21-1194-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KEITH DREW,

Plaintiff-Appellant,

v.

CITY OF NEW YORK, UNKNOWN EMPLOYEE,
AND UNKNOWN SUPERVISOR,

Defendants-Appellees.

On Appeal from the United States District Court for the
Southern District of New York, No. 1:18-cv-11709-ALC

SUPPLEMENTAL BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

Plaintiff-appellant Keith Drew was in the custody of New York City's Department of Correction when the City removed money from his inmate fund account without notice to him or pre-deprivation process, purportedly for past "debts" based on records that are demonstrably unreliable. In 2018, Drew commenced this lawsuit, *pro se*, against the City and two unknown officials over the unlawful taking of his money. Rather than construing Drew's complaint liberally and affording him the special solicitude of a *pro se* litigant, the district court imposed tight discovery schedule deadlines, denied Drew's request to amend his complaint after identifying the unknown officials, failed to recognize viable state law claims, and applied the wrong legal standard to assess his procedural due process claims. This Court should reverse the district court's grant of summary judgment to the City and denial of leave to amend the complaint.

First, the City's taking of Drew's property, without any notice or opportunity to object, violated the Fourteenth Amendment's Due Process Clause. In granting summary judgment, the district court incorrectly treated the taking of Drew's funds as "random, unauthorized" state action, rather than action pursuant to an "established state procedure." *Hellenic Am. Neighborhood Action Comm. v. City of New York* ("*HANAC*"), 101 F.3d 877, 880 (2d Cir. 1996). Because the funds at issue were taken by the City pursuant to a systematic (albeit opaque) practice and policy of

removing money from fund accounts without notice to owners, the Due Process Clause required pre-deprivation notice and an opportunity to dispute erroneous "debts." *See Mathews v. Eldridge*, 424 U.S. 319, 331 (1976). Indeed, courts have held that when "pre-deprivation process could be effective in preventing errors" in individualized deductions from inmate fund accounts, "that process is required." *Montanez v. Sec'y Pennsylvania Dep't of Corr.*, 773 F.3d 472, 484 (3d Cir. 2014). This is especially true where, as here, pre-deprivation notice and an opportunity to dispute erroneous charges would be, at most, minimally burdensome to the City.

Second, in granting summary judgment, the district court failed to consider state tort law claims of conversion and negligence raised by Drew. Drew repeatedly asserted in his complaint and other filings that the City took his money without authorization, and that he was charged for telephone calls he did not make and haircuts he did not receive. The district court failed to afford Drew, a *pro se* litigant, "special solicitude" by "liberally construing" and "interpret[ing]" his submissions "to raise the strongest arguments that they *suggest*." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474-75 (2d Cir. 2006) (quotation marks omitted). This error was compounded by an incorrect holding that Drew had released certain claims against the City by signing a general release in a separate action before those claims accrued.

Finally, the district court abused its discretion by denying Drew the opportunity to amend his complaint to name two unknown defendants—an "Unknown Employee" and an "Unknown Supervisor" (the "Unknown Defendants"). Even though courts "should freely give leave [to amend] when justice so requires," Fed. R. Civ. P. 15(a)(2), the district court denied leave on the ground that Drew's motion was untimely because the court's 30-day deadline to amend the complaint had passed and discovery had closed. By contrast, the district court liberally granted every motion by the City to extend deadlines, including motions made long after the City's deadlines had already passed. This was an abuse of discretion, and it was compounded by the district court's failure to assist Drew in identifying the Unknown Defendants. *See Valentin v. Dinkins*, 121 F.3d 72, 75 (2d Cir. 1997).

This Court should reverse the district court and remand the case for further proceedings on Drew's procedural due process and state law tort claims, with directions to grant Drew leave to amend his complaint and "an opportunity for additional discovery," if necessary, "to identify the individuals who were personally involved." *Davis v. Kelly*, 160 F.3d 917, 922 (2d Cir. 1998).

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and entered final judgment on March 31, 2021. SPA17. Drew filed a timely notice of appeal no later

than April 30, 2021. A411, A425. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the Due Process Clause of Fourteenth Amendment required the City to notify Drew of charges to his fund account and provide an opportunity to dispute erroneous charges *before* it removed money from his account, where the City never provided Drew notice of purported debts, its deductions from his account, or the restitution policy itself, and where the record indicates that Drew was charged for services he could never have received.

