

**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,)	
)	
v.)	No. 14-cv-08347
)	
CITY OF EVANSTON, ILLINOIS,)	Honorable John Z. Lee
)	
Defendant.)	

**DEFENDANT CITY OF EVANSTON'S
REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Defendant, City of Evanston (“Evanston”), by and through its attorneys, Tribler, Orpett & Meyer, P.C., states the following for its Reply in Support of its Motion for Summary Judgment:

I. The City seeks summary judgment as to any alleged takings claim.

In their Response, Plaintiffs erroneously contend the City does not seek summary judgment on their alleged takings claim (Dkt. #170, p.1, fn. 1). In its response to Plaintiffs' Motion for Summary Judgment, the City devotes the vast majority of its memorandum explaining why Plaintiffs do not allege a takings claim, and alternatively, why any such claim should be dismissed and the City be granted judgment. (Dkt. #171, pp. 2-12). In its Cross-Motion for Summary Judgment, the City argues that Plaintiff cannot assert a takings claim. (Dkt. #158, ¶1.) Instead of repeating the same arguments asserted in response to Plaintiffs' Motion, the City incorporates said arguments by reference its Memorandum in Support of its Motion. (Dkt. # 159, p.10). Specifically, in its Response, the City argues that Plaintiffs' Fifth Amendment claim fails because it is barred, has already been ruled upon in *Conyers*, is based upon underlying arguments this Court has already decided, and based upon inapplicable statutes and incorrect interpretation of statutory authority

and terms contained therein (Dkt. #161, p.2).

II. The City's Motion for Summary Judgment complies with Local Rule 56.1.

Contrary to Plaintiffs' contention, the City's Motion complies with Local Rule 56.1. Plaintiffs erroneously contend that the City's SOMF accompanying its Motion violates Local Rule 56.1 because it exceeds 80 paragraphs (Dkt. #170, p.1). The Local Rules allow for 80 paragraphs of material facts to each party filing a motion for summary judgment. Local Rule 56.1(a)(3)(B). The Local Rules allow an additional 40 paragraphs for each party opposing a motion. Local Rule 56.1 (b)(3)(B). Accordingly, the Local Rules allow parties 120 paragraphs in circumstances where a party files both a motion for summary judgment, and a motion opposing a party's motion for summary judgment. Here, the City's total of 91 SOMF is below the 120 it is allowed by the Local Rules in support of its Motion and in Response to Plaintiff's Motion. The City simply did not separate its SOMF into two documents – (1) one supporting its motion and (2) additional statements opposing Plaintiffs' Motion. Instead, the City combined all SOMF into one document.

Furthermore, Plaintiff agreed to 65 out of 80 of the City's SOMF. Therefore, it would be highly prejudicial to disregard the entire SOMF as Plaintiffs suggest. Several of the City's SOMF pertained to the same exhibits Plaintiffs used in their SOMF and sought the City to admit, yet they objected to admitting to the content of the very same exhibits. (Dkt. #160, ¶¶33, 35-36, exhibits 9-11 compared to Dkt. #152, ¶26, exhibits 16-18.) Finally, the 10 SOMF (paragraphs 81-91) Plaintiffs objected to were all supported by Plaintiffs' deposition testimony and/or Plaintiffs' Response to Request to Admit Facts and are not in dispute.

III. The City provides citations and its contentions are not contrary to the record.

The City provides citations to the record and its contentions are not contrary to the record as Plaintiffs contend. (Dkt. #170, pp. 1-3). For example, in SOMF 31, the City states that the

“Prisoner Property Receipts attached as Exhibits 5 and 6 refers arrestees to the EPD website.” Plaintiffs do not deny that the receipts refer to the website. Rather, they suggest the contention is improper because the purpose of the reference on the Prisoner Property receipt is to obtain the normal operating hours of the property bureau (Dkt. #170, p. 2). Plaintiffs point to a distinction without a difference. Regardless of the purpose of referring prisoners to the website, the fact remains that prisoners are, in fact, directed to the EPD website. The material fact is not why they were told to go to the website. The material fact is that the City apprised the Plaintiffs of the existence of the City’s website, and provided information on how to access the website.

This Court should also reject Plaintiffs’ argument that the City does not provide any evidentiary materials to support SOMF 33,34,35, 36 and 38. This argument is also without merit. The City cites to exhibits 9-11, which show the information posted on the City’s website. The City also cites to the relevant portions of the website as evidentiary materials to support these contentions (Dkt. #160, para. 33-38, Ex. 9-11). Ironically, Plaintiffs take issue with the City’s references to exhibits 9-11, yet the same exhibits are contained within Plaintiffs’ SOMF and identified as exhibits 16-18 with no other supporting citation than that used by the City. The City admitted Plaintiffs’ SOMF 26 referencing said exhibits, yet Plaintiffs chose to object to the City’s SOMF 33, 35-36 using the same exhibits. (Dkt. #168, ¶¶33, 35-36, exhibits 9-11 compared to Dkt. #162, ¶26, exhibits 16-18.)

