

Exhibit A

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

THERESA KENNEDY, }
Plaintiff, }
-vs- } Case No. 20 C 1440
CITY OF CHICAGO, } Chicago, Illinois
Defendant. } December 14, 2022
9:45 a.m.

TRANSCRIPT OF TELEPHONIC PROCEEDINGS
BEFORE THE HONORABLE GARY FEINERMAN

APPEARANCES:

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1 (Proceedings heard in open court:)

2 THE CLERK: 20 C 1440, Kennedy versus Chicago.

3 THE COURT: For the plaintiff?

4 MR. K. FLAXMAN: Kenneth Flaxman.

5 MR. J. FLAXMAN: And Joel Flaxman also for the
6 plaintiff.

7 THE COURT: And for the City?

8 MS. BABBITT: Good morning, your Honor. Elizabeth
9 Babbitt on behalf of the City of Chicago.

10 THE COURT: Okay. Good morning. So, we're here for
11 a status hearing, and also, there's been a motion -- the
12 plaintiffs have filed a motion to reconsider or for entry of a
13 54(b) judgment.

14 So, the City filed a response yesterday. Plaintiffs,
15 anything you care to add at this point?

16 MR. K. FLAXMAN: Well, I -- given -- I've never
17 turned down an opportunity to speak, your Honor. I'm sorry
18 that I can't depart from that. If I can be just two minutes,
19 I'll be very quick.

20 THE COURT: Sure.

21 MR. K. FLAXMAN: The plaintiff's view is that the
22 question of whether the City's policy in 2015 forward or 2019
23 forward, whenever the -- or 2017 forward, the starting of the
24 proposed class, is a question of fact. Was the City, in fact,
25 compelled -- did the City follow the policy because it

1 concluded it was compelled by the Chief Judge's general
2 administrative order, or was it a coincidence, or did the City
3 ask the Chief Judge, "Hey, issue this order so we can't be
4 sued and we can claim this immunity"?

5 That's a question of fact that we say -- that we
6 believe, respectfully, that the Court did not consider in its
7 decision, and that it's a question which cannot properly be
8 resolved on a motion for judgment on the pleadings.

9 As to the Rule 54(b) finding, there's really a
10 separate question about whether it's the -- your Honor's
11 ruling on the controlled by question is -- review of that
12 question as opposed to the merits of the underlying case. It
13 makes sense for the City to know its potential exposure for
14 the -- if there is liability for its policy, whether it's
15 limited to the 250 or 270, whatever it is, people, on the
16 court holidays and weekends class, or whether it's a class
17 of 3,000.

18 It would be -- if I was the City, I would not want to
19 settle -- and I have no idea if the City ever wants to settle,
20 but settling knowing that the class of 300 is really going to
21 be 3,000, and I'm really looking at 10 times -- my exposure is
22 10 times what I'm agreeing to settle for.

23 So, I suggest it makes a lot of sense to do a
24 Rule 54(b) finding if your Honor did not reconsider.

25 THE COURT: All right. I'm going to deny the motion.

1 And I know there -- there's the language in the cases about
2 a motion to reconsider should be granted only if the judge
3 concludes that he or she or they made a terrible, terrible
4 mistake and overlooked something. I'm not using that lens.
5 I'm just looking at it with fresh eyes just because if I made
6 a mistake, now's the time to correct it, rather than have the
7 case go forward with a mistake.

8 And that said, I don't think I made a mistake here.
9 The issue that the plaintiffs raise in the reconsideration
10 motion is addressed at pages 7 to 8 of my opinion, which is
11 docket 136. And, you know, the fact that the special order,
12 the CPS -- I'm sorry, the CPD special order was issued before
13 the Circuit Court of Cook County general order, I addressed
14 that in the opinion, and I said it didn't matter because the
15 state of mind of the actors at the City is irrelevant. All
16 that matters is whether under state law, as it existed at the
17 time the challenged actions were taken, determined what the
18 municipality did.

19 And the answer to that is yes. In 2019, the Circuit
20 Court of Cook County order was in place; and at least by --
21 given my understanding of that order, which I concluded was
22 state law, the CPD didn't have a choice regardless of whether
23 that policy was promulgated in 2012, which it was, or after
24 2015.

