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December 9, 2016

By ECF and E-mail
Hon. Andrew L. Carter, Jr.
United States District Judge
Southern District Court of New York
40 Foley Square
New York, NY 10007
ALCarterNYSDChambers@nysd.uscourts.gov

Re: Cho, et al. v City of New York, et al., 16 CV 7961 (ALC)(AJP)

Dear Judge Carter:

We represent Defendants in the above-captioned action. In this purported class action brought pursuant to 42 U.S.C. § 1983, Plaintiffs challenge the content and use of settlement agreements by the New York City Police Department ("NYPD") to resolve cases brought by NYPD pursuant to the City's nuisance abatement law (N.Y.C. Admin Code §§ 7-701, et seq.) (the "Nuisance Abatement Law"). Plaintiffs allege that these settlements were "coercive," and that their terms violate the Fourteenth Amendment insofar as they include provisions by which Plaintiffs purportedly agreed to waive various constitutional rights.

We write pursuant to Rule 2(A) of Your Honor's Individual Practices to request a pre-motion conference in anticipation of filing a motion to dismiss the Complaint. As set forth more fully below, Defendants will move to dismiss on the grounds that Plaintiffs' claims should be dismissed for one or more reasons. Specifically, (1) the claims asserted by Plaintiffs Jameelah El-Shabazz and David Diaz are barred by the statute of limitations; (2) Plaintiff El-Shabazz further waived her claims pursuant to a release that she executed in settlement of a related action against the City; and (3) waiving constitutional rights is not inherently coercive

and, regardless, Plaintiffs Sung Cho, Nagle Washrite LLC[1], and El-Shabazz were represented by counsel when they agreed to the challenged settlements. Moreover, none of the Plaintiffs have alleged that they are reasonably likely to be subject to another nuisance abatement action in the future. Thus, Plaintiffs lack standing insofar as they seek to permanently enjoin NYPD from entering into future settlement agreements with Plaintiffs to resolve a future nuisance abatement actions brought against them by NYPD.

The Claims of Plaintiffs El-Shabazz and Diaz are Barred by the Statute of Limitations

The statute of limitations on a § 1983 claim arising from a stipulation of settlement is three years, and accrues on the date the plaintiff signs the settlement stipulation. See Holiday v. Martinez, 68 F. App'x 219, 222 (2d Cir. 2003) (affirming dismissal on statute of limitations grounds of plaintiffs' substantive due process challenge to settlement agreement to exclude her adult son from her residence). Plaintiffs El-Shabazz and Diaz signed their stipulations of settlement on September 29, 2011 and September 6, 2013, respectively. See Compl. at ¶¶ 87-90 (El-Shabazz), ¶¶ 71-74 (Diaz).[2] The instant Complaint was filed on October 12, 2016 – five years after the stipulation of Plaintiff El-Shabazz, and three years and one month after that of Plaintiff Diaz. Thus, the claims of Plaintiffs El-Shabazz and Diaz are time-barred.

Plaintiff El-Shabazz Waived all Claims Against Defendants

Plaintiffs allege that Plaintiff El-Shabazz settled a prior lawsuit against the City for wrongful arrest and imprisonment for $12,500 for herself and $25,000 for her son arising out of events that precipitated NYPD's nuisance abatement in which El-Shabazz was a defendant. See Compl. at ¶¶ 79-82. Plaintiff was represented by counsel in that lawsuit and, on February 3, 2012, signed a release as a part of that settlement (the "Release"). Pursuant to the Release, Plaintiff El-Shabazz waived all claims against Defendants, known or unknown, based on any event occurring on or before the date of the Release. Plaintiff El-Shabazz's claim in this matter, however, is premised on the nuisance abatement settlement she signed on September 29, 2011 (Compl. at ¶ 87) – four months before she executed the Release. Accordingly, any claims predicated on that settlement agreement are barred by the Release, and must be dismissed. See Staples v. Acolatza, No. 14-CV-3922, 2016 U.S. Dist. LEXIS 153764, at *7 (S.D.N.Y. Mar. 9, 2016) (collecting cases where courts in this district have held that similarly phrased releases bar claims for alleged conduct occurring before the release).

[1] Plaintiff Nagle Washrite LLC is the business entity formed by Plaintiff Sung Cho, and of which he is the sole member. See Compl. ¶ 39. Defendants' arguments as to Plaintiff Cho therefore apply with equal force to Nagle Washrite LLC.

