SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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THE BRONX FREEDOM FUND,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE STATE OF NEW YORK

Defendants.

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INDEX NO. 156876/2024

MOTION DATE 11/21/2024, 11/21/2024

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 42, 43, 44, 45, 46, 47, 53, 57

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 49, 50, 51, 52, 58

were read on this motion to/for DISMISSAL.

In this action plaintiff, The Bronx Freedom Fund, a 26 United States Code Service § 501(c)(3) not-for-profit bail fund, alleges that defendants, The City of New York ("City"), and The State of New York ("State") violated their rights under the New York Constitution, to freedom from unreasonable seizures, and deprivation of property without due process of law, by unlawfully issuing forfeiture orders for cash bail that plaintiff provided, without a court order. Plaintiff also asserts common law claims based upon the same cash bail forfeitures. Defendants, each move pre-answer to dismiss the complaint as against them. Plaintiff seeks a declaratory judgment that defendants' conduct violated its constitutional rights, an injunction against defendants' policies, and a money judgment returning the allegedly unlawfully forfeited bail. Plaintiff also seeks an order certifying this case as a class action, to represent a class of plaintiffs it alleges have suffered similar constitutional violations as a result of defendants alleged practices.

BACKGROUND

Plaintiff is a 501(c)(3) not-for-profit charitable bail fund located in the Bronx, New York providing bail assistance to indigent criminal defendants facing pretrial detention for misdemeanors (NYSCEF Doc No 10 ¶ 13).

When someone is charged with a crime in New York State they may be entitled to post bail in order to be released during the pendency of the criminal action (*id*. at ¶ 17; *see* CPL § 500.10). Cash bail is a means to ensure that criminal defendants return to court, the money is returned to the person or entity that posts the bail at the conclusion of the proceedings, as long as the defendant complies with the legal process (NYSCEF Doc No 10 at ¶¶ 17-19). Plaintiff offered bail assistance to criminal defendants who could not afford to post bail, and made the payments to City jails and/or County courts (*id*. at ¶ 18).

Forfeiture of bail is governed by Criminal Procedure Law § 540.10 which states:

> 1. If, without sufficient excuse, a principal does not appear when required or does not render himself amenable to the orders and processes of the criminal court wherein bail has been posted, the court must enter such facts upon its minutes and the bail bond or the cash bail, as the case may be, is thereupon forfeited.
>
> 2. If the principal appears at any time before the final adjournment of the court, and satisfactorily excuses his neglect, the court may direct the forfeiture to be discharged upon such terms as are just. If the forfeiture is not so discharged and the forfeited bail consisted of a bail bond, the district attorney, within one hundred twenty days after the adjournment of the court at which such bond was directed to be forfeited, must proceed against the obligor or obligors who executed such bond, in the manner prescribed in subdivision three. If the forfeited bail consisted of cash bail, the county treasurer with whom it is deposited shall give written notice of the forfeiture to the person who posted cash bail for the defendant[1] may at any time after the final adjournment of the court or forty-five days after notice of forfeiture required herein has been given, whichever comes later, apply the money deposited to the use of the county.

Bail cannot be forfeited until a court issues an order that the defendant's absence is "without sufficient excuse." (*People v Nicholas*, 97 NY2d 24, 29 [2001]). Plaintiff alleges however, that state court administrators issue forfeiture orders (NYSCEF Doc No 10 at ¶ 27). More specifically clerks in the Bronx County Criminal Court fill out, process, and submit bail forfeiture forms to the New York City Department of Finance ("DOF")[1] without a forfeit order issued by a judge (*id*. at 27 – 38). Plaintiff alleges that an examination of 18 bail forfeitures at the Bronx Criminal Court revealed that 13 of the cases did not include a forfeiture court order (*id*. at ¶ 46).[2]

Plaintiff's four causes of action against both defendants are for: (1) Violations of the New York State Constitution NY Const., Article I,§ 6 (Due Process) and § 12 (Unreasonable Seizure); (2) Money Had and Received; (3) Unjust Enrichment; and (4) Conversion.

