UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TERRENCE BATTLE and MUNIR PUJARA,

Plaintiffs,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

11 Civ. 3599 (RMB)

DECISION & ORDER

I. Background

On July 21, 2011, Terrence Battle ("Battle") and Munir Pujara ("Pujara," and collectively, "Plaintiffs") filed an amended complaint pursuant to 42 U.S.C. § 1983 against the City of New York ("City"), New York City Police Commissioner Raymond W. Kelly, and New York City Police Officers Wendelyn Costanza, Philip Facenda, Michael Miller, Tomas Reyes, and Jeff Torreda (collectively, "Defendants"). (See Am. Compl, dated July 21, 2011, ¶¶ 5–10.) Plaintiffs allege that the New York City Police Department ("NYPD") has engaged in a "practice of detaining, questioning, frisking, and searching" livery car passengers without their consent and without "independent suspicion of wrongdoing" under the auspices of the NYPD's Taxi-Livery Robbery Inspection Program ("TRIP"). (Am. Compl. ¶¶ 1, 3.)[1] Plaintiffs allege that NYPD officers "apparently believ[e]" that driver participation in the program means that passengers consent to searches and seizures, and that this practice violates of the Fourth and Fourteenth Amendments to the United States Constitution, the New York State Constitution, and New York common law. (Am. Compl. ¶¶ 3–4.) Plaintiffs seek, among other things, "an

[1] According to Plaintiffs, TRIP allows police officers to "pull over livery cars with decals indicating they have enrolled in the program, visually inspect the vehicles, and briefly question drivers," but does not authorize officers to search or seize passengers without independent suspicion or probable cause. (Am. Compl. ¶ 3.)

injunction against the practice," "a declaration that the NYPD's practice is unlawful," and compensatory damages. (Am. Compl. ¶ 4.)

On August 4, 2011, Defendants filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing, among other things, that (1) Plaintiffs lack standing to seek injunctive relief because they "cannot establish the requisite likelihood that they will be injured in the future"; (2) the Court lacks jurisdiction over Plaintiff's declaratory judgment claim because the dispute arises out of past searches and seizures and there is no ongoing controversy of "sufficient immediacy and reality"; and (3) the City cannot be liable because the alleged police misconduct did not arise out of a municipal "policy or custom." (Mem. of Law in Supp. of Mot. to Dismiss by Defs., dated Aug. 4, 2011 ("Defs. Mem."), at 4–5, 6, 7.)

Also on August 4, 2011, the New York State Federation of Taxi Drivers ("Taxi Federation") sought to join Defendants' motion to dismiss and file a motion to intervene as a defendant pursuant to Rule 24 of the Federal Rules of Civil Procedure, arguing, among other things, that the Taxi Federation is entitled to intervene as a matter of right because it has an interest in seeing TRIP "continue unabated in its current lawful context," and a "chill in police enforcement" would result in "an increase in violent and senseless crimes" against livery cab drivers. The Taxi Federation also argues that the Court should allow it to intervene "permissively." (Defs. Mem. at 13, 16.)

On September 9, 2011, Plaintiffs filed an opposition to Defendants' motion to dismiss (and to the Taxi Federation's motion to intervene), arguing, among other things, that (1) Plaintiffs have standing to seek injunctive relief because the NYPD is sufficiently likely to subject them to unlawful searches in the future based upon the facts that "a large number of livery cars" are enrolled in TRIP; that searching and seizing livery car passengers is "standard

practice under the TRIP program;" and that Plaintiffs "have little choice but to rely on livery cabs and regularly do so"; (2) the Court has jurisdiction over Plaintiffs' declaratory judgment claim because the complaint "alleges far more than just two prior acts and instead establishes an ongoing controversy"; and (3) there is a "widespread practice" of suspicionless TRIP taxi searches and seizures amounting to either a citywide "custom" or a municipal "failure to train." (Pls.' Mem. of Law in Opp'n to Defs.' Mot. to Dismiss and to Taxi Drivers Federation's Mot. to Intervene, dated Sept. 9, 2011 ("Pls. Opp'n"), at 8, 11, 12.) Plaintiffs also contend that the Taxi Federation is not entitled to intervene as a matter of right because its claimed interest is "not in the challenged misconduct in searching and detaining passengers, but in the program itself, which is not at issue in this case"; and the Taxi Federation should not be allowed to intervene permissively because it has "only an indirect interest in the NYPD continuing to deploy resources in the TRIP program," and its intervention will cause "needless delay." (Pls. Opp'n at 21, 24.)