[2] Both stipulations were so ordered by justices of the New York State Supreme Court and are publically filed documents. Thus, the Court may take judicial notice of these settlement agreements. See Waters v. Captain Douglas, No. 12-CV-1910, 2012 U.S. Dist. LEXIS 165151, at *6 (S.D.N.Y. Nov. 14, 2012) ("Publicly filed stipulations of settlement are subject to judicial notice."). Defendants plan to attach copies of these so-ordered stipulations, and Plaintiff Cho's so-ordered stipulation to their motion papers.

Waiving Constitutional Rights is Not Inherently Coercive and, Regardless, Plaintiffs Cho and El-Shabazz Were Represented by Counsel when Signing their Settlement Stipulations

Plaintiffs allege that their respective stipulations of settlement are coercive because these agreements allegedly waived certain of their constitutional rights. See Compl. ¶¶ 52-53, 89. It is well-settled that "[i]t is a fundamental proposition that constitutional rights…can be waived if the waiver is knowing and voluntary." United States v. Stern, 312 F. Supp. 2d 155, 172 (S.D.N.Y. 2003); cf. Colorado v. Connelly, 479 U.S. 157, 168 (1986) (noting that an arrestee may knowingly and voluntarily waive Miranda rights). Plaintiffs fail to plead facts demonstrating that the waivers at issue were not knowing and voluntary. In addition, Plaintiffs Cho and El-Shabazz were represented by counsel when they agreed to the settlements because those agreements were signed by their respective counsel. Indeed, Plaintiff El-Shabazz alleges that she retained a Legal Aid attorney who signed the settlement agreement on her behalf. See Compl. at ¶¶ 87-90. Since Plaintiffs El-Shabazz and Cho were represented by counsel and have failed to allege that they lacked the capacity to understand their attorneys' advice, their stipulations were not unlawfully coerced. See Rispler v. Spitz, 377 F. App'x 111, 112 (2d Cir. 2010) (denying plaintiff's motion to vacate settlement where he had been represented by counsel and could not demonstrate a lack of capacity to enter into the agreement); Smylis v. City of New York, 25 F. Supp. 2d 461, 465 (S.D.N.Y. 1998) (rejecting plaintiff's claim of coercion where he was represented by counsel and agreed to a stipulation of settlement resolving charges against him in an administrative proceeding). Plaintiff Diaz similarly does not allege a lack of capacity to understand the agreement he entered into, or allege any facts that plausibly establish that his waiver was not knowing or voluntary.

Plaintiffs Lack Standing Insofar as They Seek Prospective Injunctive Relief

To have standing to bring a claim for injunctive relief, a plaintiff must demonstrate a likelihood of future harm. See Shain v. Ellison, 356 F.3d 211, 216 (2d Cir. 2004). Past injury is insufficient to satisfy this burden. Id. (citing DeShawn E. by Charlotte E. v. Safir, 156 F.3d 340, 344 (2d Cir. 1998) and O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974)). It is similarly insufficient to allege that a past harm was the result of an official policy. See Shain, supra, at 216 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983)).

The Nuisance Abatement Law authorizes the City, in certain situations, to obtain a temporary restraining order prohibiting enumerated illegal activities at a physical location or to temporarily close a physical location where such illegal activities have occurred. See N.Y. Admin Code § 7-703 (defining public nuisances as, *inter alia*, gun crimes, prostitution, gambling, drug sales and violations of the Alcoholic Beverage Control Law); see also id. § 7-709-710. For Plaintiffs to have standing to seek prospective injunctive relief in this case, they would have to allege, at a minimum, that there was a non-conjectural likelihood that future criminal activity would occur in their residence or business so as to trigger a nuisance abatement action. None of the Plaintiffs have so alleged. Instead, the only harm alleged in the Complaint arises from the settlement agreements they signed to resolve past nuisance abatement actions. See Compl. ¶¶ 52-55, 74, 76, and 89. This is insufficient to confer standing to seek prospective injunctive relief and, therefore, any claims for such relief should be dismissed.

For all of these reasons, Defendants respectfully request that the Court schedule a pre-motion conference to discuss this contemplated motion. Finally, as to Plaintiffs' request for a pre-motion conference requesting permission to move for class certification at this early stage of the litigation (ECF dkt. no. 22.), Defendants filed their response on November 9, 2016. ECF dkt. no. 34. Defendants further request that the Court hold its decision on Plaintiffs' pre-motion request in abeyance pending the resolution of Defendants' proposed motion to dismiss, which is dispositive and should result in the dismissal of all of Plaintiffs' claims.

Thank you for your consideration of these requests.

Respectfully,

/s/

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Evan Schnittman
Assistant Corporation Counsel

cc: All counsel of record, *by ECF and email*