IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WILLIAM MURPHY, individually and as guardian ad litem on behalf of A.T. and K.M.; and TANISHA MURPHY,	:	
Plaintiffs,	:	
v.	:	**C.A.No. 21-415-CFC**
STATE OF DELAWARE, JUSTICES OF THE PEACE; THE HONORABLE ALAN DAVIS, in his official capacity only as Chief Magistrate of the Justices of the Peace; CONSTABLE JAMAN BRISON, individually and in his official capacity as a Constable of the Justices of the Peace; CONSTABLE HUGH CRAIG, individually and in his official capacity as a Constable of the Justices of the Peace; and CONSTABLE GERARDO HERNANDEZ,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

The defense motion should be denied for the reasons that follow.

Relevant Facts

A. Plaintiffs.

Plaintiff William Murphy is a blind widower. (D.I. 29, Amd.Compl., ¶¶ 5,

56, 101, 112-14, 127, 219-23, 106, 1-2, 16, 19-20, 31-32, 151, 22, 98). He and his eldest daughter Plaintiff Tanisha Murphy had a written Lease Agreement for his rental Home running from November 15, 2020 until November 30, 2021 (¶¶ 34-37, 68, 227, 348, 364), where William lived with his two minor daughters. (¶¶ 38, 41, 62, 64-65, 81-83, 91-92, 95, 97, 100, 106, 151, 229-32, 348). State of Delaware Social Services provided rental assistance. (¶¶ 39, 83, 27, 145, 156, 420).

B. The Unlawful Eviction and Seizure.

In the middle of a snowstorm on February 11, 2021 (¶¶ 40, 5, 81, 101, 106, 136, 144, 150, 283, 348, 420), and in the midst of several state law eviction moratoriums imposed by Emergency Declaration of the Governor and by Administrative and Standing Orders of the Justices of the Peace court system (¶¶ 165-193, 136, 233, 258-61, 368-71, 420), their Home was seized and William and his two minor daughters were evicted. (¶¶ 5, 90, 95, 141, 148-49, 348, 414). They were homeless and without their possessions for 13 days. (¶¶ 406, 147, 149, 163-64, 5, 194-95).

C. The Numerous Due Process Violations.

No Plaintiff was ever served with any type of legal process and no court had personal jurisdiction to exercise any legal authority over them. (¶¶ 233-49, 253-57, 192). They also received no prior notice or opportunity to be heard, whatsoever,

that they were in danger of losing their Home. (¶¶ 375-406, 262-65, 348, 115-17).

D. What Defendants Knew at the Time.

The eviction Order and underlying lawsuit named as defendant "Viola Wilson," a person unknown to Plaintiffs. (¶¶ 49, 57-60, 118, 123-26, 132, 137, 287, 377-82). At the time they seized Plaintiffs' Home, the Constable Defendants had actual knowledge that:

- they had the wrong person, (¶¶ 57-60, 118, 124-26, 325, 420);
- William had a valid and "legitimate" Lease Agreement for his Home which "contained" the "signature" of the Landlord, (¶¶ 68-73, 119-21, 336, 348, 420);
- William had additional corroborating documentation, including from Delaware Social Services, confirming his legal right to be in his Home, (¶¶ 83, 122, 325, 337, 348, 420);
- William was blind, (¶¶ 56, 112-14, 221-23, 334, 420);
- William had no knowledge of any legal proceedings against he or his family whatsoever, (¶¶ 115-17, 325, 420); and
- they were breaking the law, with one Constable Defendant even telling the others he would "take the fall for it." (¶¶ 103-04, 332).

E. The Chief Constable Supervisor is Called and Gives Orders.

The Constable Defendants called their non-judicial supervisor, "Chief Constable Garcia," for instructions on how to proceed. (¶¶ 127-29, 325-339). They did this because all Delaware Constables operate under the "close supervision" of their superiors to ensure they comply with the Americans with

Disabilities Act, and other federal and state laws. (¶¶ 320-24). After fully advising him of all of the above facts (¶ 327), Chief Constable Garcia ordered them to seize the Home anyway and evict the Murphy family. (¶¶ 328-39). He also knew this action was "illegal[]" but did it anyway. (¶ 332).