On September 22, 2011, Defendants filed a reply. (See Mem. of Law in Further Supp. of Mot. to Dismiss by Defendants, dated Sept. 22, 2011 ("Defs. Reply").) The parties waived oral argument.

The Court accepts the following facts as true.

The NYPD created TRIP in 1994 to combat violence and crime against taxi drivers. (Am. Compl. ¶ 60; Defs. Mem. at 10.) Under TRIP, police officers may pull over livery cars with decals indicating that they have enrolled in the program, visually inspect the vehicles, and briefly question drivers. (Am. Compl. ¶ 3.) Driver participation is voluntary. (Defs. Mem. at 11.) Drivers participating in TRIP affix a decal to their cars stating, "This vehicle may be stopped and visually inspected by the police at any time to ensure driver's safety." (Am. Compl.

¶ 63.) Under TRIP, officers may not remove passengers from TRIP vehicles or frisk passengers without "reasonable suspicion of the existence of violent criminal activity or the possession of a weapon." (Am. Compl. ¶ 63.)

On October 30, 2010, Battle was riding in a livery cab in Brooklyn around 3:30 a.m. (Am. Compl. ¶¶ 11–12, 14, 16.) Officers Facenda, Miller, and Reyes pulled the cab over. (Am. Compl. ¶¶ 16–17.) One of the officers "asked the driver if everything in the vehicle was alright," and the driver responded that "everything was fine." (Am. Compl. ¶ 18.) One of the officers "ordered Mr. Battle to get out of the car" and "demanded identification." (Am. Compl. ¶¶ 20, 24.) Battle cooperated. (Am. Compl. ¶¶ 20, 24.) The police officers "patted" Battle down and searched his jacket pockets and bag. (Am. Compl. ¶¶ 25–26.) Battle "did not consent" to the searches. (Am. Compl. ¶ 25.) Battle asked the police officers why they were searching him, and one of the officers replied "that it was routine." (Am. Compl. ¶ 27.) The officer "pointed to a TRIP decal on the car," and told Battle that they were allowed to search him under TRIP. (Am. Compl. ¶ 27.) The officers stated that Battle "had consented to being questioned and searched when he entered a livery car that participated in TRIP," and that "their actions were part of a routine stop under TRIP." (Am. Compl. ¶ 29.) The officers released Battle, who was not charged with any crime. (Am. Compl. ¶¶ 28, 33.)

On September 3, 2010, Pujara was riding in a livery cab in the Bronx around 11:30 p.m. (Am. Compl. ¶ 42.) Officers Costanza and Torreda pulled the cab over. (Am. Compl. ¶¶ 42–43.) Officer Torreda "asked the driver if everything was alright," and the driver responded "that everything was fine." (Am. Compl. ¶ 44.) One of the officers asked Pujara "to get out of the car." (Am. Compl. ¶ 45.) Pujara asked the officers "if they had any suspicion or cause to ask him to leave the car," and the officers "said they did not." (Am. Compl. ¶ 46.) Pujara asked

what would happen if he did not leave the car, and the officers "told him he would be arrested." (Am. Compl. ¶ 46.) Pujara stepped out of the car, and the officers told him to "turn around, place his hands on the roof of the car, and spread his legs." (Am. Compl. ¶ 48.) Pujara told the officers "that they were not allowed to search him without his consent," and Officer Torreda replied that he could under TRIP. (Am. Compl. ¶¶ 48–49.) Officer Torreda "frisked [Pujara's] waist area and patted down and searched the front and back pockets of his pants." (Am. Compl. ¶ 51.) After the frisk, Pujara continued to dispute the legality of the police officers' actions, and Officer Torreda stated that "officers would continue frisking passengers during TRIP stops." (Am. Compl. ¶¶ 52–53.) The officers released Pujara and did not charge him with any crime. (Am. Compl. ¶¶ 54–55.)

For the reasons set forth below, Defendants' motion to dismiss and the Taxi Federation's motion to intervene are denied.[2]

II. Standard of Review

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)); see also Turkmen v. Ashcroft, 589 F.3d 542, 546 (2d Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556); see also Aguilar v. Immigration and Customs Enforcement Div. of

[2] The Court is not here ruling on the ultimate merits of Plaintiffs' claims.

the U.S. Dep't of Homeland Sec., --- F. Supp. 2d ---, 2011 WL 3273160, at *11 (S.D.N.Y. Aug. 1, 2011).

