

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

KEVIN McBRIDE, ET AL.,)	
)	
)	
PLAINTIFFS)	
)	
v.)	CIVIL No. 2:13-cv-272-DBH
)	
CITY OF WESTBROOK, ET AL.,)	
)	
DEFENDANTS)	

**DECISION AND ORDER ON DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT**

This is a lawsuit against the City of Westbrook and three of its police officers under 42 U.S.C. § 1983. It challenges as unconstitutional the police delivery of “WESTBROOK POLICE CRIMINAL TRESPASS NOTICES”¹ to private residential tenants upon a private landlord’s request. I conclude that the individual police officer defendants are entitled to qualified immunity on the damages claims against them and **GRANT** their motion for summary judgment. I also **GRANT** summary judgment to the City on the claims of one plaintiff. Some of the other plaintiff’s claims against the City for allegedly involving itself in private eviction proceedings, however, deserve further airing. The Clerk is directed to schedule oral argument on those claims. If, in light of the questions

¹ The Police Department prints and issues them with this caption in all capital letters.

I raise here, the parties wish to submit supplemental briefing before that argument, they may do so.

FACTUAL BACKGROUND

For the factual background, I rely upon the stipulations of the parties and, when there is no stipulation, the properly documented factual assertions that are most favorable to the plaintiffs, since they are the parties against whom summary judgment is sought.

The parties have stipulated that Marc and Amie LeClerc are the owners of the Westbrook apartment building in question at 277 Main Street. Stipulations With Regard to Defs.’ Mot. for Summ. J. (“Stipulations”) ¶ 1 (ECF No. 31). The plaintiff Anne Blake lived there as a tenant in Apartment 2 (“Apt. 2”) without a written lease. *Id.* ¶¶ 3, 4. In 2013, the LeClercs complained that Blake had failed to pay her rent, *id.* ¶ 8, and obtained a Forcible Entry and Detainer (“FED”) judgment against her in Maine District Court, *id.* ¶¶ 10-11 & Ex. 2, and later a Writ of Possession. *Id.* ¶ 12. On July 5, 2013, the Cumberland County Sheriff’s Office served Blake with the Writ of Possession. *Id.* ¶ 14. On July 9, at the LeClercs’ request a Westbrook police officer served a “WESTBROOK POLICE CRIMINAL TRESPASS NOTICE” on Blake. *Id.* ¶¶ 15-17 & Ex. 4. The Criminal Trespass Notice identified not just Blake’s apartment (Apt. 2), but the entire apartment building (277 Main Street) as the subject of the trespass notice. *Id.* at Ex. 4. In essence, it notified Blake that if she returned to any part of the apartment building, it “will result in criminal charges being filed in court and possible arrest” and that the trespass notice was permanent, with “no

expiration.” Id. Although it is not one of the stipulations, it is undisputed that Blake’s adult daughter and grandchildren are tenants in a different apartment in the same apartment building.

The plaintiff Kevin McBride’s status with respect to Apt. 2 is less clear-cut. It is undisputed that he was Blake’s boyfriend. He maintains that he also was a tenant-at-will along with Blake in Apt. 2. Pls.’ Opp’n to Defs.’ Mot. for Summ. J. at 2-3 (ECF No. 39). The LeClercs told the Westbrook police, however, that he was *not* a tenant. Dep. of Timothy Morrell at 28 (ECF No. 35); Dep. of Thomas Roth at 7-8 (ECF No. 34). McBride was not the subject of any FED lawsuit or judgment or writ of possession. But on July 9, 2013, he too was served with a “WESTBROOK POLICE CRIMINAL TRESPASS NOTICE” to the same effect as Blake. Stipulations ¶¶ 18-19 & Ex. 5.

