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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ADRIANA AGUILAR, et al., :
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Plaintiffs, :
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-v- :
:
IMMIGRATION AND CUSTOMS :
ENFORCEMENT DIVISION OF THE UNITED :
STATES DEPARTMENT OF HOMELAND :
SECURITY, et al., :
:
Defendants. :
----- X

07 Civ. 8224 (KBF)
MEMORANDUM & ORDER

KATHERINE B. FORREST, District Judge:

This putative class action, brought by individuals whose homes were searched by agents of the Immigrations and Customs Enforcement Division of the United States Department of Homeland Security ("ICE") during eight operations between February and September 2007, seeks to vindicate certain constitutional rights--namely those under the Fourth and Fifth Amendments of the United States Constitution--allegedly violated during those operations. In addition to injunctive relief and damages from the United States under the Federal Tort Claims Act, plaintiffs seek damages from certain individual defendants named in this action under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). (See Fourth Am. Compl. (Dkt. No. 202) ¶¶ 484-89 (Third Claim).)

The Bivens claim is the subject to two motions for summary judgment pending before the Court (both of which are resolved by this opinion). First, plaintiffs Sonia Bonilla, Beatriz Velasquez, Dalia Velasquez, Pelagia De La Rosa-Delgado, Christopher Jimenez, Bryan Jimenez, and Anthony Jimenez (the "moving plaintiffs") filed a motion for partial summary judgment on the Bivens claim against twenty ICE agents¹ who allegedly carried out two of the illegal operations of which plaintiffs complain. (Dkt. No. 304.) Second, defendants ICE 19, ICE 30, ICE 32, ICE 42, and ICE 43 (the "moving defendants")² move for summary judgment on the Bivens claim on the grounds that "there is no evidence that any of them ever approached or entered plaintiffs' homes, much less took part in the searches, arrests, or purported discriminatory conduct that allegedly occurred." (Mem. of Law in Support of Five Bivens Defs.' Mot. for Summ. J. ("Defs. Mem.") at 1.)

For the reasons discussed below, both motions for summary judgment are DENIED.

¹ The motion for partial summary judgment is directed at the following ICE agents: ICE 18, ICE 19, ICE 20, ICE 21, ICE 22, ICE 23, ICE 24, ICE 25, ICE 26, ICE 39, ICE 40, ICE 41, ICE 42, ICE 45, ICE 46, ICE 47, ICE 48, ICE 50, ICE 51, and ICE 52. (See Notice of Mot. (Dkt. No. 304).)

The ICE agents' identities have remained confidential throughout the pendency of this litigation. This Court therefore adopts the numerical designations that have been used with respect to each agent.

² Neither set of moving parties encompasses all plaintiffs or all defendants respectively.

BACKGROUND

The following facts, relevant to both motions, are undisputed unless otherwise noted.³

During the week of September 24, 2007, ICE agents conducted home operations in which they would execute "administrative arrest warrants via consensual door knocks at pre-targeted locations" (the "September 2007 operations"). (Pls.' Rule 56.1 Stmt. ("Pls. 56.1") ¶¶ 1, 2.) ICE previously had issued memoranda for those types of home operations, instructing agents on the use of "ruse techniques." (Id. ¶ 3.) Three of the eight home operations at issue in this litigation are the subject of the two motions: 710 Jefferson Street (both plaintiffs' and defendants'), 15 West 18th Street (plaintiffs' only), and 22 Dogwood Lane (defendants' only).

Ten ICE agents--ICE 18, 19, 20, 21, 22, 24, 25, 26, and 42 along with members of the Nassau County Police Department, conducted the operation on September 24, 2007, at 710 Jefferson Street in Westbury, New York. (Pls. 56.1 ¶¶ 16, 19.) At the time of the operation, plaintiff Sonia Bonilla resided there with her husband and two minor daughters, Beatriz, age 12, and

³ Defendants deny certain of plaintiffs' facts on the grounds that they are "immaterial" to plaintiffs' motion for partial summary judgment. (See, e.g., Defs.' Resp. to Pls.' Rule 56.1 Stmt. ("Defs. 56.1 Resp.") ¶¶ 1-7, 35, 75-81, 115.) Such conclusory denials, unsupported by contrary facts creating a "material dispute," are insufficient to rebut statements of facts supported by admissible evidence. See Fed. R. Civ. P. 56(c)(1)(A), 56(e)(2); Schultz v. Stoner, No. 00 Civ. 439, 2009 WL 455163, at *2 nn.3-4. Thus, for purposes of resolving plaintiffs' motion, the Court deems facts that defendants dispute as "immaterial" admitted.

