbor disputes) and should remain neutral." (*Id.* at ¶ 386.4.2.) Reviewing the policy in-context, the court finds that the City's off-duty policy does not encourage off-duty officers to act whenever "desirable" as Plaintiff contends, but discourages them from acting while off-duty and states that they should loudly and repeatedly identify themselves as a Pasadena Police Department officer if they choose to act. De Sylva did not identify himself as a police officer, and the evidence suggests that he did not follow the City's off-duty policy. As such, the court finds that Plaintiff has not demonstrated that a triable issue of material fact that the City is vicariously liable based on its off-duty policy. [6]

For the reasons stated above, the court finds that Segura has not met his burden to demonstrate that a triable issue of fact exists to show that De Sylva was acting within the scope of his employment during the events of January 2, 2015. The court thus GRANTS summary adjudication on this issue. Because the City has not met its initial burden with respect to Plaintiff's direct theories of liability, however, granting summary adjudication on this issue only disposes of Plaintiff's theory of vicarious liability, and not the entirety of Plaintiff's remaining claims.[7]

IV. Ralph Civil Rights Act and Evidence of Racial Animus

The City contends that Segura's first and second cause of action for violation of the Ralph Civil Rights Act (Civ. Code, § 51.7) additionally fail because there is no evidence to demonstrate that De Sylva's actions were based upon racial animus. Although the court has granted summary adjudication as to Plaintiff's vicarious liability theory, Plaintiff's direct theories of liability against the City on these claims remain. (Compl. ¶¶ 14, 15, 18, 22, 27.)

Civil Code, section 51.7 (the "Ralph Act") provides, in relevant part:

(a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive.

(Civ. Code, § 51.7, subd. (a).)

The City contends that a plaintiff's subjective

belief that a defendant was motivated by race is insufficient to defeat a motion for summary judgment. The City further asserts that "Plaintiff's only 'evidence' of race-based animus is his subjective belief that the confrontation between the two was because of his race." (Mot. 14.) Segura disputes the City's assertion and contends that De Sylva told Segura that he "did not belong" in the neighborhood (PSS ¶¶ 16, 45; Ex. 2 (Cacic Depo.) at 156:6-12; Ex. 5 at p. 4)—a neighborhood which is predominantly Caucasian and only 3.2% Black or African-American.[8] (PSS ¶ 17; 7/18/17 Opp. Ex. 8.) Segura contends that he perceived racial animus in De Sylva's attitude and body language toward him. (PSS ¶ 13.) Although the City contends that De Sylva may have meant that Segura did not belong there because of the time of day, the incident occurred at approximately 5:45 p.m., and the City's argument is insufficient for it to meet its initial burden to demonstrate the non-existence of a triable issue of material fact regarding whether De Sylva's statements and conduct were racially motivated.

Accordingly, the court DENIES the City's motion with respect to Plaintiff's direct theories of liability on his first and second causes of action.

V. Bane Civil Rights Act and Freedom of Speech

Civil Code, section 52.1 (the "Bane Civil Rights Act") provides a civil remedy for persons whose exercise of constitutional rights has been interfered with by "threats, intimidation, or coercion." (Civ. Code, § 52.1, subd. (a).) Section 52.1 requires "an attempted or completed act of interference with a legal right, accompanied by a form of coercion." (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329.)

The City contends that Segura's third cause of action alleging violations of the Bane Civil Rights Act for the alleged interference with Plaintiff's "right to free speech and to solicit customers door to door" fails as a matter of law because freedom of speech can only be violated by a government actor and De Sylva was acting as a private citizen. (Mot. 2.) Plaintiff disagrees and contends that the City is liable because De Sylva intervened as a Pasadena police officer and was therefore a government actor.

As stated above, the City has met its initial burden to demonstrate that De Sylva was not acting within the scope of his employment during the events in question—therefore, the City has also met its initial burden demonstrate that De Sylva acted in his private capacity—and not as a government actor. This is sufficient to negate an element of Plaintiff's third claim—i.e., the alleged violation of Plaintiff's constitutional right to free speech and to solicit customers door-to-door. Likewise and as stated above, Plaintiff has not met his burden to present evidence demonstrating a triable issue of fact that De Sylva was acting in the scope of his employment, instead of in his private capacity.

As the City has met its burden to negate an element of Plaintiff's claim, the court GRANTS summary adjudication as to the third cause of action on all theories of liability.

[1] All other issues presented have been rendered MOOT by Plaintiff's non-opposition to the sixth, seventh, eighth, ninth, and tenth causes of action.

[2] The City objects that Plaintiff violates California Rules of Court, rule 3.1116(c), which requires the relevant portion of any testimony in

a deposition to be marked in a manner that calls attention to the testimony. Plaintiff has produced excerpts of the deposition testimony cited instead of the entire depositions; the court finds that Plaintiff has substantially complied with this rule.

[3] The City contends that Plaintiff conflates the issue of "course and scope of employment" with the allegation that De Sylva was acting under the "color of law." The City argues that the "color of law" theory is pertinent only to claims brought under 42 U.S.C. § 1983, and is not applicable to the state law causes of action alleged in the complaint. However, the issue of whether an employee's conduct occurs within the scope of employment is an issue of fact, meaning that each case will be evaluated on its own merits. (*Mary M.*, *supra*, 54 Cal.3d at p. 213.) And, as a practical matter, whether an officer acts under "color of law" will involve factual questions that also are pertinent to whether the officer is acting within the "course and scope" of his or her employment.

[4] During the deposition of Segura, Defendant's counsel identified this weapon as Segura's "service revolver," however, Plaintiff only identified this weapon as "a gun" during his deposition. (Segura Deposition at 110:10-11.) Plaintiff presents no evidence that he knew that this weapon had been issued by the City during the course of the parties' altercation.

[5] Plaintiff cites his own deposition testimony to contend that he was arrested by De Sylva—and not the local police officers—and that custody was subsequently transferred to the local officers when they arrived. (PRS ¶ 25, citing Segura Depo. at 108:20-109:6.) The cited testimony, however, does not support Plaintiff's assertion that De Sylva effected the arrest; Segura only states that De Sylva told him to get on the ground, that Plaintiff responded he had not done anything wrong, and that Plaintiff was

subsequently interviewed by the police in the squad car. (*Ibid.*)

[6] The City additionally contends that applying respondeat superior would contravene public policy. Having found that Plaintiff has not demonstrated the existence of a triable issue of material fact regarding vicarious liability, the court need not address the City's arguments regarding public policy.

[7] Plaintiff's remaining causes of action of the Complaint incorporate and reference Plaintiff's direct theories of liability. (See Compl. ¶¶ 14, 15, 18, 22, 27, 31, 38, 41.)

[8] The City specifically notes that De Sylva is Sri Lankan and visibly not Caucasian, but fails to state why this is a relevant fact; the City does not provide any authority to support the proposition that individuals of Sri Lankan ethnicity may not hold racial animus against African-American men.