Cited
As of: Dec 05, 2012

FIONA SCHAER (NEE GINTY), ANDREW SCHAER, Plaintiffs, against THE CITY OF NEW YORK, CITY MARSHAL JEFFREY ROSE, Defendants.

09 Civ. 7441 (CM) (MHD)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2011 U.S. Dist. LEXIS 36380

March 25, 2011, Decided
March 25, 2011, Filed

CORE TERMS: marshal, ticket, state actor, parking, pleaded, deprivation, seizure, tow, municipal, traffic, state law, civil rights, indemnification, vicarious, seized, mail, confrontation, truck, failure to protect, failure to train, process rights, parking tickets, parking tickets, constitutional rights, outstanding, conscience, seize, scene, color, independent contractors

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JUDGES: Colleen McMahon, United States District Judge.

OPINION BY: Colleen McMahon

OPINION

DECISION AND ORDER GRANTING IN PART CITY OF NEW YORK'S MOTION TO DISMISS THE AMENDED COMPLAINT

McMahon, J.

INTRODUCTION

Plaintiffs, husband and wife Fiona Ginty ("Ginty") and Andrew Schaer ("Schaer") (collectively "plaintiffs") commenced this action against defendants the City of New York (the "City"), New York City Marshal Jeffrey Rose ("Marshal Rose" **[*2]** "Rose"), and Marshals John Doe 1 through 8 two of whom are John Valencia and Louis Ramirez (the "Marshals" "John Doe Marshals"). Plaintiffs assert claims for deprivation of liberty and property rights as well as failure to protect and violations of due process under *42 U.S.C. § 1983* ("*Section 1983*") and New York Law. Plaintiffs also assert claims for assault and battery under New York law. Marshal Rose filed his answer to plaintiffs' Amended Complaint on February 26, 2010 in which he asserted a cross-claim against the City for indemnification. On March 3, 2010, the City filed the instant motion to dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*.

BACKGROUND

A. City Marshals

New York City Marshals are essentially civil law enforcement officers of New York City. The position of Marshal is created by Article 16 of the N.Y. City Civ. Ct. Act. With respect to employment regulations, New York City Marshals are independent contractors; they are not employees of the City of New York. See generally, *In re Unified Court System, 58 N.Y.2d 876, 447 N.E.2d 41, 460 N.Y.S.2d 493 (1983)*. They do not receive any salary from the City. Id. Nonetheless, they are appointed by the Mayor to five-year terms, and they **[*3]** are regulated and supervised by the New York City Department of Investigation. See *N.Y. City Civ. Ct. Act § 1604*.

Marshals have jurisdiction to enforce orders entered in civil cases. They collect on judgments, tow cars, seize utility meters and carry out evictions. *Burgos v. Airday, 2001 U.S. Dist. LEXIS 13193, 2001 WL 995342, *5-*6(S.D.N.Y 2001)*.

Marshals are compensated through collection fees that are set by statute. Id.

B. May 28, 2008 Confrontation

The following well-pleaded facts are taken from the plaintiffs' Amended Complaint and are assumed to be true at this point.

Prior to May 28, 2008, plaintiffs Ginty and Schaer had received at least two parking tickets from New York City. [1] (Am. Compl. ¶ 75.) Plaintiffs did not pay these tickets. Instead, they allege that they responded to the tickets "with a plea of 'not guilty' and requested a hearing by letter." (Id.) It is unclear from the Amended Complaint whether the plaintiffs in fact mailed both tickets to the Parking Violations Bureau with check marks in the boxes on the tickets that indicate a request for a hearing or if the plaintiffs simply sent some sort of letter to the Bureau indicating their plea and requesting a hearing. Plaintiffs' Amended Complaint **[*4]** is also ambiguous about whether plaintiffs responded to each of the tickets they received individually, or if they simply sent a single correspondence pleading not guilty to both of their tickets. Obviously, plaintiffs have no way of knowing whether the City ever received plaintiffs' request for a hearing, but it is undisputed that no hearing was ever held, because the City entered two default judgments against the plaintiffs and placed their vehicle on a list of vehicles to be seized (the "execution list" or "vehicle seizure list"). [2] (Id.) This list of vehicles to be seized was provided to the City Marshals so that they could seize the vehicles listed thereon.

1 While the Amended Complaint intimates that plaintiffs received more than one ticket, it does not state precisely how many parking tickets they received. In the description of the initial confrontation between Ginty and one of the Marshals, there is an indication that at least two different tickets were the basis of the seizure order. Plaintiffs also state in their Amended Complaint that Mr. Schaer "responded to mailed tickets with a plea of 'not guilty'" further indicating that the plaintiffs had received at least two tickets. **[*5]** (Am. Compl. ¶75.)

2 That the City entered two default judgments against plaintiffs further supports the inference that plaintiffs received two parking tickets.

On May 28, 2008, plaintiff Fiona Ginty was sitting in the driver's seat of plaintiffs' car, which was parked on Columbus Avenue between West 76th and West 77th. (Id. ¶ 11.) Ginty was waiting for her husband, plaintiff Andrew Schaer, to return to the car. (Id.) A black sedan pulled in directly behind her, and an unnamed City Marshal (not defendant Rose) got out and walked over to

plaintiffs' car. He began shouting at Ginty to get out of the car, telling her to pay him $500 or he would pull her out of her car and seize the vehicle. (Id. ¶¶ 13-18.) The John Doe Marshal did not identify himself as a New York City Marshal (Id. ¶¶ 14-16.), and Ginty at first thought the man was trying to rob her. (Id. ¶ 16.) Eventually Ginty understood that the Marshal was demanding payment for outstanding parking tickets. (Id. ¶ 16.) Ginty felt as though the Marshal was "keeping [her] hostage" in her car. (Id. ¶ 19.)

At least three other Marshals arrived on the scene, which became increasingly chaotic as the Marshals' abusive and aggressive demeanor **[*6]** escalated significantly. (Id. ¶¶ 21-23.) Matter became even more confused when a New York City parking meter attendant (a so-called "Brownie") happened on the scene and asked one of the Marshals to move his sedan, which was blocking traffic; the Marshal refused. (Id. ¶17.) Afraid that she was going to be physically attacked, Ginty got out of her car and handed her keys over to one of the Marshals. (Id. ¶ 23-26.) Apparently this occurred over the course of several hours.