Dalia, age 9. (Id. ¶¶ 13-14.) Neither the ICE agents nor the police officers had judicial warrants to enter or search 710 Jefferson Street, and no "specific particularized danger," "exigent circumstances," or "threat to safety" existed (or was apparent) at the time of the operation. (Pls. 56.1 ¶¶ 20, 22, 23.) The government has conceded that this operation (as well as the other seven at issue) was not based on probable cause. (Id. ¶ 21.)

The 710 Jefferson Street operation had both a primary target--Luis Mata--and a secondary target--Rojar Cruz. (Pls. 56.1 ¶¶ 24, 26.) Although defendants dispute its relevance, ICE did not have evidence (and may have had contrary evidence prior to the operation) that either Mata or Cruz resided at 710 Jefferson Street at the time of the operation. (Id. ¶¶ 24, 26.) The members of the 710 Jefferson Street team visited a separate residence prior to conducting the one at issue. (Id. ¶ 18.)

Neither plaintiff Bonilla nor her husband were present at the time the ICE agents arrived at 710 Jefferson Street, as they left sometime between 5:30 a.m. and 6:30 a.m., when Bonilla drove her husband to work. (Pls. 56.1 ¶¶ 29, 30.) Upon arrival, the agents and officers--who were carrying guns, and wearing bulletproof or tactical vests (or in some cases, raid jackets)--parked their cars (approximately seven) in front of the subject premises. (Id. ¶¶ 31, 32.) At the commencement of

the operation, ICE 18--the leader of the 710 Jefferson operation--was at the front of the house; ICE 19 and 20, on the perimeter (performing "perimeter security"--i.e., monitoring persons exiting the premises); ICE 21, on the outside of the home to establish "perimeter security"; ICE 22, approached the residence (although precisely where she was stationed cannot be recalled); ICE 23, at or near the front door; ICE 24 and ICE 25, on the outside of the house conducting "perimeter security"; ICE 26, in the backyard and at the back of the house; and ICE 42, outside the home, near her car. (Id. ¶¶ 33-39, 41-43.)

The agents approached the residence at 710 Jefferson Street and began knocking on the door. (Pls. 56.1 ¶ 45.) The manner of the knocking is in dispute--plaintiffs assert that the knocking was "loud," that the agents were shouting "police" and "open the door," and insisted upon entering. (Id. ¶¶ 45, 49.) Defendants dispute all of that conduct, except that the agents identified themselves as police. (Defs. Resp. to Pls.' Rule 56.1 Stmt. ("Defs. 56.1 Resp.") ¶¶ 45, 49.) Plaintiffs further assert that the agents ordered those inside the house (allegedly only Bonilla's two minor daughters--Beatriz and Dalia) to open the door, and tie down the dog, and informed those inside that they had to enter. (Pls. 56.1 ¶¶ 45, 49, 50.) Twelve-year old Beatriz testified that she, having been awakened by her sister who had heard the agents knocking, opened the door to talk to

the agents when they stepped around her and went through the door and fanned out in the house--i.e., they entered without consent. (Id. ¶¶ 46, 47, 51, 52.) Plaintiffs assert--although defendants dispute--that one of the officers shouted that someone in the house was dying in order to obtain consent. (Id. ¶ 50; Defs. 56.1 Resp. ¶ 50.) At their depositions, none of the officers or agents could recall whether--and if so, from whom-- consent was obtained to enter 710 Jefferson Street. (Pls. 56.1 ¶ 54.)