DISCUSSION

I. Constitutional Claims

Defendants argue that plaintiff's claims for violations of the New York Constitution fail as a matter of law because, the claims are not justiciable, because plaintiff does not have standing to bring the suit, and that plaintiff has failed to state a claim on which relief can be granted. Defendants argue that when a state law provides adequate alternative remedies to the alleged

[1] The DOF is a City agency charged with collecting tax and other revenue for the City, including the proceeds from forfeited cash bails. (NYSCEF Doc No 10 at ¶ 14). The State is responsible for the operation, financing, and administration of the New York State Courts (*id*. at ¶ 15).

[2] Plaintiff initially filed this putative class action in the Southern District of New York, in December 2021 (see SDNY Docket No. 1:21-cv-10614-JPC-BCM (the "SDNY Action")). The Complaint in the SDNY Action included claims against the City and the DOF and various individuals in their official capacities as agents of the State (NYSCEF Doc No 10 ¶ 6). In the SDNY action plaintiff brought the same state law claims as here, in addition to violations of the U.S. Constitution pursuant to § 1983 (*id.* at ¶ 7). On March 28, 2024, the Southern District dismissed without prejudice the federal claims against the state defendants, for lack of subject matter jurisdiction, and it dismissed with prejudice the federal claims against the City (*id*. at ¶ 10; see also NYSCEF Doc No 2). The court declined to exercise supplemental jurisdiction over the remaining state law claims, without prejudice to refiling in state court (*id*.).

injury, there is no cause of action available for a constitutional tort. They further argue that plaintiff has not properly alleged a due process violation or an unlawful seizure pursuant to the New York State Constitution.

a. Justiciability

The State argues that plaintiff's constitutional claims must be dismissed because they are not justiciable, since plaintiff is seeking to remedy an issue for which it lacks standing.

"[I]n order to warrant a determination of the merits of a cause of action, [the] party requesting relief must state a justiciable claim—one that is capable of review and redress by the courts at the time it is brought for review" (*Schulz v Cuomo*, 133 AD3d 945, 947 [3d Dept 2015]). "Cases that have presented nonjusticiable controversies involve political questions, advisory opinions, moot issues and those where there is no standing to maintain an action" (*Roberts v Health and Hosps. Corp.*, 87 AD3d 311, 322 [1st Dept 2011]). "A controversy is justiciable when the plaintiff in an action for a declaratory judgment has an interest sufficient to constitute standing to maintain the action" (*Sullivan v New York State Joint Commn. on Pub. Ethics*, 207 AD3d 117, 130 [3d Dept 2022]).

"New York courts [treat] standing as a common-law concept[3], requiring that the litigant have something truly at stake in a genuine controversy" (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 812 [2003]). In New York, to establish standing a plaintiff must demonstrate an injury in fact, that falls within the zone of interests sought to be protected by the statute or right under which the suit arose (*Fritz v Huntington Hosp.*, 39 NY2d

[3] In contrast, "[t]he standing requirement in Federal actions has been grounded in the Federal constitutional requirement of a case or controversy" as derived from Article III of the US Constitution (*Socy. of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 772 [1991]; *see* U.S. Const., art. III, § 2, cl. 1). As a result, state courts are not bound by the federal constitutional standing doctrine, although to note New York courts have adopted the prudential requirement "zone of interest" requirement that is also present in federal courts (see *US Bank N.A. v Nelson*, 36 NY3d 998, 1003 [2020]).