F. Practice or Custom.

In everything but name, his Order here, and the Constables' three written statements recounting it, confirm the existence of, and mirror, the "evict first, ask questions later" practice or custom detailed at length since day one in the Complaint. (Compare ¶¶ 328, 131-34 with ¶¶ 79, 86, 348, 341, 407, 421).

G. No Reasonable Accommodation Was Made.

No reasonable accommodation was ever provided for William's blindness. (¶¶ 136, 282-93, 339). Defendants' own internal records contradict each other and reveal that either a letter was mailed to the house or a notice was posted to the door of the house. Regardless of which, it was addressed to "Viola Wilson." (Compare ¶ 124 with ¶¶ 125-26; see also ¶ 137). It is undisputed that neither was in braille or in any of the other forms expressly required by the ADA/RA when giving legal notice to a blind person. (¶¶ 285-92, 384-85, 136).

Standard of Review

Under Fed.R.Civ.P. 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."

Connelly v. Lane Constr. Corp., 809 F.3d 780, 786 (3d Cir. 2016).

Argument

I. PLAINTIFF HAS PLAUSIBLY STATED A CLAIM FOR DISABILITY DISCRIMINATION.

A. The Limited Defense Motion.

The defense motion challenges only two limited aspects under Count I, that: (1) Plaintiffs have not pled one of the four elements required to prove a *prima facie* case of disability discrimination, the fourth causal element; and (2) the three daughter Plaintiffs lack standing. (OB at 7). All other legal issues – including the exhaustively pled benefits and services denied (see ¶¶ 233-80) and lack of any accommodation (see ¶¶ 281-93, 136, 420), are unchallenged and not at issue.

B. The *Prima Facie* Case.

1. First, the defense invites legal error by conflating pleading standards with evidentiary standards. As the Third Circuit has explained in another post-Twombly due process case, "[s]tandards of pleading are not the same as standards of proof." Phillips v. Cnty. of Allegheny, 515 F.3d 224, 246 (3d Cir. 2008).[1] It is "worth reiterating that, at least for purposes of pleading sufficiency, a complaint need not establish a *prima facie* case in order to survive a motion to

[1] This has long been the law. See Weston v. Pa., 251 F.3d 420, 429 (3d Cir. 2001) (complaints "need not plead law or match facts to every element of a legal theory.").

dismiss," Connelly, 809 F.3d at 788, because this "is an evidentiary standard, not a pleading requirement and hence is not a proper measure of whether a complaint fails to state a claim." Id. at 789 (cleaned up). "Instead of requiring a *prima facie* case, the post-Twombly pleading standard simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary elements." Id. (cleaned up). Thus, even assuming *arguendo* that Plaintiffs have not pled each of the four *prima facie* elements, it is irrelevant since this is an evidentiary standard, not a pleading requirement.

2. Second, factually, although ignored by the defense, causation was explicitly pled in detail (see ¶¶ 294-95, 342-44),[2] so even a premature and inapplicable evidentiary standard is satisfied, or at least plausibly alleged.

3. Third, review of the first page of the defense's own factual recitation demonstrates this error. The defense admits that Delaware law requires it to "give at least 24 hours notice to the persons to be removed." (OB at 2) (cleaned up) (quoting 25 Del.C. § 5715(b)).

The "services ... or activities," 42 U.S.C. § 12132,[3] of the JP Court being

[2] As was RA federal funding. (¶¶ 215-17).