ICE 18, 21, 23, 25, and 26 all entered 710 Jefferson Street. (Pls. 56.1 ¶ 59.) Upon entry, ICE 18 directed Beatriz and Dalia to go to their room and take their dog. (Id. ¶ 56; cf. id. ¶ 60.) Although there are no facts proffered for what precisely happened between entry and the time that four or five persons who were inside the home "had been secured," it is undisputed that those persons were indeed so "secured" in the living room, where ICE 21 was present. (Id. ¶ 61.) ICE 25 went to the hallway and kitchen area, in which he encountered another individual (a male) who had been handcuffed on the stairwell. (Id. ¶ 62.) ICE 26 entered the bedrooms of some of the other residents and, accompanied by other agents, corralled those individuals into the living room. (Id. ¶ 64.) Other ICE agents similarly corralled individuals in the living room. (Id. ¶ 65.)

During the course of the operation, plaintiff Bonilla returned home. (Pls. 56.1 ¶ 67.) Upon being informed that the homeowner had returned, ICE 18 exited the premises and spoke with Bonilla. (Id. ¶ 68.) He did not seek Bonilla's consent to continue the search. (Id.)

It is disputed whether the agents allowed Bonilla inside immediately upon her return, but it is undisputed that she was eventually allowed inside. (Pls. 56.1 ¶¶ 69, 70; Defs. 56.1 Resp. ¶¶ 69, 70.) What Bonilla witnessed upon entering her home is highly disputed: Bonilla states that her daughters were crying in their room, that she saw ICE agents trying to force open a closet in her bedroom, and that certain tenants were handcuffed. (Id. ¶¶ 70-73.) Defendants dispute all of that. (Defs. 56.1 Resp. ¶¶ 70-73.)

Eleven ICE agents--ICE 39, 40, 41, 45, 46, 47, 48, 49, 50, 51, and 52--along with officers from the Suffolk County Police Department conducted the operation at 15 W. 18th Street in Huntington, New York on September 27, 2007. (Pls. 56.1 ¶¶ 82, 85.)⁴ Plaintiffs Peggy de la Rosa-Delgado, Christopher Jimenez, Anthony Jimenez, and Bryan Jimenez lived at 15 West 18th Street at the time of the alleged incident--and had lived there since 2003. (Id. ¶ 77.) Christopher, Anthony, and Bryan were 17, 19,

⁴ The ICE agents and officers who participated in the operation at 15 West 18th Street had visited a separate home that morning prior to conducting the 18th Street operation. (Pls. 56.1 ¶ 84.)

and 14 years old, respectively, at the time of the search. (Id. ¶¶ 79, 80, 81.) Neither the ICE agents nor the police officers had judicial warrants to enter or search 710 Jefferson Street, and no "specific particularized danger," "exigent circumstances," or "threat to safety" existed (or was apparent) at the time of the operation. (Id. ¶¶ 86-88.) The West 18th Street operation was specifically targeted at Miguel Quintanilla. (Id. ¶ 89.) There is no dispute that the officers and agents did not find Quintanilla at 15 West 18th Street. (Id. ¶ 115.)

As with the operation at 710 Jefferson Street, the agents and officers arrived at 15 West 18th Street sometime between 5:00 a.m. and 6:30 a.m. (Id. ¶ 93.) And upon arrival, the agents and officers--who were carrying guns, and wearing bulletproof or tactical vests (or in some cases, raid jackets)--parked their cars (approximately five or six) in front of the subject premises. (Id. ¶¶ 94, 95.)

At least six agents or officers approached the 18th Street location and surrounded the premises. Certain agents began knocking on the front door of the house, insisting that someone open the door. (Id. ¶¶ 96, 97.)⁵ There is a dispute over whether the agents "pounded loudly" on the front door and

⁵ Defendants dispute plaintiffs' use of the word "surrounded," but concede that agents patrolled the perimeter of 15 West 18th Street. (Defs. 56.1 Resp. ¶ 96.)

whether they insisted upon entry. (Id. ¶¶ 96, 97; Defs. 56.1 Resp. ¶¶ 96, 97.) According to plaintiffs, Christopher Jimenez cracked the door open after requesting that the agents identify themselves. (Id. ¶ 102.) Plaintiffs further assert that agents pushed the door open further and pushed past Christopher into the house. (Id. ¶ 103.) Defendants dispute all of that. (Defs. 56.1 Resp. ¶ 103.) What is not disputed, however, is that additional agents entered the house through the back door. (Pls. 56.1 ¶ 104.) There is no dispute that, at a minimum, ICE 39, 40, 41, 47, 49, and 50 entered the house. (Id. ¶ 105.)