Eventually Mr. Schaer arrived on the scene. He found an extremely upset and frightened wife standing on the sidewalk and a tow truck next to his car. (Id. ¶ 29.) However, plaintiffs' vehicle had not yet been secured to the truck. So Schaer used his own set of keys to open the locked car; he and his wife got in and drove away. (Id. ¶ 30.) The Marshals immediately gave chase in their own vehicles. (Id. ¶¶ 31-33.)

The Marshals eventually forced Schaer to stop by cutting off his car. (Am. Compl. ¶¶ 31-33.) They used a bull-horn to demand that the plaintiffs get out of their vehicle. (Id. ¶33.) When Schaer opened his window to speak to one of the Marshals, who had approached his side of the vehicle, he was pulled from the **[*7]** car. (Id. ¶ 35.)

The Marshals got their car; they secured the vehicle to a tow truck and towed it to the impound yard. Plaintiffs were left on the sidewalk with their personal belongings, including their two dogs, which were in the car. (Id. ¶¶ 37-41.) A New York City police officer helped the Schaers to get a rental car, in which they slept, devoured all the while by mosquitoes. (Id. ¶ 45.) The following day plaintiffs retrieved their car from the pound and drove to their home in Saratoga Springs.

Plaintiffs allege that they suffered both physical and emotional injuries as result of their traumatic confrontation with the Marshals. (Id. ¶¶ 38-46.) Plaintiffs do not allege that they did not receive tickets, and they do not allege that they ever paid any of the tickets that were issued to them.

Although plaintiffs never state specific acts of misconduct perpetrated by Marshal Rose -they identify the Marshals who were involved in the confrontation as John Doe Marshals 1-8-plaintiffs allege that at all times, all of the Marshals involved in the confrontation were acting under the employ and direction of Marshal Rose. (See id. ¶ 8.) It is not clear whether Marshal Rose was even present during **[*8]** the initial confrontation between Ginty and the Marshals. However plaintiffs do allege that by the time plaintiffs' vehicle was actually towed away, Marshal Rose was in fact present. (See id. ¶ 41.)

Plaintiffs reported this confrontation to the New York City Department of Investigation ("DoI") two days after the incident. (Am. Compl. ¶ 50.) Receiving no response, they filed a Freedom of Information request, and learned thereby that the DoI had looked into their complaint and found that the Marshals had violated applicable traffic laws during the incident, which resulted in levying a fine on Marshal Rose. (Id. ¶¶ 50-51.) It does not appear that the DoI concluded that the Marshals did anything wrong by towing plaintiffs' car as a result of the unpaid tickets; rather, the Marshals wrongfully required the plaintiffs to get out of and remove their dogs from their car while it was in a traffic lane. (Id. ¶¶ 51-52.)

C. The Pleadings

On August 25, 2009, plaintiffs filed their original Complaint in this action, alleging violations of their civil rights by defendants New York City, Marshal Rose, and eight other subordinate John Doe Marshals. They filed an Amended Complaint on February 5, 2010 alleging **[*9]** municipal and vicarious liability against the City, that the City failed to protect them, and that the City violated their due process rights.

Plaintiffs Amended Complaint contains eleven Counts. Counts One through Three of the Amended Complaint assert *Section 1983* claims against defendant Marshal Rose and allege deprivation of liberty, deprivation of property, and derivative responsibility of Marshal Rose for negligent hiring and retention of his

subordinate City Marshals.

Counts Four through Six assert *Section 1983* claims against the City of New York under the municipal liability doctrine and allege failure to train, failure to protect, and violations of procedural and substantive due process.

Count Seven asserts a *Section 1983* claim against the City of New York alleging "vicarious responsibility of New York City, et al, regarding Marshal Rose; negligent supervision and continued engagement." (Am. Compl. Count 7.)

Counts Eight through Ten assert various pendent (not "pendant," which is a lavalliere) tort claims against Rose and the John Doe defendants, for assault, battery, and (of course) for intentional infliction of emotional distress.

Finally, Count Eleven alleges that, as a result **[*10]** of the City's failure to provide adequate instruction, control, or correction of its Marshals, the City violated plaintiffs' civil rights in violation of *New York Executive Law Article 15*.

On February 26, 2010, defendant Marshal Rose filed his Answer to plaintiffs' Amended Complaint, in which he asserted a cross-claim against the City for indemnification.

The City has moved to dismiss all claims asserted against it.

DISCUSSION

A. Motion to Dismiss Standard

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." See *Fed. R. Civ. P. 8(a)*. Specific facts are not necessary and the statement need only "'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" See *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct 1955, 1964, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. Under *Rule 12(b)(6)*, a plaintiff's complaint will be dismissed if it fails to state a claim upon which relief can be granted. See *Fed. R. Civ. P. 12(b)(6)*. When ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. See *Bell Atl. Corp., 127 S.Ct. at 1965* **[*11]** (citing *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508, n. 1, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002))*. While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. See *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)* (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

In ruling on a motion to dismiss, a court is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." See *Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985)* (citing *Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities Inc., 748 F.2d 774, 779 (2d. Cir. 1984))*. Therefore, after interpreting the complaint in favor of the plaintiff, if it is determined that the plaintiff has failed to allege a set of facts which, if proven to be true, would entitle him to relief, the complaint will be dismissed. See *Ferran v. Town of Nassau, 11 F.3d 21, 22 (2d Cir. 1993)*, cert. denied, **[*12]** *513 U.S. 1014, 115 S. Ct. 572, 130 L. Ed. 2d 489(1994)*.

The claims against New York City are as follows: a Monell "policy and practice" claim appurtenant to plaintiffs' *Section 1983* claims against Marshal Rose (Count Four); a so-called "failure to protect" claim (Count Five); a deprivation of due process claim (Count Six); a "vicarious liability" claim (Count Seven); and a claim for "deprivation of civil rights" under the *New York State Executive Law § 290*, predicated on the City's alleged failure to train, control and correct its Marshals (Count Eleven). The City moves to dismiss all of them.