2. Whether the district court erred by failing to address Drew's tort claims for conversion and negligence, where Drew alleged and argued repeatedly that the City removed money from his fund account for phone calls he never made and haircuts he never received, where clear documentary evidence shows that Drew was charged for services that he could never have received, and where Drew was proceeding *pro se*.

3. Whether the district court abused its discretion by denying Drew's post-discovery motion to amend the complaint to name the Unknown Defendants, where Drew was incarcerated and proceeding *pro se*, and where Drew first identified them during discovery without any assistance from the district court.

STATEMENT OF THE CASE[1]

Drew appeals from a judgment of dismissal entered by the U.S. District Court for the Southern District of New York (Carter, J.) after summary judgment. The relevant rulings are unreported.

A. Drew's Time In City Custody

Drew is homeless and suffers from mental health issues. *See* A157, A162-63. From July 11, 2010 through August 23, 2019, Drew spent about 1,608 days in City jails for various low-level offenses. *See* A310-12, A395.

As relevant to this appeal, in 2018, Drew was arrested and detained twice for possessing a bent MetroCard.[2] *See* A310, A395, A155, A170. In January of that year, Drew, then 54, was living in a men's shelter in Manhattan, receiving Supplemental Nutrition Assistance Program (SNAP) benefits and $40 per month in public assistance benefits. *See* A165-67, A146. On February 3, 2018, Drew was arrested for possession of a bent MetroCard. A169-70. The following day, after his release from City custody, Drew checked himself into a shelter in Brooklyn. *See* A395, A166. On June 30, 2018, Drew again was arrested for possession of a bent

[1] Because the City moved for summary judgment, the record is presented in the light most favorable to Drew, the non-moving party, with all reasonable inferences made in his favor. *See Washington v. Napolitano*, 29 F.4th 93, 99 (2d Cir. 2022).

[2] By creating a small bend in the magnetic strip of an empty MetroCard, an individual may obtain a free ride in violation of New York law. *See People v. Mattocks*, 12 N.Y.3d 326, 328-32 (2009).

MetroCard. A155-56. Following his release from City custody on November 5, 2018, Drew checked himself into a mental health treatment facility in the Bronx. *See* A155-57, A310, A55.

In total, Drew served about 32 months in City and New York State ("State") custody for these two offenses. Drew's June 2018 offense was reduced to a misdemeanor violation, and he was sentenced to time served (*i.e.*, 128 days). *See* A155-56, A169-70. Drew, however, was sentenced to an indeterminate term of two-to-five years' imprisonment on the February 2018 offense. New York State Dep't of Corr. and Cmty. Supervision ("DOCCS"), Incarcerated Lookup https://tinyurl.com/4kfc6nh4 (search: Keith Drew (DIN 19A3129)). In connection with that sentence, Drew reentered City custody on January 28, 2019, and he remained there until August 23, 2019. A312. Drew was then transferred to a State facility, where he served the remainder of his sentence until his May 26, 2021 parole. *See* A312, A426; *see also* DOCCS Incarcerated Lookup (DIN 19A3129).[3]

B. The City's Inmate Fund Accounts And Restitution Policy

The City's Commissioner of Correction has "[a]ll authority, except as otherwise provided by law, concerning the care and custody of felons,

[3] New York City jails "house individuals sentenced to no more than one year of incarceration, those awaiting transfer to state prison to serve a sentence longer than one year, and those whose court cases are pending." New York State Div. of Crim. Just. Servs., *Monthly Jail Population Trends* (June 1, 2022) at i, https://tinyurl.com/2r2jvnwb.