Similarly, Plaintiffs’ argument that the City fails to support its SOMF #51 that “most arrestee property is retrieved” also lacks merit. Simply because Wasowicz did not look up the exact number of unclaimed property items does not mean he could not glean from general observation and personal experience that the majority of items did not remain in the warehouse.

Finally, Plaintiffs' argue that SOMF #59 is not supported by the record. SOMF #59 states: "The Prisoner Property Receipt attached as Exhibit 6 demonstrates that Sanders transferred possession of the identified personal property to the EPD." Plaintiffs suggest this is contrary to the record, pointing to Sanders' deposition testimony that the signature at the bottom of Exhibit 6 was not his signature (Dkt. #170, p. 3). Yet, Sanders also testified that the signature at the top of the page, was his signature (Sanders Dep. p. 30:1-13). Sanders further testified that he recalled receiving the Personal Property Receipt from the Evanston Police Department. Accordingly, contention #59 does not include factual contentions that are contrary to the record.

IV. Deliberate indifference is an element of this case which Plaintiffs fail to prove.

Plaintiffs' Second Amended Complaint alleges that the City deprived them of a personal property interest by its failure to prevent the destruction of their personal property. Plaintiffs erroneously argue that deliberate indifference is not an element of the claim in this case. Plaintiffs' contend that "deliberate indifference is not required, when, as in this case, constitutional injury is caused by an express municipal." (Dkt. #170, p. 4). Defendant is unclear what Plaintiffs' mean when they refer to an "express municipal." Plaintiffs do concede, however, that "deliberate indifference" applies to a municipality's failure to respond to a need. *Id.* Indeed, Plaintiffs' argument is refuted by caselaw they cite in their response—*Elizarri v. Sheriff*, 901 F.3d 788 (7th Cir. 2018)(holding that "deliberate indifference" is an element of a claim that involves a failure to prevent the loss or theft of detainee property."). The facts in this case are similar to those in *Elizarri*, another class action lawsuit wherein Plaintiffs asserted *Monell* liability against the Sheriff of Cook County alleging that their constitutional rights had been violated by the Sheriff's failure to prevent the loss of their personal property while they were in Cook County jail. *See Elizarri*, 901 F. 3d 787, 788 (7th Cir. 2018).

The jury returned a verdict in favor of the Sheriff, the plaintiffs appealed, and the Seventh Circuit affirmed the verdict. *See id.* at 789-792. The Seventh Circuit held that the trial judge correctly instructed the jury on the question of the Sheriff's liability under § 1983. Within that instruction, the judge told the jury that the Sheriff could be found liable for violating the Fourteenth Amendment if:

1. The Defendant was **deliberately indifferent** to Plaintiffs' losses. To show **deliberate indifference**, the Plaintiffs must prove by a preponderance of the evidence these two things:
 - a. That the Defendant actually knew of the substantial risk that the property storage practices in effect would cause a loss of Plaintiffs' property; and
 - b. The Defendant consciously disregarded this risk by failing to take reasonable measures to prevent such losses.

Elzarri at 790. (Emphasis added.)

Plaintiffs allege the City failed to prevent the destruction of their property while they were detained in jail, and therefore, allege the City failed to respond to a need—namely, Plaintiffs' need to have the City guard/safekeep/store their personal property. Accordingly, deliberate indifference is an element of their claim in this case for the same reasons as *Elzarri*.

Conclusion

Plaintiffs fail to refute the City's Motion. Their response fails to refute that the Evanston ordinance does not create a constitutionally protected property interest. They further fail to provide any evidence to support that they were prevented from retrieving their property, that Evanston's policy was the "moving force" behind this alleged deprivation or the result of "deliberate indifference." Plaintiffs also cannot explain why they could retrieve their property on prior arrests, but not in this case. For all of the foregoing reasons, this Court should grant the City's Motion for Summary Judgment and dismiss Plaintiffs' Second Amended Complaint with prejudice. The City further requests leave to file SOMF 81-91 should it have misinterpreted the Local Rules.

Respectfully submitted,

s/ William B. Oberts

One of the Attorneys for City of Evanston

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Defendant, City of Evanston's Reply in Support of Its Motion for Summary Judgment, was served upon:

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service was accomplished pursuant to ECF as to Filing Users and complies with LR 5.5 as to any party who is not a Filing User or represented by a Filing User by mailing a copy to the above-named attorney or party of record at the address listed above, from 225 W. Washington Street, Suite 2550, Chicago, IL 60606, on the 20th day of January, 2021, with proper postage prepaid.

s/ William B. Oberts
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