[3] This statutory phrase "is extremely broad in scope and includes anything a public entity does." Disability Rights N.J., Inc. v. Comm'r, 796 F.3d 293, 301 (3d Cir. 2015) (cleaned up).

provided here are notice of a pending eviction. The purpose of a 'notice' is to notify. William Murphy is blind. The ADA/RA requires that a 'notice' to a blind person must be in braille[4] otherwise that person is "denied the benefits of the services ... or activities of a public entity." Id. But the notice provided by the JP Court was not in braille. (¶¶ 136, 287, 385). Because it was not, William was not notified and he was denied the statutorily required notification services of the Court. This is sufficient to demonstrate a plausible causal connection between the notice that violated the ADA/RA and the removal of the blind Plaintiff from his home soon thereafter.

4. Fourth, and relatedly, proper 'notice' is fundamental to our legal system[5] and a required ADA/RA 'accommodation.' As detailed in the Complaint (¶¶ 234-49, 253-57, 262-65), the failure to properly 'notify' Plaintiffs by serving them with legal process thereby putting them on 'notice' that their Home was in

---

[4] See 28 C.F.R. §§ 35.160(a)(1), (b)(1)-(2); id. at Pt. 35, App. A, § 35.160; id. at App. B, § 35.160; id. at §§ 35.130 (b)(1)(ii)-(iv); id. at § 35.104; id. at Pt. 35, App. A, § 35.104; USDOJ Title II Technical Assistance Manual, "Effective Communication" (Jan. 2014) at 1-4; USDOJ ADA Update: A Primer for State and Local Governments (2015) at 7-8; see also Amd.Compl. ¶¶ 285-92.

[5] See, e.g. Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.") (cleaned up).

danger, deprived them of their ability to 'know' they needed to access that same legal system in order to keep themselves from being evicted. The Supreme Court has made it clear that barriers preventing equal access by the disabled to the justice system was one of the specific problems Congress intended to remedy by enacting Title II.[6] Review of both Supreme Court and Third Circuit decisions demonstrate that ADA/RA accommodation requirements and due process protections often go hand in hand.[7]

5. Finally, a fair statement of the defense position since day 1 in this case is that a legal notice naming Person A, is legally sufficient notice to Person B. But if Person B is blind, the ADA/RA requires that notice be in braille. (¶¶ 286-92). It is undisputed that here it was not.

C. The Daughter Plaintiffs Have Standing.

As factually pled in detail (¶¶ 226-32), all daughter Plaintiffs have standing to invoke Title II's protections because of their relationship and known association with their blind father. The two minor daughters were rendered homeless, and

---

[6] See Tennessee v. Lane, 541 U.S. 509, 524-34 (2004).

[7] See, e.g. id. at 532 (the ADA "duty to accommodate is perfectly consistent with the well-established due process principle that ... a State must afford to all individuals a meaningful opportunity to be heard in its courts") (cleaned up); Geness v. Cox, 902 F.3d 344, 361-63 (3d Cir. 2018) (depriving a disabled person "of normal benefits of [legal] procedure and due process of law" states a claim under Title II).

adult Tanisha was deprived of her contractual interest in the Home because of the treatment of their blind father. The very case cited by the defense confirms this because if an adoptive parent has standing to assert a Title II ADA claim because of their association with their disabled son, so also daughters have standing to assert such claims because of injuries suffered because of their association with their disabled father. See Doe v. Cnty. of Ctr., Pa., 242 F.3d 437, 447 (3d Cir. 2001) (cited in OB at 11). The Fourth Circuit has explained the reason for this is grounded upon the statutory language itself,[8] and noted that the Circuits are "unanimous" that the right to bring an action extends well-beyond the basic family relationship in our case. Id. at 363.[9]

D. Trailing Issues.

1. Vicarious Liability.

Although Judge Andrews has previously treated this issue as subsumed within the *prima facie* case, see Glover v. City of Wilmington, 966 F.Supp.2d 417,

---

[8] See A Helping Hand, LLC v. Baltimore Cnty., Md., 515 F.3d 356, 363-64 (4th Cir. 2008).