I will discuss each of these claims in turn.

B. The City's Motions to Dismiss Counts Five (Failure to Protect) and Six (Deprivation of Due Process) Are Granted

Plaintiffs assert two direct liability claims against New York City under federal law.

(1) Count Five (Failure to Protect/Substantive Due Process)

First, plaintiffs allege that the City failed to protect

their civil rights in that they suffered a "serious and shocking deprivation of liberty and property" which violated their right to substantive and procedural due process, from which "predictable violations" the City failed to protect them. (Am. Compl. ¶ 76.) The City argues **[*13]** that this cause of action must be dismissed because it is a so-called "DeShaney" claim. See *DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 197, 109 S. Ct. 998, 103 L. Ed. 2d 249(1989)*. But the City is wrong.

As a general matter, "[A] State's failure to protect an individual against *private violence* simply does not constitute a violation of the *Due Process Clause*." *Id. at 198* (emphasis added). The Supreme Court has held that under certain limited circumstances the Constitution imposes upon the state affirmative duties with respect to protection from *private individuals.* Id.

However, the *DeShaney* doctrine has no applicability to unauthorized violence committed by a state actor, such as the New York City Marshals. When a state actor misbehaves, the governmental entity itself has created or increased the danger to an individual, thus taking the case out of the ambit of DeShaney. *Ting Jing Gan v. City of New York, 996 F.2d 522, 533 (2d Cir. 1993).*

That does not, however, get plaintiff past the City's motion to dismiss. For if a municipality's agent misbehaves, and thereby violates a citizen's federal constitutional rights, the municipality can be held liable only under *Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*. **[*14]** So if plaintiffs' "failure to protect" claim is not to be conflated with their Monell claim (Count Four), they must be alleging something else. I take that "something else" to be a violation of their substantive due process rights -- if only because Count Five specifically mentions substantive due process, and Count Six specifically alleges procedural due process violations. So I interpret Count Five as alleging that the City violated their right to substantive due process by failing to protect them from the "predictable" violence that was visited on them by Marshal Rose and his team. (Am. Compl. ¶¶ 76-78.)

We begin by disposing of the conclusory suggestion that plaintiffs were somehow deprived of their liberty -- shockingly or otherwise. There is no allegation in the Amended Complaint that plaintiffs were arrested or incarcerated, so they suffered no deprivation of their constitutionally-protected liberty interests. See *California v. Hodari D., 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991)*("an arrest ... [is] the quintessential seizure of the person under .... *Fourth Amendment* jurisprudence").

If plaintiffs are suggesting that Fiona Ginty was deprived of her liberty because she remained with her car for some two **[*15]** hours after her initial encounter with the Marshals, they are entirely off base. Marshals are not peace officers; they do not have the power to arrest or detain anyone. See *New York Civ. Prac. Law Art. 1 § 105 (s-1)*. They are only authorized to detain *cars.* No fact is pleaded tending to suggest that Rose or any other Marshal "detained" her. The Amended Complaint alleges that she was "unable" to leave her car (for some unspecified period) because (1) she was afraid she was going to be physically attacked; (2) she had two dogs in the car; and (3) she could not see her husband. (Am. Compl. ¶23.) All that suggests is that Ginty refused to leave her car of her own volition -- not because the Marshals ordered her to remain in the car or physically kept her from leaving the car. No pleaded fact suggests that she stayed at the scene until her husband emerged from the event he was attending at the New York Historical Society because the Marshals forced her to remain.

Plaintiffs' real complaint is that their substantive due process rights were violated (1) because their car was seized, and (2) because of the way it was seized. They do allege that they were deprived of their property (the car).

For **[*16]** state action to violate substantive due process rights, it must have occurred under circumstances warranting the labels "arbitrary" and "outrageous." *County of Sacramento v. Lewis, 523 U.S. 833, 845, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).* Only conduct that "shocks the conscience" qualify as even potentially violative of plaintiffs' substantive due process rights. See *Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999)*; accord *Leeandy Dev. Corp. v. Town of Woodbury, 134 F. Supp. 2d 537, 543 (S.D.N.Y. 2001).*

Here, the pleaded facts concerning the fact of the car's seizure are far from conscience shocking. Plaintiffs admit that they were issued one or more parking tickets, which they did not pay; that the City obtained default judgments against them on account of those tickets; and that the City informed the Marshal of those judgments. By law, therefore, the Marshal was authorized to seize the car. There is absolutely nothing conscience shocking

about any of that; the seizure of vehicles to satisfy parking fines has been held to be constitutional and furthers a legitimate state interest. See generally *Rackley v. City of New York, 186 F. Supp. 2d 466, 478 (S.D.N.Y. 2002)*.

Plaintiffs do assert various procedural **[*17]** claims against the City that allegedly undermined the validity of the judgments entered against them. But the fact remains that the Marshal knew nothing about any infirmity in the underlying judgments -- plaintiffs even admit that. (See Am. Compl. ¶¶ 76-78.) Having been advised that judgment had been entered (which it had), the Marshal proceeded to seize the car, as the law permitted him to do. On those facts there can be no conceivable substantive due process violation.

The pleaded facts also do not suggest that the Marshals who were at the scene behaved in a manner that shocked the conscience at any point during the seizure of the car. There is certainly no "conscience shocking" allegation relating to Mrs. Schaer's initial encounter with the individual defendants. Were they rude and confrontational toward her? According to the Amended Complaint, they certainly were. (Id. ¶ 13.) Did they demand her keys and-frighten her? Indubitably. (Id. ¶¶ 21, 23.) Did they intimidate her into getting out of her car? Yes; without question. (Id. ¶¶ 23-26.) But did they hit her or physically abuse her? There is no such allegation. The only physical injury suffered by Mrs. Schaer -- a "cut and contusion" **[*18]** (bruise) -- appears to have been caused by her own dogs, which pulled her to the ground. (Id. ¶¶ 39-40.) [3]

> 3 The Amended Complaint does allege that Mrs. Schaer's leg was "struck" by the tow truck on the scene while it "approached Plaintiff's car." (Am. Compl. ¶ 38.) However, it does not appear that this contact was significant, or that it caused any injury to Mrs. Schaer; there is no specific allegation that the two truck caused her injury, or that she suffered any injury that required medical attention.