In order to intervene as a matter of right under Rule 24(a)(2), a party must "(1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action." R Best Produce, Inc. v. Shulman-Rabin Mktg. Corp., 467 F.3d 238, 240 (2d Cir. 2006) (internal quotation marks omitted). "The court considers substantially the same factors whether the claim for intervention is of right under Fed. R. Civ. P. 24(a)(2), or permissive under Fed. R. Civ. P. 24(b)(2)." Id. (internal quotation marks omitted); see also Marriott v. Cnty. of Montgomery, 227 F.R.D. 159, 167 (N.D.N.Y. 2005). "Failure to satisfy any one of these four requirements is a sufficient ground to deny the application." R Best Produce, 467 F.3d at 241 (internal quotation marks omitted).

III. Analysis

(1) Injunctive Relief

Defendants argue that each Plaintiff had only one alleged wrongful experience with NYPD officers under the TRIP program and "cannot establish the requisite likelihood that they will be injured in the future." (Defs. Mem. at 4–5.) Plaintiffs argue that the searches and seizures were "part of an official NYPD program—the TRIP program," "the [police] officers stated that such treatment of passengers was standard practice under the TRIP program," and Plaintiffs "have little choice but to rely on livery cabs and regularly do so." (Pl. Opp'n at 8.)

To establish standing for injunctive relief, a plaintiff "must demonstrate both a likelihood of future harm and the existence of an official policy or its equivalent." Shain v. Ellison, 356 F.3d 211, 216 (2d Cir. 2004) (emphasis in original). A plaintiff "cannot rely on past injury to

satisfy the injury requirement but must show a likelihood that he or she will be injured in the future." Deshawn E. by Charlotte E. v. Safir, 156 F.3d 340, 344 (2d Cir. 1998). "Assessing whether a threatened injury, by itself, is sufficiently probable to support standing is a qualitative, not quantitative inquiry that is highly case-specific," and "[t]he probability required logically varies with the severity of the probable harm." Amnesty Int'l USA v. Clapper, 638 F.3d 118, 137–38 (2d Cir. 2011) (internal quotation marks omitted). "One factor that bolsters a plaintiff's argument that the injury is likely to come to pass . . . is the existence of a policy that authorizes the potentially harmful conduct." Id. at 137.

Plaintiffs have adequately alleged a likelihood of future harm. See Shain, 356 F.3d at 216. Plaintiffs allege that a "large number of livery cars" are enrolled in TRIP, that livery car drivers report that that NYPD officers search and seize passengers without independent suspicion under TRIP, that livery cars are the "main form of for-hire passenger car service" in neighborhoods outside of Manhattan, and that Plaintiffs have "no other choice" but to continue to take livery cars. (Am. Compl. ¶¶ 38, 59, 60, 62, 66.) These allegations suggest that it is "reasonably likely" that Plaintiffs will encounter suspicionless searches and seizures under TRIP again. Amnesty, 638 F.3d at 139; see Deshawn E., 156 F.3d at 344–45.

Plaintiffs have also adequately alleged the existence of an official policy or its equivalent. See Shain, 356 F.3d at 216. They contend that NYPD officers have stated on multiple occasions that searches and seizures of livery car passengers are "routine," and that they are authorized under TRIP and would occur "more often." (Am. Compl. ¶¶ 27, 29, 49, 50, 53, 65.) The pleadings suggest a widespread custom or failure to train. See Okin v. Village of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 439–40 (2d Cir. 2009). That NYPD officers allegedly believe that the City has authorized suspicionless searches and seizures of passengers under

TRIP also suggests that Plaintiffs "can reasonably assume that government officials will actually engage in that conduct," thus enhancing the likelihood of future harm. Amnesty, 638 F.3d at 138; see Deshawn E., 156 F.3d at 344–45; Roe v. City of New York, 151 F. Supp. 2d 495, 504–06 (S.D.N.Y. 2001). The Court concludes that Plaintiffs' risk of future injury is "real and immediate," and not "hypothetical" or "conjectural." City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).

Accordingly, Plaintiffs have standing to seek injunctive relief.

(2) Declaratory Judgment

Defendants argue that the Court lacks jurisdiction to grant declaratory relief because there is "no present controversy between the parties," i.e., Plaintiffs' (two) prior incidents with the NYPD are not enough. (Defs. Reply at 6.) Plaintiffs argue that they have alleged "an ongoing controversy between the parties" which is "far more than just two prior acts." (Pls. Opp'n at 11.)