misdemeanants and violators of local laws held in the institutions under his charge." N.Y.C. Charter § 623(4). Among other things, the Commissioner must "maintain an institutional fund account on behalf of every lawfully sentenced incarcerated individual or prisoner in his or her custody and shall for the benefit of the person make deposits into said accounts of any prisoner funds." N.Y. Correct. Law § 500-c(7); *see also* 9 N.Y.C.R.R. § 7016.2. The City is required to "inform every incarcerated individual upon admission to the custody of the [City], in writing, using plain and simple language, of their rights under [City] policy" on various topics, including "telephone calls" and "personal hygiene." N.Y.C. Admin. Code § 9-139(a). Similarly, every individual must be provided with "detailed information relating to their incarceration, including [their rights and privileges]." 39 R.C.N.Y. § 1-01 (titled "Inmate Rule Book"). "Upon incarceration," individuals should be given "information about what property may be kept in jail and how to get other property back after discharge." 39 R.C.N.Y. § 1-02; *see also* 9 N.Y.C.R.R. § 7002.9(a) ("Each local correctional facility shall prepare and distribute to all prisoners, upon admission, a written copy of facility rules and information. Such rules and information shall include, but is not limited to, . . . telephone services and rules for use; [and] . . . commissary operations.").

Under the City's "policies and procedures," the City maintains a "Transaction List" and a "Restitution List" on behalf of inmates "in the ordinary course of

business." A279-80, A252, A254. The City will advance the inmate funds and record the debt on the inmate's Restitution List if an inmate lacks sufficient money to cover certain facility expenses, such as telephone calls, haircuts, and (ironically enough) MetroCards.[4] *See* A276-77; *see also* New York City Dep't of Corr. ("DOC"), *Inmate Handbook* (Dec. 2007) at 12, 34, 43, https://tinyurl.com/2p8nuc72 (the "2007 Handbook"); DOC Directive No. 4004R-B, *Barbershops/Beauty Parlors* (eff. Mar. 12, 2008) at IV(A), https://tinyurl.com/3f973rkc. Charges on the Restitution List reflect the date of each charge. *See, e.g.*, A252-53.

The Transaction List records historical deposits and deductions from a fund account, tracked according to the date that the money is deposited or deducted, including, for example, "payroll" deposits for work at City facilities and any "mail deposit[s]" or "visit deposit[s]" by family or friends. A280; *see also, e.g.*, A254-75 (Drew's Transaction List). Because the Transaction List tracks only deposits and deductions, not debts, it never shows a negative balance, even when an inmate owes the City money. *See* A280. Similarly, the Transaction List does not indicate when the debt underlying a particular deduction may have been incurred. *See* A280-81; *see also, e.g.*, A254-75.

[4] The City charges for the MetroCard required to leave Rikers Island and some other City facilities. *Compare* A253 ("02/04/18" MetroCard card), *with* A395 ("04-Feb-18" release).

Shortly after money is deposited into an account, the City deducts outstanding debts from the Restitution List, prioritizing telephone call charges first. A276-77, A281; *see also, e.g.*, DOC Directive No. 1506, *Rikers Island Central Cashier (RICC)* (eff. May 23, 2011) at IV(D)(5)(a), https://tinyurl.com/2p8fwjhp. The City will then remove the charge from the Restitution List. *Compare* A252-53 (Drew's Restitution List), *with* A254-75 (Drew's Transaction List). It does not appear that the City maintains a historic Restitution List for each inmate. *See* A252-53 (listing only outstanding charges). As a result, once the City deducts funds from an account and records the deduction on the Transaction List, the City is unable to identify when a particular charge occurred.

The City assigns an individual a Book & Case ("B&C") each time they enter or reenter City custody. A277. If an individual is transferred or released from City custody with an unpaid restitution balance associated with their B&C number and subsequently returns to City custody, the balance is rolled over to the individual's new B&C number. A277.

C. The City's Deductions From Drew's Account

Between February 2018 and August 2019, fifteen deposits were made to Drew's account, totaling $274.34. *See* A260-75. After each deposit, the City

immediately deducted the full balance in order to cover Drew's purported debts, including primarily telephone calls. A260-75.[5]

For example, on February 4, 2018, Drew's sister deposited $20 into his empty account. A260. That day, the City deducted the entire $20 from his account with 88 withdrawals, 87 of which were for purported telephone calls. A260-62. Because the City only recorded the deduction date, the Transaction List does not show when, if ever, these alleged calls occurred. *See* A260-62 (listing "02/04/18" for all 87 telephone charges).

The City never provided Drew with notice of its restitution policy or notice of his deposits, purported debts, and deductions the City made from his fund account. A178, A191, A196, A337, A347.