There is an equal lack of "conscience shocking" allegations about the events of later in the afternoon. Did Andrew Schaer intentionally drive his car away from a tow truck and from persons who were legally authorized to seize the car? The Amended Complaint so alleges. (Am. Compl. ¶¶ 27-30.) Did Schaer, believing that he was being stopped by New York City Police, refuse to get out of his car until he was finally pulled out by one of the John Doe defendants? So it seems. (Id. ¶¶ 31-35.) But did Schaer have unpaid parking tickets outstanding? Indeed he did. Were there judgments on the books against him? Yes there were. Did the Marshals have the right and the power to tow his car at that moment? **[*19]** Yes they did -- which perforce authorized them to *stop* the car, as they in fact did.

So to the extent that plaintiffs allege a substantive due process violation, Count Five is plainly insufficient -- and cannot possibly be resuscitated. [4]

> 4 For the same reason, the facts pleaded do not come close to making out a claim against any of the individual defendants for intentional infliction of emotional distress -- an extremely disfavored cause of action under New York law that is routinely dismissed on pre-answer motion. Marshal Rose and his confreres have, however, answered the complaint, and I will not *sua sponte* dismiss a claim -- even a patently deficient one -- when the party against whom it is asserted has chosen not to move for dismissal. Unless something extraordinary comes out during discovery, that claim (and the corresponding claim for vicarious liability against the City) will not survive a motion for summary judgment.

Count Five also mentions in passing that plaintiffs' equal protection rights were violated by the City's failure to protect them from the Marshals. Unfortunately for plaintiffs, they allege not a single fact tending to show that similarly situated individuals -- i.e., persons **[*20]** who have had judgments entered against them for failing to pay their traffic tickets -- did not have their cars towed in circumstances like those in which plaintiffs found themselves. On the contrary, the purported "pattern and practice" allegations of paragraph 53 of the Amended Complaint suggest that plaintiffs were treated exactly like every other scofflaw. The *sine qua non* of an equal protection claim is some allegation that plaintiffs were treated differently than persons who are similarly situated to them in all material respects. *Phillips v. Girdich, 408 F.3d 124, 129 (2d Cir. 2005)* (citations omitted). As no facts supporting any such conclusion are pleaded, Count Five fails to state a viable equal protection claim.

Accordingly, Count Five of plaintiffs' Amended Complaint is dismissed.

(2) Procedural Due Process

In Count Six of the Amended Complaint, plaintiffs allege that the City failed to maintain adequate records, or to communicate with Schaer when he mailed in his parking tickets with a plea of "not guilty" and asked for a hearing, which resulted in the City's giving the Marshal an "execution list" that was deficient. For a variety of reasons, this fails to state a claim for **[*21]** violation of plaintiffs' procedural due process rights.

In assessing the viability of a procedural due process claim, a court must decide: (1) whether a claimant possessed a liberty or property interest and, if so, (2) what process they were due before they could be deprived of that interest. *Ciambriello v. County of Nassau, 292 F.3d 307, 313 (2d Cir. 2002)*. "In determining how much process is due, a court must weigh (1) the private interest affected, (2) the risk of erroneous deprivation through the procedures used and the value of other safeguards, and (3) the government's interest." *Spinelli v. City of New York, 579 F.3d 160, 170 (2d Cir. 2009)*; *O'Connor v. Pierson, 426 F.3d 187, 197 (2d Cir. 2005)*.

The City's administrative parking violations procedures, together with the judicial system of the State of New York, provided plaintiffs with adequate remedies, both pre-and-post-deprivation, such that they received all the process they were due.

We start with pre-deprivation remedies.

New York City maintains an administrative system for dealing with parking tickets that gives alleged violators many different ways to handle their tickets. See generally, The Official Compilation of the *Rules of the City of New York, Title 19, §39*. **[*22]** When a parking violation summons is issued, the rules prescribed by the New York City Parking Violations Bureau ("NYC PVB") require a plea to be entered within thirty days after the service of the notice of violation. Id. *§39-04*. The plea may be entered in person, by the respondent or a representative on his behalf at any borough hearing office, or by ordinary mail. Id. Recent news articles reveal that recipients of tickets can now contest them on-line, see Javier C. Hernandez, *City Room: Go Online, Not Downtown, to Fight a Parking Ticket*, N.Y. Times, March 22, 2011 at A20, but that method was not available to the Ginty/Schaers. To enter a plea by mail, a respondent is required only to enter his name and address on a plea form -- which is on the back of the parking violations summons -- and indicate on the plea form whether the respondent is pleading guilty or not guilty. Id. If a respondent enters a plea of guilty, the summons is supposed to be sent to the NYC PVB accompanied by payment of the fine listed on the summons. Id.

When a respondent enters a plea of not guilty, the summons must be sent to the NYC PVB with the appropriate indication requesting **[*23]** a hearing. Id. Although the respondent may request a specified date, time and place for a hearing, the NYC PVB reserves the right to schedule the hearing at whatever time and place it sees fit. Id. After the NYC PVB receives a plea of not guilty, it sets a date for a hearing and informs the respondent listed on the plea form by first class mail of the assigned hearing date. Id. "Hearing examiners," who are designated by the Director of the Parking Violations Bureau, preside over the hearings to dispute parking violations. Id. *§39-01*. If a respondent fails to plead within the time period allowed or to appear for a hearing, a default judgment sustaining the charges and fixing a fine is entered against the respondent. Id. *§39-10*.

Respondents also have the ability to appeal decisions made by Parking Violations Bureau hearing examiners. Id. *§39-12*. Within thirty days of a decision by a hearing examiner, a respondent may appeal the decision by submitting a written notice of appeal to the Bureau that sets forth the reason why the original decision should be reversed or modified. Id. An appeals board made up of three or more hearing examiners reviews appeals sent to the Bureau. Id. Within sixty-days **[*24]** of receipt of an appeal, the appeals board issues a final determination on whether the original decision should be affirmed. Id. If a respondent is unsatisfied with the result of an appeal, he can pursue an Article 78 proceeding in an appropriate New York State court. *Rackley, 186 F. Supp. 2d at 482*.