339 [1976]). Plaintiff claims violations of the New York State Constitution's prohibition on deprivation of property without due process of the law, (NY Const art. I, § 6) and prohibition of unreasonable seizures (NY Const art. I, § 12).

i. Zone of Interests

NY Const art. I, § 6 provides in relevant part, "No person shall be deprived of life, liberty or property without due process of law." "The touchstone of due process is protection of the individual against arbitrary actions of the government" (*County of Nassau v Canavan*, 303 AD2d 355, 356 [2d Dept 2003]). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner" (*Matter of Kigin v State of New York Workers' Compensation Bd.*, 24 NY3d 459, 469 [2014]). Generally, due process is satisfied when a party is given, after notice, a right to be heard prior to the deprivation of property (*id*.).

When applied to the forfeiture of bail, since the proceedings that precede a forfeiture occur in open court, there is no due process requirement that prior notice be given to the person who or entity that provides the cash bail (*People v Castro*, 119 Misc 2d 787 [SC NY Co 1983], *affd*, 111 AD2d 910 [2d Dept 1985]). However, "statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause" (*People ex rel. Neville v Toulon*, 43 NY3d 1, 9 [2024]). In *People v. Nicholas*, the Court of Appeals determined that pursuant to CPL § 540.10(1), because bail is only forfeited when there is no sufficient excuse, a court is required to inquire whether a non-appearance is without excuse and that "the court must enter such facts upon its minutes" and prepare a formal order to be signed to effectuate a forfeiture (*Nicholas*; 97 NY2d at 30).

Here, plaintiff alleges that its bail was forfeited without a court order, thus denying it the due process right created by CPL § 540.10 and required by the New York State Constitution.

Since plaintiff alleges that the defendants improperly retained its cash bail without due process, plaintiff's claims are within the zone of interest of the rights created by the New York State Constitution and CPL § 540.10.

As for plaintiff's constitutional claims that arise from the constitutional prohibition of unreasonable seizures, NY Const art. I, § 12 provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

While, a cause of action asserting an unconstitutional search or seizure is most often brought against law enforcement agencies, it also encompasses "administrative inspections designed to enforce a regulatory scheme" (*Owner Operator Ind. Drivers Assn., Inc. v New York State Dept. of Transportation*, 40 NY3d 55, 62 [2023]). "The motive force for the constitutional safeguards precluding unreasonable searches and seizures is protection against arbitrary governmental invasion of privacy" (*People v Hodge*, 44 NY2d 553, 557 [1978] [internal citations omitted]). "The protection of personal privacy, *not property rights*, is the primary object of constitutional limitations on search and seizure (*People v Kreichman*, 37 NY2d 693, 698 [1975]). Here, plaintiff's alleged injury does not arise out of an invasion of its privacy rights, but rather for funds voluntarily turned over to defendants, that were then forfeited in violation of lawful procedure. Therefore, a "seizure" within the meaning of NY Const art. I, § 12 did not occur here, and plaintiff cannot establish "an injury in fact, that falls within the zone of interests sought to be protected by" this constitutional right (*Fritz*, 39 NY2d at 339), and accordingly plaintiff's claims alleging a cause of action for a constitutional tort arising from an alleged unreasonable seizure will be dismissed.

ii. Injury in Fact

Plaintiff has standing to seek redress for its claimed past injuries because plaintiff alleges that, since 2016, it has forfeited cash bail in 213 cases, amounting to $217,151, often without a court order (NYSCEF Doc No 10 at ¶ 21). Since plaintiff alleges that the manner in which this cash bail was forfeited violated its due process rights, plaintiff has standing to recover this money. However, plaintiff also seeks a declaratory judgment that the City's conduct of improperly forfeiting bail violated plaintiff's rights, and an injunction to stop this policy, in other words, prospective relief. "[R]elief that serves to remedy a past violation of the law is retrospective in nature. On the other hand, prospective relief seeks to end an ongoing or future violation of law" (*Matter of Giaquinto v Commr. of New York State Dept. of Health*, 11 NY3d 179, 188 [2008]). The Southern District highlighted this distinction, in dismissing plaintiff's claims seeking injunctive relief for a lack of standing but determined that plaintiff did have standing to bring claims based on past injuries (NYSCEF Doc No 45 at p 11 – 16).