25 And the why of it, why did the City do what it did,

1 is not pertinent. The only thing that's pertinent is the City
2 had to do what it did. And that -- that issue was addressed
3 in the opinion, and I adhere to that analysis.

4 On the 54(b) judgment, I'm going to deny that as
5 well. Certainly, the *Bethesda Home* issue is separate from any
6 issue that Kennedy will face going forward; but if there is an
7 appeal, the City will seek to affirm the judgment on the
8 *Bethesda Home* issue, which has to do with the Circuit Court of
9 Cook County general order, but I imagine also will argue in
10 the alternative that there was no Fourth Amendment violation
11 in the first place. And they'll be -- the City will be
12 entitled to make that argument. I'm sure it will make that
13 argument.

14 And that particular issue is -- completely overlaps
15 with the issues that remain in play for Kennedy, whether there
16 was a substantive violation of the Fourth and perhaps the
17 Fourteenth Amendment. So, given that overlap, under Seventh
18 Circuit precedent, a 54(b) judgment would not be appropriate.

19 So, I'm going to deny docket 137.

20 As to a schedule going forward, you know, I -- I was
21 looking at both sides' positions in the status report; and it
22 did seem to me that before I stayed discovery in light of
23 the -- what was going to be the motion for judgment on the
24 pleadings, the plaintiff did say that the parties had agreed
25 to defer certain discovery pending resolution of the

1 forthcoming motion for judgment on the pleadings. And among
2 that discovery was written discovery to resolve a potential
3 objection to numerosity. And I reviewed the docket, and I
4 never saw the defendant push back on that at any time.

5 So, I'm inclined to allow the plaintiff to seek
6 written discovery regarding the individuals who are similarly
7 situated or at least arguably similarly situated to Kennedy,
8 given how things played out this summer with the stay; but I
9 wanted to ask the defendant whether I'm missing anything.

10 MS. BABBITT: Yes, your Honor. Elizabeth Babbitt for
11 the City.

12 I would just add, your Honor, and I know we laid this
13 out in our status report position, so I don't want to repeat
14 myself too much; but I would highlight the point that we made,
15 which is that, you know, the amended pleading deadline was
16 over -- it was in April of 2021 by the agreement. I don't
17 believe we understood additional discovery to contemplate the
18 idea that they'd be adding new plaintiffs, particularly when
19 that --

20 THE COURT: I'm sorry to interrupt. I wasn't yet
21 talking about amending the pleadings. All I was talking
22 about was the discovery that the plaintiffs referenced at
23 docket 111 at page 6.

24 MS. BABBITT: Okay. I'm sorry, your Honor. I mean,
25 I do see them sort of dovetailing together because it seems --

1 my understanding was that they wanted this additional
2 discovery so that they could, in fact, amend their pleadings.

3 But I take your Honor's point as to, you know, the
4 reservation of some written discovery by the plaintiffs; but
5 I think the City would -- as we say in our status report, to
6 the extent it now becomes we're opening the door to identify
7 more potential plaintiffs and to start things over again where
8 we're now just deposing additional plaintiffs, issuing
9 discovery and the like, I think that's where the City would
10 ask the Court to draw a line.

11 THE COURT: All right. So, I am going to allow the
12 plaintiff to serve -- I think the plaintiff may have already
13 served that discovery seeking further data, arrest reports
14 and transport records, for members of what will now be the
15 narrowed putative class, meaning individuals arrested on
16 weekends and holiday weekdays on warrants issued here in --
17 I can't remember whether it was Chicago or Cook County.

18 But as to amending the pleadings, that, I'm kind of
19 leaning towards the defendant on that issue just because, you
20 know, we don't know at this juncture whether the City will
21 challenge Kennedy's adequacy or typicality, and we don't know
22 whether any such challenge would succeed.

23 And the cases that the plaintiff cited in the status
24 report, *Mervyn* and *Lukis*, say that if a putative class rep is
25 knocked out on adequacy or typicality grounds, there ought to

1 be a chance given to find a replacement. But we're not at
2 that point yet.

