New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 239—NO. 102 WEDNESDAY, MAY 28, 2008 ALM

SECOND CIRCUIT REVIEW

BY MARTIN FLUMENBAUM AND BRAD S. KARP

City Liability for Invoking Unconstitutional State Laws

In this month's column, we discuss *Vives v. City of New York*,[1] in which the U.S. Court of Appeals for the Second Circuit ruled for the first time "whether—and under what circumstances—a municipality can be liable for enforcing a[n unconstitutional] state law…."

In its decision, written by Judge Rosemary S. Pooler, and joined by Judges Robert A. Katzmann and Barrington D. Parker, the court concluded that "there must have been conscious decision making by the City's policymakers [to enforce a particular state law] before the City can be held to have made a conscious choice."[2] Accordingly, the court vacated the district court's grant of summary judgment on plaintiff's claim for violation of his First and Fourth amendment rights, and remanded the case for additional discovery, briefing by the New York solicitor general on the issue of whether or not "the City had a meaningful choice" to enforce the law at issue, and, if so, "whether the City adopted a discrete policy to enforce [the law] that represented a conscious choice by a municipal policymaker."[3]

Martin Flumenbaum *and* **Brad S. Karp** *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison LLP, specializing in complex commercial and white-collar defense litigation.* **Aliza J. Balog,** *a litigation associate at the firm, assisted in the preparation of this column.*

Martin Flumenbaum *Brad S. Karp*

Background and Procedural History

Plaintiff Carlos Vives filed a 42 U.S.C. §1983 action against New York City, the two officers who arrested him, and Raymond Kelly, the police commissioner, for violating his First and Fourth amendment rights when he was arrested on charges of aggravated harassment, pursuant to New York Penal Law §2403(1), for mailing "non-threatening religious and political materials" to a political candidate and "other 'people of the Jewish faith'"[4]

Mr. Vives is a New York City resident who, for the past 20 years, has sent press clippings and written statements on religious and political issues to thousands of individuals. In early 2002, Mr. Vives sent religious and political materials to a candidate for lieutenant governor. On April 3, 2002, detectives went to the candidate's campaign office, where her campaign manager informed the detectives that the candidate "found [Mr.] Vives' mailing to be 'alarming and/or annoying.'"[5]

On April 6, 2002, the detectives allegedly went to Mr. Vives' home, convinced him to come to the precinct by giving him the impression that he was going to meet Mayor Michael Bloomberg, placed him in a holding cell, informed him that he was being charged with aggravated harassment, and then released him. The District Attorney's Office declined to prosecute him. Nevertheless, on March 25, 2003, two more police officers allegedly went to Mr. Vives' apartment to question him about his mailings, without offering any explanation as to why they were there.[6]

Thereafter, Mr. Vives filed suit alleging that his arrest violated his First and Fourth amendment rights, the New York State Constitution, and New York common law. Mr. Vives sought both damages and a declaration that N.Y.P.L §240.30(1) was unconstitutional to the extent that it prohibited protected speech.[7]

The parties each moved for summary judgment. On Nov. 24, 2003, the district court held that: (1) the officers violated the Fourth Amendment because they lacked probable cause to arrest Mr. Vives; (2) the officers were not entitled to qualified immunity as a matter of law; and (3) Mr. Vives was entitled to injunctive relief prohibiting Mr. Kelly from enforcing the statute against Mr. Vives. Thereafter, defendants brought an interlocutory appeal challenging only that portion of the district court's decision relating to qualified immunity. The Second Circuit reversed, on the basis that the officers did not have fair notice of the law's unconstitutionality.[8]

Even before the Second Circuit's decision, the city moved for judgment pursuant to Fed.R.Civ.P. 12(c) on the basis that "[Mr.] Vives could not establish that any City policy caused him harm because Section 240.30(1) was enacted by the state legislature." The district court denied

the city's motion in an oral decision on the basis that "there was a dispositive difference between state statutes that a municipality is required to enforce and state statutes that a municipality is merely authorized to enforce." The court concluded that municipalities could be liable for enforcing the latter, but not the former, and permitted discovery on "whether New York required or commanded the City to enforce state penal laws."[9]

At the end of discovery, each of the parties moved for summary judgment on the issue of municipal liability. The district court granted plaintiff's motion for summary judgment on the basis that "it was undisputed that the City had a practice and policy of enforcing Section 240.30(1) and the City offered no evidence that it was mandated to enforce the statute." Thereafter, the district court held a jury trial on the issue of damages. The jury awarded Mr. Vives $3,300.