Establishing "the injury-in-fact element [for prospective relief] requires a showing that [a plaintiff] will actually be harmed by the challenged action" (*Matter of Brennan Ctr. for Justice at Nyu School of Law v New York State Bd. of Elections*, 159 AD3d 1299, 1300 [3d Dept 2018]) "[T]he injury must be more than conjectural" (*id*.). However, the Court of Appeals has "recognized that standing rules should not be heavy-handed [and is] reluctant to apply [standing] principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review" (*Matter of Assn. for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation*, 23 NY3d 1, 6 [2014]). Indicative of the less strict standing requirements in New York courts compared to federal courts is that in New York a "claim that a party lacks standing can be waived" (*Dawn II. v Natyssa JJ*., 223 AD3d 982, 983 [3d Dept

2024]) as compared to federal courts where Article III standing is a jurisdictional question, meaning if a plaintiff lacks standing the federal court cannot hear the case because it lacks subject matter jurisdiction over the matter (*see Lugo v City of Troy, New York*, 114 F4th 80 [2d Cir 2024]).

The State argues that plaintiff lacks standing to pursue a declaratory judgment, because it has failed to articulate that it will actually suffer harm that is "sufficiently concrete and particularized to warrant judicial intervention" (*Stevens v New York State Div. of Criminal Justice Services*, 206 AD3d 88, 98 [1st Dept 2022]). The State contends that the injuries alleged by plaintiff are "far too generalized and speculative to satisfy the injury in fact requirement that would confer plaintiff with standing" (*Bloomfield v Cannavo*, 123 AD3d 603, 605 [1st Dept 2014]). Additionally, a plaintiff "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending" *Greco v Syracuse ASC, LLC*, 218 AD3d 1156 [4th Dept 2023]).

For example in, *Matter of Niagara County v Power Auth. of State*, individual consumers of hydroelectric power, were found to lack standing to challenge decisions made by the New York Power Authority, a state public power utility, because they failed to allege an injury-in fact, and while the petitioners alleged that the agency's decisions may result in future rate increases, the court held that "the mere possibility of a future rate increase, without more, is insufficient to establish standing" (82 AD3d 1597 at 1599 [4th Dept 2011]). In contrast, in *Parents for Educ. and Religious Liberty in Schools v Young*, a group of private schools that sought to challenge newly enacted regulation which had yet to be enforced, had standing as they alleged facts that they were reasonably certain to suffer imminent harm from the regulations when enforced (230 AD3d 83 [3d Dept 2024]).

Similarly, in *Sullivan v New York State Joint Commn. on Pub. Ethics*, the plaintiff, an advocate who, among other measures, rented advertisement space to express support and attempt to influence the New York Legislature to pass a proposed bill was later notified by the New York State Joint Commission on Public Ethics ("JCOPE") that, pursuant to the Lobbying Act she may be required to register and report her activities with the agency (*Sullivan*, 207 AD3d at 120-21). The plaintiff refused to cooperate and JCOPE notified her that while it would not take action at this time, it warned plaintiff that if she undertook future activity covered by the Lobbying Act, the registering and reporting requirements would again be triggered (*id*. at 121). Plaintiff, then filed suit seeking a declaratory judgment that enforcement of the Lobbying Act was unconstitutional both on its face, and as applied to plaintiff's activities (*id*.). The court rejected JCOPE's argument that because JCOPE had not charged plaintiff with a violation of the Lobbying Act, plaintiff lacked standing to bring the action (*id*. at 132). The court held that "the existence of a credible threat that the challenged law will be enforced [was] sufficient to establish the injury required for a justiciable controversy" (*id*.).