3 So, given that, and also the fact that the plaintiff
4 didn't -- didn't cite Rule 16(b)(4), let alone establish that
5 it was satisfied, and given that the current state of play as
6 to Kennedy's adequacy and typicality should have been apparent
7 to everybody ever since Kennedy joined the case, I don't even
8 see how 16(b)(4) could be satisfied at this juncture.

9 So, I'm leaning against allowing for creating a new
10 deadline for leave to amend, but let me ask plaintiff the same
11 question I just asked the defendant on the other side of the
12 coin, whether you think I -- the reasons why you think I ought
13 to go in the opposite direction.

14 MR. K. FLAXMAN: I would suggest that it be denied
15 without prejudice to moving after defendants respond to a
16 motion for class certification. I am confident that they will
17 raise every objection that is conceivable and that those
18 objections will include typicality and adequacy of
19 representation.

20 That's why we originally had five representatives
21 going forward, for that kind of -- I'm anticipating that kind
22 of challenge. Now we have one, and it's much easier to pick
23 off one than three or four.

24 THE COURT: Right. Although of the -- the other four
25 were non-Cook County warrants.

1 MR. K. FLAXMAN: Right. But there was no distinction
2 between out of county and holidays and weekends until your
3 Honor ruled.

4 THE COURT: Yeah. Well, I guess I -- of course, I
5 didn't rule until I ruled, but, you know, it was -- it was
6 something that perhaps could have been anticipated.

7 But anyway, I'll -- I think what you say is fair.
8 So, I'll deny the request to extend the time to move to add
9 new parties. That's without prejudice to plaintiff making
10 another run at it at some future juncture. I'm not saying
11 that it should be granted at that future juncture. It's just
12 I don't know what's going to happen between now and then.

13 And given that, if the plaintiff wants to ask again,
14 the plaintiff can ask again; and then that decision will be
15 made based on the circumstances prevailing at that juncture.

16 So, let's put this schedule in place. City, I was
17 going to set a date of production for you at some point in
18 early to mid January. Would that be feasible?

19 MS. BABBITT: I think that if we could get, like, the
20 third week of January, the end of that week, your Honor. I
21 know we're coming up against holidays and things seem to grind
22 to a halt. But maybe by January 20th or January 23rd.

23 THE COURT: Yeah. Let's say January 20th. And
24 then -- so the City will produce those documents by
25 January 20th. Fact discovery will close on March 17th;

1 And then how long after the close of fact discovery,
2 Mr. Flaxman, would you like to file your renewed class
3 certification motion?

4 MR. K. FLAXMAN: 28 days, your Honor.

5 THE COURT: Sure. So that would be April 14th. Then
6 we'll have a response due on May 19th, and then we'll have a
7 reply, the class certification reply due on June 9th.

8 And then, Jackie, let's set this for a status
9 hearing -- why don't we say in the middle of February.

10 THE CLERK: Sure. How about February 17th, 9:15 a.m.

11 THE COURT: And let's ask the parties to file a
12 status report by February 10th. It will be my standard COVID
13 civil status report. The case at that point will be under new
14 management by then, but hopefully we've laid the foundation
15 for everybody to know what they need to do and when.

16 Anything further at this point from the plaintiff?

17 MR. K. FLAXMAN: Nothing. It's been a pleasure being
18 before you, your Honor.

19 THE COURT: Well, thank you. It's been a pleasure
20 these 12 years having you in court.

21 Defendant, anything else you need to discuss?

22 MS. BABBITT: No, your Honor. I thank you again.
23 I follow Mr. Flaxman. It's a big loss to the bench, but best
24 of luck on your next move.

25 THE COURT: Thank you. I really appreciate that.

1 And maybe I'll see you on the other side.

2 MR. K. FLAXMAN: Thank you, your Honor.

3 MS. BABBITT: Thank you, your Honor.

4 (Which were all the proceedings heard.)

5 CERTIFICATE

6 I certify that the foregoing is a correct transcript from
7 the record of proceedings in the above-entitled matter.

8

9 /s/Charles R. Zandi

December 15, 2022

10 Charles R. Zandi
11 Official Court Reporter

Date

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