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

Jevarreo Kelley-Lomax, individually and for a class	)	
Plaintiff,	)	No. 20-cv-4638
-vs-	)	*(Judge Lee)*
City of Chicago,	)	
Defendant.	)	

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Plaintiff Jevarreo Kelley-Lomax challenges, individually and for a class, the practice of the City of Chicago to destroy personal belongings taken from arrestees who cannot retrieve their belongings because they are in custody as pre-trial detainees. Defendant has moved to dismiss, relying on arguments this Court rejected in *Wilson v. Evanston*, 14-cv-8347. The Court should once again reject those arguments and deny the motion to dismiss.

I. Factual Background

All persons arrested by Chicago police officers who are to be charged with a crime and not released from the police station must surrender their personal belongings, including items that are not contraband or evidence of a crime, such as jewelry, cell phones, and other electronic devices. (ECF No. 6, Amended Complaint ¶ 4.) The City allows arrestees thirty days to retrieve their belongings. (*Id.* ¶¶ 6, 9.) The property is destroyed or sold at auction pursuant to an express municipal policy if the arrestee does not re-claim the

property within thirty days of arrest. (*Id.* ¶ 9.) The City does not provide any compensation to an arrestee who has been thusly deprived of property.[1]

Arrestees, like plaintiff, who are held as pre-trial detainees at the Cook County Jail are unable to retrieve their belongings in person; although the City permits a detainee to designate another person to retrieve the belongings, many arrestees, like plaintiff, are unable to secure a designee to retrieve their belongings. (ECF No. 6, Amended Complaint ¶ 7.) The City is aware of this injustice but has refused to establish a procedure to remedy it. (*Id.* ¶ 10.)

The result of the City's procedures is that arrestees, including plaintiff Jevarreo Kelley-Lomax, are permanently deprived of their belongings without the "just compensation" required by the Fifth Amendment.

Plaintiff was arrested on April 18, 2019 by Chicago police officers, who seized from plaintiff a cellphone, charger, earbuds, and two earrings. (ECF No. 6, Amended Complaint ¶ 12.) These items were neither evidence nor contraband. (*Id.* ¶¶ 4-5, 12.)

Plaintiff was transferred to the Cook County Jail following his arrest; plaintiff remained in the Jail for nearly seven months until he was released from custody on October 17, 2019. (ECF No. 6, Amended Complaint ¶ 13.) Plaintiff was unable to secure a designee to retrieve his belongings while in custody at the Jail. (*Id.* ¶ 15.) Accordingly, defendant destroyed or sold at auction plaintiff's cellphone, charger, earbuds, and two earrings. (*Id.*

[1] Plaintiff includes this fact, which is "consistent with the well-pleaded complaint" pursuant to *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1147 (7th Cir. 2010).

¶ 16.) Plaintiff has not received any compensation for being permanently deprived of his belongings.

Plaintiff brings this action individually and for all person similarly situated, asserting claims under the Fourth, Fifth, and Fourteenth Amendments of the Constitution. (*Id.* ¶¶ 17-18.)

II. Fourth Amendment Claim

Plaintiff acknowledges that the Fourth Amendment authorized defendant to seize and inventory his belongings.[2] Plaintiff contends, however, that despite the legality of the initial seizure, defendant's subsequent action to permanently deprive him of his property was an unreasonable seizure in violation of the Fourth Amendment.

Plaintiff also acknowledges that the Seventh Circuit adopted a different view of the Fourth Amendment in *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003) and *Bell v. City of Chicago*, 835 F.3d 736 (7th Cir. 2016), holding that the protections of the Fourth Amendment end when the property is seized. *Lee*, 330 F.3d at 466; *Bell*, 835 F.3d at 741. These cases, however, are inconsistent with the decision of the Supreme Court in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017).

Whether the Fourth Amendment protects arrestee property after it has been seized is before the Seventh Circuit in *Conyers v. Chicago*, 7th Cir., No. 20-1934, Brief of

[2] "At the stationhouse, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed." *Illinois v. Lafayette*, 462 U.S. 640, 646 (1983). The purpose of this inventory is "to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Colorado v. Bertine*, 479 U.S. 367, 372 (1987).

Appellants 27-31. Plaintiff recognizes that this Court cannot overrule the Court of Appeals, "for it is [that] Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Plaintiff raises the Fourth Amendment claim to preserve it.