Here, plaintiff argues a justiciable controversy exists because plaintiff has plead an injury-in-fact, that is "sufficiently concrete and particularized to warrant judicial intervention" (*Stevens*, 206 AD3d at 98). Plaintiff alleges that, since 2016, it has forfeited cash bail in 213 cases, totaling $217,151, often without a court order (NYSCEF Doc No 10 at ¶ 21). Further, plaintiff claims that upon examination of 18 of the forfeitures, 13 did not include a court order (*id*. at ¶ 46). The Amended Complaint further alleges that plaintiff currently has $25,350 in cash bail currently outstanding which may also be forfeited due to the allegedly unconstitutional policy (*id*. at ¶ 22). However, only $3,600 of that outstanding cash bail is in Bronx County (*id*.). As noted by the Southern District, an "injury-in-fact" as to this $3,600 would only occur if:

> (1) a defendant associated with that bail remains in criminal proceedings in the Bronx; (2) that defendant misses a court date and has a bench warrant issued for his arrest; (3) on the basis of that bench warrant alone (i.e., without a judicial order of forfeiture), the Bronx County Criminal Court forfeits the defendant's bail without a court order; and (4) the DOF refuses to return such forfeited bail.

(NYSCEF Doc No 45 at 11 – 12).

Furthermore, at this juncture, plaintiff stopped posting cash bail for indigent criminal defendants (*see* NYSCEF Doc No 10 at p 27 – 28). While plaintiff avers that it may resume posting cash bail if New York State enacts certain bail reform measures, considering the speculative nature of this chain of events, plaintiff has failed to satisfy the requisite standing requirements to seek a declaratory judgment because it has failed to establish it will actually suffer harm that is "sufficiently concrete and particularized" concerning the $3,600 in outstanding cash bail (*Stevens*, 206 AD3d at 98). Therefore, plaintiff lacks standing to seek prospective relief for the $3,600 pending cash bail.

However, plaintiff has standing for its claims alleging past injuries arising from a violation of its due process rights, and the cause of action will not be dismissed.

b. Failure to State a Cause of Action

When reviewing a "motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), [courts] must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every reasonable inference, and determine only whether the facts, as alleged fit within any cognizable legal theory" (*Bangladesh Bank v Rizal Commercial Banking Corp.*, 226 AD3d 60, 85-86 [1st Dept 2024] [internal quotations omitted]). "In making this determination, [a court is] not authorized to assess the merits of the complaint or any of its factual allegations" (*id*. at 86 [internal quotations omitted]). Further "[i]n assessing a motion under CPLR 3211(a)(7), ... the criterion is whether the proponent of the pleading has a cause of

action, not whether [they have] stated one" (*Eccles v Shamrock Capital Advisors, LLC*, 2024 NY Slip Op 02841 [Ct App May 23, 2024] [internal quotations omitted]).

i. Alternative Remedies

Defendants argue that plaintiff cannot maintain a cause of action for violations of the New York State Constitution, when there are alternative remedies for relief available. Plaintiff argues that the alternative remedies proposed by defendants do not adequately address the deprivations alleged in the Complaint.

"A constitutional tort is any action for damages for violation of a constitutional right against a government or individual defendants" (*Brown v State*, 89 NY2d 172, 177 [1996]). As stated above, plaintiff has sufficiently plead that the defendants deprived it of its due process rights by failing to adhere with the statutory requirements of CPL § 540.10 by forfeiting plaintiff's cash bail without a court order. However, because plaintiff has failed to plead a cause of action for a violation of the prohibition on unreasonable seizures, for the reasons previously stated, the portions of the cause of actions seeking relief based upon NY Const art. I, § 12 will accordingly be dismissed.

A plaintiff "has no private right of action to recover damages for violations of the New York State Constitution [when] the alleged wrongs could be redressed by [other means]" (*Berrio v City of New York*, 212 AD3d 569, 569-70 [1st Dept 2023]). For example, in *Berrio*, the court held that the plaintiff could not maintain an action for violations of the New York State Constitution, as the alleged wrongs could be redressed by her common-law claim for false imprisonment (*id.*). A cause of action for violation of the New York State Constitution can only be maintained where it is necessary to ensure full realization of a plaintiff's constitutional rights (*Brown*, 89 NY2d at 186).

