

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

Anthony Murdock, *et al.*,)
)
 Plaintiffs,)
) 20-cv-1440
 -vs-)
) (Judge Feinerman)
 City of Chicago,)
)
 Defendant.)

RESPONSE TO MOTION TO STAY

Defendant asks the Court to stay proceedings pending the disposition of its soon to be filed motion for judgment on the pleadings. (ECF No. 109.) Plaintiffs do not object to a stay of discovery, but object to a stay of proceedings on class certification. Plaintiffs respectfully suggest that the Court consider defendant's motion for judgment on the pleadings together with plaintiffs' motion for class certification. The parties can then complete any remaining discovery after the Court rules on the motions.

1. The controversy underlying this case

“[T]he constitutional liberty interest in release on bail arises after a magistrate has determined that an accused may be released upon deposit of whatever sum of money will ensure the accused’s appearance for trial.”

Doyle v. Elsea, 658 F.2d 512, 516 n.6 (7th Cir.1981).

Plaintiffs and the members of the putative class are all persons for whom a judge set an amount of cash bond in issuing an arrest warrant, who could have paid that bond immediately following execution of the warrant, and who were not permitted to post bond because of an express municipal policy.¹

Consistent with *Doyle v. Elsea, supra*, plaintiffs contend that they therefore had a “constitutional liberty interest in release on bail.”² The Seventh Circuit applied this rule in *Driver v. Marion County Sheriff*, 859 F.3d 489, 491 (7th Cir. 2017) and *Williams v. Dart*, 867 F.3d 625, 632-34 (7th Cir. 2020). The three other circuits that have addressed this issue are in accord. *Campbell v. Johnson*, 586 F.3d 835, 940 (11th Cir. 2009); *Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. 2010); *Steele v. Cicchi*, 855 F.3d 494, 502 (3d Cir. 2017).

Defendant did not permit plaintiffs and the members of the putative class to post cash bond at a police station because of a municipal policy set

¹ Plaintiffs will show in their motion for class certification that the identity of the members of that proposed class can be ascertained from records maintained by the Sheriff of Cook County.

² Plaintiff will show in briefing on their class motion and on the impending motion for judgment on the pleadings that this liberty interest arises from either the Fourth Amendment or the Due Process Clause of the Fourteenth Amendment.

out in Chicago Police Department Special Order S06-12-02. (Amended Complaint, ¶ 5.) This policy prohibited plaintiffs and the members of the putative class from posting bail at the local police station on a warrant issued outside of Chicago when, as here, the amount of bond had already been set by the judge who approved the arrest warrant. Because of the policy, plaintiffs and the members of the putative class remained in custody overnight at a police station and were transferred (in handcuffs) the next morning to “Central Bond Court.” The judge at bond court did not conduct a bond hearing for plaintiffs and the members of the putative class. Nor did the judge review the bond that another judge had set on the warrant. The judge simply inquired whether the arrestee could post 10% of the bond that had previously been set. Plaintiffs and the members of the putative class were then permitted to post the bond that had been set on the warrant.

The municipal policy permits persons arrested on warrants issued in Chicago to post bail at the local police station and be released immediately.³ In contrast to plaintiffs and members of the putative class, these arrestees were not required to remain in custody overnight at the police station and were not transferred to bond court before being permitted to post bond.

³ In addition to the Unreasonable Seizure and Due Process claims, this case thus also presents an obvious Equal Protection claim.

Plaintiffs contend that the municipal policy is unconstitutional and seek to litigate this question for a class of similarly situated persons.

Defendant seeks a stay because it intends to move for judgment on the pleadings based on the Seventh Circuit's recent decision in *Mitchell v. Doherty*, ___ F.4th ___, 2022 WL 2235461 (7th Cir. 2022).

The plaintiffs in *Mitchell* had been arrested at a political demonstration and, after a judge found probable cause to detain, were held in custody for more than 48 hours awaiting a bond hearing. In contrast to the arrests on warrants in this case, an amount of bond had not been set for the *Mitchell* plaintiffs before they were arrested. The plaintiffs in *Mitchell* argued "that the County violated the Fourth Amendment by denying them a bail hearing within forty-eight hours after detention even though a probable-cause determination had been made within that period." *Mitchel*, 2022 WL 2235461 *2. The Seventh Circuit rejected this claim.