In July 2018, Drew became aware that the City was deducting funds from his account without notice. *See* A35. On July 20, 2018, Drew filed a grievance with the City, alleging that the City "unlawfully charged" his account "without notice or any procedure or process for challenging the accuracy of the balance or if [the charges] actually exist." A35. On August 4, 2018, Drew's family deposited $10 into his inmate account, A263, A34, but Drew did not receive notice of the deposit, A34, A178. In response, Drew filed another grievance with the City, demanding a

[5] Only claims arising from deductions occurring after November 8, 2016 are relevant to this action because of a general release that Drew signed as part of a settlement agreement in an unrelated case against the City. *See* A309.

hearing "to examine the [City]'s inmate account procedure and discover the exact location of my family's money." A34. In response to his grievances, the City provided Drew a partial copy of his Transaction List. A183, A196; *see also* A36-52 (partial list). Drew thereafter filed a Freedom of Information Law (FOIL) request in order to obtain further City documents regarding his account. *See* A206. Drew did not, however, receive a copy of his Restitution List until the City produced it in discovery before the district court. A191, A196.

The Restitution List reveals that, among other charges, the City erroneously charged Drew for at least 10 expenses that he could not have incurred because he was not in City custody when the purchases were ostensibly made. *Compare* A310-12 (detailing Drew's custody in City facilities), *with* A252 (listing 10 charges when Drew was not in City custody). The charges included: an April 8, 2010 haircut; an April 27, 2010 MetroCard; a November 21, 2011 haircut; a January 9, 2012 haircut; a May 4, 2012 MetroCard; an October 22, 2013 haircut; a January 27, 2014 haircut; a March 31, 2014 haircut; a May 5, 2014 haircut; and a May 21, 2014 MetroCard.[6]

[6] On May 3, 2019, the City amended its Code so that individuals in City custody have access to free telephone services; the amendment barred the City from profiting off of inmate phone calls. *See* N.Y.C. Admin. Code § 9-154; *see also* A277. Unpaid telephone charges still on Drew's Restitution List were subsequently removed, and thus there are no telephone charges reflected on Drew's Restitution List. A282, A277.

On August 23, 2019, in the midst of discovery in this action, Drew was transferred from City custody to State custody, still purportedly owing $193.09 to the City (after the phone charges were removed). A253, A275, A282. On May 26, 2021, shortly after appealing the district court's grant of summary judgment, the State released Drew on parole. *See* A426, A312; *see also* DOCCS Incarcerated Lookup (DIN 19A3129).

D. Relevant Procedural History

In November 2018, Drew filed a *pro se* complaint against the City and the Unknown Defendants in New York Supreme Court, Bronx County. A11, A54. On December 14, 2018, the City removed the action to the U.S. District Court for the Southern District of New York, and it answered the complaint on May 2, 2019, almost six months after the deadline. A1, A57-59.

1. Discovery

On May 6, 2019, the district court referred the case to a magistrate judge for general pretrial matters, including "scheduling, discovery, [and] non-dispositive pretrial motions." A2. The magistrate judge held an initial pretrial conference on May 21, 2019 and issued a civil case management plan the following day, which gave Drew only one month (*i.e.*, by June 21, 2019) to "amend the pleadings or join additional parties," and set the close of discovery for three months later (*i.e.*, September 30, 2019). A3, A68. The magistrate judge subsequently denied Drew's

request that the court appoint him *pro bono* counsel, and she did not assist Drew, an incarcerated litigant, in identifying the Unknown Defendants by issuing a *Valentin* order. A4; *see, e.g.*, *Dolce v. Suffolk Cnty*., No. 12-cv-108, 2014 WL 655371, at *1 (E.D.N.Y. Feb. 20, 2014) (Bianco, J.) (explaining that, because "plaintiff was unaware of the identities of the corrections officers who allegedly injured him" when he filed his complaint, the court issued a "*Valentin* order" requiring the government "to ascertain the names and addresses of the corrections officers involved"), *aff'd*, 599 F. App'x 15 (2d Cir. 2015).

The City twice moved to extend the discovery deadline, and the magistrate judge granted both motions. A92, A94, A5-6. Discovery ultimately closed on December 23, 2019. A6.