Defendants argue that there are statutory provisions available to plaintiff that vitiate plaintiff's claims under the New York State Constitution. Defendants cite CPL § 540.30 as a provision affording parties a private civil remedy to recover forfeited bail.

CPL § 540.30 states:

> 1. After the forfeiture of a bail bond or cash bail, as provided in section 540.10, an application for remission of such forfeiture may be made to a court as follows:
> (a) If the forfeiture has been ordered by a superior court, the application must be made in such court;
> (b) If the forfeiture has been ordered by a local criminal court, the application must be made to a superior court in the county, except that if the local criminal court which ordered the forfeiture was a district court, the application may alternatively be made to that district court.
> 2. The application must be made within one year after the forfeiture of the bail is declared upon at least five days notice to the district attorney and service of copies of the affidavits and papers upon which the application is founded. The court may grant the application and remit the forfeiture or any part thereof, upon such terms as are just. The application may be granted only upon payment of the costs and expenses incurred in the proceedings for the enforcement of the forfeiture.

CPL § 540.30 limits applications for the remission of forfeiture to cases where the forfeiture is ordered by either the superior court, or a local criminal court, and here, plaintiff is alleging that the forfeitures are being ordered absent a court order. Further, the remedies are limited to forfeiture of bail pursuant to CPL § 540.10 which provides that:

> 1. If, without sufficient excuse, a principal does not appear when required or does not render himself amenable to the orders and processes of the criminal court wherein bail has been posted, *the court must enter such facts upon its minutes* and the bail bond or the cash bail, is thereupon forfeited.

In *Nicholas*, the Court of Appeals held that the one-year period for remission applications in CPL § 540.30, "is not triggered until a court directs forfeiture of the bail bond" (97 NY2d 24,

29 [2001]). The statute does not provide a remedy for instances as plaintiff alleges, where bail is forfeited without a court order. Additionally, since plaintiff alleges that when bail was forfeited without a court order, it did not receive notice of the forfeiture until after making inquiries, often occurring years after the forfeiture occurred, the CPL § 540.30 remedy was not available since it was often beyond the one-year time limitation pursuant to CPL § 540.30(2). Therefore, CPL § 540.30 does not address the due process implications that bail forfeiture absent a court order allegedly violates, and as such a cause of action for a violation of the New York Constitution is "necessary and appropriate to ensure the full realization of the rights" they seek to protect (*Brown*, 89 NY2d at 189).

Similarly, defendants' arguments that plaintiff could move under CPLR § 5015 to vacate the judgment imposing bail forfeiture suffers from the same deficiency, in that CPLR § 5015 provides a procedural mechanism to vacate a court order issued by a judge and again, here plaintiff's claims are that bail forfeitures are at times not issued by a judge. While defendants cite *People v Empire Bonding & Ins. Co.* which held that a CPLR § 5015 motion may be used "to vacate a [bail forfeiture] judgment entered by the People that was beyond their power" (196 AD3d 21, 26 [1st Dept 2021])[4], a CPLR § 5015 motion, permits relief from a judgment or order only by the court which rendered such judgment or order, it does not however provide a mechanism to seek relief from clerks who allegedly acted beyond the scope of their authority.

[4] *Empire Bonding* held that a party may move to vacate a judgement of bail forfeiture that was untimely entered by the State and that since, the untimely entering of that judgement is beyond the power of the State, the movant would not be limited by the one-year time limitation of CPL § 540.10(2), since that statute allows for remittance of a forfeiture made by a legal judgment and order. However, since the judgment in *Empire Bonding* was entered in violation of statutory power, the CPLR § 5015 motion would not be subject to limitations. In *Empire Bonding* the movant sought to vacate an order and judgment issued by a judge. Here, the forfeitures were not issued by a judge and therefore, CPLR § 5015 is inapplicable.

