



INSTITUTE FOR JUSTICE

December 14, 2016

The Honorable Andrew L. Carter, Jr.  
United States District Judge  
Thurgood Marshall United States Courthouse  
40 Foley Square, Room 435  
New York, NY 10007

**\*Courtesy Copy**  
Original Filed by ECF  
Assigned Document No. 36

**Re: *Cho v. City of New York*, No. 1:16-cv-07961-ALC — Response to Defendants’  
Request for a Pre-Motion Conference re: Motion to Dismiss**

Dear Judge Carter:

We represent Plaintiffs Sung Cho, Nagle Washrite LLC, David Diaz, and Jameelah El-Shabazz in the above-referenced putative class action. Pursuant to this Court’s Individual Rule 2(A), we submit this letter in response to Defendants’ December 9 letter requesting a pre-motion conference regarding an anticipated motion to dismiss.

This case involves Defendants’ use of New York City’s no-fault eviction ordinance to force residents and business owners to sign agreements waiving constitutional rights. Defendants include New York City, the NYPD, and other officers and agencies within the New York City government, and all are referred to hereinafter as “the City.”

Under the City’s no-fault eviction ordinance, people can be evicted from their homes or businesses simply because a crime *occurred* on the premises, even if the person being evicted had nothing to do with the offense. Compl. ¶¶ 24-28. The City uses the threat of eviction under the ordinance to force innocent people—including Plaintiffs—to agree to perpetual waivers of their constitutional rights, including their rights to be free from warrantless searches, to have access to a judge prior to facing future sanctions, and to live with family members. *Id.* ¶¶ 36-37.

The City lists four arguments that it plans to raise in its motion to dismiss. Taking these arguments in the same order that they are raised by the City, none has any merit.

**None of Plaintiffs’ Claims Are Time-Barred.**

The City contends that the claims of Jameelah and David are time-barred because they signed agreements waiving their constitutional rights more than three years ago. Dec. 9 Letter at 2. However, this ignores the fact that Jameelah and David are *still subject* to those agreements. Jameelah cannot allow her own son to enter her apartment. Compl. ¶¶ 101-102. David is likewise required to exclude his two brothers, and one brother is homeless as a result. *Id.* ¶¶ 98-100. Jameelah and David suffer this continuing injury every day.

The statute of limitations for this kind of ongoing constitutional violation does not begin to run until the violation ends—an event that, in this case, has not occurred. *See, e.g., Wallace v. N.Y.*, 40 F. Supp. 3d 278, 303 (E.D.N.Y. 2014) (challenge to sex offender residency restrictions was not time-barred because restrictions “remain[ed] in effect”). Likewise, it is well established that the time to bring a claim based on a contract requiring continual performance “begins to run only from the time when the contract is in some way terminated or [a] breach occurs.” *Asian Vegetable Research and Dev. Ctr. v. Institute of Int’l Educ.*, 944 F. Supp. 1169, 1177 (S.D.N.Y. 1996) (quoting 31 Am. Jur. 2d *Limitation of Actions* § 92). Jameelah and David are subject to contracts that restrict their constitutional rights today and so can challenge those contracts today.

### **Plaintiff El-Shabazz Has Not Waived Her Claims.**

The City also contends that Jameelah waived her claims by signing a release in a prior wrongful-arrest case. Dec. 9 Letter at 2. This argument is not cognizable on a motion to dismiss, as it raises issues outside the pleadings. *See Calcutti v. SBU, Inc.*, 273 F. Supp. 2d 488, 499 (S.D.N.Y. 2003) (arguments based on release were “inappropriate on a motion to dismiss”). Plaintiffs did not include any allegations about this purported release in their Complaint, and indeed Plaintiffs have not seen this purported release and do not concede that it exists or that it was signed by Jameelah.<sup>1</sup>

In order to determine the effect of this purported release, the Court will need to consider myriad factual issues that cannot be resolved on a motion to dismiss. First, the Court will need to determine if Jameelah actually signed the purported release. Second, the Court will need to determine if the effective date of the purported release falls before or after the events at issue.<sup>2</sup> Third, the Court will need to inquire into the circumstances under which the release was obtained in order to determine if it is tainted by coercion or is otherwise invalid. *See, e.g., Cain v. Darby Borough*, 7 F.3d 377, 383 (3d Cir. 1993) (finding release invalid where it was obtained under blanket government policy of requiring releases of civil rights claims). Additional issues may arise after Plaintiffs have an opportunity to see the purported release and conduct discovery. This simply is not an issue that can be resolved on a motion to dismiss.

### **Plaintiffs Have Stated a Viable Claim on the Merits.**

The City contends that Plaintiffs have failed to state a viable claim on the merits, as Plaintiffs “fail to plead facts demonstrating that the waivers at issue were not knowing and voluntary.” Dec. 9 Letter at 3. To the contrary, however, Plaintiffs alleged in the Complaint that

---

<sup>1</sup> The City notably does not argue that this purported release is a public document subject to judicial notice. *See* Dec. 9 Letter at 2 n.2 (making this argument only for settlement agreements in the eviction cases). Even if the purported release *was* a proper subject for judicial notice, this Court could take judicial notice of its existence but could not assume “the truth of the contents therein.” *Calcutti*, 273 F. Supp. 2d at 499.