On June 4, 2020, before the City moved for summary judgment, Drew moved to amend the complaint to identify the Unknown Defendants as Joseph Antonelli and Letitia Bailey—respectively, DOC's Acting Associate Commissioner of Budget Management and Planning and an employee of the DOC. A115-19. On July 9, 2020, the magistrate judge denied Drew's motion as untimely, noting that "discovery in this matter closed on December 23, 2019" and that Drew "ha[d] not established good cause to modify [the civil case management plan and] scheduling order that required him to amend his pleadings and join parties by June 21, 2019." A333. The magistrate judge did not provide Drew an opportunity to establish "good cause."

2. Summary Judgment

The City moved for summary judgment on all of Drew's claims on June 25, 2020, A124, which Drew opposed on or around July 27, 2020, A365.

The City argued, in relevant part, that the district court should dismiss Drew's procedural due process claim "for failure to state a claim under the Fourteenth Amendment" because a due process claim is not "redressable under [42 U.S.C.] § 1983 if 'adequate state post-deprivation remedies are available.'" A327-28 (quoting *Davis v. New York*, 311 F. App'x 397, 400 (2d Cir. 2009)). It further argued that the City did not violate Drew's rights "by charging him for these transactions" as inmates "do not have a right to free haircuts and MetroCards," and that the deductions were in accordance with the City's policies. A325. Despite acknowledging that Bailey and Antonelli "provided information in the course of discovery," the City argued that Drew's "request to amend the complaint to name Letitia Bailey and Joseph Antonelli should be denied" as untimely. A319 n.2. Drew, still proceeding *pro se*, responded that he was charged for telephone calls he did not place and haircuts he did not receive, that the City inaccurately recorded "discharges" of unused funds on his Transaction List without actually providing him with those funds, and that the City confiscated his property without his knowledge or consent. *See generally* A334-65.

On March 31, 2021, the district court issued an opinion and order granting the City's motion. The district court held, as relevant here, that: (1) Drew's procedural due process claims were not "cognizable under § 1983" because "New York affords an adequate postdeprivation remedy in the form of, *inter alia*, a Court of Claims action pursuant to N.Y. Comp. Codes R. & Regs. tit. 7, § 1700.3(b)(4)"; (2) Drew's claim that "he was wrongfully deprived of his funds because he was charged for phone calls he didn't make and haircuts/hairstyles he did not receive" was defeated by a "thorough review of the record," which "reveal[ed] that Mr. Drew was charged for telephone calls in accordance with [City] policy, *i.e.*, he was charged for previous calls made as funds became available in his inmate account"; and (3) any claims "arising out of transactions that occurred prior to November 8, 2016 [we]re barred by [a] release signed by Mr. Drew" in an unrelated litigation against the City. SPA10-13 (quotation marks omitted). The court also (4) dismissed *sua sponte* Drew's claims against the Unknown Defendants, apparently concluding that Drew "had ample time and opportunity to identify and serve" them. SPA1 n.1 (quotation marks omitted).

This timely appeal followed. A411.[7]

[7] On appeal, Drew moved this Court for the appointment of *pro bono* counsel. The Court granted the motion on April 7, 2022, directing counsel to brief certain issues, and the undersigned was appointed on April 26, 2022.

SUMMARY OF ARGUMENT

The district court erred in granting summary judgment to the City because it applied the wrong legal standard to the due process claim, because it failed to recognize viable state law claims in the complaint, and because material facts remain in dispute as to all of these claims. Moreover, the district court abused its discretion in denying Drew, a *pro se* plaintiff, an opportunity to amend his complaint. The judgment should be reversed.

First, the Due Process Clause of the Fourteenth Amendment required the City to notify Drew of his purported debts and afford him an opportunity to dispute erroneous charges *before* the City removed money from his account. As a threshold matter, the district court erred in summarily applying the legal standard offered by the City, which provides that post-deprivation process is sufficient with respect to "random, unauthorized" state action. *Compare HANAC*, 101 F.3d at 880 *with* SPA12. But the removal of Drew's funds was pursuant to an established policy. Under the correct standard, pursuant to *Mathews v. Eldridge*, 424 U.S. 319 (1976), the City's black box policy of deducting funds from inmate accounts without notice or an opportunity to object creates an impermissibly great risk that the City will erroneously deprive inmates—many of whom are indigent—of their already limited property. "[W]hen pre-deprivation process could be effective in preventing errors" in individualized deductions from inmate accounts, "that process is required."

