

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ERNEST STEVE BARRY and
MICHAEL BURKHART,

Plaintiffs,
-against-

CITY OF NEW YORK, NEW
YORK CITY TRANSIT AUTHORITY,
and STEVEN DUTES, a member of the
New York City Police Department,

Defendants.
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ORDER

11 CV 5533 (CLP)

On November 14, 2011, plaintiffs Ernest Steve Barry (“Barry”) and Michael Burkhart (“Burkhart”) commenced a civil rights action against the City of New York, the New York City Transit Authority (“Transit Authority”), and Steven Dutes, a member of the New York City Police Department (“Officer Dutes”).¹ Plaintiffs claim that their constitutional rights were violated when Officer Dutes demanded identification from them while they were photographing a vintage New York City subway train. The officer subsequently arrested Mr. Barry when he offered his name but did not produce an identification document. Plaintiffs raise both facial and as applied challenges to the Transit Authority rule on identification (“the ID Rule”) that Officer Dutes relied upon in approaching Barry; plaintiffs claim that the ID Rule is unconstitutionally vague and violates the fundamental right to freedom of movement without identification papers.

¹Plaintiffs’ claims against the City of New York and Officer Dutes have since been resolved through plaintiff’s acceptance of a Rule 68 Offer of Judgment; therefore, the Transit Authority is the only remaining defendant. (See Docket Entry #48).

(Pl.'s Mem.² at 1).

Although there is no dispute that Barry declined to provide identification when asked by the officer, the parties dispute the location where Mr. Barry was standing when he was approached by Officer Dutes. Mr. Barry contends that he was standing on the subway station platform, while the Transit Authority contends that Mr. Barry was standing in an unauthorized area. (Transit Authority Let. I³ at 1-2). Mr. Barry's location may be relevant in determining whether Officer Dutes had a proper purpose when he approached Mr. Barry. (*Id.*)

On June 27, 2012, this Court held a status conference with the parties. At the conference, the parties expressed their desire to attempt to resolve the remaining issues in the case through cross motions for summary judgment. The Court granted the parties leave to file the motions and set a schedule for filings. However, the Court instructed the parties to limit their motions to issues that did not involve the unresolved factual question of where Mr. Barry was standing when Officer Dutes approached him and demanded identification.

On July 23, 2012, defendant Transit Authority filed a motion to dismiss the case, and on the same day, plaintiff filed a cross-motion for summary judgment. Plaintiff's motion includes an as applied challenge to the ID Rule. By letter motion dated July 24, 2012, defendant Transit Authority moves to strike plaintiff's motion to the extent that it seeks judgment on the as applied challenge to the ID Rule. Defendant contends that, based on its understanding of the Court's

²Citations to "Pl.'s Mem." refer to Plaintiff Ernest Steve Barry's Memorandum of Law in Support of Motion for Summary Judgment, filed by plaintiff on July 23, 2012.

³Citations to "Transit Authority Let. I" refer to the letter filed by defendant Transit Authority on June 15, 2012.

instructions during the June 27, 2012 status conference, plaintiff was instructed to limit his motion to issues relating to the *facial* challenge to the ID Rule. (Transit Authority Let. II⁴). Plaintiff Barry argues that his as applied challenge to the ID Rule was encompassed within the Court's instructions, because the motion as drafted does not place in issue the question of where Mr. Barry was standing, and therefore is not dependent on a resolution of the parties' factual dispute. (Pl.'s Let.⁵ at 1-2).

Having reviewed both parties' letters and motions, this Court finds that striking plaintiff's motion, insofar as it addresses the as applied challenge to the ID Rule, is not warranted, because the motion appears to raise a new argument not addressed at the conference, and resolution of this new argument does not seem to require a determination of location. Accordingly, defendant's motion to strike that portion of plaintiff's motion for summary judgment raising the as applied challenge is hereby denied.

By letter dated August 2, 2012, defendant requested an extension of the briefing schedule previously established and an adjournment of oral argument. The Court hereby grants both requests. The parties must file their oppositions to each other's motions by **September 10, 2012**, and they must file replies by **September 24, 2012**. The oral argument previously scheduled for 11:00 a.m. on September 13, 2012 is rescheduled for 11:00 a.m. on **October 23, 2012**.

⁴Citations to "Transit Authority Let. II" refer to the letter filed by defendant Transit Authority on July 24, 2012.

⁵Citations to "Pl.'s Let." refer to the letter filed by plaintiff on July 24, 2012.

CONCLUSION

For the reasons stated above, this Court hereby denies defendant's motion to strike. The Court also grants an extension of the briefing schedule and adjournment of oral argument.

The Clerk is directed to send copies of this Order to the parties either electronically through the Electronic Case Filing (ECF) system or by mail.

SO ORDERED.

Dated: Brooklyn, New York
August 6, 2012

/s/ CHERYL POLLAK
Cheryl L. Pollak
United States Magistrate Judge
Eastern District of New York