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

Theresa Kennedy,	)	
	)	
Plaintiffs,	)	
	)	No. 20-cv-1440
-vs-	)	
	)	
City of Chicago,	)	*(Judge Durkin)*
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO ADD PLAINTIFFS AND TO FILE AMENDMENT TO AMENDED COMPLAINT

The Court should grant plaintiff leave to add Santiago Bravo and John Plummer as additional plaintiffs and to file an amendment to the amended complaint.

The orders of the predecessor judge leave the putative class represented by a single plaintiff, Theresa Kennedy. Defendant contends that Ms. Kennedy does not have a viable individual claim (ECF No. 146 at 3) and it is a certainty that defendant will invoke *Mullen v. GLV, Inc.*, 37 F.4th 1326, 1328 (7th Cir. 2022) to argue that Ms. Kennedy cannot adequately represent the putative class. In an abundance of caution, and consistent with *Phillips v. Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2006) and *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 616 (7th Cir. 2020), plaintiff seeks leave of court to add two additional plaintiffs (Bravo and Plummer) to this action in

an amendment to the amended complaint. Plaintiff explains below why the Court should grant this motion.

I. The procedural history shows that the motion is timely

The procedural history of this case shows that the Court should reject defendant's timeliness argument (ECF No. 146 at 3) and find that the motion to add plaintiffs is timely.[1]

The original plaintiff Anthony Murdock filed this action on February 27, 2020, challenging a written policy of the City of Chicago that prohibits an arrestee from posting cash bail at the police station when that person had been arrested on a warrant on a weekend or holiday or on a warrant issued by a judge sitting outside of the City of Chicago. The policy requires such arrestees to spend the night at a police station before being transported to Central Bond Court (at the Leighton Courthouse located at 2650 South California Avenue) before being permitted to post bond and be released in the late afternoon or early evening.

The district court allowed ten members of the putative class to join the action as plaintiffs on April 25, 2021. (ECF No. 55.) Six subsequently

[1] Although Rule 21 does not include a timeliness requirement, the Seventh Circuit held in *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595 (7th Cir. 2020), that a motion to add parties should be judged by the timeliness standard of Rule 15, because adding parties necessitates an amendment to the complaint. *Id.* at 616.

withdrew as named plaintiffs on December 6, 2021 (ECF 91) and February 12, 2022. (ECF No. 100.)

The parties litigated defendant's claim of a "deliberative process privilege" from June of 2021 to October 4, 2021, when the predecessor judge rejected the asserted privilege. (ECF No. 82.) The parties then focused on paper discovery. Defendant engaged the law firm of Taft Stettinius and Hollister LLP, and new counsel appeared for defendant in January of 2022. (ECF Nos. 94-97.)

On June 23, 2022, the court set a schedule for the completion of fact discovery by August 5, 2022 and for briefing on class certification. (ECF No. 108.) Eight days later, defendant asked the court to stay discovery and class certification proceedings while it prepared a Rule 12(c) motion for judgment on the pleadings. (ECF No. 109.) The Court granted the motion to stay on July 11, 2022 (ECF No. 112), and defendant filed its Rule 12(c) motion on July 19, 2022. (ECF No. 115.)

On December 1, 2022, the predecessor judge granted the Rule 12(c) motion in part, holding that plaintiffs could not challenge the municipal policy as it applied to persons arrested on warrants issued by judges sitting outside of Cook County. (ECF No. 136.) The predecessor judge then dismissed the claims of four of the original plaintiffs. (*Id.*) Theresa Kennedy,

the fifth plaintiff, continued in the case: she had been arrested on a warrant issued by a judge sitting in the City of Chicago but had not been permitted to post bond because she had been arrested on a weekend.[2]

Plaintiffs moved to reconsider or, in the alternative for entry of a Rule 54(b) judgment. (ECF No. 137.) The district judge denied the motion to reconsider and the request for partial final judgment under Rule 54(b) on December 14, 2022. (ECF No. 142.)

II. The order of December 1, 2022 was a sea-change in this case

For more than two years, plaintiffs prosecuted this case on the theory that the policy of the City of Chicago set out in Section IV.B.3 of Police Department Special Order S06-12-02 violated the Fourth and Fourteenth Amendments as applied to every person arrested on a warrant for whom a judge had set an amount of cash bail.