[9] See, e.g. id. at 364 (operator of methadone clinic has standing based on injuries suffered from association with addicted persons it serves); Socal Recovery, LLC v. City of Costa Mesa, 56 F.4th 802, 813 (9th Cir. 2023) (sober living facility has standing to assert discrimination against its members); see also 28 C.F.R. § 35.130(g); id. at Pt. 35, App. B, § 35.130; id. at § 35.160(a)(2) (all explaining standing extends beyond just the family relationship).

429 (D.Del. 2013), Plaintiffs address it here if the Court disagrees.

Citing only a single Northern District of Illinois decision – which itself concedes is the minority view of judges in that district[10] – the defense asks this Court to upend settled agency principles and hold that an employer is not responsible for the actions of its employees that deprive others of their statutory-grounded civil rights. (OB at 9).

This is legal error. First, it leads to a unreasonable result that undermines the remedial intent of Congress in enacting the ADA. See 42 U.S.C. § 12101. It is settled law that individual employees cannot be sued under such statutes,[11] leaving their employers as the only possible defendant to hold liable for such discriminatory action. Other courts have noted vicarious liability must apply under Title II for this very reason. See Latham v. Acton, 2020 WL 6122941, *8 n.81 and *6 (D.Alaska Oct. 9, 2020).

Second -

> every district court judge in our Circuit confronted with this question has determined public entities are vicariously liable for the conduct of their employees under Title II of the [ADA].

---

[10] See Ravenna v. Vill. of Skokie, 388 F.Supp.3d 999, 1007 (N.D.Ill. 2019) (citing five intra-district decisions to the contrary).

[11] See, e.g. Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1077-78 (3d Cir. 1996) (en banc) (Title VII); Fasano v. Fed. Rsrv. Bank of N.Y., 457 F.3d 274, 289 (3d Cir. 2006) (ADA Title I); Emerson v. Thiel Coll., 296 F.3d 184, 189 (3d Cir. 2002) (ADA Title III).

Geness v. Pa., 503 F.Supp.3d 318, 339 (W.D.Pa. 2020) (citing cases).[12]

Third, moving outside our Circuit, numerous courts, including circuits[13] and districts,[14] have held vicarious liability applies under Title II.

2. The Heightened Liability Standard Triggering Compensatory Damages is Satisfied.

Because the ADA/RA define discrimination to include failure to make a

---

[12] See, e.g. Miretskaya v. Rutgers State Univ. of N.J., 2022 WL 3020153, *6 (D.N.J. July 29, 2022); Waters v. Amtrak, 456 F.Supp.3d 666, 671 (E.D.Pa. 2020); Ali v. City of Newark, 2018 WL 2175770, *5 (D.N.J. May 11, 2018); Guynup v. Lancaster Cnty., 2008 WL 4771852, *1 (E.D.Pa. Oct. 29, 2008); see also Stevenson v. Pierce, 2017 WL 1454993, *3 (D.Del. Apr. 20, 2017) (holding that because Title II does not allow individual employee liability, the case can proceed into discovery against the State of Delaware employer).

[13] See, e.g. Downey v. Snohomish Cnty. Sheriff's Office, 2022 WL 1135417, *1 (9th Cir. Apr. 18, 2022); Gray v. Cummings, 917 F.3d 1, 17 (1st Cir. 2019); T.W. v. Sch. Bd. of Seminole Cnty., Fl., 610 F.3d 588, 604 (11th Cir. 2010); Delano-Pyle v. Victoria Cnty., Tex., 302 F.3d 567, 574-75 (5th Cir. 2002); Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1141 (9th Cir. 2001); Rosen v. Montgomery Cnty. Md., 121 F.3d 154, 157 n.3 (4th Cir. 1997).