III. Takings Claim

The Fifth Amendment, as applied to the states by the Fourteenth Amendment, imposes two conditions on the government's power to seize private property: "the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Found. of Washington*, 538 U.S. 216, 231–32 (2003). The City's policy does not satisfy either condition.

A. Public Use Requires a Legislative Judgment

A "public use" for the taking of private property requires a "legislature's judgment of what constitutes a public use." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984). There has not been any legislative judgment in this case. Defendant overlooks this rule and argues that, to state a takings claim, plaintiff must allege that his belongings were taken for a public use. (ECF No. 15 at 5-7.) The Court should reject this argument.

Takings claims often turn on whether the government can show a public purpose. For example, in *Kelo v. City of New London*, 545 U.S. 469, 480 (2005), the Supreme Court explained that the challenge to the City's taking "turns on the question whether the City's development plan serves a 'public purpose.'" Similarly, as Judge Wood observed in her concurring opinion in *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003), "if a taking is not for a public purpose, the government has no right to complete the act of eminent domain." *Id.* at 475.

The plaintiffs in *Daniels v. Area Plan Comm'n of Allen Cty.*, 306 F.3d 445 (7th Cir. 2002), claimed that the defendant violated the Fifth Amendment because "their property was taken not for a 'public use.'" *Id.* at 459. The Seventh Circuit squarely held that when a plaintiff makes such a claim, as plaintiff does here, the government has the burden of showing a public use. *Id.*

Defendant seeks to rely (ECF No. 15 at 6-7) on the statement by Judge Tharp in *Conyers v. City of Chicago*, No. 12-CV-06144, 2020 WL 2528534 (N.D. Ill. May 18, 2020), appeal pending 7th Cir., No. 20-1934, that "for the plaintiffs to succeed on their motion [to reconsider dismissal of the takings claim in light of *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019)] they must demonstrate a public purpose for the destruction of their property." *Id.* at *11. This Court, of course, is not bound by Judge Tharp's conclusion. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (citation omitted).

The Court should not follow Judge Tharp's ruling because it is contrary to *Daniels v. Area Plan Comm'n of Allen Cty.*, 306 F.3d 445 (7th Cir. 2002), which held that the burden is on the government to show that a taking was for a "public purpose." *Id.* at 460. Demonstrating a "public purpose" is properly viewed as an affirmative defense, which the Court should not consider on a motion to dismiss because "a plaintiff is not required to plead facts in the complaint to anticipate and defeat affirmative defenses." *Indep. Trust Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 935 (7th Cir. 2012). In any event,

defendant does not argue that there was a public purpose for the destruction of plaintiff's belongings. The Court should reject defendant's public purpose argument.

B. Chicago's Police Powers Do Not Allow It to Sell or Destroy Arrestee Property

Defendant next argues (ECF No. 15 at 7-10) that plaintiff's taking claim must fail because plaintiff's belongings were "lawfully acquired under the exercise of governmental authority." *Bennis v. Michigan*, 516 U.S. 442, 452 (1996). But plaintiff is not challenging the acquisition of his belongings; he challenges the sale or destruction of his belongings.

Selling or destroying an arrestee's belongings while the arrestee remains in custody awaiting trial is not a valid exercise of police powers because it fails to "promote the public convenience or the general prosperity … [nor does it] promote the public health, the public morals or the public safety." *Chicago B & Q Ry. Co. v. Illinois ex rel. Grimwood*, 200 U.S. 561, 592-93 (1906). As Judge Tharp correctly concluded in *Conyers*, "[t]he disposal of personal property seized from arrestees is not an action that has any discernible connection to the exercise of the State's police powers." *Conyers v. City of Chicago*, No. 12-CV-06144, 2020 WL 2528534, at *10 (N.D. Ill. May 18, 2020).

Defendant acknowledges that Judge Tharp rejected its arguments about "police powers" but repeats the same meritless arguments it raised in *Conyers*.[3] Rather than point out any flaw in Judge Tharp's reasoning, the City asks the Court to follow the

[3] *Compare* Memorandum in Support of Motion to Dismiss, ECF No. 15 at 7-9 *with* Sur-Reply in Opposition to Plaintiffs' Motion to Reconsider, *Conyers v. Chicago*, 12-cv-6144, ECF No. 212 at 2-5.

factually distinguishable order in *Singer v. City of Chicago*, 435 F. Supp. 3d 875 (N.D. Ill. 2020). The Court should reject this request.