Illinois law requires a judge issuing an arrest warrant to include within the warrant the amount of bail required for release. 725 ILCS 5/107-

[2] The policy allows persons arrested on Chicago warrants other than on weekends or holidays to post cash bond at the police station, avoiding the overnight stay, trip to Central Bond court the next morning, and detention until the late afternoon or early evening after bond is posted.

9(d)(6).[3] Under the statute presently in force, persons arrested on a warrant may therefore obtain release by posting cash bail at a police station.[4]

The municipal policy in this case prohibits persons arrested on a warrant issued by a judge sitting outside the City of Chicago (the First Municipal District) from posting bail at the police station. The policy also prohibits the posting of cash bond by persons arrested on a weekend or holiday on a warrant issued by a judge sitting in the City of Chicago.

Plaintiffs identify two legal theories in their amended motion for class certification (ECF No. 117 at 12-14): First, plaintiffs contend that the disparate treatment of warrants issued by judges sitting in the City of Chicago and warrants issued by all other judges in the State of Illinois does not have a "rational connection to a legitimate state interest," *Ostrowski v. Lake County*, 33 F.4th 960, 967 (7th Cir. 2022), and therefore violates the Equal Protection Clause of the Fourteenth Amendment.

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[3] The amendment to Section 9(d)(6) in the "SAFE-T ACT" changes "amount of bail" to "conditions of pretrial release." Enforcement of the statute has been stayed by the Illinois Supreme Court. *People ex rel. Berlin v. Raoul*, No. 129249 (December 31, 2022).

[4] 725 ILCS 5/110-9 provides as follows:

> When bail has been set by a judicial officer for a particular offense or offender any sheriff or other peace officer may take bail in accordance with the provisions of Section 110-7 or 110-8 of this Code and release the offender to appear in accordance with the conditions of the bail bond, the Notice to Appear or the Summons.

Second, plaintiffs contend that the policy violates the Fourth Amendment when it deprives persons arrested on a warrant from posting cash bail at the police station. In *Doyle v. Elsea*, 658 F.2d 512 (7th Cir. 1981), the Seventh Circuit held that "the 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." [5] *Id.* at 516 n.6. Plaintiffs rely on the decisions of the Seventh Circuit in *Driver v. Marion County. Sheriff*, 859 F.3d 489, 490 (7th Cir. 2017) and *Williams v. Dart*, 967 F.3d 625, 632 (7th Cir. 2020), to argue that the case presents common questions of law.

The City argued in its Rule 12(c) motion that its policy had been compelled by a "General Administrative Order" that had been adopted in 2015 (5 years before the original plaintiff filed this case) by the Chief Judge of the Circuit Court of Cook County. (ECF No. 115 at 14.) The City, based on this and other theories, sought judgment on the pleadings.

Plaintiffs opposed the City's claimed reliance on the General Administrative Order, but on December 1, 2022, the predecessor judge granted

[5] Under *Manuel v. City of Joliet*, 137 S.Ct. 911 (2017), this "liberty interest" is properly viewed as implicating the Fourth Amendment. See *Alcocer v. Mills*, 906 F.3d 944, 954 (11th Cir. 2018) ("we conclude that the precise right implicated by the facts Alcocer alleges is the Fourth Amendment right to be free from unreasonable seizures").

judgment on the pleadings against the four plaintiffs who had been arrested on warrants issued outside of Cook County. (ECF No. 136.) Plaintiffs filed a motion to reconsider on December 8, 2022 (ECF No. 137), and the predecessor judge adhered to his original ruling in an oral ruling on December 14, 2022. (ECF No. 142.)

The partial grant of judgment on the pleadings imposed a significant limitation on the scope of the putative class. The putative class no longer includes persons arrested on warrants issued outside of Cook County. The putative class can now include only persons arrested on Chicago warrants on weekends and holidays and persons arrested on warrants issued in Cook County but by judges sitting outside of Chicago. These limitations on the class definition required plaintiff to retool her numerosity calculations. The new limits on the breadth of the potential class also required counsel to assess possible challenges to the ability of the sole remaining plaintiff to adequately represent the putative class.

Plaintiff Kennedy was arrested on a Saturday on a warrant issued by a judge sitting in Chicago. (Amended Complaint, ¶ 42, ECF No. 56 at 9.) Counsel expects defendants to argue that Kennedy cannot adequately represent persons arrested in Cook County on arrest warrants issued by judges sitting outside of Chicago. Counsel also expects defendant to rely on

Kennedy's deposition testimony to argue that Kennedy was not injured by defendant's policy and cannot represent a class. *See Mullen v. GLV, Inc.*, 37 F.4th 1326, 1328 (7th Cir. 2022), discussing application of *TransUnion LLC v. Ramirez,* 141 S.Ct. 2190 (2021) to this situation. Plaintiff proceeded promptly to respond to these anticipated challenges after the court ruled on defendant's Rule 12(c) motion.