[14] See, e.g. A.K.B. By & Through Silva v. Indep. Sch. Dist. 194, 2020 WL 1470971, *9 (D.Minn. Mar. 26, 2020) (noting "every circuit court considering the issue of vicarious liability under these statutes has held that a public entity can be held vicariously liable."); Haulmark v. City of Wichita, 2022 WL 1442844, *6 (D.Kan. 2022) (noting the "true" and "unremarkable premise that public entities can be vicariously liable under [Title II] for the acts of their employees."); Boynton v. City of Tallahassee, 2015 WL 12938932, *3 n.3 (N.D.Fla. May 14, 2015) (finding a defendant's contention to the contrary is "meritless."); A.V. through Hanson v. Douglas Cnty. Sch. Dist. RE-1, 586 F.Supp.3d 1053, 1067 (D.Colo. 2022); Mullen v. Board of Comm'rs. of the Cnty. of Adams, 2022 WL 17261428, *4 (D.Colo. Nov. 29, 2022); Hall v. City of Walnut Creek, 2020 WL 1694359, *4 (N.D.Cal. Apr. 7, 2020); Brown v. Belt, 2019 WL 1643648, *5 (S.D.W.V. Apr. 15, 2019).

reasonable accommodation,[15] a showing of discriminatory intent is not required before a plaintiff establishes a statutory right to declaratory, injunctive and other relief, as well as attorneys fees.[16] This is because

> Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.

Alexander v. Choate, 469 U.S. 287, 295 (1985). This is why "the RA and the ADA are targeted to address more subtle forms of discrimination than merely obviously exclusionary conduct." S.H. ex rel Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 264 (3d Cir. 2013) (cleaned up).

Nevertheless, in order to recover compensatory damages, "deliberate indifference" of the government entity must be shown. Id. at 263-65. Even under the case relied upon by the defense, it is satisfied by "actual knowledge of discrimination ... and failure to adequately respond." Id. at 263 n.23 (quoting Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (cited in OB at

---

[15] See, e.g. Berardelli v. Allied Servs. Inst. of Rehab. Med., 900 F.3d 104, 116 (3d Cir. 2018) ("Title[] II ... define[s] discrimination to include the failure to make 'reasonable modifications.'"); Haberle v. Troxell, 885 F.3d 170, 180 (3d Cir. 2018) ("discrimination under the ADA encompasses not only adverse actions motivated by prejudice and fear of disabilities, but also includes failing to make reasonable accommodations for a plaintiff's disabilities."); 28 C.F.R. § 35.130(b)(1)(iii) (the ADA is violated when a service to the blind "is not as effective in affording equal opportunity to obtain the same result[or] to gain the same benefit" as that provided to the sighted).

[16] See 42 U.S.C. § 12133.

9)).[17]

The flaw in the defense motion here is that it completely ignores the detailed historical facts implicating top management. The Constables called their top level supervisor, Chief Constable Garcia, and explained the entire situation to him. Despite the state employer's professed dedication to complying with the legal mandates of the ADA (see ¶¶ 311-19), he told them to throw Plaintiff out on the street despite knowing: (1) they were dealing with a blind man; (2) all notices had to be in braille to be compliant with the ADA/RA; (3) the statutory mandated notice naming a different person had failed; and (4) all of other facts outlined in the recitation above. (Facts at **E.** above).

Both the Third Circuit and Supreme Court have held there are certain risks that are "so great, so obvious" that failure by the government to adequately respond to them easily meets the deliberate indifference standard.[18] One such 'great and obvious' risk is that a blind man will lose his Home if a legal notice to him about it is not: (1) in a form he can actually read (notice in braille); and (2)

---

[17] See Sample v. Diecks, 885 F.2d 1099, 1110 (3d Cir. 1989) (requiring "knowledge of the [plaintiff's] problem" and that the official "failed to act or took only ineffectual action under circumstances indicating that his or her response to the problem was a product of deliberate indifference to the [plaintiff's] plight.").