Plaintiffs claim that none of the agents or officers who were part of the 15 W. 18th Street operation obtained consent, but defendants dispute that the agents entered the home unlawfully. (Id. ¶ 106; Defs. 56.1 Resp. ¶ 106; see also Pls. 56.1 ¶¶ 107-08; Defs. 56.1 Resp. ¶¶ 107-08.) The same can be said for the agents'/officers' entry into the yard at 15 West 18th Street. (Pls. 56.1 ¶ 110; Defs. 56.1 Resp. ¶ 110.) The events that transpired once the agents were inside the house at 15 West 18th Street are highly disputed. (See Pls. 56.1 ¶¶ 111-14; Defs. 56.1 Resp. ¶¶ 111-14.)

As discussed above, ICE 19, 30, 32, 42, and 43 all participated in the September 2007 operations--ICE 19 and 42 at 710 Jefferson Street, and ICE 30, 32, and 43 at 22 Dogwood Lane (one of the subject residences of defendants' motion only).

(Defs. Local R. 56.1 Stmt. of Undisputed Facts ("Defs. 56.1") ¶¶ 1, 3, 9, 10, 15, 17, 23, 25, 29.) None of the ICE agents played any role in selecting the targets or planning the operations at the locations in which the searches were carried out. (Id. ¶¶ 2, 9, 16, 24, 30.)

The precise roles that each of ICE 19, 30, 32, and 42 played in the operations at the two locations that are the subject of defendants' motion are in dispute. What is not disputed regarding their roles is as follows.

At the 710 Jefferson Street location, neither ICE 19 nor ICE 42 entered the house. (Defs. 56.1 ¶¶ 8, 14; see also Pls. 56.1 ¶¶ 34, 43, 59.)⁶ From his position approximately 20-25 yards from the front door of 710 Jefferson Street, ICE 19 could see officers approach the location, heard the word "police" uttered by the officers at the front door, and did not see any officers draw their weapons. (Defs. 56.1 ¶¶ 5-6.) ICE 42, from her location outside of the house, likewise did not witness any

⁶ Plaintiffs dispute that ICE 19 and 42 did not enter 710 Jefferson Street on the basis that they have not been given an opportunity to identify the specific ICE officers who participated in the operations at each location. (See Pls.' Resp. to Defs.' 56.1 ("Pls. 56.1 Resp.") ¶¶ 8, 14.) As noted by defendants, plaintiffs were given photos of each of the ICE officers who participated in the seven operations approximately a year and a half before filing their summary judgment motion, and conducted depositions subsequent to the production of those pictures. Plaintiffs complain, without citation to an affidavit or otherwise, that the pictures are "woefully" outdated. Despite having the pictures for such a lengthy period of time, plaintiffs never made the pictures the subject of any motion to compel--or any other discovery motion. See Di Benedetto v. Pan Am World Serv., Inc., 359 F.3d 627, 630 (2d Cir. 2004). Thus assertions regarding what the photographs can or cannot show do not raise--or dispel--triable issues of fact.

officers draw weapons. (Id. ¶ 14.) However, there is conflicting testimony regarding whether ICE 42 may have entered the yard of 710 Jefferson Street: one resident recalled that there was a woman present and there were only two women who were part of the operation that day (including ICE 42). (Defs. 56.1 ¶¶ 10-12; Pls.' Resp. to Defs.' 56.1 ("Pls. 56.1 Resp.") ¶¶ 10-12.)