The Notice served on McBride is captioned “WESTBROOK POLICE CRIMINAL TRESPASS NOTICE” and has a police “case #.” Stipulations Ex. 5. It lists McBride as “TRESPASSER.” It has a large bold “WARNING” appearing above quoted portions of Maine’s criminal trespass statute, and lists the trespass penalties in capital letters (“ONE YEAR IN JAIL” or “SIX MONTHS IN JAIL” as the case may be). Id. This Police Department NOTICE states that the “complainant,” identified earlier in the form as the landlords, “has authorized this agency [the Westbrook Police Department] to act as their agent or representative.” Id. It orders McBride to “CEASE AND DESIST FROM ENGAGING IN” trespassing activity and states: “FAILURE TO COMPLY WITH THIS LAWFUL ORDER WILL RESULT IN CRIMINAL CHARGES BEING FILED IN COURT AND POSSIBLE

ARREST.” Id. The Westbrook officer who served the notice on McBride told him that he had “less than 30 minutes to remove whatever property you have in the apartment and leave *because you are being evicted.*” Dep. of Kevin McBride at 29 (ECF No. 33) (emphasis added). Another officer demanded McBride’s keys, id. at 33, and one told him that the criminal trespass notice “doesn’t allow me [McBride] to come onto the property for any reason and that if I did violate it that I can be arrested.” Id. at 30.²

The use of criminal trespass notices derives from Maine’s criminal trespass statute, 17-A M.R.S.A. § 402. The state statute makes it a crime to enter any dwelling *knowing* that one is not licensed or privileged to do so, or to remain in or enter any place “*in defiance of a lawful order to leave [or not to enter] that was personally communicated to that person by the owner or another authorized person.*” 17-A M.R.S.A. § 402(D) & (E) (emphasis added). Criminal trespass notices are used by the Westbrook Police Department and police departments in other Maine towns to place persons on notice that they are not permitted on certain property. Defs.’ Statement of Material Facts (“Defs.’ SOMF”) ¶ 29.³

ANALYSIS

Blake’s Claims

Blake claims a First Amendment right and a substantive due process right to associate with her daughter and grandchildren in *her daughter’s apartment* at

² Neither Blake nor McBride has been arrested pursuant to the Criminal Trespass Notices. Stipulations ¶¶ 22, 24.

³ Apparently the most common use of criminal trespass notices is to remove someone from the premises of retail establishments. See Dep. of Thomas Roth (Westbrook’s police captain and second-in-command) at 9 (ECF No. 34). This lawsuit does not address that use.

277 Main Street. Blake does not contest the fact that the FED proceedings and the writ of possession against her removed any rights she had as a tenant in Apt. 2, but Blake contends that the criminal trespass notice against her extending to *all* of 277 Main Street deprived her of family associational rights by its threat of arrest and prosecution if she should visit her daughter's apartment.

The criminal trespass notice in question does not limit Blake's freedom of association at any location other than 277 Main Street. That apartment building is private property over which the landlords have authority. Blake's daughter may possess rights as a tenant to have her mother visit her at her own apartment at 277 Main Street,⁴ but Blake's daughter is not asserting those rights in this lawsuit, and those tenant's rights are not Blake's rights. I **GRANT** all the defendants' motions to dismiss Blake's First Amendment and substantive due process claims arising out of the criminal trespass notice.⁵ She has no other claims.

⁴ Maine's Law Court has stated: "The right of a tenant to have visitors in their homes at reasonable times and for reasonable purposes . . . is so fundamental it requires no statutory authority"; that the assertion that tenants do not have the right to receive visitors "is without merit"; and that tenants' right to quiet enjoyment "includes a right to receive visitors in their homes." State v. DeCoster, 653 A.2d 891, 893 n.1, 894 (1995).

⁵ See Thompson v. Ashe, 250 F.3d 399, 409 (6th Cir. 2001) ("Thompson . . . lacks standing to raise the interesting question of whether the KCDC's policy violates the rights of tenants who wish to entertain guests who are on the no-trespass list. In Diggs, the plaintiffs were themselves public housing tenants; Thompson is not. And even if Thompson were correct that KCDC cannot ban invitees from coming onto the property, Thompson can show injury only if he has been arrested for trespassing while on KCDC property at the invitation of a tenant."); Diggs v. The Housing Auth'y, 67 F. Supp. 2d 522, 532 n. 15 (D. Md. 1999) (dismissing guests' Housing Act claims).

McBride's Claims

Procedural Due Process

McBride makes a procedural due process claim—that he was deprived of his property interest in Apt. 2 without due process of law, a violation of the Fourteenth Amendment.⁶ Unlike Blake, McBride was not the subject of an FED court proceeding and writ of possession before Westbrook police served him with the criminal trespass notice.

