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

UPTOWN TENT CITY ORGANIZERS and ANDY THAYER,

Plaintiffs,

v.

CITY OF CHICAGO DEPARTMENT OF ADMINISTRATIVE HEARINGS, CITY OF CHICAGO DEPARTMENT OF TRANSPORTATION, and CITY OF CHICAGO,

Defendants.

Case No. 17-cv-04518

Hon. Sidney I. Schenkier,
Presiding Magistrate Judge

DEFENDANTS' RULE 12(b)(1) AND 12(b)(6) MOTION TO DISMISS COUNTS II-VI OF PLAINTIFFS' SECOND AMENDED COMPLAINT

Defendants City of Chicago Department of Administrative Hearings, the City of Chicago Department of Transportation, and the City of Chicago (collectively "Defendants" or the "City"), by their attorney, Edward N. Siskel, Corporation Counsel for the City of Chicago, hereby move this Court pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss Counts II-VI of the Second Amended Complaint filed by Plaintiffs Uptown Tent City Organizers and Andy Thayer (collectively, "Plaintiffs").[1] In support of their motion, the Defendants state as follows:

1. Plaintiffs' lawsuit stems from ongoing construction of the Wilson and Lawrence Avenue viaducts under Lake Shore Drive and the City's denial of a notification of public assembly for an area known as Stewart Mall. Because the construction plans would displace

[1] This Rule 12 motion does not address Count I of the Second Amended Complaint, which seeks administrative review of a decision by the Department of Administrative Hearings. In accordance with applicable Illinois administrative review law, Defendants have previously answered that count by filing the administrative record, and Defendants' substantive response to the count consists of a separate response to the specification of errors contained in the count. See ECF No. 54.

homeless individuals who were staying at the viaducts, Plaintiffs sought the City's approval to hold a public assembly at Stewart Mall for a period of nearly seven months – 24 hours a day – to include erecting tents where homeless individuals would reside. Because Plaintiffs did not have a required permit to erect structures on the public way, that portion of their assembly notification was denied. However, Plaintiffs were granted the right to assemble at Stewart Mall for the entire time period they requested, just without the ability to erect tents.

2. After the City removed Plaintiffs' administrative review claim to federal court, Plaintiffs filed a first amended complaint re-asserting their administrative review claim, and adding new claims under the First and Eighth Amendments to the U.S. Constitution, and a state law claim under the Illinois Bill of Rights for the Homeless Act.

3. After being denied a preliminary injunction on their first amended complaint, on November 7, 2017, Plaintiffs filed their Second Amended Complaint, repleading each of the four claims asserted in their first amended complaint, as well as adding new federal constitutional claims under the Fourth and Fifth Amendments, relating to alleged actions taken by Defendants in the days following the commencement of construction.

4. To establish subject matter jurisdiction under Rule 12(b)(1), a plaintiff has the burden to show that they have standing under Article III's case or controversy requirement; it is "'not a mere pleading requirement but rather an indispensable part of plaintiffs' case[.]'" Apex Digital, Inc. v. Sears, Roebuck & Co., 572 F.3d 440, 443(7th Cir. 2009) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). Article III standing requires (1) an injury-in-fact to a legally protected interest, (2) a causal nexus whereby the injury is fairly traceable to defendant's actions, and (3) redressability of the injury by court action. Lujan, 504 U.S. at 560-61. An organization has standing to sue on behalf of others only when: (a) its members would

otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of the individual members of the lawsuit. Hunt v. Wash. State Apple Adver. Com'n, 432 U.S. 333, 343 (1977). It is a plaintiff's burden to establish standing. Lujan, 504 U.S. at 561.

5. To survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A complaint must contain more than "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" Id. (quoting Twombly, 550 U.S. at 555). The defendant must be given "fair notice of what the claim is and the grounds upon which it rests." Twombly, 550 U.S. at 555. Although well-pleaded factual allegations are presumed true for purposes of a motion to dismiss, legal conclusions and conclusory allegations that merely recite the elements of a claim are not entitled to a presumption of truth. Munson v. Gaetz, 673 F.3d 630, 632 (7th Cir. 2012). "Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557).