[18] See, e.g. Haberle, 936 F.3d at 181; Beers-Capitol v. Whetzel, 256 F.3d 120, 134 (3d Cir. 2001); Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir.1989); City of Canton v. Harris, 489 U.S. 378, 390 (1989).

given with enough time for him to act upon it (meaningful opportunity to be heard).

3. Applies to Court Systems.

The parade of horribles the defense claims will occur if a state court system is required to comply with the ADA/RA (OB at 11), is similarly without merit. Such asserted 'rights' of non-compliance have been repeatedly rejected by the U.S. Department of Justice,[19] the Third Circuit,[20] the U.S. Supreme Court[21] and even Delaware's own Supreme Court.[22] The Third Circuit's recent words are *apropos*, "[t]he demands of the federal Rehabilitation Act or ADA do not yield to state laws that discriminate against the disabled; it works the other way around." Gibbs v. City of Pittsburgh, 989 F.3d 226, 230 (3d Cir. 2021) (cleaned up).

II. PLAINTIFF HAS PLAUSIBLY STATED A CLAIM FOR TWO CONSTITUTIONAL VIOLATIONS.

A. Due Process.

Procedural due process analysis has two steps. First, whether there is a

---

[19] See 28 C.F.R. Pt. 35, App. B, § 35.102; id. at App. A, § 35.160; see also D.I. 22 at 8.

[20] Geness, 902 F.3d at 361-65 (systemic breakdown within the Pennsylvania court system which, *in toto*, deprived the disabled of their legal right under the ADA to equal application of due process of law).

[21] Lane, 541 U.S. at 533-34.

[22] In re Murphy, 283 A.3d 1167, 1176-77 (Del. 2022) (en banc).

liberty or property interest. Second, the process that is due. Hill v. Borough of Kutztown, 455 F.3d 225, 233-34 (3d Cir. 2006). Under step one are the many liberty and property interests exhaustively detailed in the Complaint. (¶¶ 350-72). Step two is governed by the three part test of Mathews v. Eldridge, 424 U.S. 319, 335 (1976), also addressed in the Complaint. (¶¶ 373-406). The defense contests neither. (See OB at 16-17).

Out of an abundance of caution, Plaintiffs notes that the "core of due process is the right to notice and a meaningful opportunity to be heard." LaChance v. Erickson, 522 U.S. 262, 266 (1998). The Supreme Court in the 1970s exhaustively addressed and held that **prior notice** is a constitutional requirement,[23] even when only relatively minor property interests are at stake.[24] The Court has specifically held that prior notice is required before seizing someone's home because a person's "right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance" that "cannot be classified as *de minimis* for purposes of procedural due process." U.S. v. James Daniel Good Real Property, 510 U.S. 43,

---

[23] See, e.g. Fuentes, 407 U.S. at 80-93; Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 569-70 (1972); see also Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985).

[24] See, e.g. Fuentes, 407 U.S. at 89-90 (kitchen appliances, beds, tables).

53-54 (1993).

Additionally, as addressed in the Complaint (¶¶ 240-45, 234-39), it is hornbook law that due process is violated when a court exercises legal authority over a person when it lacks personal jurisdiction.[25] Personal jurisdiction requires a valid means of service.[26] Service on the wrong person is a "nullity" and does not create personal jurisdiction.[27] Even actual notice does not replace formal service of process.[28] Plaintiffs were never served so Defendants never acquired personal jurisdiction over them. Evicting them anyway violated due process.

For these reasons the "absolute" right of procedural due process was violated.[29]

B. Seizure.

---

[25] See, e.g. Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884 (2011).

[26] See, e.g. In re P3 Health Grp. Holdings, LLC, 282 A.3d 1054, 1058 (Del.Ch. 2022).

[27] See, e.g. Furek v. Univ. of Del., 594 A.2d 506, 513-14 (Del. 1991); Ayres v. Jacobs & Crumplar, P.A., 99 F.3d 565, 569 (3d Cir. 1996); Ayres v. Jacobs & Crumplar, P.A., 1995 WL 704781, *5 (D.Del. Nov. 20, 1995).