Plaintiffs argue that they were somehow prohibited from taking advantage of these various pre-deprivation remedies: Schaer contends that he pled not guilty on his two parking tickets by mail and sought a hearing. He seems to think that his failure to hear back from the City absolved him of any further responsibility and deprived him of his right to a hearing. It did not.

A person who is competent to be issued a driver's license should know that parking tickets do not just "go away;" the underlying violations have to be adjudicated. Plaintiffs plead no facts tending to show that he took any steps to deal with the underlying violation, other than to

mail the tickets back with a "not guilty" plea. They do not allege that plaintiffs took advantage of the various procedures that allow a citizen to check the status of an outstanding ticket such as calling the NYC PVB or utilizing NYC PVB's website. **[*25]** They do not allege that plaintiffs went to any of the offices of the NYC PVB -- which any person can do at any time, with or without an appointment -- to contest their tickets, which would have resulted in their receiving a hearing that very day. See *De Young v. City of New York, 607 F. Supp 1040, 1045 (S.D.N.Y. 1985)*. They simply waited for the City to take the next step -- even though there were plenty of procedures available to them for resolving the outstanding violations. Plaintiffs allege no conceivable reason why they were entitled to assume that the City would contact them; given the state of the mails, it is entirely possible that the City never received plaintiffs' mailed-in plea of not guilty.

In the end, plaintiffs were responsible, for taking care that their outstanding tickets were settled; the City had no obligation to do it for them. The City's administrative parking violations system has been held to be constitutional *Rackley, 186 F. Supp. 2d at 486*; see, e.g., *Jaouad v. City of New York, 39 F. Supp. 2d 383 (S.D.N.Y. 1999)*; *All Aire Conditioning, Inc. v. City of New York, 979 F. Supp. 1010 (S.D.N.Y 1997)*; so the fact that those procedures place the onus for resolving outstanding **[*26]** tickets on the driver, rather than on the City, does not violate the *Due Process Clause of the United States Constitution*. Plaintiffs acted at their peril when they chose to make no inquiry once a reasonable period of time had passed and they heard nothing about a hearing. It is their own fault that the City obtained the default judgments and towed their car.

Plaintiffs also had the ability to challenge the seizure of their car post-deprivation, in an action in the New York City Civil Court. New York State law provides any person who is injured by the unauthorized actions of a City Marshal with a special post-deprivation remedy. Marshals are required to provide a bond so that they may "answer to the City of New York and any persons that may complain for the true and faithful execution by such marshal of the duties of his office." *N.Y. City Civ. Ct. Act § 1604*. Therefore, any person who is aggrieved by a Marshal's dereliction of duty has the right to sue on the Marshal's bond in the New York City Civil Court. *Cla-Mil East Holdings Corp. v. Medallion Funding Corp., 6 N.Y.3d 375, 379, 846 N.E.2d 431, 813 N.Y.S.2d 1 (2006)*; *N.Y. City Civ. Ct. Act § 1605*. Plaintiffs have, at all times since the seizure of their car, been **[*27]** entitled to sue Marshal Rose on his bond if he wrongfully seized the car or otherwise violated their rights during a lawful seizure.

Finally, the Second Circuit has "held on numerous occasions that an Article 78 proceeding is a perfectly adequate postdeprivation remedy" in cases based on random and unauthorized acts by state employees. *Hellenic American Neighborhood Action Committee v. City of New York, 101 F.3d 877, 881 (2d Cir. 1996)* (citing *Interboro Inst., Inc. v. Foley, 985 F. 2d 90, 93 (2d Cir. 1993)*; *McDarby v. Dinkins, 907 F.2d 1334, 1338 (2d Cir. 1990)*; *Alfaro Motors, Inc. v. Ward, 814 F.2d 883, 888 (2d Cir. 1987)*; *Giglio v. Dunn, 732 F.2d 1133, 1135 (2d Cir. 1984)*. Plaintiffs had the opportunity to bring an Article 78 proceeding against the City in New York State Supreme Court to challenge any random or unauthorized act by the Marshals. They appear to have chosen not to do so.

Accordingly, plaintiffs have no legally cognizable claim of any constitutional violation for the temporary loss of the use of their automobile. Count Six is, therefore, dismissed with prejudice.

C. The Motion to Dismiss Count Eleven (N.Y. Human Rights Law) is Granted

In Count Eleven of the Amended Complaint, **[*28]** plaintiffs accuse the City of New York of violating the New York State Human Rights Law by failing to instruct Marshal Rose in the proper execution of his duties. This is indeed a novel claim. It is also easily dismissed. [5]

> 5 It is not entirely clear that the City MOVED to dismiss this claim; I believe that it subsumed any discussion of Count Eleven under its Monell argument, interpreting it as some sort of failure to train municipal liability claim. That decision (the result of the Corporation Counsel's stubborn refusal to draft motion papers that specifically and plainly address particular COUNTS in the Amended Complaint) ignores the fact that the claim purports to assert a violation of *Section 290 of New York's Executive Law* (which is the statement of purpose and introduction to the New York State Human Rights Law, the state's antidiscrimination statute). Addressing the claim in the terms actually pleaded makes plain that it

has to be dismissed. The Corporation Counsel does not make this obvious argument, but I see no reason to defer dismissing a patently inadequate claim.

The New York State *Human* Rights Law (*Executive Law § 290 et seq.*) (emphasis added) ("Human Rights Law") is the **[*29]** state's antidiscrimination law -- its equivalent to numerous federal civil rights laws, including *Titles VI*, *VII* and *IX of the Civil Rights Act of 1964*, the Age Discrimination in Employment Act, and the Americans with Disability Act. The Human Rights Law prohibits discrimination in employment, public accommodation, housing, and educational opportunity on the basis of race, color, religion, gender, age, national origin, sexual orientation, disability, military status, genetic predisposition or carrier status. The Human Rights Law declares that the right not to be discriminated against is a civil right (*N.Y. Exec. L. § 291*), but the reach of that civil right is limited to the unlawful discriminatory practices set forth in *§ 296* of that statute.