During the 22 Dogwood Lane operation, ICE 30 and 43 did not enter the premises. (Defs. 56.1 ¶¶ 22, 34.) It is disputed whether ICE 32 did so. (See Pls. 56.1 Resp. ¶ 28.) ICE 30 entered the front yard of the premises and took--and maintained--a position at the perimeter on the side of the house; from this position he heard agents at the door say "police." (Defs. 56.1 ¶¶ 18, 21.) ICE 43 also assumed entered a fenced area of the home and took a perimeter position, approximately 30 feet from the front door; she remained in his position for the entirety of the operation. (Id. ¶¶ 32, 33.) Although ICE 32 testified that he did not enter or approach the Dogwood Lane residence (Defs. 56.1 ¶ 28), ICE 31 testified that ICE 32 did enter at one point and also assisted in transporting prisoners from the house to the waiting vehicles (Pls. 56.1 Resp. ¶ 28).

As to ICE 19, 30, 32, 42, and 43, there are significant factual disputes as to whether the officers who undisputedly heard other officers say "police" at the front door of the two

subject locations could also hear other conversations, whether they were all a part of a show of authority that assisted in the overall search effort, whether they could see if any officers removed their guns from their holsters and if so, when, and generally, whether they had a reasonable opportunity to intervene. (See generally Pls. 56.1 Resp. ¶¶ 1-34.)

DISCUSSION

I. LEGAL STANDARD

Summary judgment may not be granted unless all of the submissions taken together "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of demonstrating "the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In making that determination, the court must "construe all evidence in the light most favorable to the nonmoving party, drawing all inferences and resolving all ambiguities in its favor." Dickerson v. Napolitano, 604 F.3d 732, 740 (2d Cir. 2010).

Once the moving party has asserted facts showing that the non-movant's claims cannot be sustained, the opposing party must "set out specific facts showing a genuine issue for trial," and cannot "rely merely on allegations or denials" contained in the pleadings. Fed. R. Civ. P.

56(e); see also Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009). "A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," as "[m]ere conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise exist." Hicks v. Baines, 539 F.3d 159, 166 (2d Cir. 2010) (citations omitted). In addition, self-serving affidavits, sitting alone, are insufficient to create a triable issue of fact and defeat a motion for summary judgment. See BellSouth Telecommc'ns, Inc. v. W.R. Grace & Co.-Conn., 77 F.3d 603, 615 (2d Cir. 1996). Only disputes over material facts--i.e., "facts that might affect the outcome of the suit under the governing law"--will properly preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (stating that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts").

II. APPLICABLE LAW

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" U.S. Const. amend

IV. Encompassed in that protection is the right to be free from warrantless searches within one's home. See Bringham City, Utah v. Stuart, 547 U.S. 398, 403 (2006).⁷ A warrantless search may be constitutional, however, if consent was given for the search of the person's home. See U.S. v. Wilson, 11 F.3d 346, 351 (2d Cir. 1993). "Home"--or the area which is protected by the Fourth Amendment--has been construed, however, to include the "curtilage." U.S. v. Dunn, 480 U.S. 294, 300-01 (1987). "Curtilage" is defined by examining "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." Id. at 301. An individual's "reasonable expectation of privacy" is the hallmark of determining "curtilage" protected by the Fourth Amendment. U.S. v. Titemore, 437 F.3d 251, 256-59 (2d Cir. 2006). Questions of "curtilage" thus are highly fact-specific. Id. at 259-260.

Consent to enter one's home (which includes the curtilage) must be freely given and independent, rather than mere "acquiescence [to] a show of authority." Wilson, 11 F.3d at

⁷Such a "presumptively unreasonable search" is rebutted in the "narrow" circumstance where law enforcement officials acting under color of state law conduct a "protective sweep"--i.e., "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." Maryland v. Buie, 494 U.S. 325, 327 (1990).

351. The burden of establishing free and independent consent rests with the government. Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973). Whether an individual has consented to a search is a question of fact to be determined by the 'totality of all of the circumstances.'" Wilson, 11 F.3d at 351 (quoting Schneckloth, 412 U.S. at 227) (emphasis added).