A district court may issue a declaratory judgment in "a case of actual controversy within its jurisdiction." New York Times Co. v. Gonzales, 459 F.3d 160, 165 (2d Cir. 2006). An actual controversy exists if "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." In re Prudential Lines Inc., 158 F.3d 65, 70 (2d Cir. 1998) (internal quotation marks omitted). While there is "no basis for declaratory relief where only past acts are involved," Chiste v. Hotels.com L.P., 756 F. Supp. 2d 382, 407 (S.D.N.Y. 2010), contingent liability "does not necessarily defeat jurisdiction of a declaratory judgment action. Rather, courts should focus on the practical likelihood that the contingencies will occur." Employers Ins. of Wausau v. Fox Entm't Group, Inc., 522 F.3d 271, 278 (2d Cir. 2008) (internal quotation marks omitted).

The Court may issue declaratory relief (if Plaintiffs prove their case) because there is a practical likelihood that Plaintiffs will again experience suspicionless searches and seizures under TRIP. See id. Plaintiffs contend that there is an unlawful, "routine," ongoing practice by the NYPD relating to an official government program, TRIP, in which a substantial number of livery cabs are enrolled. (Am. Compl. ¶¶ 27, 29, 38, 49, 50, 53, 59, 60, 62, 65). Because a practical likelihood of future harm exists, Wausau, 533 F.3d at 278, a declaratory judgment may serve "a useful purpose in clarifying or settling the legal issues involved" and may "offer relief from uncertainty." Duane Reade, Inc. v. St. Paul Fire and Marine Ins. Co., 411 F.3d 384, 389 (2d Cir. 2005).

(3) Municipal Liability

Defendants argue that Plaintiffs have failed to allege a municipal pattern or practice of police misconduct that is sufficiently persistent or widespread "to acquire the force of law." (Defs. Reply at 7.) Plaintiffs counter that they have alleged a widespread practice of suspicionless searches and seizures that amounts to a citywide "custom" or a municipal "failure to train." (Pls. Opp'n at 12.)

Under Monell v. Dep't of Social Servs. of City of New York, 436 U.S. 658, 690–91 (1978), Section 1983 liability may extend to a municipality where "that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation." Okin, 577 F.3d at 439 (internal quotation marks omitted). A municipality may be found to have a custom that gives rise a constitutional violation if, "when faced with a pattern of misconduct, it does nothing, compelling the conclusion that it has acquiesced in or tacitly authorized its subordinates' unlawful actions." Id. (internal quotation marks omitted). Municipal liability may also be premised upon a failure to train employees when inadequate

training "reflects deliberate indifference to constitutional rights," i.e., where (1) "a policymaker knows to a moral certainty that her employees will confront a given situation"; (2) "the situation either 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) "the wrong choice by the employee will frequently cause the deprivation of a citizen's constitutional rights." Id. at 440 (internal quotation marks omitted).

Plaintiffs have adequately alleged a widespread and unlawful municipal custom, by arguing that NYPD officers allegedly understand that searching and seizing livery car passengers is "routine," is authorized under TRIP, and will occur "more often" in the future. (Am. Compl. ¶¶ 27, 29, 49, 50, 53, 65.) This alleged practice, presumably supported by reports from other livery car drivers (Am. Compl. ¶ 66), appears to be "so widespread as to have the force of law." Bryan County Comm'rs v. Brown, 520 U.S. 397, 404 (1997). Plaintiffs have alleged that the City has "acquiesced in" or "tacitly authorized" this custom, Okin, 577 F.3d at 439, and that NYPD officers believe their actions are "part of a larger crime-fighting strategy," (Am. Compl. ¶ 65). See Colon-Rodriguez v. New York City Dep't of Correction, No. 07-cv-8126, 2009 WL 995181, at *6–8 (S.D.N.Y. Apr. 13, 2009).

Plaintiffs have also alleged municipal liability under a failure to train theory, arguing that NYPD officers (and passengers) may continue to confront the issue of searching and seizing livery car passengers because TRIP is an official NYPD program. (Am. Compl. ¶¶ 3, 60.); see Okin, 577 F.3d at 440. Plaintiffs plausibly contend that additional training or supervision would assist officers in conducting only authorized searches or seizures of passengers under TRIP. (See Am. Compl. ¶ 3); Okin, 577 F.3d at 440. Plaintiffs also describe the absence of any TRIP guidelines in the NYPD Patrol Guide as a "specific deficiency in the [C]ity's training program"

that is "closely related to the ultimate injury." Okin, 577 F.3d at 440; (see Am. Compl. ¶ 68.) Plaintiffs also allege that further suspicionless searches and seizures of passengers may result in future violations of Plaintiffs' Fourth Amendment rights. (See Am. Compl. ¶¶ 4, 73, 74); Okin, 577 F.3d at 440.