The property in *Singer* was seized in 2012 pursuant to a search warrant. *Singer v. City of Chicago*, 435 F. Supp. 3d 875, 878 (N.D. Ill. 2020). The City retained the property during the criminal prosecution, which ended in June of 2014. *Id.* at 879. Illinois law expressly authorized the continued custody of the items seized during the pendency of the criminal case.[4] The plaintiff sought the return of his property in 2018 and learned that the City had destroyed some of the seized items after he had not reclaimed the property within 30 days of disposition of the criminal case. *Id.* The district court in *Singer* rejected the taking claims because the City had lawfully held the property during the pendency of the criminal case. *Id.* at 877. The same is not true in this case.

Defendant is unable to identify any Illinois law that authorizes it to retain arrestee property after the arrestee leaves police custody and is held as a pre-trial detainee in the Cook County Jail. In fact, Illinois law is to contrary.

The Illinois Administrative Code, which has "the force and effect of law," *Union Elec. Co. v. Department of Revenue*, 136 Ill.2d 385, 391, 556 N.E2d 236, 239 (1990), requires defendant to return to arrestees all their property when arrestees are released, discharged, or transferred to the custody of the Sheriff of Cook County. Title 20, Illinois Administrative Code, Section 720.25(h) provides as follows:

h) Personal Property

[4] Under 725 ILCS 5/108-11, when items are seized pursuant to a warrant, "[t]he court before which the instruments, articles or things are returned shall enter an order providing for their custody pending further proceedings."

> The Chief of Police shall determine what personal property, if any, a detainee may retain. Receipts must be issued for all personal property taken from a detainee. Personal property, except for items confiscated as evidence, shall be returned to the detainee or his or her designee upon release and such return shall be documented.

Thus, unlike property seized pursuant to a search warrant that may be held during the pendency of criminal proceedings, as in *Singer*, the City must return all personal property "except for items confiscated as evidence" to the arrestee upon release. The City did not "lawfully acquire[]," *Singer v. City of Chicago*, 435 F. Supp. 3d 875, 877 (N.D. Ill. 2020), the jewelry, cell phones, and other electronic devices (ECF No. 6, Amended Complaint ¶ 4) that it retains after transferring an arrestee to the custody of the Sheriff. The City does not act under its police power, as in *Johnson v. Manitowoc County*, 635 F.3d 331, 336 (7th Cir. 2011), when it retains this property, but rather acts unlawfully, in violation of Illinois law, when it retains arrestee property that is not contraband or evidence of a crime.[5]

Defendant also mistakenly relies on forfeiture cases to support its argument about police powers. (ECF No. 15 at 7-10.) These cases apply the rule that governmental action "does not effect a taking if it 'substantially advance[s] legitimate state interests.'" *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1023–24 (1992) (internal citations

[5] Judge Tharp read 20 Illinois Administrative Code 720.25(h) as requiring the City to return personal property to arrestees upon release, *Conyers v. City of Chicago*, 12-CV-06144, 2020 WL 2528534, at *10 (N.D. Ill. May 18, 2020), but construed "release" to mean "parole, mandatory supervised release, discharge, or parole." *Id.* at *7 n. is 7. Plaintiffs in *Conyers* challenge this ruling on appeal. *Conyers v. Chicago*, 7th Cir., No. 20-1934, Brief of Appellants 24-26.

omitted). Nothing in defendant's policy of selling or destroying arrestee property furthers any legitimate state interest.

In contrast, there is an unquestionable legitimate governmental interest when property is seized through forfeiture. The personal property in such cases has been used for an improper purpose; forfeiture laws implement the ancient rule that "an owner's interest in property may be forfeited by reason of the use to which the property is put." *Bennis v. Michigan*, 516 U.S. 442, 446 (1996). *Bennis* traced this rule from *The Palmyra*, 12 Wheat. 1, 6 L.Ed. 531 (1827), a case involving the seizure of a privateer that had attacked a United States vessel, to *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), where the Court upheld forfeiture of a yacht that had been used to transport controlled substances. *Bennis*, 516 U.S. at 446-450.