Qualified Immunity of Individual Officers

Qualified immunity “protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” Pearson v. Callahan, 55 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Qualified immunity allows “for the inevitable reality that ‘law enforcement officials will in some cases reasonably but mistakenly conclude that [their conduct] is [constitutional], and . . . that . . . those officials—like other officials who act in ways they reasonably believe to be lawful—*should not be held personally liable.*” Hegarty v. Somerset Cty., 53 F.3d 1367, 1373 (1st Cir. 1995) (emphasis in original).

It is undisputed in this case that the landlords told the police officers that McBride was not a tenant. Morell Dep. at 27-28, 31; Roth Dep. at 7-8, 22-23. There is no assertion that McBride told the officers that he *was* a tenant, only

⁶ “[N]or shall any State deprive any person of life, liberty, or property, without due process of law” U.S. Const. amend. XIV, § 1.

that he lived there, see McBride Dep. at 29; Dep. of Melissa May at 23 (ECF No. 36). That was consistent with the officers' understanding from the landlords that Blake was the tenant and McBride was her boyfriend, not a tenant in his own right. See, e.g., May Dep. at 22, 23. The plaintiffs say that Blake tried to show the police a letter from a lawyer that would show that McBride was a tenant, but they have not provided the letter in this summary judgment proceeding, and the deposition testimony shows that the police officers refused to read the letter, relying instead on the court documents that the landlords had provided.⁷ I conclude that the individual police officers have qualified immunity against any damages claim for unconstitutional deprivation of McBride's property because, on the facts as the officers understood them, McBride had no property interest of which they were depriving him.⁸

⁷ The plaintiffs say that "Ms. Blake showed the police her letter from her lawyers explaining that Mr. McBride was a tenant." Pls.' Opp'n to Defs.' Mot. for Summ. J. at 9 (ECF No. 39). The deposition citations they provide in support of that statement do not say that, and they have not provided the letter. Blake testified that she told one officer "I had a letter from my lawyer stating that I could stay . . . I showed it to him. His exact words to me were, quote, unquote: I only listen to the judges. I do not listen to lawyers or Pine Tree Legal." Dep. of Anne Blake at 50 (ECF No. 32). Blake also testified that she told another officer about the letter "And she—no. She said no. She went by what he said" and that this officer agreed with the male officer. Id. at 54. One of the officers testified: "We explained to [Blake] our purpose. Told her that the landlord has gone to court and obtained a writ of possession, which is hereby forcing her to vacate the apartment. At that point, she handed me a letter from her stated attorney. I explained to her that we had a court order, and if she has an issue with the landlord, I really can't take advice from other people's attorneys, that she needs to take it up with her attorney and basically explained the process to her." Morrell Dep. at 25-26. Captain Roth testified: "she showed Sergeant Morrell a document that claimed it gave her rights to the apartment, he glanced at it, I had a chance to look at it quickly, it looked like it was something on Pine Tree Legal letterhead and it was just a paragraph, it didn't appear to be a court document" and later "I didn't read the entire thing." Roth Dep. at 24, 25. None of this testimony shows that the letter established McBride's status as a tenant.

⁸ I do not rely on the fact that the police officers also consulted a lawyer in the district attorney's office before serving the notices because the record is unclear as to what they actually told the lawyer in obtaining his/her blessing. Roth Dep. at 14.

City Liability

But it is a distinct question whether McBride actually *did* have a property interest, *i.e.*, a tenancy-at-will in Apt. 2 and, if he did, whether through serving the criminal trespass notice, taking his keys, and ordering him to leave the property within 30 minutes, the City of Westbrook deprived him of that property interest without due process of law, *i.e.*, notice and an opportunity to be heard. The City argues that it is entitled to summary judgment on this claim for a number of reasons. I find some of them insufficient or subject to factual dispute that will require a trial, but there are a few where I need further analysis and argument from the lawyers before I decide whether they entitle the City of Westbrook to summary judgment. They will be the subject of oral argument.

Property Interest

On the question whether McBride had a Fourteenth Amendment property interest as a tenant of Apt. 2, I conclude that there is a genuine issue of material fact in dispute about the landlord-tenant relationship between the landlords and McBride. Taking the facts most favorably to McBride, against whom the summary judgment motion is brought, I treat him as having a property interest for purposes of ruling on the motion. The Westbrook defendants concede as much. See Defs.' Mot. for Summ. J. at 9 (ECF No. 29).⁹

⁹ I am not sure what to make of Westbrook's argument, without supporting authority, that McBride later "abandoned" his property interest by not suing the landlords for illegal eviction. Defs.' Mot. for Summ. J. at 10.