To prevail on a claim seeking money damages for a violation of the Fourth Amendment, see Bivens, 403 U.S. 388, a plaintiff must establish a defendant's personal involvement in the alleged constitutional violation. Thomas v. Ashcroft, 470 F.3d 491, 496 (2d Cir. 2006) ("[I]n Bivens actions, a plaintiff must allege that the individual defendant was personally involved in the constitutional violation."); see also Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) ("Because vicarious liability is inapplicable to Bivens and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."). "Personal involvement" stems from either an officer's "direct participation" or from an officer's failure "to intercede on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers." O'Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988). The requirement to "intercede" arises where an officer knows, inter alia, that any constitutional violation is being committed by another law

enforcement official. Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994). However, "[i]n order for liability to attach, there must have been a realistic opportunity to intervene to prevent the harm from occurring." Id. Determining "[w]hether an officer had sufficient time to intercede or was capable of preventing the harm being caused by another officer is an issue of fact for the jury unless, considering all the evidence, a reasonable jury could not possible conclude otherwise." Id. Further, if an officer is determined to be part of a show of force, that is sufficient for Bivens liability to attach under the Fourth Amendment. See Graham v. Connor, 490 U.S. 386, 395 n.10 (1989).

As discussed in Parts III and IV infra, in laying the factual record before the Court against the legal framework set forth above, it is clear that there are significant areas of factual dispute--e.g., whether valid consent was obtained at the Jefferson Street and West 18th Street locations, whether certain ICE agents were in what could be understood to be the curtilage of any of the three residences at issue, whether certain ICE agents could reasonably have interceded to protect plaintiffs--precluding summary judgment for either the moving plaintiffs or the moving defendants.

III. MOVING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs' version of the facts regarding the entry and search issues relating to 710 Jefferson Street and 15 West 18th Street (and the similarities of the operations as between the two locations)--although highly disputed by defendants--are troubling. However, there are sufficient factual disputes regarding the nature and manner of consent and entry that preclude summary judgment. Since this Court determines that fact issues regarding consent and entry to preclude summary judgment, it need not reach the additional issues regarding conduct that occurred within the home. Those issues will be tried together.

A. 710 Jefferson Street

It is undisputed that twelve-year old Beatriz Valasquez (plaintiff Bonilla's daughter) responded to the officers' knocks at 710 Jefferson Street. That alone, however, does not mean that consent was not obtained for entry into the premises. See Abdella v. O'Toole, 343 F. Supp. 2d 129, 135 (D. Conn. 2004) (finding that the totality of the circumstances need to be analyzed to determine whether a minor's consent is valid). There are disputes regarding what words were spoken, and whether anyone actually mentioned that someone "was dying upstairs" in order to obtain entry. It is not the case, as plaintiffs state, that there is a clear concession by defendants that Beatriz

never gave consent. Although some agents apparently stated their view that a minor could not give consent (see Pls. 56.1 ¶ 55), that is contested by other agents--and in any event, consent is a matter of law to be evaluated in light of the circumstances. See Abdella, 343 F. Supp. 2d at 135. In fact, ICE 18 testified that they would not have entered the premises if consent had not been given.

There are plainly a number of factual disputes as to whether Beatriz did give consent, if so, whether such consent was voluntary or coerced, and then a legal question as to the validity of any consent given based upon the totality of the circumstances. Those factual disputes cannot be determined on this motion and preclude summary judgment as to plaintiffs' Bivens claim with respect to the operation at 710 Jefferson Street.

B. 15 West 18th Street

Similarly, there are issues of fact regarding whether there was consent to enter 15 West 18th Street. Plaintiffs have put forward significant evidence that consent was not given, and defendants have responded to that evidence with evidence of their own suggesting that consent was requested--and provided--in an appropriate manner. For instance, various ICE agents testified that no agent or officer pushed through an open door without consent. Several members of the team who participated

in the 15 West 18th Street operation said that they would remember if they had entered without obtaining consent because that would have been inconsistent with ICE policy.

On a motion for summary judgment, this Court can neither weigh the conflicting testimony on consent nor make credibility determinations. Thus, resolution of what occurred at this location must await trial.

Accordingly, the moving plaintiffs' motion for partial summary judgment as to the operations at 710 Jefferson Street and 15 West 18th Street is denied.

IV. MOVING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants' motion for summary judgment is brought only as to ICE Agents 19, 30, 32, 42 and 43. In order for any one of the moving defendants to prevail on this motion, they must demonstrate that there is no material issue of fact as to whether they were directly involved in--or reasonably had an opportunity to intercede to prevent--the constitutional violations alleged. As to each of those five agents, there are disputed issues of fact regarding each agent's involvement that preclude summary judgment--as well as whether the overall operation at each location constituted an unconstitutional show of force which forced consent.