Montanez, 773 F.3d at 484. That conclusion is all the more true where, as here, pre-deprivation notice and an opportunity to dispute erroneous charges would—at most—minimally burden the City.

Second, notwithstanding an obligation to "liberally construe" a *pro se* litigant's papers "to raise the strongest arguments that they *suggest*," *Triestman*, 470 F.3d at 474-75, the district court failed to address Drew's conversion and negligence claims, even though both the complaint and Drew's other filings made clear that he was complaining of the unlawful taking of his money by the City. The district court compounded its error by apparently holding that Drew released the City of any liability for unpaid "debts" incurred before signing a general release on November 8, 2016 in an unrelated case against the City, even when the City removed money from his account (which gave rise to his tort claims) *after* he signed the release.

Finally, the district court abused its discretion by refusing to grant Drew a reasonable opportunity to amend his complaint to name the Unknown Defendants, instead dismissing them from the case *sua sponte*. Courts "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Here, Drew was operating at a clear disadvantage because he was *pro se*, indigent, and incarcerated. The district court's denial of Drew's motion on the grounds that it was untimely is particularly striking given that the district court repeatedly granted the City's often untimely motions to extend deadlines. Moreover, the district court's abuse of

discretion was compounded by its failure to assist Drew in identifying the Unknown Defendants. *See Valentin*, 121 F.3d at 75-76.

STANDARDS OF REVIEW

This Court "review[s] *de novo* a district court's decision to grant summary judgment, construing the evidence in the light most favorable to the party against whom summary judgment was granted and drawing all reasonable inferences in that party's favor." *Bey v. City of New York*, 999 F.3d 157, 164 (2d Cir. 2021). "Summary judgment is appropriate only if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)).

This Court "review[s] the district court's denial of leave to amend for abuse of discretion." *Kim v. Kimm*, 884 F.3d 98, 105 (2d Cir. 2018).

ARGUMENT

I. The City's Restitution Policy Violates The Due Process Clause

The district court erred in dismissing Drew's procedural due process claim because it assessed the claim under a legal standard applicable only to random, unauthorized deprivations. Here, the City acted pursuant to an established policy and the district court was required to determine whether, under *Mathews v. Eldridge*, 424 U.S. 319 (1976), Drew was entitled to notice of the City's policy, notice of his purported debts, and an opportunity to dispute erroneous charges before the City

deprived Drew of his money. Under established precedent and the facts of this case, such pre-deprivation process was required.

A. The District Court Applied The Wrong Legal Standard In Dismissing The Due Process Claim

The district court erred at the outset by summarily adopting the City's argument that Drew's procedural due process claim was "not cognizable under § 1983" because "adequate state post-deprivation remedies are available," including "a Court of Claims action." SPA12 (quotation marks omitted).

The United States Supreme Court has distinguished between procedural due process claims (a) "based on random, unauthorized acts by state employees" and (b) "based on established state procedures." *HANAC*, 101 F.3d at 880. Where the deprivation arises from "random" and "unauthorized" state action, a due process violation is not cognizable under Section 1983 if the state provides adequate post-deprivation relief. *Id.*; *see also Hudson v. Palmer*, 468 U.S. 517, 532 (1984); *Parratt v. Taylor*, 451 U.S. 527, 541 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). Due to the nature of such state action, it is often "not only impracticable, but impossible, to provide a meaningful hearing before the deprivation" occurs. *Hudson*, 468 U.S. at 532 (quotation marks omitted).

By contrast, where the deprivation arises from state action pursuant to "established state procedures," "the availability of postdeprivation procedures will not, ipso facto, satisfy due process." *HANAC*, 101 F.3d at 880. "[T]o determine

whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate." *Zinermon v. Burch*, 494 U.S. 113, 126 (1990). In other words, the Court must "engage in the familiar three-factor test first articulated in *Mathews v. Eldridge*." *Barrows v. Becerra*, 24 F.4th 116, 140 (2d Cir. 2022).