Knowledge of State Court Proceedings against Blake

I reject the argument that because McBride knew, through the FED proceeding against Blake, that the landlords were trying to evict them both, he had prior notice and opportunity to be heard. That set of state court procedures was directed solely against Blake. McBride was not obliged to try to insert himself into that lawsuit.

Municipal Liability for Acts of its Police Officers

In Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 694 (1978), the Supreme Court said that “a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.” Based upon Monell, Westbrook argues that, because the City and the Police Department had no specific policy about how or when to serve criminal trespass notices, it has no (vicarious) liability for any injury to McBride from what the police officers did here, even if they did deprive him of a property interest as a tenant. On that issue of Westbrook policy, however, there is a genuine issue of material fact.

Looking at the record most favorably to the plaintiff as I must, I see that these are City of Westbrook Police Department notices, using a printed form with blanks that the officers complete as the occasion demands. Roth Dep. at 15; Stipulations Ex. 5. A factfinder certainly could find that service of criminal

trespass notices is a policy of the City, not a random event. Moreover, Maine's trespass statute seems to contemplate that a trespass notice will come from the property owner, stating that it is a crime to remain in or enter any place "in defiance of a lawful order to leave [or not to enter] that was personally communicated to that person *by the owner or another authorized person.*" 17-A M.R.S.A. § 402(D) & (E) (emphasis added). Westbrook's criminal trespass notices state that the Westbrook police are acting as the "agent or representative" of the landlords. Stipulations Ex. 5. A factfinder could find that this too demonstrates a City policy to intervene on behalf of those seeking eviction. Although the individual officers have discretion, there is evidence in the police officers' depositions that the officers in fact accept what the property owners tell them about the situation, with only limited checking of facts. Roth Dep. at 4, 13-16; Morrell Dep. at 26-28, 31; May Dep. 21-24. A factfinder might find this further evidence of a City policy in support of those seeking eviction. Finally, in this instance, the police chief himself was aware that the police captain, his second-in-command, was going to serve the notice in the face of a challenge from Blake's lawyers. Roth Dep. at 28, 12-24.¹⁰

On the other hand, a factfinder might conclude that the error (if there was one) in determining McBride's status as a tenant was "a single incident," a "random event," rather than reflective of a true municipal policy. See Calhoun v. Ramsey, 408 F.3d 375, 380 (7th Cir. 2005). Westbrook makes that very

¹⁰ Cf. Cyr v. Addison Rutland Supervisory Union, No. 1:12-CV-105-JGM, 2014 WL 4925102, at *11 (D. Vt. Sept. 30, 2014) ("The notices against trespass were not issued randomly or without authority, but were decisions approved by . . . the chief administrator of the school district.")

argument: “any error on [the police officers’] part in assessing the situation was nothing more than a random deviation from the enforcement of criminal trespass law.” Defs.’ Mot. for Summ. J. at 10-11.¹¹

I conclude that summary judgment is not available to Westbrook on this argument because of the factual issues and inferences to be resolved on the question of Westbrook’s policy or custom.¹²

Service of Criminal Trespass Notice as Effecting a Deprivation of Property

Westbrook also argues that it is entitled to summary judgment because police service of the criminal trespass notice upon McBride could not in itself amount to the deprivation of McBride’s property interest as a tenant under the Fourteenth Amendment. The First Circuit has said: “We do not doubt that, in certain circumstances, a police officer’s participation in an unlawful eviction can implicate a tenant’s Fourth and Fourteenth Amendment rights and give rise to liability under 42 U.S.C. § 1983.” Higgins v. Penobscot Cnty. Sheriff’s Dep’t, 446 F.3d 11, 14 (1st Cir. 2006). It is necessary, therefore to go deeper.

¹¹ Similarly, it argues that there is no “custom, policy or practice of the City of Westbrook of serving criminal trespass notices for the purpose of ‘evicting’ tenants” Defs.’ Mot. for Summ. J. at 4-5.

¹² The plaintiffs’ separate “failure to train” basis for municipal liability will not survive. That is the “most tenuous” basis for municipal liability, Connick v. Thompson, 131 S. Ct. 1350, 1359 (2011), and requires “deliberate indifference to the rights of persons with whom the [untrained employees] come into contact,” id., and “proof that a municipal actor disregarded a known or obvious consequence of his action.” Id. at 1360. It ordinarily requires a “pattern of similar constitutional violations by untrained employees.” Id. The plaintiffs have made none of those showings. The Supreme Court has “left open the possibility that, ‘in a narrow range of circumstances,’ a pattern of similar violations might not be necessary,” id. at 1361, but that is only where “the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations.” Id. Any failure to train Westbrook police officers on the issuance and service of criminal trespass notices simply does not meet that standard.

The District of Maine and the First Circuit dealt with service of a Maine criminal trespass order in Higgins v. Penobscot County Sheriff's Department, Civil No. 04-157-B-W, 2005 WL 1331200 (D. Me. June 2, 2005) (M.J. decision), aff'd, 2005 WL 1961369 (D. Me. Aug. 15, 2005) (D.J. decision), aff'd, 446 F.3d 11 (1st Cir. 2006). In Higgins, addressing a Fourth Amendment argument, the Magistrate Judge observed that in serving a trespass order and ordering the plaintiff to leave, a deputy sheriff “did not effect any legal change in whether or not [the plaintiff] actually had a tenancy interest under Maine Law. In short, I am doubtful, even if [the plaintiff] can prove that he had some possessory interest in the property and that [the deputy sheriff] knew about that claimed possessory interest, that [the deputy sheriff] could be held accountable for a Fourth Amendment violation by ordering [the plaintiff] to leave.” 2005 WL 1331200 at *12.¹³ The First Circuit agreed that the deputy sheriff was entitled to qualified immunity in that case (the conclusion I reach for the individual Westbrook police officers here), but did not decide whether service of a criminal trespass order actually amounts to a deprivation of property, saying instead that the viability of the constitutional claim depended “on whether, *to the extent that what happened properly can be found to have been an ‘eviction’ at all,*” the deputy sheriff could be found to have known that it was unlawful. 446 F.3d at 14 (emphasis added). So while the Magistrate Judge expressed some doubt about whether mere service

¹³ The Magistrate Judge was even more skeptical of a Fourteenth Amendment violation, but accepted the proposition that there was one because of an earlier First Circuit precedent. Higgins, 2005 WL 1331200 at *16.

of a trespass notice could impair a property interest, the question remains open in this Circuit.

If all that the Westbrook police did was serve a landlord-prepared notice on McBride (it is not unusual for law enforcement officers to be involved in serving process of various kinds), I would be tempted to share the Magistrate Judge's skepticism in Higgins and conclude that such service alone does not involve a municipality in altering property rights. But I must look at the facts here—not a landlord-prepared notice but a Westbrook Police Department-prepared notice and the police officers' statements and actions in serving it on McBride. The Notice is captioned "WESTBROOK POLICE CRIMINAL TRESPASS NOTICE" and has a police "case #." Stipulations Ex. 5. It lists McBride as "TRESPASSER," and has a large bold "WARNING," below which portions of the criminal trespass statute are quoted and the jail penalties listed in capital letters. Id. This Police Department notice states that the landlords have "authorized this agency [the Westbrook Police Department] to act as their agent or representative." Id. It orders McBride to "CEASE AND DESIST FROM ENGAGING IN" trespassing activity and states: "FAILURE TO COMPLY WITH THIS LAWFUL ORDER WILL RESULT IN CRIMINAL CHARGES BEING FILED IN COURT AND POSSIBLE ARREST." Id. The officer who served the notice on McBride told him that he had "less than 30 minutes to remove whatever property you have in the apartment and leave *because you are being evicted.*" McBride Dep. at 29 (emphasis added). Another officer demanded McBride's keys, id. at 33, and one told him that the criminal trespass notice "doesn't allow me

[McBride] to come onto the property for any reason and that if I did violate it that I can be arrested.” Id. at 30.¹⁴ I am not prepared to conclude at this stage of the proceedings that a factfinder could not find from these circumstances that the Westbrook Police Department here was participating in a private eviction.