Defendants arguments that plaintiff could avail itself of Judiciary Law § 798,[5] and General Municipal Law § 99-m[6] are equally unavailing as Judiciary Law § 798 is "applicable only to applications for bail remission, and has no application to vacatur of forfeitures" (*Castro*, 119 Misc 2d at 791), and while General Municipal Law § 99-m references remittance of bail and directs that upon order by an appropriate court that the funds should be returned, it does not provide a mechanism for how a person may seek that relief.

Therefore, plaintiff may maintain the causes of action seeking relief for the alleged due process violations, but not the alleged unreasonable seizures claims.

ii. Policy and Procedure

Defendants also argue that plaintiff's due process claim fails because the alleged forfeitures without court orders did not occur as a result of an established state procedure or policy. "When reviewing alleged procedural due process violations, the Supreme Court has distinguished between (a) claims based on established state procedures and (b) claims based on random, unauthorized acts by state employees" (*Hellenic Am. Neighborhood Action Comm. v*

[5] Judiciary Law § 798 provides:
Upon the application of a person, who has been fined by a court, or of a person whose recognizance has become forfeited, or of his surety or of a person who has posted cash bail, or bail by credit card or similar device which has been forfeited, the county court of the county in which the term of the court was held, where the fine was imposed, or the recognizance taken, may, except as otherwise prescribed in section seven hundred and ninety-nine; upon good cause shown, and upon such terms as it deems just, make an order, remitting the fine, wholly or partly, or the forfeiture of the recognizance, or part of the penalty thereof; or it may discharge the recognizance. If a fine so remitted has been paid, the county treasurer, or other officer, in whose hands the money remains, must pay the same, or the part remitted, according to the order.

[6] General Municipal Law § 99-m provides in relevant part:
Except as otherwise provided by an order issued pursuant to section 420.10 of the criminal procedure law, upon the exoneration or remission of the bail, the money so deposited, less such fee, shall, by order of the appropriate court, be refunded to the person who originally deposited such money. Upon a termination of the criminal action or proceeding in favor of the accused, as defined in subdivision two of section 160.50 of the criminal procedure law, the two per centum fee so retained shall, by order of the appropriate court, be refunded to the person who originally deposited such money.

City of New York, 101 F3d 877, 880 [2d Cir 1996]). When a deprivation is based on random and unauthorized acts, due process is satisfied so long as a post deprivation remedy is offered (*id*.).[7]

"The distinction between random and unauthorized conduct and established state procedures, however, is not clear-cut" (*Rivera-Powell v New York City Bd. of Elections*, 470 F3d 458, 465 [2d Cir 2006]). "[T]he acts of high-ranking officials who are ultimate decision-maker[s] and have final authority over significant matters, even if those acts are contrary to law, should not be considered 'random and unauthorized' conduct for purposes of a procedural due process analysis (*id*.). Here, plaintiff alleges that it asked William Kalish, the Chief Clerk of the Bronx Criminal Court, about bail forfeitures not issued by a judge and he reiterated that the policy of his office was to proceed with bail forfeitures absent a court order. Considering, the alleged number of forfeitures without court orders, and the approval of the policy by the Chief Clerk, and the early stage of the litigation, plaintiff states a claim that the alleged forfeitures were based on policy approved by high level officials and the claims will not be dismissed. Similarly, as for the claims against the City, plaintiff has also sufficiently alleged that the number of times the City officials effectuated forfeiture orders issued to them absent a judicial order, is an official act depriving plaintiff of its due process rights.

Accordingly, plaintiff has sufficiently plead a cause of action for an unconstitutional violation of its due process rights and the claim will not be dismissed.