Unlike the cases cited by defendant, this case does not present any use of personal property for an improper purpose. For example, *Tate v. District of Columbia*, 627 F.3d 904 (D.C. Cir. 2010) (ECF No. 15 at 4, 8-9) involved a governmental "practice of auctioning a vehicle when tickets go unpaid [which] is the culmination of a sort of graduated forfeiture process." *Id.* at 909. The District of Columbia Circuit found that this practice "both deters drivers from committing traffic and parking infractions in the first instance and induces delinquents to pay penalties once incurred," and was therefore consistent with the forfeiture process the Supreme Court upheld in *Bennis*. *Id.* at 909. The same cannot be said in this case, where the City violates Illinois law when it holds onto arrestee property.

Defendant also mistakenly relies on cases from the Federal Court of Claims. (ECF No. 15 at 7, 9.) Each of these cases involved the power "to investigate, arrest, seize, impound, subject to forfeiture, or otherwise enforce criminal law." *Patty v. United States*, 136 Fed. Cl. 211, 214 (Fed. Ct. Cl. 2018).

In *Kam–Almaz v. United States*, 682 F.3d 1364 (Fed. Cir. 2012) (ECF No. 15 at 9), an ICE agent, who was acting as a Customs agent with the authority to seize and inspect property entering the United States, seized a laptop from the subject of an ICE investigation. *Id.* at 1366-67. The government kept the laptop for ten weeks and returned it in non-working condition. *Id.* at 1366. In ruling against the owner of the laptop who claimed "damages totaling $469,480.00 due to lost business contracts," *id.* at 1367, the Federal Circuit held that there had not been any unconstitutional taking because the property had been seized as part of a lawful investigation. *Id.* at 1371. The same is not true here, where defendant sold or destroyed plaintiff's property that was unrelated to any criminal investigation or prosecution.

Seay v. United States, 61 Fed. Cl. 32 (Fed. Ct. Cl. 2004) (ECF No. 15 at 9), involved the retention of property during a criminal investigation, where "[t]he government lawfully seized the plaintiff's property and held it for the duration of a criminal investigation." *Id.* at 35. Unlike this case, in *Seay* "the government eventually returned the plaintiff's possessions." *Id.* at 34. Here, defendant sold or destroyed plaintiffs' possessions.

In *Alde, S.A. v. United States*, 28 Fed. Cl. 26 (Fed. Ct. Cl. 1993) (ECF No. 15 at 8), the Customs Service seized an aircraft for failure to request landing rights in violation of 19 U.S.C. § 1436. Thereafter, the government instituted forfeiture proceedings, but

eventually returned the aircraft to its owner. *Id.* at 28-29. In this case, plaintiff lawfully possessed various belongings when he was arrested. There is no allegation that the property was contraband, had been used to commit a crime, or was evidence of a crime. Defendant should not be heard to claim that it may seize *any* property possessed by a person simply because the arrestee is accused of a crime. "If defendant's position is the law, the police power would swallow private property whole." *Patty v. United States*, 136 Fed. Cl. 211, 315 (Fed. Ct. Cl. 2018).

For all the reasons, the Court should deny the motion to dismiss the takings claim.

IV. Due Process Claim

Plaintiff's claim under the Fourteenth Amendment is twofold: First, that defendant's procedure for arrestees in custody to reclaim their belonging is inadequate. And second, if the Court rejects the taking claim, defendant's policy results in a denial of substantive due process.

A. Procedural Due Process

Defendant does not dispute that, under the Fourteenth Amendment, plaintiff is entitled to an adequate procedure before he is deprived of his property. *E.g.*, *Gates v. Towery*, 623 F.3d 389, 405 (7th Cir. 2010).

Plaintiff describes the challenged procedure in his amended complaint:

> 7. At all relevant times, the official policy of the City of Chicago has been that an arrestee who is in custody following arrest may retrieve the "Property Available for Return to Owner" only by designating a person to whom the property should be released.
>
> 8. The designee must then retrieve the property by going in person to the Chicago Police Department Evidence and Recovered Property Section.

> 9. At all relevant times, the official policy of the City of Chicago has been that "Property Available for Return to Owner" not retrieved within 30 days of arrest is considered abandoned under Chicago Municipal Code Section 2-84-160 and is destroyed, confiscated, or sold at public auction

(Amended Complaint, ECF No. 6 ¶¶ 7-9.)

Defendant asserts that this procedure is constitutional because it provides the arrestee with "clear and concise instructions regarding how to retrieve his property, and what would occur if he failed to reclaim it within 30 days." (ECF No. 15 at 14.) This, however, is not the standard for procedural due process.

The Supreme Court set out the test for procedural adequacy in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The test "generally requires consideration of three distinct factors:"

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. Defendant does not address this standard in its motion to dismiss, but simply refers the Court to *Pesce v. City of Des Moines*, 439 F. Supp. 3d 1101, 1123 (S.D. Iowa 2020) (ECF No. 15 at 14-15.) In *Pesce*, the court concluded that "notice pertaining to the disposition of the dogs did not comport with the requirements of due process," *id.* at 1124, but found that the defendants were not responsible for the inadequate notice.

In this case, plaintiff will prove at trial that the process provided by the defendant is ineffective for persons, like plaintiff, who are pre-trial detainees and who are unable to find a designee to reclaim their belongings. For persons like plaintiff, defendant's

procedures are a cruel and meaningless charade that fails short of the procedural fairness required by the Fourteenth Amendment.

Plaintiff specifically alleges that the procedures are inadequate because many arrestees are unable to secure a designee to retrieve their belongings, defendant is aware of this fact, and defendant has refused to establish a procedure to return belongings to those arrestees. (Amended Complaint, ECF No. 6 ¶¶ 7, 10.) Defendants ignore these allegations, which are analogous to the procedural due process claim that this Court allowed to proceed in *Wilson v. City of Evanston*, No. 14 C 8347, 2016 WL 344533, at *5 (N.D. Ill. Jan. 28, 2016). The Court should deny the motion to dismiss the procedural due process claim.

B. Substantive Due Process

"The substantive component of the Due Process Clause bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them." *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357, 369 (7th Cir. 2018) (citation omitted). Defendant's policy of selling or destroying the belongings of pre-trial detainees who are unable to find a designee to reclaim their belongings meets this standard.

Defendant contends that plaintiff must allege that "state law remedies are inadequate" to state a substantive due process claim. (ECF No. 15 at 12.) This argument is based on Seventh Circuit cases applying the exhaustion requirement of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) to "takings claims in disguise." *Black Earth Meat Mkt., LLC v. Village of Black*

Earth, 834 F.3d 841, 847 (7th Cir. 2016). The Supreme Court abrogated *Williamson County* in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), and this Court should not apply any exhaustion requirement to plaintiff's substantive due process claim.

Even if the Court applied an exhaustion requirement, Illinois law does not provide a remedy for defendant's failure to return plaintiff's belongings. As explained below, any such claim is barred by the Local Governmental and Governmental Employees Tort Immunity Act. 745 ILCS 10/4-102.

The plaintiff in *American Family Mutual Insurance Co. v. Tyler*, 2016 IL App (1st) 153502, 68 N.E.3d 442 (2016), sued the City of Chicago (a defendant not named in the caption), seeking a remedy for the City's failure to return a stolen car to the plaintiff's insured. The Chicago police department had seized a vehicle and returned it to a person who was not entitled to possess the vehicle. 2016 IL App (1st) 153502, ¶ 4, 68 N.E.3d at 444. In this case, the Chicago police department has seized personal possessions and destroyed or sold them.

The plaintiff insurance company asserted a claim against the City that it characterized as a "bailment contract claim." 2016 IL App (1st) 153502, ¶ 7, 68 N.E.3d at 445. Illinois law applies the same characterization (a bailment) to the holding of prisoner property. *Arsberry v. State of Illinois*, 32 Ill. Ct. Cl. 127 (1978).

The City of Chicago argued that the plaintiff's claim in *American Family Mutual* was barred by the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/4-102, under which:

> Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service

> or, if police protection service is provided, for failure to provide adequate police protection or service, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals. This immunity is not waived by a contract for private security service, but cannot be transferred to any nonpublic entity or employee.

The Illinois Appellate Court accepted the City's argument that the action was barred by the Tort Immunity Act, as construed by the Illinois Supreme Court in *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill.2d 484, 500, 752 N.E.2d 1090 (2001). *American Family Mutual Insurance Co. v. Tyler*, 2016 IL App (1st) 153502, ¶ 20, 68 N.E.3d at 447. The same result would befall plaintiff (or any former detainee) on a claim in state court seeking compensation for the sale or destruction of arrestee property. The Court should deny the motion to dismiss plaintiff's substantive due process claim.

V. Conclusion

The Court should therefore deny defendant's motion to dismiss.

Respectfully submitted,

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