The rule of *Mitchell* is that the Constitution does not require that an arrestee receive a bond hearing within 48 hours of arrest, and there is no constitutional violation when a bail hearing is held within 68 hours of arrest. *Mitchel*, 2022 WL 2235461 *10.

It is difficult to identify the impact, if any, that *Mitchell* has on this case. Plaintiffs do not read *Mitchell* as having any application to a claim by

a person whose bond was set before arrest. Nor do plaintiffs read *Mitchell* as ratifying a policy that some (but not all) persons arrested on warrants, for whom a judge has set bond, must remain in custody until those persons can appear before “a judge in bond court” (Motion to Stay, ¶ 13, ECF No. 109 at 4), even when the bond court judge does not set or review bond, but merely inquiries if the arrestee is able to post bond.

2. Plaintiffs’ motion for class certification

Plaintiffs seek to prosecute the case for

All persons who, on and after February 27, 2018,

- (a) were detained by police officers of the City of Chicago on a warrant for which a judge had set an amount of cash bail,
- (b) were not permitted to post bail at the police station pursuant to the explicit policies set out in Section IV.B.3(a) or IV.B.3(c) of Chicago Police Department Special Order S06-12-02, and
- (c) were released by posting bail after an appearance before a judge of the Circuit Court of Cook County without being held at the Cook County Jail.

(ECF No. 102 at 1.) Pursuant to the Court’s order of June 23, 2022, plaintiffs’ amended or supplemental motion for class certification is due on August 1, 2022, and the motion will be fully briefed by October 7, 2022. (ECF No. 108.)

3. The status of discovery

Defendant has deposed one of the named plaintiffs and seeks to depose the remaining four plaintiffs. Plaintiffs intend to propound written discovery to resolve a potential objection to numerosity. Plaintiffs also seek to

undertake a Rule 30(b)(6) deposition to identify defendant's justification, if any, for the challenged policy.

The parties have agreed to defer this discovery pending the Court's ruling on the motion to stay. Plaintiffs explain below why they do not oppose continuing to stay discovery pending the Court's ruling on defendant's impending motion for judgment on the pleadings and plaintiffs' motion for class certification.

4. The Court should resolve defendant's impending motion for judgment on the pleadings together with plaintiffs' motion for class certification

The legal questions to be posed by defendant's impending motion for judgment on the pleadings are intertwined with the commonality, typicality, and predominance questions to be resolved on plaintiffs' motion for class certification. To resolve these questions, the Court must evaluate the legal theories presented by the proposed class. *Montoya v. Jeffreys*, No. 18 C 1991, 2020 WL 6581648, at *11 (N.D. Ill. Nov. 10, 2020), *opinion on summary judgment*, *Montoya v. Jeffreys*, 565 F. Supp. 3d 1045 (N.D. Ill. 2021). This inquiry is required for commonality as well as typicality, which requires that class claims be "based on the same legal theory." *Douglas v. W. Union Co.*, 328 F.R.D. 204, 212 (N.D. Ill. 2018), quoting *Muro v. Target Corp.*, 580 F.3d 485, 492 (7th Cir. 2009). Identification of plaintiffs' legal theories to be advanced by the plaintiff class is specifically required by Rule 23(c)(1)(B),

which provides that the order certifying a case as “a class action must define the class claims, issues or defenses.” *See Montoya*, 565 F. Supp. 3d at 1059.

The Court’s ruling on defendant’s impending motion for judgment on the pleadings will require the same careful inquiry into the legal theories advanced for the putative class as plaintiffs’ class motion. In the interest of judicial economy, plaintiffs therefore suggest that the Court rule on defendant’s impending motion for judgment on the pleadings together with plaintiffs’ motion for class certification.

5. Conclusion

It is therefore respectfully submitted that the Court stay discovery while it hears and decides defendant’s motion for judgment on the pleadings and plaintiffs’ motion for class certification. The parties can complete any remaining discovery after the Court rules on the motions.

Respectfully submitted,

/s/ Kenneth N. Flaxman
KENNETH N. FLAXMAN
ARDC No. 830399
knf@kenlaw.com
JOEL A. FLAXMAN
200 S Michigan Ave Ste 201
Chicago, IL 60604-2430
(312) 427-3200
attorneys for plaintiff