Accordingly, Defendants' motion to dismiss is denied.

(4) No Basis for Intervention

The Taxi Federation argues that it has an interest in seeing TRIP "continue unabated in its current lawful context," and, if Plaintiffs were to prevail, that it "could lead to the gutting of [TRIP] or its outright dismantling, thereby resulting in a concomitant spike in crimes against the cab drivers." (Defs. Mem. at 13.) The Taxi Federation also argues that the Court should allow it to intervene permissively for substantially the same reasons. (Defs. Mem. at 16.) Plaintiffs argue that the Taxi Federation does not have a cognizable interest in this case because Plaintiffs "do not challenge the lawfulness of the TRIP program itself, but only the [alleged] unlawful search and seizure of passengers." (Pls. Opp'n at 18.) Plaintiffs also argue that the Court should not allow the Taxi Federation to intervene permissively because it does not assert a common "claim or defense," and its intervention would cause "needless delay." (Pls. Opp'n at 24.)

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides that the court must permit a person to intervene who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). An interest under Rule 24(a)(2) must be "direct, substantial, and legally protectable." Person v. New York State Bd. of Elections, 467 F.3d 141 (2d Cir. 2006). "An interest that is remote from the subject matter of the proceeding, or

that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule." United States v. Peoples Benefit Life Ins. Co., 271 F.3d 411, 415 (2d Cir. 2001). Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure provides that the court may permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). The "principal consideration" for permissive intervention is "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." U.S. Postal Serv. v. Brennan, 579 F.2d 188, 191 (2d Cir. 1978).

The Taxi Federation may not intervene as a matter of right because its interest is too remote and indirect. See Peoples Benefit Life Ins. Co., 271 F.3d at 417; Crown Fin. Corp. v. Winthrop Lawrence Corp., 531 F.2d 76, 77 (2d Cir. 1976). That is, Plaintiffs contest the legality of the NYPD's allegedly unlawful and impermissible searches and seizures of livery car passengers. (See Am. Compl. ¶ 1.) They do not challenge the legality or continuation of the TRIP program, which is the Taxi Federation's main concern. (See Defs. Mem. at 13.) Accordingly, the Taxi Federation does not show that it has a cognizable interest in this case requiring it to intervene, or that its interest would be impaired absent intervention. See MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc., 471 F.3d 377, 390; Louis Berger Grp., Inc. v. State Bank of India, --- F. Supp. 2d ---, 2011 WL 3585504, at *3 (S.D.N.Y. Aug. 9, 2011).

The Court also denies the Taxi Federation's request to intervene permissively because it does not assert any "claim or defense [relating to passengers] that shares with the main action a common question of fact or law" as required by Rule 24(b)(1)(B). Fed. R. Civ. P. 24(b)(1)(B). The Taxi Federation's intervention might well serve to "unduly delay or prejudice the adjudication of the rights of the original parties" because additional parties are often the source

of additional discovery, objections, briefs, arguments, and motions. British Airways Bd. v. Port Auth. of New York and New Jersey, 71 F.R.D. 583, 585 (S.D.N.Y. 1976); see Rodriguez v. Pataki, 211 F.R.D. 215, 219 (S.D.N.Y. 2002). The City is more than capable (adequate) to represent the Taxi Federation's interest in preserving the TRIP program, see Butler, Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171, 179 (2d Cir. 2001), and the City will no doubt "vigorously litigate" this case, Liz Claiborne, Inc. v. Mademoiselle Knitwear, Inc., No. 96 Civ. 2064, 1996 WL 346352, at *3 (S.D.N.Y. June 25, 1996). To the extent that Taxi Federation members may have had relevant experiences with TRIP, they may participate as fact witnesses, and the Taxi Federation may request to participate as an amicus curiae. See British Airways, 71 F.R.D. at 585 ("Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention.")

IV. Conclusion

For the foregoing reasons, Defendants' motion to dismiss [#25, #27] and the Taxi Federation's motion to intervene [#8, #28] are denied.

Dated: New York, New York
January 13, 2012

RMB

RICHARD M. BERMAN, U.S.D.J.