There is no allegation in the complaint that the City reduced plaintiffs' tickets to judgment, or that the Marshals towed plaintiffs' car, for any reason prohibited by *Section 296* of the Human Rights Law. Therefore, the State Human Rights Law has absolutely nothing to say about what happened to the Schaers when they failed to pay or otherwise dispose of their parking tickets.

D. The Motions to Dismiss Count Seven (Vicarious Liability) Is Denied But [*30] the Motion to Dismiss Count Four (Monell Liability) is Granted

Plaintiffs seek to hold the City vicariously liable for various common law torts allegedly committed by Marshal Rose and the John Doe Defendants -- assault, battery and intentional infliction of emotional distress. [6] The City argues that this claim must be dismissed because New York City Marshals are not "agents, servants or employees" of the City of New York.

6 To the extent that the complaint can be read to seek to hold the City vicariously liable for the various constitutional torts pleaded against Rose and the John Doe Defendants in Counts One, Two and Three, the City correctly notes that there is no vicarious liability under *Section 1983* -- only Monell liability, which will be discussed separately in the next section of this opinion.

Similarly, the City moves to dismiss plaintiff's Monell claim, which seeks to hold the City liable for the constitutional torts allegedly committed by the Marshals in the course of carrying out their duties. It argues that, because the Marshals are not City employees, they are not state actors.

The City's arguments are misguided in both respects.

It is absolutely true that New York City Marshals **[*31]** are not "employees" of the City of New York for purposes of the New York Labor Law. The Marshals are independent contractors, who maintain their own offices, employ their own staff, pay their own expenses, set their own schedules, and derive their own income from fees. *In re Unified Court System, 58 N.Y. 2d 876, 878, 447 N.E.2d 41, 460 N.Y.S.2d 493 (1983)*. As a result, the City has no obligation to contribute to the state-run welfare benefit funds (Workers' Compensation, Disability) or to pay them overtime compensation. Id.

However, the fact that the Marshals are independent contractors does not mean that they are not agents of the City -- and still less that they are not state actors.

The New York City Marshal is without question acting as an agent of the City when it tows automobiles on behalf of the City in order to enforce civil "scofflaw" judgments obtained by the City for violations of the City's parking rules. It is well-settled that the City of New York, like any other municipality, can be held vicariously liable for the common law torts of its "agents, employees and servants" under a theory of respondeat superior. *Hacker v. City of New York, 26 A.D.2d 400, 275 N.Y.S.2d 146 (N.Y. App. Div. 1966)*, aff'd *20 N.Y.2d 722, 229 N.E.2d 613, 283 N.Y.S.2d 46 (N.Y. 1967)* **[*32]** cert. denied *390 U.S. 1036, 88 S. Ct. 1436, 20 L. Ed. 2d 296 (1968)*. Therefore, Count Seven -- at least insofar as it the City's potential liability for the individual defendants' alleged assault, battery and intentional infliction of emotional distress -- cannot be dismissed on motion. [7]

7 It remains to be seen whether the various John Doe defendants were "agents, employees or servants" of New York City -- particularly some private tow truck drivers who appear to have gotten involved in emptying plaintiffs' car.

Count Four also cannot be dismissed on the ground that a City Marshal is not a state actor.

The idea that a New York City Marshal does not act under color of state law is, frankly, ludicrous. The position of City Marshal exists only because it was created by state law. That law gives City Marshals the power to carry out certain state functions that private citizens are not allowed to perform. There can be little question that Marshals are carrying out a New York City municipal function when they tow the cars of scofflaws like plaintiffs; enforcing the traffic laws and civil judgments are quintessentially state functions. And since the only thing that gives a Marshal the authority to tow a car is the law of the State **[*33]** of New York -- specifically the *N.Y. City Civ. Ct. Act Art. 16* -- a Marshal is "acting under color of state law" when he does so. [8]

8 Interestingly, the case cited by the Corporation Counsel for the proposition that the Marshal is not an employee of the City, *In the Matter of the Unified Court System, State of New York, 58 N.Y. 2d 876, 447 N.E.2d 41, 460 N.Y.S.2d 493 (1983)*, actually holds that (1) the Marshals are independent contractors (2) who are "local (not State) officers", and (3) who "if they could be deemed 'employees' of any governmental body, would, under the Unified Court Budgetary Act...remain employees of the city, not of the State." Plainly and unsurprisingly, New York's high court has concluded that the City Marshal is appurtenant to the City of New York, for whose benefit the post was created.

The Corporation Counsel (or at least the Assistant Corporation Counsel who is handling this case, apparently without supervision) seems to believe that someone who is not an employee of the City is automatically a private actor rather than a state actor. That is not correct as a matter of law or logic. The United States Supreme Court held a half century ago that even private actors (which a Marshal manifestly is *not*) **[*34]** who perform quintessentially state functions become "state actors" for purposes of *Section 1983* liability. *Evans v. Newton, 382 U.S. 296, 299, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966)*; see also *Burton v. Wilmington Parking Authority, 365 U.S. 715, 724-725, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961)*. And the City Marshal is not a private actor. In *In re Unified Court System, supra.*, the New York Court of Appeals recognized that City Marshals were *local officers* rather than *state officers.* The Marshals' status as employees (of any entity) or independent contractor was of no relevance whatsoever to the fact that they were *officers* of some municipal entity.

The City cites to not a single case that holds that a New York City Marshal is a private actor rather than a state actor. Corporation Counsel either misreads or misunderstands the few cases it cites for the proposition that a Marshal is not a state actor. In In re Unified Court System, the principal authority on which the City relies, the New York Court of Appeals was deciding whether the State of New York had to pay for unemployment insurance for City Marshals -- not whether Marshals are acting under color of state law when they carry out their duties. As noted above, the Court of Appeals made that decision **[*35]** without regard to the Marshals' status as *officers* of the municipality. And in *Fox v. Doran, 974 F. Supp 276 (S.D.N.Y. 1997)*, now--Circuit Judge Parker did not dismiss *Section 1983* claims against the City of Yonkers on the ground that its City Marshal was not a "state actor." In Fox, *the Marshal was the plaintiff* in an action seeking damages against the City of Yonkers for wrongfully terminating him from his position on account of his political views. *Id. at 278-279*. The issue raised by the case was whether Yonkers municipal officials were qualifiedly immune from liability for *First Amendment* retaliation because the law had not been settled at the time they acted -- not whether the Marshal was or was not a state actor. *Id. at 279-280*. That was simply assumed.