[28] See, e.g. Skye Min. Invs., LLC v. DXS Cap. (U.S.) Ltd., 2021 WL 2983182, *3 (Del.Ch. July 15, 2021); Showell v. Div. of Family Servs., 971 A.2d 98, 102 (Del. 2009); Ayres, 99 F.3d at 569.

[29] Carey v. Piphus, 435 U.S. 247, 266 (1978); CMR D.N. Corp. v. City of Phila., 703 F.3d 612, 627 (3d Cir. 2013).

A home eviction is a seizure which triggers Fourth Amendment analysis. Soldal v. Cook County, Ill., 506 U.S. 56, 61 (1992). The crux of the dispute with the defense is whether the order was "facially valid" (OB at 16), which goes to whether their actions were objectively reasonable. See Berg v. Cnty. of Allegheny, 219 F.3d 261, 273 (3d Cir. 2000) ("an apparently valid warrant does not render an officer immune from suit if his reliance on it is unreasonable in light of the relevant circumstances. Such circumstances include, but are not limited to, other information that the officer possesses or to which he has reasonable access ...").

Ours is not a case where:

- a defendant "reasonably mistake[s] a second party for the first party," cf. Hill v. California, 401 U.S. 797, 802 (1971);
- the name on the order matches that of the person being arrested because of a clerical error, cf. Berg, 219 F.3d 267-68;
- the person arrested is the father with the same name of the person being sought, the son, cf. Noone v. City of Ocean City, 60 Fed.Appx. 904, 906 (3d Cir. 2003);
- the first and last names of unrelated persons are identical, with only the middle initial differing. Cf. Rothermel v. Dauphin Cnty. Pa., 861 Fed.Appx. 498, 502 (3d Cir. 2021).

Nor is this a case where questions were only belatedly raised, long after-the-fact. Instead, they were contemporaneously brought to Defendants' attention. But even setting aside the factual standard of review, the Court need not rely on Plaintiffs' account alone. To defense counsel's credit for producing them, the Constables'

own written statements confirm those historical facts. (See Facts at **D.** above). At the time, Defendants knew:

- they had the wrong person;
- William had a valid lease and other official documentation from the State itself confirming this;
- he was blind; and
- he had not had any notice of or opportunity to contest the eviction.

One Constable even told the others that he would "take the fall for it" because he knew they were breaking the law. For these reasons, and because Defendants did not make any reasonable accommodation whatsoever as they were required to do by the ADA/RA, objective unreasonableness is plausibly alleged.[30]

C. Ex Parte Young.

An ongoing practice or custom was factually alleged in the Complaint, the shorthand of which was "evict first, ask questions later." Internal court records later produced by the defense factually confirmed its existence and actual application by the top supervisor, the Chief Constable. (See Facts **F.** above). Thus it is plausibly alleged.

The defense does not contest this or even deny its factual existence but

[30] The defense raised no argument on the clearly established prong of qualified immunity so it is waived.

instead only claims something cannot be "ongoing" if there is a written statute to the contrary. (OB at 14-15). But this is legal error because the courts have long held that a practice or custom that violates a policy still subjects a defendant to liability.[31]

Finally, the defense claim (OB at 15) that they followed the statutory procedure was disproved in Argument **I.B.3.** above and exhaustively disproved in the Complaint. (See ¶¶ 234-80). Again, the question is not whether they provide notice to persons who can see. Instead, the question is whether they provide the reasonable accommodations required by the ADA/RA to provide notice to those who cannot.