The district court's conclusory dismissal—based on a purported "adequate postdeprivation remedy" in the Court of Claims—elided this fundamental distinction. *See* SPA12 (quotation marks omitted). Although the district court did not find the City's deductions to be "random" and "unauthorized," the caselaw on which the court's theory rests is based in this very distinction. *See Green v. Niles*, No. 11-cv-1349, 2012 WL 987473, at *6 (S.D.N.Y. Mar. 23, 2012) (Engelmayer, J.) (mishandled mail); *Davis*, 311 F. App'x at 400 (undelivered package); *see also Jackson v. Burke*, 256 F.3d 93, 96 (2d Cir. 2001) (destruction of mail); *Love v. Coughlin*, 714 F.2d 207, 208-09 (2d Cir. 1983) (loss of duffel bags).

Here, the City admits that it deducted money from Drew's account pursuant to established "policies and procedures" implemented "in the ordinary course of business." *See* A279-80, A276-77. In an affidavit accompanying the City's summary judgment briefing, Patricia Lyons (the DOC's Deputy Commissioner of the Financial, Facility, and Fleet Administration) avers that the affidavit is "based upon [her] knowledge of DOC's policies and procedures and [her] conversations

with staff," and that the DOC maintained Drew's Restitution List and Transaction List "in the ordinary course of business." A279-80.

The City's policy also appears to be authorized under City law. The City Code, for example, requires the DOC to publish on its website a document that details the inmate's rights under DOC policy. N.Y.C. Admin. Code § 9-139(a), (d). The document during the relevant time period—the 2007 Handbook—informs inmates that "[w]hile you are incarcerated, you must pay for some services such as haircuts and long distance telephone calls." 2007 Handbook at 12 (emphasis omitted). "If you have no funds in your [inmate] account," the DOC "will pay for these calls provided they are local and are each no longer than six (6) minutes long" and "will withdraw the amount that you would have paid for those calls from any funds that are put in your [inmate] account afterwards." *Id.* at 43 (emphasis omitted). Similarly, "[i]f you have no money in your [inmate] account you may still obtain a haircut, but the cost of the haircut will be taken from your account when you get money in it." *Id.* at 34. Moreover, one DOC directive states that if "an inmate lacks sufficient funds for full payment" of a haircut, "[r]estitution will be placed against the inmate's account to recoup any monies owed at a later date." DOC Directive No. 4004R-B at IV(A). Another DOC directive, which applies to Rikers Island where Drew was held, states that inmate "correspondence found to contain cash will result in the cash being posted to the inmate's account and held in escrow until the

inmate is discharged," except for cash "[u]sed to pay outstanding restitutions." DOC Directive No. 1506 at IV(D)(5).

Because the removal of funds from Drew's account was pursuant to an established procedure, available post-deprivation process does not render Drew's Section 1983 claim incognizable. *See HANAC*, 101 F.3d at 880.

In any event, the Court of Claims does not offer an "adequate state postdeprivation remedy" here. Drew seeks compensatory *and injunctive relief* against the City of New York, A13, A335, but the Court of Claims only affords money damages, and only in claims against *the State*. *See* N.Y. Court of Claims Act § 9; *Koerner v. State of New York*, 62 N.Y.2d 442, 448 (1984); *Foy v. State of New York*, 71 Misc. 3d 605, 607 (N.Y. Ct. Cl. 2021).

The district court failed to engage the appropriate legal standard, and its summary judgment decision should be reversed for this reason alone.

B. Due Process Required The City To Provide Notice And An Opportunity To Dispute Erroneous Charges Before Taking Money From Drew's Account

Due process is "a flexible concept that varies with the particular situation." *Zinermon*, 494 U.S. at 127. "In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Id.* at

132. To determine the required process in a given case, the Court weighs several factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335; *see also, e.g.*, *Barrows*, 24 F.4th at 140. None of these factors were addressed by the district court.

Although this Court has yet to address the due process protections required before a state makes individualized deductions from an inmate's account, the Third Circuit's analysis in *Montanez v. Secretary Pennsylvania Department of Correction*, 773 F.3d 472 (3d Cir. 2014), is instructive. There, Pennsylvania implemented a program that automatically deducted up to 20% from each inmate's account balance each month to cover court-ordered restitution, fines, and costs. *Id.* at 477. Finding that the state's post-deprivation grievance procedures satisfied inmates' procedural due process rights, the district court held that no pre-deprivation hearing was required. *Id.* at 483, 485.