So the City is completely misguided in its attempt to transform what the New York Court of Appeals has identified as a "local officer" into a purely private actor. Given what Marshals do and why they are allowed to do it, it is hard to understand how the City can argue that Marshals are *not* acting under color of state law with a straight face.

The real issue raised by the City's motion to dismiss is whether plaintiffs have adequately **[*36]** pleaded facts that would, if proved, establish that the City had a policy or practice of failing to supervise its Marshals. The answer is no: plaintiffs have pleaded no such facts.

In order to state a claim against the City arising out of the Marshal's violation of plaintiffs' constitutional rights, plaintiffs must plead facts tending to show that (1) their civil rights were violated by an agent of the municipality acting under color of state law, and (2) the agent's actions were of result of either official municipal policy or governmental custom. *Monell, 436 U.S. at 691*.

It is only by pleading (and ultimately proving) some official policy or custom--in this case, a policy or practice of mistreating scofflaws like themselves -- that New York City can be held liable for a deprivation of rights committed by such agent or employee. *Pembaur v. City of Cincinnati, 475 U.S. 469, 483-84, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986)*.

The City correctly asserts that plaintiff's have not adequately pleaded a Monell claim -- even under the liberal pleading standards of *Rule 8*. For purposes of the motion, we ignore conclusory allegations such as plaintiffs' assertion that "NYC developed and maintained policies and customs exhibiting deliberate **[*37]** indifference to the constitutional rights of persons in said City, which caused the. violation of plaintiffs' rights." (Am. Compl. ¶ 68.) Instead, we look for allegations of fact that would suggest the existence of a policy. These include:

(1) The City did not respond to Plaintiffs' complaint about the behavior of the Marshals. (Am. Compl. ¶¶ 50-52.) Aside from being limited to the single incident about which plaintiffs complain (which does not show any pattern or practice), *this allegation is contradicted by the very next numbered paragraph in the Amended Complaint.* Paragraph 51 of the Amended Complaint reveals that the Department of Investigations ("DoI") looked into the complaint and concluded that requiring plaintiffs to get out of their car and remove their dogs from the vehicle in a traffic lane violated applicable traffic rules, as well as the Standard Operating Procedures of the Department of Finances (the City department responsible for enforcement of parking violations), and the procedures set forth in the Marshals Handbook, which requires New York City Marshals to obey the law in all official activities. (Am. Compl. ¶ 51.) The fact that the DoI did not mail plaintiffs a copy **[*38]** of these findings (or otherwise communicate with plaintiffs) does not mean that the City did not respond to their complaint -- it just means that the City was careless or rude. The fact that the DoI's findings did not make mention of any violation of plaintiffs' constitutional rights (Id. ¶ 52) is of no moment, because plaintiffs were and are not entitled (constitutionally or otherwise) to have the DoI (or this Court, for that matter) agree with their opinion that their constitutional rights were somehow violated.

(2) Marshal Rose's "aggressive disdain for the rights of citizens" and the City's purported toleration of same had been the subject of two news stories (a New York Times article dated January 23, 2003 and a New York Magazine article published in February 1997), one citizen complaint concerning mistaken towing, and one 2007 lawsuit growing out of a fact pattern similar to the one before this Court. (Am. Compl. ¶ 53.) Aside from having appeared many years prior to the incident here in question, these articles and complaints do not suggest any pattern of tolerating illegal conduct. The excerpts pleaded in the Amended Complaint do not show any illegal or unconstitutional conduct **[*39]** by Marshal Rose or any other New York City Marshal, let alone any widespread civil rights violations; while the writers plainly express sympathy for individuals who have had their vehicles seized, they do not suggest that these people had their rights violated during vehicle seizures. Neither do they suggest that the seizures were wrongful -- to the contrary, it appears that the individuals whose stories are recounted were, like plaintiffs, scofflaws.

(3) The statement (in an article that is years old) that Marshal Rose has occasionally been sued but had "no problems with the New York City Department of Investigations" (see Am. Compl. ¶ 53 (d)) (citing Jennifer Wolf, *License to Steal*, New York Magazine, February 10, 1997) does not demonstrate that New York City has allowed Marshal Rose to violate citizens' constitutional rights with impunity. The Department of Investigation has not turned a blind eye to misbehavior by Marshal Rose; plaintiffs acknowledge in their Amended Complaint that the DoI fined Rose for his violation of City policy in this very case! (Am. Compl. ¶ 71.) The fact that the DoI's punishment is not as great as plaintiffs believe appropriate is of no moment; plaintiffs **[*40]** are not entitled to have the DoI agree with their point of view. And if it is indeed the case that Marshal Rose is rarely chastised (which plaintiffs intimate but fail to allege adequately as a matter of fact) -- well, it is equally likely that rarity of punishment (especially coupled with the admission that punishment was administered in this case) admits most logically of the conclusion that, on most occasions, he operates zealously but within the literal bounds of the law. It certainly does not suggest that the City routinely permits Marshal Rose to violate citizens' rights with impunity.

Finally, the less said about the Lynn case the better. It is axiomatic that a settlement in a *Section 1983* action does not resolve disputed issues of liability. No inference

whatever can be drawn from the fact that someone sued the City over actions allegedly taken by the Marshal and the case was settled. [9]

> 9 The City wastes a great deal of time and energy apprising the court of the contents of factual details of the Lynn case, even though such material is completely *dehors* the pleadings and much of it cannot be considered on a *Rule 12(b)(6)* motion. While the court could consider the details of the **[*41]** settlement (particularly the fact that the City settled and the Marshal, who was separately represented, did not) on the ground that plaintiffs necessarily relied on (indeed, called attention to) the settlement in drafting their pleading, see *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995)* (quotation and citation omitted), it is not necessary to do so. It is sufficient to observe that pre-trial settlements are made for many reasons (one of them being to save money in the long run) and do not suggest liability on anyone's part.

In short, the so-called "policy and practice" allegations in plaintiffs' Amended Complaint do not cross the threshold of pleading facts that, if proven, would establish that the City routinely tolerated illegal, unconstitutional behavior on the part of its Marshals.

To the extent that plaintiffs' Amended Complaint attempts to assert a claim for municipal liability under a "failure to train" theory, plaintiffs have also not sufficiently pleaded their claim.

To prove a claim for municipal liability under a failure to train theory, a plaintiff must show: (1) 'that a policymaker knows "to a moral certainty" that ... employees will **[*42]** confront a given situation;' (2) 'that the situation presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation; and (3) 'that the wrong choice by the ... employee will frequently cause the deprivation of a citizen's constitutional rights." *Okin v. Village of Cornwall-on-Hudson Police Dept., 577 F.3d 415, 440 (2d Cir. 2009)*. Furthermore, a "plaintiff must offer evidence to support the conclusion that the training program was inadequate, not that a particular [state actor] may be unsatisfactorily trained or that an otherwise sound program has occasionally been negligently administered, and that a hypothetically well-trained [state actor] would have avoided the constitutional violation." *Id. at 440-41*.

Plaintiffs fail to plead any deficiency in the training or supervision of the City Marshals that was foreseeable and closely related to their alleged constitutional injury, or that actually caused the alleged deprivation of plaintiffs' rights. Plaintiffs argue (in completely conclusory fashion) that they "can say there is a lack of training where one alleged judgment debtor **[*43]** and another completely innocent passenger is physically snatched from a car blocked in mid traffic or where the innocent occupant of a car is terrorized for two hours." (Pl. Op. at 19.) But restating (their version of) the facts in this singular case does not, without more, support any conclusion that the City failed to train its agents, the Marshals, in proper car seizure techniques. In fact, by recounting the DoI's conclusion that the Marshals violated City policy and their own handbook when they forced plaintiffs to get out of their car in a moving traffic lane plaintiffs undercut their policy and practice and failure to train claims against the City -- while bolstering a claim of misconduct (though perhaps not misconduct of constitutional dimension) against the Marshals individually.

So Count Four must be dismissed. It is dismissed without prejudice and with leave to replead -- but plaintiffs and their counsel are warned that they will have to plead a great deal more than appears in the Amended Complaint to withstand either another motion to dismiss or a motion for sanctions.

E. Defendant Rose Has Failed to Plead a Claim for Indemnification

In his answer to plaintiffs' Amended Complaint, **[*44]** defendant Marshal Rose asserted a cross-claim against the City for indemnification. Specifically, defendant Rose alleges "If the Plaintiffs suffered damages as alleged in the Amended Complaint, due to any culpable conduct other than Plaintiffs' own culpable conduct, then such damages were entirely caused by the culpable conduct, negligent acts or omissions or commissions of defendant the City of New York." (Def. Rose Ans. to Am. Compl. ¶117.) The City moves for dismissal of this cross-claim. The motion is granted.

"Under New York law, 'A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the

other, unless the payor is barred by the wrongful nature of his conduct.'" *Panigeon v. Alliance Navigation Line, Inc., 96 Civ. 8350 (SAS), 1997 U.S. Dist. LEXIS 12239 at *18 (S.D.N.Y. Aug. 19, 1997)* (citing *City of New York v. Keene Corp., 132 Misc. 2d 745, 505 N.Y.S.2d 782, 784 (Sup. Ct. N.Y. Co. 1986)*, aff'd, *129 A.D.2d 1019, 513 N.Y.S.2d 1004, 129 N.Y.S.2d 1019 (1st Dep't 1987)* (quoting *Restatement, Restitution § 76*)).

New York courts require that a claimant who seeks indemnification must satisfy **[*45]** two elements: (1) the third party defendant must have owed a duty, express or implied, to indemnify the third-party plaintiff; and (2) the third defendant and the third-party plaintiff must have owed a duty to the plaintiff in the underlying action. *Sierra Rutile Ltd. v. Katz, 90 Civ. 4913 (JFK), 1995 U.S. Dist. LEXIS 15675, at *13 (S.D.N.Y. Oct 24, 1995)*. "The New York Court of Appeals [has] clearly stated that in order to state a claim for indemnification, it must be alleged that the third-party plaintiff and the third-party defendant breached a duty to plaintiff and it must be alleged that some duty to indemnify exists between them." *Id. at *13-14* (citations omitted). The classic indemnity claim exists, of course, in favor or a person who has been held vicariously liable for the tort of another. *McDermott v. New York, 50 N.Y.2d 211, 218, 406 N.E.2d 460, 428 N.Y.S.2d 643 (1980).*

In the instant matter, the Marshal's Answer alleges neither that the City owed a duty to the plaintiffs nor that Marshal Rose was compelled to fulfill a duty owed by the City to the Plaintiffs. It is the Marshal who by state law must indemnify the City (by way of his bond, see *N.Y. Civ. Court Act Art. 16*) -- not the other way around.

Had the **[*46]** plaintiffs been able to plead some sort of due process violation by the City connected to the procurement of the judgment, it is possible that a claim for indemnity would exist in favor of the Marshal and against the City, because the Marshal only seized plaintiffs' car when presented with a judgment and an execution. However, the Court has dismissed the direct due process claims against the City, and I anticipate that the analogous claims against the Marshal will eventually be dismissed as well.

CONCLUSION

For the reasons set forth above, New York City's motion to dismiss is granted to the extent of dismissing Counts Four (without prejudice), Five (with prejudice), Six (with prejudice), and Eleven (with prejudice); it is denied with respect to Count Seven (vicarious liability for common law torts of its agents). The City's motion to dismiss the cross-claim for indemnification asserted by the City Marshal is also granted. The Docket Clerk is instructed to remove Docket #20 from the Court's list of pending motions.

Dated: March 25, 2011

/s/ Colleen McMahon

U.S.D.J.