Further, there are insufficient facts on the record before the Court to determine as a matter of law what part of which of

the locations at issue is the curtilage. Questions of reasonable expectations of privacy as well as ability to view the residents, etc. raise material issues of fact unable to be resolved on summary judgment.

A. ICE 19

As set forth above, it is undisputed that ICE 19 had a car parked in front of 710 Jefferson Street and that there was a prisoner inside the car at the time. There is testimony in the record that at one point during the 710 Jefferson Street search, ICE 19 exited the vehicle and stood in front of it. Those actions are sufficient in and of themselves to raise a triable issue of fact as to whether ICE 19 was part of a show of authority that assisted directly in an illegal search at 710 Jefferson Street.

In addition, however, there is testimony that ICE 19 was able to hear the word "police" uttered while the agents were on the front porch prior to entry; there is a triable issue of fact as to whether ICE 19 heard the comment regarding someone dying upstairs, would have understood this to be an unlawful ruse, and reasonably could have and should have intervened. That is a separate reason to deny summary judgment as to ICE 19.

B. ICE 30

There is testimony in the record that ICE 30 entered the fenced area of 22 Dogwood Lane and took a perimeter position.

There is an issue of fact as to whether the protected curtilage of Dogwood Lane encompasses the fenced yard within which ICE 30 was positioned. It is likely that it does. If that is so, liability might attach. At the very least, therefore, there is a material issue of fact as to whether ICE 30 was in fact part of an illegal entry into protected premises. In addition, however, there is a question of fact as to whether ICE 30 was reasonably able to intercede to prevent the alleged constitutional search of 22 Dogwood. In addition, what ICE 30 could and could not hear from his position at the perimeter is highly disputed, meaning that there is a dispute of material fact as to whether ICE 30 knew that plaintiffs' constitutional rights were being violated by the other officers at the door of the residence. For that reason, summary judgment is not appropriate as to ICE 30.

C. ICE 32

There is a material issue of fact as to whether ICE 32 entered the premises at 22 Dogwood Lane. ICE 31 has testified that ICE 32 did enter the premises. That disputed fact alone precludes summary judgment as to ICE 31.

D. ICE 42

ICE 42 claims to have only been in her police vehicle during the operation at 710 Jefferson Street. However, there is a material issue of fact as to whether at some point ICE 42

assumed a position in the yard of 710 Jefferson Street, within a protected curtilage. If ICE 42 did, that could lead to her direct participation in an illegal search. There is testimony from one of the residents that a female agent did enter the yard, and there were only two female agents who participated in the 710 Jefferson Street operation. Thus, this question of fact is appropriate for the jury to decide.

E. ICE 43

There is testimony in the record that ICE 43 entered the yard of 22 Dogwood Lane and assumed a position on the perimeter during the operation. As with ICE 30, this position raises material questions of fact precluding summary judgment regarding whether the yard was protected curtilage to which an expectation of privacy attached (thus making ICE 43 part of the illegal search), and/or whether the presence of ICE 43 added to the show of authority that enable an illegal search without voluntary consent. Further, even if ICE 43 remained on the perimeter, there are material issues of fact as to whether ICE 43 could reasonably have interceded in the alleged constitutional violations perpetrated by the ICE agents who were at the front door of the residence--or inside the residence--as well as whether ICE 43 understood that plaintiffs' rights were being violated by those other agents.

As to each of the five moving defendants, there are therefore material questions of fact regarding the circumstances of their participation in alleged illegal searches. Those factual disputes preclude summary judgment.

CONCLUSION

For the aforementioned reasons, plaintiffs' motion for partial summary judgment is DENIED and defendants' motion for summary judgment as to the five moving defendant ICE agents is also DENIED.

The Clerk of the Court is directed to terminate the motions at Docket Nos. 304 and 305.

SO ORDERED:

Dated: New York, New York
April 30, 2012



KATHERINE B. FORREST
United States District Judge