Moreover, the parties have not addressed the relevance of cases that assess the effect of criminal trespass notices issued concerning *public* property. In Catron v. City of St. Petersburg, 658 F.3d 1260 (11th Cir. 2011), for example, the Eleventh Circuit dealt with homeless plaintiffs’ challenges to trespass warnings under a city ordinance that allowed police or public officials to issue trespass warnings to prevent the plaintiffs’ access to public property. The Eleventh Circuit concluded that the threat of the warnings alone was enough to affect the plaintiffs’ liberty interests under the Fourteenth Amendment. (Because the property in question was public property, the plaintiffs had no property interest, but the court considered their access to public property a matter of Fourteenth Amendment protected liberty.) In Cyr v. Addison Rutland Supervisory Union, No. 1:12-CV-105-JGM, 2014 WL 4925102 (D. Vt. Sept. 30, 2014), the court found that service of trespass notices alone was enough to deprive a parent of a First Amendment right to express his views at school board meetings.

I would like the parties to address both (1) the relevance of these public property access cases in determining whether service of a criminal trespass

¹⁴ Actual arrest would implicate the Fourth Amendment as a “seizure,” not necessarily the Fourteenth Amendment’s prohibition of property takings without due process.

notice for private property in Maine in itself operates as a deprivation of a property interest, and (2) the significance of the degree of Westbrook police involvement that occurred here. As I noted earlier, the Maine statute seems to contemplate notice coming from the landlord. But the Westbrook Police Department holds itself out as the *agent* of the landlord in these notices, thereby arguably inserting itself into a private eviction procedure—in McBride’s case, giving him 30 minutes to remove himself and his personal property from the premises, taking his keys and telling him that he was being evicted—yet simultaneously acting as official law enforcement authority in warning about arrest and penalties to follow. Although the record tells me that trespass notices are used by the Westbrook Police Department and police departments in other Maine towns to place persons on notice that they are not permitted on certain property, Defs.’ SOMF ¶ 29, that statement is low on specifics and does not tell me what other police department notices say or how they are used, particularly when they are issued to people concerning the places where they live, the circumstances here. Moreover, the record does not establish why Westbrook provides the notices, words them the way it does, making itself the landlords’ agent, or allows its police officers to serve them. I decline to speculate. All of this deserves further argument or perhaps evidence at a trial.

What Process is Due

If McBride was a tenant, not just a guest in Apt. 2, and if Westbrook police service of the criminal trespass notice did take a property interest from him, a remaining question will be whether Westbrook provided due process in doing so.

Blake had the process of the FED lawsuit, judgment and a writ of possession that gave her 48 hours' notice of her obligation to vacate the premises or be deemed a trespasser before she actually received the criminal trespass notice. Stipulations Exs. 2 and 3. McBride had none of those.

Due process generally consists of notice and the opportunity to be heard, either before an action is taken or, if prior notice and hearing are impractical, after the action is taken. Gilbert v. Homar, 520 U.S. 924, 930 (1997). In determining specifically what process is due in a given situation, courts balance three factors: (1) the nature of “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such an interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) the government's interest, “including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” Mathews v. Eldridge, 424 U.S. 319, 335 (1976). A procedural due process claim also requires an examination of “the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation [] and any remedies for erroneous deprivations provided by statute or tort law.” Zinermon v. Burch, 494 U.S. 113, 125–26 (1990).

On the three Mathews v. Eldridge factors, I assume on this motion for summary judgment that McBride was a tenant vis-à-vis the landlords at the time of his eviction. On Mathews factor 1, then, his interest in enjoying uninterrupted occupancy in his residence of choice is substantial. I need additional argument

on factors 2 and 3, however—the risk of erroneous deprivation of a property interest through the procedures Westbrook used and the probable value of additional or substitute procedural safeguards; and the City of Westbrook's interest, including the “function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

Here, the City of Westbrook has no established procedure of its own for challenging and vacating criminal trespass notices that its Police Department issues even if they are issued improperly or are overly broad. But it points to rights that McBride may have to sue his landlords for illegal eviction under a Maine statute, 14 M.R.S.A. § 6014, Defs.’ Mot. for Summ J. at 10, and argues that that remedy provides due process. If the Westbrook Police truly are acting only as the landlord’s agent when they serve a criminal trespass notice, that argument may have some appeal. McBride, on the other hand, focuses on what the City has done in impairing his property interests in the apartment by the manner in which it served the notice (ordering him off the property, taking his keys, threatening him with arrest if he returned), and says that any rights he may or may not have against his landlord are irrelevant to his claim about the City’s actions. In this context as well, I would like the parties to address the relevance of the cases that deal with criminal trespass notices concerning public property. In Catron, for example, the ability to challenge a trespass notice in a later prosecution for trespass was deemed insufficient to satisfy due process because the “trespass warnings are intended to serve instantly as some kind of restraining injunction.” 658 F.3d at 1268. That reasoning may apply here. In