6. At the outset, Counts II-VI of the Second Amended Complaint should be dismissed pursuant to Rule 12(b)(1) because Plaintiffs lack standing. Plaintiff Thayer lacks standing to assert Counts III-VI because (a) he has testified in this case that he is not homeless and (b) he has not alleged that any of his property was seized, searched or taken by Defendants. Plaintiff UTCO lacks standing to assert Counts II-VI because it has failed to allege that it has

organizational standing under Hunt v. Wash. State Apple Adver. Com'n, 432 U.S. 333, 343 (1977). But even if Plaintiffs had standing, their claims still fail on the merits.

7. Count II, which asserts a First Amendment violation, fails for several reasons. First, erecting tents is not protected expression under the First Amendment. But even if it was protected expression, the City's rejection of the request to erect tents, while providing Plaintiffs with the right to assemble in the same place and time as they requested, is a reasonable time, place and manner restriction. The same holds true to the extent that individuals attempted to erect new tent encampments on the public way nearby the viaducts following the closure of the viaducts. And the City, which is the only properly-named defendant on this count, cannot be held liable for the decisions of its employees that prevented those tent encampments because Plaintiffs do not allege that such decisions resulted from a City policy, as required by Monell v. Dept. of Social Servs., 436 U.S. 658(1978).

8. Plaintiffs' Eighth Amendment claim (Count III) fails on its merits because no action by the Defendants has criminalized homelessness, and therefore no cruel or unusual punishment has been inflicted by Defendants. Further, as to any decisions by City employees that prevented new tent encampments nearby the viaducts, the City is not liable because Plaintiffs do not allege that such decisions resulted from a City policy, as required by Monell.

9. Count IV of Plaintiffs' Second Amended Complaint purports to assert Fourth Amendment violations based on the alleged seizure of certain property by City employees in the days following the commencement of construction. This claim fails because Plaintiffs do not assert that their property was searched or seized, and they cannot vicariously assert Fourth Amendment claims on behalf of others. Further, Plaintiffs have not established that any actions

were taken pursuant to a City policy, as required by Monell. Moreover, to the extent that any property was seized, such seizure was reasonable, and therefore no warrant was required.

10. Plaintiffs' takings claim in Count V also the alleged seizure of certain property by City employees in the days following the commencement of construction. This claim fails because neither Plaintiff has claimed that their property was taken. Further, Plaintiffs have not established that any actions were taken pursuant to a City policy, as required by Monell. Further, even if Plaintiffs could overcome these hurdles, this claim should still be dismissed because it is not ripe. Plaintiffs have not made the required showing that a property owner has been denied compensation for any property taken. See Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-95 (1985).

11. Finally, Plaintiffs' state law claim under the Bill of Rights for the Homeless Act in Count VI fails because they have not shown that homeless individuals were treated any differently than a non-homeless person , that any right to privacy under the Act was violated, or that any adverse action was taken solely because people were homeless.

12. For the foregoing reasons, set forth more fully in Defendants' accompanying Memorandum in Support, which is incorporated as if set forth fully herein, Counts II-VI of Plaintiffs' Seconded Amended Complaint should be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) with prejudice.

WHEREFORE, the Defendants respectfully request that this Court dismiss Counts II-VI of Plaintiffs' Second Amended Complaint and grant the Defendants such further relief as the Court deems just and appropriate.

Date: January 19, 2018

Respectfully submitted,

EDWARD N. SISKEL,
Corporation Counsel for the City of Chicago

By: /s/ Margaret Sobota
Attorney for Defendants

ANDREW W. WORSECK
Andrew.Worseck@cityofchicago.org
KELLEY A. GANDURSKI
Kelley.Gandurski2@cityofchicago.org
ANDREW S. MINE
Andrew.Mine@cityofchicago.org
MARGARET SOBOTA
Maggie.Sobota@cityofchicago.org
City of Chicago, Department of Law
30 North LaSalle Street, Suites 1230 &1720
Chicago, Illinois 60602
(312) 744-7129 / 744-0688