II. Common Law Claims

In the Amended Complaint, plaintiff asserts common-law claims for Money Had and Received; Unjust Enrichment; and Conversion stating that the allegations are against "Defendants" (NYSCEF Doc No 10 at ¶ 84 – 92). However, in its memorandum of law in

[7] As stated above, even if the deprivations are found to be based on random and unauthorized acts, the inadequacy of the post-deprivation remedies, also favors denying dismissal of the due process violation claims.

opposition to the State's motion to dismiss, plaintiff states that "The Fund's common law claims are only alleged as against the City" (NYSCEF Doc No 53 at p 8 n1). Accordingly, these causes of action will be dismissed as against the State (*Siegel v Delta Airlines, Inc.*, 227 AD3d 516 [1st Dept 2024]).

The City argues that the common law claims must be dismissed because plaintiff failed to file a notice of claim pursuant to New York General Municipal Law §§ 50-e and 50-i. Plaintiff argues that since this case has been litigated since December 2021, initially in federal court, that the City has constructively waived the Notice of Claim requirement, or alternatively, since the City would suffer no prejudice that the court should grant it leave to serve a late Notice of Claim.

GML § 50-e provides that:

> (a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, … the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises.

"General Municipal Law § 50-e (5) confers upon the court the discretion to determine whether to grant or deny leave to serve a late notice of claim within certain parameters" (*Thomas v City of New York*, 118 AD3d 537 [1st Dept 2014]). "[A] court shall consider, in particular, whether the public corporation acquired actual knowledge of the essential facts constituting the claim within the 90-day period specified in section 50-e (1) or within a reasonable time thereafter" (*id*.). However, courts lack the discretion to allow a late notice of claim if the plaintiff fails to make an application to allow late service within the statute of limitations of one year and ninety days (*see Frankel v New York City Tr. Auth.*, 134 AD3d 440 [1st Dept 2015]). Here, the parties stipulated that the applicable statute of limitations for this action would expire on November 11, 2024 (NYSCEF Doc No 37 ¶ 2). However, plaintiff failed to make a motion for

leave to file a notice of claim prior to that date. Consequently, since the statute of limitations has expired, plaintiff's motion to allow a late notice of claim must be denied.

Moreover, while plaintiff argues that the defense should be deemed waived, because the City failed to raise the defense in the Southern District action and the City had notice of the allegations, "[w]here, as here, a municipality has enacted a prior written notice statute, constructive notice of a condition is insufficient to satisfy the requirement of prior written notice … nor does actual notice ... obviate the need to comply with the prior written notice requirement" (*Chirco v City of Long Beach*, 106 AD3d 941, 943 [2d Dept 2013]).

Accordingly, the second, third, and fourth cause of actions as asserted against the City will be dismissed.

Abased on the foregoing, it is,

ORDERED that defendant, State of New York's (MS #3) is granted to the extent that the second, third, and fourth causes of action as against it are dismissed as abandoned; and it is further

ORDERED that the portion of defendant, State of New York's (MS #3) motion to dismiss the Constitutional claims as against it is granted to the extent that the first cause of action grounded in N.Y. Const Art. I § 12 (Unreasonable Seizure) and to the extent that the first cause of action seeks declaratory relief and is otherwise denied; and it is further

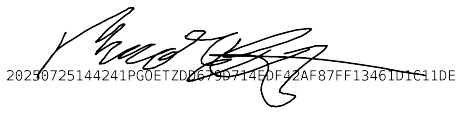
ORDERED that defendant, City of New York's motion (MS #4) to dismiss the second, third, and fourth causes of action as against it is granted; and it is further

ORDERED that the portion of defendant, City of New York's (MS #4) motion and to dismiss the Constitutional claims as against it is granted to the extent that the first cause of action

grounded in N.Y. Const Art. I § 12 (Unreasonable Seizure) and to the extent that the first cause of action seeks declaratory relief and is otherwise denied; and it is further

ORDERED that defendants shall serve answers to the Amended Complaint within 21 days of this order; and it is further

ORDERED that the parties are directed to attend a preliminary conference on October 3, 2025 at 9:30 AM.



7/25/2025
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE