IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

CITY OF CHICAGO,	)	
	)	
Plaintiff,	)	
	)	
-vs. -	)	No. 11 MC1-237718
	)	
	)	
TIEG ALEXANDER, ET AL.	)	
	)	
Defendants.	)	

ORDER

This matter comes before the court on Defendants' Joint Motion to Dismiss charges brought against them by the Plaintiff City of Chicago ("City") for remaining in Grant Park past curfew hours in violation of Chapter VII, Section B.2 of the Chicago Park District Code (the "Curfew"). This order addresses three procedural motions. The City moves to strike all Defendants' affidavits as untimely. The City also brings a motion to strike portions of Defendants' affidavits pursuant to Illinois Supreme Court Rule 191(a). Finally, Defendants bring a motion for discovery pursuant to Illinois Supreme Court Rule 191(b).

Procedural Background

The Chicago Park District may establish ordinances for the government and protection of parks under its jurisdiction and provide penalties not exceeding $500 for any one offense for violations. 70 ILCS 1505/7.02 (2012). An action to recover a penalty for the violation of ordinances, though quasi-criminal in character, is civil in form and falls subject to the rules governing civil actions. See City of Danville v. Hartshorn, 53 Ill. 2d 399, 402 (1973).

In civil actions, where other affirmative matter avoiding the legal effect of or defeating the claim bars the claim asserted, it may be dismissed. 735 ILCS 5/2-619(a)(9) (2012). *Affirmative matter* encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action. If the *affirmative matter* is not apparent on the face of the complaint, the motion must be supported by affidavit. 735 ILCS 5/2-619(a) (2012); see also 4 Richard A. Michael, Ill. Practice Series Civil Procedure Before Trial § 41.8, 481 (2d ed., West 2011). By presenting adequate affidavits supporting the asserted defense, defendant satisfies the initial burden of going forward on the motion. The burden of production then shifts to the plaintiff. The plaintiff must establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven. The plaintiff may do so by affidavit or other proof. 735 ILCS 5/2-619(c) (2012). A counter-affidavit is necessary, however, to refute evidentiary facts properly asserted by affidavit supporting the motion or the facts are deemed admitted. If, after considering the pleadings and affidavits, the plaintiff has failed to carry the shifted burden of going forward, the motion must be granted and the cause of action dismissed. Kedzie and 103rd Currency Exch., Inc. v. Hodge, 156 Ill. 2d 112, 115-16 (1993). While defendants ordinarily must attach affidavits to their initial motion to shift the burden to the plaintiff, untimely affidavits may be considered. See Hall v. DeFalco, 178 Ill. App. 3d 408, 411 (1st Dist. 1988) (court may allow submission even after ruling).

Motion to Strike Based on Timeliness

As a threshold matter, the City moves to dismiss all Defendants' affidavits as untimely. Defendant's failed to attach affidavits to their motion to dismiss or the

memorandum filed in support of that motion. However, the City submitted affidavits with their response brief. Defendants then attached affidavits to their reply. At oral argument, the court indicated it was likely to consider Defendants' affidavits and offered the City the opportunity of filing any affidavits they wished responsive to the averments contained in the Defendants' affidavits. The City elected to stand on its original affidavits. While it would certainly have been preferable for Defendants to have submitted their affidavits with their motion, the City has suffered no prejudice, having been offered the opportunity to supplement the affidavits it submitted with its response. Moreover, striking the affidavits entirely would elevate technical rules over substantive justice. For these reasons, the court denies the City's motion to strike as untimely all Defendants' affidavits. See Hall v. DeFalco, 178 Ill. App. 3d 408, 411 (1st Dist. 1988).

Motion to Strike Pursuant to Rule 191(a)

In summary proceedings, such as motions to dismiss, affidavits must consist of facts admissible in evidence. 4 Richard A. Michael, Ill. Practice Series Civil Procedure Before Trial § 39.2, 345 (2d ed., West 2011). Although ultimate facts may suffice for pleadings, affidavits require evidentiary facts. Id. at 346. Consequently conversations require foundation. Wiszowaty v. Baumgard, 257 Ill. App. 3d 812, 819-20 (1st Dist. 1994). Conversations are properly excluded when the affidavits "lack basic foundational requirements (such as time, date, place and persons present during conversations referred to by [affiant]) which makes it difficult to determine if the affiant actually witnessed [the events] or gained his information from hearsay sources." Id. at 819. While hearsay is impermissible, lay opinion testimony may be admissible in those "limited circumstances" where such testimony is proper and where sufficient foundation appears within the

affidavit. See 4 Richard A. Michael, Ill. Practice Series Civil Procedure Before Trial § 39.2, 344, 346-47 (2d ed., West 2011).

An affidavit must (i) show personal knowledge, (ii) state facts with particularity, (iii) attach sworn or certified copies of any papers relied on, (iv) consist of facts admissible in evidence (not conclusions), and (v) show competence to testify to these facts. Ill. Sup. Ct. R. 191(a). An affidavit must not state facts "on information and belief." Fooden v. Bd. of Govs. of St. Colleges and U., 48 Ill. 2d 580, 587 (1971); Madden v. F.H. Paschen, S.N. Nielson, Inc., 395 Ill. App. 3d 362, 388 (1st Dist. 2009). An affidavit must state particularly the facts supporting its conclusions. Steiner Elec. Co. v. NuLine Tech., Inc., 364 Ill. App. 3d 876, 881-82 (1st Dist. 2006) (court properly struck an affidavit that stated the totals claimed for returns and for over-billings without stating the facts that supported each return claim and each over-billing claim); Madden, 395 Ill. App. 3d at 388 (court properly struck as a legal conclusion the statement that the premises were "under the control" of defendants at the time of the accident); see also 4 Richard A. Michael, Ill. Practice Series Civil Procedure Before Trial § 39.2, 345-46 (2d ed., West 2011). Additionally, any exhibits submitted to the court must be supported by an affidavit authenticating the exhibit. See Piser v. State Farm Mut. Auto. Ins. Co., 405 Ill. App. 3d 341, 348-350 (authentication needed to make a document admissible on motion to dismiss).

Initially, the court notes that Defendants elected to stand on the affidavits as submitted, never requesting leave of court to file amended affidavits.

The court grants the City's motion to strike Samuel Brody's affidavit as to paragraphs 6, 8, 13, and 19. Paragraphs 6 and 8 are struck as conclusory and improper

opinion testimony. The court strikes paragraph 13 as hearsay, conclusory, and improper opinion testimony, as was conceded in oral argument. Additionally, the court strikes the last sentence of paragraph 7 as not based on personal knowledge, the last two sentences in paragraph 11 conclusory, the portion of paragraph 14 beginning with the words "which led me to believe" until "undecided" as conclusory and hearsay, the last sentence of paragraph 16 as conclusory, and everything in paragraph 17 except the third sentence beginning "Nor did any ..." as improper opinion testimony.

The court grants the City's motion to strike Andrea Ford's affidavit as to paragraphs 6, 8, 13, and 16. Paragraphs 6, 8 and 13 are struck as conclusory. Paragraph 16 is struck as both hearsay and conclusory. Additionally, the court strikes the last sentence of paragraph 7 as not based on personal knowledge ("I understand"), the last two sentences in paragraph 11 as conclusory, the portion of paragraph 14 beginning with the words "which led me to believe" until "after 11:00 p.m." as conclusory, and everything in paragraph 17 except the third sentence beginning "Nor did any ..." as improper opinion testimony.

The court grants the City's motion to strike Robert Jennings's affidavit as to paragraphs 6, 8, 13, and 16. Paragraphs 6, 8, and 13 are struck as conclusory. Paragraph 16 is struck as both hearsay and conclusory. Additionally the court strikes the last two sentences in paragraph 11 as conclusory, the portion of paragraph 14 beginning with the words "which led me to believe" until "after 11:00 p.m." as conclusory, everything in paragraph 17 except the third sentence beginning "Nor did any ..." as improper opinion testimony, and the last portion of paragraph 19 starting with "several of my friends ..." as lacking personal knowledge.

The court grants the City's motion to strike Gregory Goodman's affidavit as to paragraphs 6, 8, 13, and 16. Paragraphs 6, 8, and 13 are struck as conclusory. Paragraph 16 is struck as conclusory and lacking personal knowledge. Additionally the court strikes the last two sentences in paragraph 11 as conclusory, the portion of paragraph 14 beginning with the words "gave to this announcement the air ..." through the words "Grant Park" as improper opinion testimony, and everything in paragraph 17 except the third sentence beginning "Nor did any ..." as conclusory.

The court grants the City's motion to strike in Micah Philbrook's affidavit the portion of paragraph 6 beginning with the words "but I believe ..." as improper opinion testimony, the second and fourth sentences in paragraph 7 as conclusory and as improper opinion testimony, the last sentence in paragraph 8, the last three sentences in paragraph 12, and all of paragraph 15 with the exception the last sentence as improper opinion testimony.

The court grants the City's motion to strike Daniel Hensley's affidavit as to paragraph 8 as improper opinion testimony. Additionally, the court strikes the last sentences of paragraphs 10 and 12 as improper opinion testimony. The City also moves to strike paragraph 11. Paragraph 11 states:

> On several occasions, I had conversations with Officer Mirabelli, who was a Chicago Police Officer assigned to District 001. During one conversation, Mirabelli stated that the current Chicago Police Department Superintendent received orders from Mayor Rahm Emmanuel to "get rid of Occupy Chicago by any means possible because they are embarrassing the city administration and causing great strain to Rahm's White House connections in the Obama administration."

The City objects that paragraph 11 lacks appropriate foundation and it constitutes "blatant hearsay." In both their briefs and arguments, Defendants make no

response to this objection. Indeed, at oral argument, they repeatedly conceded that paragraph 11 "could have been more specific." Defendants further conceded that the failure to identify Mirabelli's rank weakened the affidavit, making it difficult to determine the scope of his agency and his ability to make admissions that bind the City. Additionally, Defendants made no response at oral argument to the City's objection that the paragraph lacked foundation and constituted hearsay.

Paragraph 11 lacks the "basic foundational requirements (such as time, date, place and persons present during conversations referred to by [affiant]) which makes it difficult to determine if the affiant actually witnessed [the events] or gained his information from hearsay sources." Wiszowaty v. Baumgard, 257 Ill. App. 3d 812, 819 (1st Dist. 1994). There are several possible out of court statements contained in this statement. First, there is Officer Mirabelli's statement to Hensley. Second, there is Mayor Emanuel's statement to the Superintendent. It is unclear from paragraph 11 whether Mirabelli heard the Mayor give this order to the Superintendent or whether the superintendent confided in Mirabelli that the Mayor had given him this order or whether Mirabelli learned about this order from other sources. The failure of the affiant to provide a foundation for the conversation creates this ambiguity. This ambiguity makes it impossible to determine whether the statements might fit within one of the exceptions to the rule prohibiting hearsay. The court consequently strikes paragraph 11 as both lacking foundation and as hearsay.

The court grants the City's motion to strike Evelyn Dehais's affidavit as to paragraph 5 as lacking personal knowledge ("it became known"). The City moves to strike paragraph 8 as improper opinion testimony. Dehais states that she "personally felt as if the City of Chicago and the Chicago Police Department were purposely pushing Occupy Chicago and slowly taking away more of Occupy Chicago's First Amendment rights as time progressed." Defendants' argue that this constitutes proper lay opinion, citing People v. Novak 163 Ill. 2d 93, 102 (1994); overruled on other grounds People v. Kolton, 219 Ill. 2d 353 (2006). However, lay opinion must be confined to observations of a "person's mental or physical condition, character or reputation, or the emotions manifest by his or her acts; or things that occur and can be observed, including speed, appearance, odor, flavor, and temperature." Novak, 163 Ill. 2d at 102. A "purpose" is not a physical condition, character, or reputation; it is not an emotion; it is not speed, appearance, odor or color. Defendants cite no authority that statements purporting to divine another person's "purpose" forms permissible lay opinion testimony. The court strikes paragraph 8 as improper lay opinion. Additionally, the court strikes the last sentence of paragraph 7 as hearsay.

The court grants the City's motion to strike Michael Herbert's affidavit as to paragraphs 12 and 13 as improper opinion testimony, and paragraph 14 as conclusory. Additionally, the court strikes all of paragraph 10 except the first sentence as hearsay, and the second sentence of paragraph 11 as improper opinion testimony.

The court grants the City's motion to strike Sarah A. Whitford's affidavit as to paragraphs 7 and 8 as hearsay, and paragraph 9 as improper opinion testimony.

In all other respects the City's motion to strike is denied.

Motions for Discovery Pursuant to Rule 191(b)

To strengthen their as-applied challenge, the Defendants move for discovery pursuant to Supreme Court Rule 191(b) to allow them to "affirmatively demonstrate that these arrests were deliberately removed from the discretion of the Chicago Police Department by the Mayor's Office and the Mayor himself." Defendants ask for discovery to be issued in the form of "affidavits, interrogatories, depositions, and/or document requests." They ask to be allowed to serve such discovery upon "Mayor Rahm Emmanuel, City of Chicago Officials and certain police officers who participated in the decision-making process regarding Defendants' arrests ... ."

