IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Jermaine Wilson and Dameon Sanders, individually and for a class	)	
Plaintiffs,	)	14-cv-8347
-vs-	)	*(Judge Lee)*
City of Evanston, Illinois,	)	
Defendant.	)	

RESPONSE TO MOTION TO STRIKE (ECF No. 163)

Defendant has asked the Court to strike five exhibits on which plaintiffs rely in their motion for summary judgment. These exhibits are similar to the exhibits which defendant uses in its cross-motion for summary judgment. Moreover, defendant overlooks the 2010 amendment to Rule 56(c)(2) of the Federal Rules of Civil Procedure. The motion should therefore be denied.

I. The 2010 Amendment Rule 56(c)(2)

Rule 56(c)(2) of the Federal Rules of Civil Procedure was amended in 2010 to provide as follows:

> (2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

This subsection means that the form in which evidence is "produced at summary judgment need not be admissible," *Wragg v. Vill. of Thornton*, 604

F.3d 464, 466 (7th Cir. 2010), as long that material could be "presented in a form that would be admissible in evidence."

Defendants rely on the pre-2010 rule, as applied to inadmissible hearsay in *Gunville v. Walker*, 583 F. 3d 979, 985 (7th Cir. 2009). (ECF No. 163 at 1.) The Court should not apply the pre-2010 rule to this case.

II. Evanston Police Department General Order 10.1

Defendant produced Evanston Police Department General Order 10.1 during discovery. Plaintiffs relies on the written policies set out in this order to support paragraphs 4-6, 11, and 16 of Statement of Undisputed Facts, ECF No. 152. Defendant argues that the General Order is inadmissible for lack of foundation and "confusing to the jury and unfairly prejudicial to Defendant." (ECF No. 163 at 2.) These objections are frivolous.

First, defendant "is not acting in good faith in raising such an objection [of lack of foundation] if the party nevertheless knows that the document is authentic." *Fenje v. Feld*, 301 F. Supp. 2d 781, 789 (N.D. Ill. 2003), *aff'd*, 398 F.3d 620 (7th Cir. 2005). Second, the General Order set out explicit policies of the City of Evanston that are applied to arrestees. It is not "unfairly prejudicial" to permit plaintiffs to prove their claims.

III. Emails

Evanston produced an email chain with the Cook County Sheriff's Office setting out the property that the Sheriff will accept when Evanston transports arrestees to the District 2 (Skokie) Court House. (ECF No. 152-4.) Evanston

argues that the emails are "hearsay and inadmissible." (ECF No. 163 at 3.) The Court should reject this objection because the emails are business records under Federal Rule of Evidence 803(6). *Campbell v. Whobrey*, No. 16 C 4631, 2020 WL 1330661, n. 7 (N.D. Ill. Mar. 22, 2020).

IV. Evanston Police Department Report

Evanston produced Exhibit 7, a "Court Supplementary Report" (ECF No. 152-8) during discovery. Evanston argues that the report should be stricken as "impermissible hearsay." (ECF No. 163 at 3.) The Court should reject defendant's perfunctory single-sentence argument.

Plaintiffs cite the report to show that plaintiff Wilson was released from the Cook County Jail on October 15, 2014. (ECF No. 152, ¶ 4.) This is an easily verifiable fact which, in most cases, would be the subject of a stipulation. Barring a stipulation, and assuming that Evanston's report is not admissible as a business record, the date that Wilson was released from the Jail could easily be "presented in a form that would be admissible in evidence" with testimony from the Custodian of Records of the Cook County Jail.

Evanston's report should, however, be treated as a business record. and admissible under Federal Rule of Evidence 803(6). Statement of third parties in police reports do not come within this exception, *Jordan v. Binns*, 712 F.3d 1123, 1133 (7th Cir. 2013), but the date that plaintiff Wilson was released from the Cook County Jail is not a statement of a third party.

In addition, the report was prepared by an employee of defendant acting within the scope of the employee's duties and is therefore admissible against defendant under Rule 801(d)(2)(D). The reference in the police report to the date Wilson left the Jail is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" *Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 310 (7th Cir. 2010).

V. Contract with PropertyRoom.com

Evanston has entered into a contract with "PropertyRoom.com" to dispose of certain items of arrestee property; plaintiffs rely on this contract to show that Evanston receives a portion of the proceeds from sales of arrestee property (ECF No. 152, ¶¶ 37-39), thereby implicating the Fifth Amendment Takings Clause.

Evanston produced a copy of this contract during discovery but asks the Court to exclude the contract because "[n]one of the signatories or parties to this contract have offered any testimony regarding this document." (ECF No. 163 at 3.) The Court should overrule this frivolous objection for at least two reasons. First, the Court should not sustain any foundation objection to documents that the opposing party produced during discovery. *Vulcan Golf, LLC v. Google, Inc.*, 726 F.Supp.2d 911, 914 (N.D. Ill. 2010). Second, admissibility of a business record does not require testimony by the author of the document. *United States v. Reese*, 666 F.3d 1007, 1017 (7th Cir. 2012).

VI. Letter from Defense Counsel

Plaintiffs rely on a letter from defense counsel to show that defendant stopped destroying unclaimed arrestee property during this litigation. (ECF No. 152, ¶ 40.) Defendant does not dispute the pedigree of this letter. Nor does defendant assert that its former attorney misrepresented the facts to plaintiffs' counsel.

Defendant nonetheless asks the Court to exclude this letter for lack of foundation. (ECF No. 163 at 3.) But this objection—if it is seriously advanced by defendant—can be overcome at trial with testimony from defendant's former counsel and easily be "presented in a form that would be admissible in evidence." FED. R. CIV. P. 56(c)(2).

Respectfully submitted,

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