III. The motion to add plaintiffs is timely

Promptly after the ruling of December 1, 2022, plaintiff's counsel began to identify persons who could serve as additional class representatives. On December 6, 2022, plaintiff served a request for documents about the arrest of potential members of the putative class, as modified by the Court's ruling, and on January 20, 2023, defendant produced documents about 253 potential class members. Plaintiff's counsel used these discovery responses and other resources to communicate with potential members of the putative class and identified two persons willing to serve as named plaintiffs. Plaintiff files her motion to add additional plaintiffs on February 28, 2023, in accordance with the schedule set at the status hearing on February 17, 2023.

This Court has recognized the need to add named plaintiffs in a case brought as a class action. In *Gubala v. CVS Pharm., Inc.*, 14 C 9039, 2015 WL 3777627 (N.D. Ill. June 16, 2015), the Court dismissed the complaint, but allowed the plaintiff an opportunity to amend the complaint "to include a

named plaintiff who can prosecute those claims." *Id.* at *8. The rule that allows class plaintiffs to amend to add class representatives is well settled in the Seventh Circuit.

In *Phillips v. Ford Motor Co.*, 435 F.3d 785 (7th Cir. 2006) the Seventh Circuit applied the rule that "[s]ubstitution of unnamed class members for named plaintiffs who fall out of the case because of settlement or other reasons is a common and normally an unexceptionable ('routine') feature of class action litigation ... in the federal courts ..." *Id.* at 785. More recently, the Court of Appeals described the routine practice that plaintiff follows here as seeking "only to rearrange the seating chart within a single, ongoing action." *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 616 (7th Cir. 2020).

The rule encouraging substitution of unnamed class members for named plaintiffs is frequently applied. *See, e.g., In re NorthShore U. HealthSystem Antitrust Litig.*, 07-CV-4446, 2018 WL 2383098, at *8 (N.D. Ill. Mar. 31, 2018) (setting time limit by which "Plaintiffs' counsel shall file a motion to substitute a class representative"); *Mullen v. GLV, Inc.*, 488 F. Supp. 3d 695, 705 (N.D. Ill. 2020), *aff'd*, 37 F.4th 1326 (7th Cir. 2022) (dismissing claim of named plaintiff, but "provid[ing] the class an opportunity to substitute a new class representative who has standing to pursue count 2"); *Pierre v. Midland Credit Mgt., Inc.*, 16 C 2895, 2019 WL 4059154, at *5

(N.D. Ill. Aug. 28, 2019) (recognizing that " a district court may substitute an alternative representative from the class to serve as the named plaintiff if the named plaintiff's standing is eliminated after certification"); *Smith v. ERJ Dining, LLC*, 11-CV-2061, 2013 WL 1286674, at *6 (N.D. Ill. Mar. 28, 2013) (same).

There is no merit in any argument that the rule encouraging substitution of unnamed class members for named plaintiffs who fall out of the case is limited to cases where class certification has been granted. The Seventh Circuit considered and rejected this argument in *Phillips v. Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2006). Decisions from other circuits are in accord. *See, e.g., Klein on behalf of Qlik Techs., Inc. v. Qlik Techs., Inc.*, 906 F.3d 215, 223 (2d Cir. 2018); *In re Community Bank of N. Virginia*, 622 F.3d 275, 298 (3d Cir. 2010). The basis for these decisions is that "absent members of a class—at least in relation to an applicable statute-of-limitations period—are essentially 'parties' to the class action while a certification decision is pending." *In re Community Bank of N. Virginia, supra*. In this case, plaintiff identified this case as a class action in his original complaint (Complaint, ¶ 8, ECF No. 1 at 2) and has repeatedly requested that the case proceed as a class action. (ECF Nos. 23, 52, and 117.)

The Court should therefore grant plaintiff's motion to add Bravo and Plummer and allow plaintiffs to file an amendment to the amended complaint.

IV. Conclusion

The Court should therefore grant the motion to add additional plaintiffs and allow plaintiffs to file the amendment to the amended complaint.

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