Catron, the court found problematic the fact that there were no formal procedures by which the recipient of a trespass warning could challenge the basis of the warning or its terms, as well as the amount of discretion and lack of guidance officials and officers possessed in exercising their discretion. 658 F.3d at 1265, 1267-68. All those factors may apply here. In Brown v. Dayton Metro. Housing Authority, No. C-3-93-037, 1993 WL 1367433 at *26 (S.D. Oh. Aug. 26, 1993), the court found no denial of procedural due process because the trespass warnings contained a written notice of the right to appeal. Westbrook has no such appeal rights. In Cyr, the court found that service of trespass notices deprived a parent of his First Amendment right to express his views at school board meetings where “they were not issued pursuant to any protocol, . . . they did not set out a process to contest the ban, and . . . [the plaintiff] did not receive a meaningful opportunity to contest his ban.” 2014 WL 4925102, at *11. Those arguments may or may not apply here.

On this issue of what process is due, McBride seems to suggest that he was deprived of due process in two respects. The first is that the City failed to give him an opportunity to produce paperwork “showing that he had a legal right to remain in the property.” Pls.’ Opp’n to Defs.’ Mot. for Summ. J. at 9. But as I said at note 7 supra, McBride on this motion has not provided any paperwork that would have shown that he *was* a tenant. As a result, the City is entitled to summary judgment on that part of his claim. The second due process failure he advances is the City’s failure to require a private property owner to produce a writ of possession naming the person to be evicted before police officers serve a

criminal trespass notice on that person who is living on the property. *Id.* at 10. McBride finds some support for that alternative in a California case, Arrieta v. Mahon, 31 Cal.3d 381 (Cal. 1982). I need to hear argument concerning the implications under Mathews factors 2 and 3 of requiring such a procedure¹⁵ or whether there is some other process that would meet the appropriate standard if I conclude that Westbrook's current practices do violate due process.

McBride's Property Right to Have Guests

McBride claims that the criminal trespass order the Westbrook Police Department issued against Blake takes away his property right as a tenant in Apt. 2 to have guests of his choice. Pls.' Opp'n to Defs.' Mot. for Summ. J. at 14.

The individual officers are entitled to qualified immunity on this claim because, as I described above, they had no reason to believe that McBride had any right to be in the apartment. But the City is not entitled to summary judgment because, if McBride did have tenancy rights to Apt. 2, then its criminal trespass order against Blake may have deprived him of his tenant's rights. See note 4 supra. This issue requires further development.¹⁶

CONCLUSION

Accordingly, the individual defendants' motions for summary judgment are **GRANTED** on all claims; the City of Westbrook's motion for summary judgment is **GRANTED** on Blake's claims and on McBride's claims based upon failure to train and failure to give him an opportunity to produce paperwork to show that

¹⁵ For example, what would be the implications for dealing with squatters?

¹⁶ The plaintiffs devoted a single sentence to it in the legal memorandum, Pls.' Opp'n to Defs.' Mot. for Summ. J. at 14, and the defendants talk only about McBride's right to associate elsewhere than 277 Main Street. Defs.' Mot. for Summ J. at 12.

he was a tenant. The Clerk's Office shall schedule oral argument on the remainder of the City of Westbrook's motion for summary judgment on McBride's claims.

SO ORDERED.

DATED THIS 19TH DAY OF NOVEMBER, 2014

/s/D. BROCK HORNBY
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE (PORTLAND)
CIVIL DOCKET NO. 2:13-CV-272-DBH**

Kevin McBride

and

Anne Blake,

Plaintiffs

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v.

City of Westbrook,

and

Melissa May, *in her official capacity
as a Westbrook Police Officer,*

and

Timothy Morrell, *in his official
capacity as a Westbrook Police
Sergeant,*

and

Thomas Roth, *in his official capacity
as a Westbrook Police Captain,*

Defendants

Represented By **John J. Wall, III**

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