Mr. Vives subsequently appealed the district court's decision to the Second Circuit, contending that the court had erred when it held that the city's policy of enforcing NYPL §240.30(1) was a municipal policy within the meaning of *Monell v. Department of Social Services of the City of New York*.[11]

The Second Circuit Decision

In holding that there must be a meaningful and conscious decision by the city's policy makers to enforce a policy for the city to be deemed to have a policy that causes constitutional violations under *Monell,* the Second Circuit addressed an issue of first impression. The issue is significant to potential plaintiffs, municipalities, and taxpayers because municipalities may be held liable for constitutional injuries pursuant to 42 U.S.C. §1983, whereas states may not.

In a series of decisions beginning with *Monell* in 1978, the Supreme Court has held that: (1) municipalities may be liable for violations of 42 U.S.C. §1983 for even "good faith constitutional violations presuming that the municipality has a policy that causes those violations"; (2) "the word 'policy' generally implies a course of action consciously chosen from among various alternatives"; and (3) policies can be created not only by legislative bodies, but also by municipal officials.[12] The Supreme Court has not, however, had the opportunity to apply *Monell* and its progeny to a case where a municipality allegedly caused a constitutional injury by enforcing an unconstitutional state law.

Nevertheless, as the Second Circuit noted, six other circuits have previously issued rulings that touch on whether and when a municipality may be held liable for enforcing an unconstitutional state law, but none of them is "squarely on point." According to the court, the Sixth, Ninth and Eleventh circuits have each issued decisions supporting, in part, the contention that "a municipality engages in policy making when it determines to enforce a state law that authorizes it to perform certain actions but does not mandate that it do so." Decisions issued by the Fourth, Seventh, and Tenth circuits support the preposition that a municipality does not engage in policy making when it merely enforces a state law.[13]

After reviewing the decisional law, the Second Circuit concluded that, consistent with the Sixth, Seventh and Eleventh circuit decisions, a municipality will not be held liable under *Monell* unless the municipality makes both a meaningful and conscious choice to enforce the statute.[14]

The court reasoned that a "mere municipal directive to enforce all state and municipal laws [does not] constitute[] a city policy to enforce a particular unconstitutional statute" because "the 'conscious' portion of the 'conscious choice' requirement may be lacking in these circumstances." Moreover, although a municipality need not know that the statute at issue is unconstitutional, a municipality's policy makers must, at a minimum, have focused to some extent on the statute in question. Essentially, "there must have been conscious decision making by the City's policy makers before the City can be held to have made a conscious choice."[15]

Having determined under what circumstances a municipality may be held liable in a §1983 action for enforcing a state law, the court then remanded the case to the district court to determine if, in this particular instance, the city made a "meaningful choice" to enforce the statute and, if so, then whether city policy makers had made a "conscious choice" to enforce the statute by adopting a discrete policy pertaining to the enforcement of the statute. The court specifically requested that the New York Solicitor General's Office offer its views on whether a city is mandated to enforce the state's penal laws. The court also suggested that resolution of these remaining issues would resolve the question of whether the city's actions caused plaintiff's constitutional injury.

Conclusion

With its decision in *Vives,* the Second Circuit has clarified for district courts when a municipality may be held liable for constitutional injuries for enforcing unconstitutional state laws. Under *Vives,* municipalities will be held liable only where they have made a real choice to enforce an unconstitutional state law.

•••••••••••••●●●•••••••••••••

1. —F.3d—, No. 05-1664-cv, 2008 WL 1902092 (2d Cir. May 1, 2008).
2. *Vives,* 2008 WL 1902092 at *4.
3. Id. at *6.
4. *Vives v. City of New York (Vives II),* 405 F.3d 115, 116 (2d Cir. 2005).
5. *Vives v. City of New York (Vives I),* 305 F. Supp. 2d 289, 293-94 (S.D.N.Y. 2003).
6. Id. at 294-95.
7. Id. at 295.
8. *Vives,* 2008 WL 1902092 at *1-2.
9. Id. at *2.
10. Id.
11. Id. (citing *Monell,* 436 U.S. 658 (1978)).
12. Id. at *3 (discussing *Monell,* 436 U.S. 658 (1978); *Owen v. City of Independence,* 445 U.S. 622 (1980); *Oklahoma City v. Tuttle,* 471 U.S. 808 (1985); *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1985)).
13. Id. at *4-5 (discussing *Cooper v. Dillon,* 403 F.3d 1208 (11th Cir. 2005); *Whitesel v. Sengenberger,* 222 F.3d 861 (10th Cir. 2000); *Bockes v. Fields,* 999 F.2d 788 (4th Cir. 1993); *Garner v. Memphis Police Dep't,* 8 F.3d 358 (6th Cir. 1993); *Surplus Store & Exch., Inc. v. City of Delphi,* 928 F.2d 788 (7th Cir. 1991); *Evers v. County of Custer,* 745 F.2d 1196 (9th Cir. 1984)).
14. Id. at *5.
15. Id.