Defendants conceded in oral argument that they had failed to move for discovery pursuant to People v. Schmidt, 56 Ill. 2d 572 (1974). Cf. City of Chicago v. Brown, 61 Ill. App. 3d 266, 273 (1st Dist. 1978) (affirming Schmidt discovery in ordinance violation prosecution). Not only have Defendants failed to avail themselves of routine discovery generally available in ordinance prosecutions that might have aided them in making a more specific 191(b) motion, Defendants have not requested that the court postpone ruling on the motion to dismiss until after Schmidt discovery has been completed. Cf. Kimbrough v. Jewel Companies, Inc., 92 Ill. App. 3d 813, 819-20 (1st Dist. 1981) (respondent claimed witness existed but failed to conduct ordinary discovery and to ask for continuance to conduct discovery).

Where a party establishes that "*material* facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, [1] naming the persons and [2] showing why their affidavits cannot be procured and [3] what affiant believes they would testify to if sworn,

[4] with his reasons for his belief," the court may make any order that may be just. Ill. Sup. Ct. R. 191(b) (emphasis added). Failure to state *material facts* known only to hostile witnesses and merely alleging a general sense that the witnesses had information fatally flaws a 191(b) motion. See Crichton, v. Golden Rule Ins. Co., 358 Ill. App. 3d 1137, 1151-52 (5th Dist. 2005). Additionally, failure to allege what the movant believes the witnesses would say and the reasons for this belief renders such a motion facially defective. Janda v. United States Cellular Corp., 2011 IL App (1st) 103552, ¶ 98 (mere fishing expeditions disfavored); Kensington's Wine Auctioneers and Brokers, Inc., v. John Hart Fine Wine, Ltd., 392 Ill. App. 3d 1, 20-21 (1st Dist. 2009).

At first blush, Rule 191(b) seems ideally suited to help Defendants develop *material* facts that might support their as-applied challenge. Obviously, City officials would be reluctant to reveal facts substantiating a discriminatory animus. Facts showing selective enforcement would be *material*. Moreover, Rule 191(b) allows an adverse party to obtain material facts that are in the possession of the other side notwithstanding such reluctance.

Defendants attach the affidavit of Neil Landers. Landers believes the Mayor will testify that he "instructed Chicago Police Officers to enforce the Ordinance and arrest me ... ." Based on his "personal observations and experiences," he believes the Mayor would testify that he decided to prohibit all First Amendment activity in the Park. He paraphrases comments by an unnamed police officer who arrested Landers. Landers states that the officer made comments along the lines of "'the mayor doesn't want to mess around with protests right now,'" "'the mayor's getting ready for the NATO conference in spring, this is just a dry run; he's just practicing on you guys; that's gonna

be way more intense than this,'" and "'the city does not want to let you guys get off the hook because it's gearing up for the protests in the spring." While the City did not move to strike these statements, they lack the "basic foundational requirements (such as time, date, place and persons present during conversations referred to by [affiant]) which makes it difficult to determine if the affiant actually witnessed [the events] or gained his information from hearsay sources.'" Wiszowaty v. Baumgard, 257 Ill. App. 3d 812, 819 (1st Dist. 1994). Absent sufficient foundation, these anonymous, paraphrased comments carry little weight. Regardless, they fail to demonstrate that the Mayor would testify as Landers claims. Thus, Defendants have failed to supply facts that sufficiently support their 191(b) request.

As to the Defendants' request that *unidentified* City officials and police officers be compelled to testify or answer discovery, the motion is facially defective for failure to name the witnesses. For all these reasons, the Defendants' 191(b) motion is denied.

Conclusion

For the above reasons, the court denies the City's motion to strike Defendant's affidavits in their entirety based on their untimeliness, the court grants in part and denies in part the City's motion to trike pursuant to Rule 191(a) and denies Defendants' motion for discovery pursuant to Rule 191(b).

The court sets the case for September 27, 2012, at 10:30 a.m. in room 1307 to deliver its ruling regarding Defendants' motion to dismiss.

The clerk of the court shall deliver a copy of this order to all parties of record.

Entered the 13th of September 2012
Chicago, Illinois

Thomas More Donnelly
Associate Judge

Associate Judge
Thomas More Donnelly

SEP 13 2012

Circuit Court - 1803