<sup>2</sup> While the City contends that Jameelah signed this purported release months *after* resolving the eviction case, Dec. 9 Letter at 2, the Complaint alleges that Jameelah settled her wrongful arrest suit *before* the City filed its eviction action, Compl. ¶¶ 82-83. Notably, the record in the eviction case contradicts the City’s timeline, as Jameelah submitted an affidavit in the eviction case referencing the settlement of her wrongful arrest case. *See* Aff. Opp’n ¶ 33, *The City of New York v. Kelly Mgt. LLC, et al.*, No. 251484/11 (N.Y. Sup. Ct., Bronx Cty.) (filed Sept. 28, 2011).

their waivers of constitutional rights were *not* voluntary because they were extracted under threat of eviction. Compl. ¶¶ 50, 74, 88, 187, 195, 203.

On a motion to dismiss, the Court is required to accept Plaintiffs' allegations as true. *See O'Grady v. Middle Country School District No. 11*, 556 F. Supp. 2d 196, 198 (E.D.N.Y. 2008). For this reason, Courts generally hold that the voluntariness of a waiver is precisely the kind of intensely factual issue that cannot be resolved on a motion to dismiss. *Id.* at 201.

Plaintiffs waived their constitutional rights only because they were offered an impossible choice between waiver and eviction. The Supreme Court has held that this kind of government arm-twisting runs afoul of the "unconstitutional conditions" doctrine, which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586, 2594 (2013); *see also Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). This doctrine fully applies to government's settlement demands. *See Louisiana Pacific Corp. v. Beazer Materials & Services, Inc.*, 842 F. Supp. 1243, 1250-51 (E.D. Cal. 1994).

The perpetual waivers of constitutional rights extracted by the City run afoul of the unconstitutional conditions doctrine because they are not remotely justified by the City's asserted interests. *See Dolan*, 512 U.S. at 391 (setting out "nexus" and "proportionality" test and explaining it is more rigorous than rational basis review); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 258-59 (1974) (when government conditions implicate "fundamental rights," strict scrutiny is required). The government cannot force innocent people—people neither accused nor convicted of a crime—to give up their constitutional rights forever simply because a crime allegedly occurred at their home or business.

The City makes much of the fact that Jameelah and Sung were represented by lawyers when they signed their agreements. Dec. 9 Letter at 3. But even people with lawyers can be coerced by the government; the property owners in *Nollan*, for instance, were represented by counsel. *See Nollan v. Cal. Coastal Comm'n*, 177 Cal. App. 3d 719 (Ct. App. 1986). The lawyers representing Jameelah and Sung could advise them about the risk of eviction that they faced if they defied the City's demands, but the lawyers could not make that risk of eviction go away. The mere presence of a lawyer does not change the critical fact that Jameelah and Sung were forced, under threat of eviction, to waive their constitutional rights.

### **Plaintiffs Have Standing to Seek Prospective Injunctive Relief.**

Lastly, the City claims that Plaintiffs lack standing to seek prospective injunctive relief because they cannot show "a non-conjectural likelihood that future criminal activity would occur in their residence or business." Dec. 9 Letter at 3.

Plaintiffs, however, need not make any such showing. Plaintiffs seek declaratory and injunctive relief to bar the City from enforcing the challenged agreements. Compl. ¶¶ F-G. Plaintiffs have standing to seek that relief because they are currently being injured by those agreements. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 130 (2007) (party to contract had standing to bring declaratory judgment action challenging contract's application without having to breach contract first). Under the challenged agreements, David and Jameelah are currently forced to exclude family members from their homes, and Sung is no longer entitled

to invoke his Fourth Amendment rights or his right to a judicial hearing prior to future fines or evictions. Compl. ¶¶ 94-102. An injunction will remedy those injuries by restoring the rights that Plaintiffs were forced to waive.

For all of these reasons, the City's anticipated motion to dismiss is without merit and should be denied without need for further briefing on the merits.

Respectfully submitted,

/s/ Robert Everett Johnson

Darpana M. Sheth (DS 1976)  
Robert Everett Johnson\*  
Milad Emam\*  
INSTITUTE FOR JUSTICE  
901 North Glebe Road, Suite 900  
Arlington, VA 22203  
Tel: (703) 682-9320  
Fax: (703) 682-9321  
Email: dsheth@ij.org  
rjohnson@ij.org  
memam@ij.org

\* Admitted *Pro Hac Vice*

*Attorneys for Plaintiffs Sung Cho,  
Nagle Washrite LLC, David Diaz,  
Jameelah El-Shabazz, and the  
Plaintiff Classes*

**CERTIFICATE OF SERVICE**

I, Robert Everett Johnson, hereby certify that, on this 14th day of December, 2016, I caused a true and correct copy of the foregoing letter to be electronically filed using the court's CM/ECF system, which will automatically send email notification to all counsel of record.

/s/ Robert Everett Johnson