D. Judicial Immunity.

The defense claim (OB at 17-18) that a court officer, executing a court order, is entitled to absolute quasi-judicial immunity is contradicted by the very Third Circuit case cited in support of the proposition. In Russell v. Richardson,

---

[31] See, e.g. Ware v. Jackson Cnty., 150 F.3d 873, 882 (8th Cir. 1988) ("the existence of written policies of a defendant are of no moment in the face of evidence that such policies are neither followed nor enforced"); Adela v. City of Wildwood, 790 F.2d 1063, 1067 (3d Cir. 1986) (the "City established a practice contrary to [the law] and must bear responsibility therefor."); City of St. Louis v. Praprotnik, 485 U.S. 112, 131 (1988) ("[r]efusals to carry out stated policies could obviously help to show that a municipality's actual policies were different from the ones that had been announced."); Sample, 885 F.2d at 1116 (discussing how a *de jure* system can be displaced by a *de facto* practice).

905 F.3d 239, 250-51 (3d Cir. 2018), the Third Circuit denied such immunity to a court marshal executing a facially valid, Virgin Island Superior Court order. And just three months ago, relying on Russell, the Eastern District of Pennsylvania also denied such immunity to a sheriff seeking to execute a facially valid, Philadelphia Court of Common Pleas order (an eviction writ of possession no less), by first posting multiple paper eviction notices on the front door, and putting copies in the mail slot, of the home of the physically disabled, deaf and mute occupant. In re Toppin, 645 B.R. 773, 784-85 (E.D.Pa. 2022).

In Russell, the Third Circuit held that: (1) not even court officers are immune from civil rights liability challenging "the manner in which" they execute an otherwise facially valid court order, 905 F.3d at 250;[32] and (2) because "a court order carries an implicit caveat that the officer follow the Constitution in executing it," an officer may be held civilly liable if he violates a constitutional right as he executes the order. Id. (cleaned up). In Toppin, the Eastern District recognized these holdings, 645 B.R. at 784, and noted that key factual circumstances denying immunity included that the sheriff acted even after being put on notice that his actions violated a federal statute, and that he violated his office's own policy. Id. at 779, 781, 785-86.

[32] The Court grounded its holding in the settled common law doctrine that court officers are liable for "carelessness or negligence" in the "manner" in which they execute such orders. Id. at 248.

Defendants herein are not entitled to immunity because they knew:

- they had the wrong person;
- William had a valid lease and additional confirmatory State documentation;
- he was blind;
- he was given no notice or opportunity to be heard; and
- one defendant would have to "take the fall" for the others because they knew they were breaking the law.

These trigger two independent grounds for denying immunity under Russell, both the "manner" in which they executed the order (including the ADA/RA violations) and multiple violations of the "Constitution[al]" right of procedural due process. 905 F.3d at 250.

Conclusion

The defense motion must be denied.

Respectfully Submitted,

THE NEUBERGER FIRM, P.A.

/s/ Stephen J. Neuberger
STEPHEN J. NEUBERGER, ESQ. (#4440)
THOMAS S. NEUBERGER, ESQ. (#243)
17 Harlech Drive, P.O. Box 4481
Wilmington, DE 19807
(302) 655-0582
SJN@NeubergerLaw.com
TSN@NeubergerLaw.com

SANJAY K. BHATNAGAR, ESQ. (#4829)
SANJAY K. BHATNAGAR, ATTORNEY AT LAW
Brandywine Plaza
2500 Grubb Road
Suite 240-B
Wilmington, DE 19810
(302) 990-3144
Sanjay@skblawde.com

OF COUNSEL
THE RUTHERFORD INSTITUTE
JOHN W. WHITEHEAD, ESQ.
WILLIAM WINTERS, ESQ.
P.O. Box 7482
Charlottesville, VA 22906-7482
(434) 978-3888
Legal@Rutherford.org

Dated: February 7, 2023 Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to Chief Judge Connolly's Standing Order dated November 10, 2022, I certify, based on the word-counting function of my word processing system (Word Perfect X4), that this brief complies with that Standing Order, in that the brief is prepared in a 14-point, proportional format (Times New Roman) and contains 5,000 words or fewer, to wit, no more than 4,996 words.

/s/ Stephen J. Neuberger
STEPHEN J. NEUBERGER, ESQ.