On appeal, the Third Circuit reversed, holding that "when pre-deprivation process could be effective in preventing errors, that process is required." *Id.* at 484. Engaging with the *Mathews* test, the court stated that inmates have a "reduced"

property interest in the funds in their inmate accounts because inmates do not possess complete control over their money while incarcerated, while the state has an "important" interest in "collecting restitution, costs, and fines from incarcerated criminal offenders to compensate victims." *Id.* at 483. Nevertheless, the court held that due process requires some process *before* inmates are deprived of funds in their accounts. *Id.* at 485. The court explained that, unlike some policies deducting "a fixed dollar amount per day to each inmate," the state's policy of deducting up to 20% from each inmate's account each month "require[d] individualized process to determine each inmate's total cost prior to the commencement of the deductions." *Id.* at 484. Given this individualized accounting process, the court explained that "additional pre-deprivation process would mitigate at least some risk of error in the application of" the state's policy. *Id.* The court concluded too that the pre-deprivation process "need not be administratively burdensome" as other jurisdictions, including Iowa and Ohio, were able to implement pre-deprivation process in like circumstances. *Id.*

Other circuits have held similarly. The Ninth Circuit has held that, "[a]t a minimum, due process requires that inmates be informed of their financial liability (including the basis for the calculation), and have a meaningful opportunity to contest the assessment before significant assets are deducted or frozen." *Shinault v. Hawks*, 782 F.3d 1053, 1059 (9th Cir. 2015); *see also Quick v. Jones*, 754 F.2d 1521,

1523-24 (9th Cir. 1985) ($66 deduction from inmate account requires pre-deprivation process). The Seventh Circuit, in rejecting an inmate's due process claim, emphasized that the inmate had "precise notice of the charges against him" (including $1,445.68 in restitution) and received "an opportunity . . . to dispute the charges" before his account was impounded. *Campbell v. Miller*, 787 F.2d 217, 221-25 (7th Cir. 1986). And the Eighth Circuit likewise held that due process was satisfied where, among other things, "a log was kept indicating the amount deducted" from an inmate's account and "the date" of the transaction, inmates were able to "obtain copies of the [log] on request," and inmates were "regularly furnished with monthly statements of their account." *Jensen v. Klecker*, 648 F.2d 1179, 1183 (8th Cir. 1981); *see also Gillihan v. Shillinger*, 872 F.2d 935, 937 (10th Cir. 1989) ("[S]ince . . . the facts alleged by plaintiff indicate that [the State] could have provided plaintiff with a hearing prior to depriving him of his [$174.53], we conclude that plaintiff stated a claim for relief.").

So too here. The City deprived Drew of $274.34 and claims another $193.09 in unpaid restitution.[8] While this may seem like a modest sum, Drew's interest in those funds is significant: Drew is homeless and indigent, surviving on food stamps and $40 per month in public assistance benefits. *See* A156-57, A166-67. Indeed, the crimes that Drew committed that led to his recent incarceration—possessing bent MetroCards—are connected to a lack of money. *See* A155, A170. His family likewise struggles to provide what they can to help him. *See, e.g.*, A254 ($10 deposit), A257 ($20), A260 ($20), A263 ($10); *see also* A148-53. Drew's circumstances are not unique, as a significant proportion of inmates in New York are caught in a similar cycle. *See, e.g.*, Brennan Center For Justice, *Poverty and Mass Incarceration in New York: An Agenda for Change* (Feb. 23, 2021), https://tinyurl.com/mdf4fp6c.

New York law appears to recognize this reality. State law requires State facilities to "take such steps as are necessary to ensure that inmates have at least

[8] The City has never disputed—nor could it—that Drew has a property interest in the money deposited into his inmate account by his family or as payment in connection with his employment. *See, e.g.*, *Reynolds v. Wagner*, 128 F.3d 166, 179 (3d Cir. 1997) ("Inmates have a property interest in funds held in prison accounts."); *Campbell*, 787 F.2d at 222 ("It is beyond dispute that [an inmate] has a property interest in the funds on deposit in his prison account."); *Quick*, 754 F.2d at 1523 ("There is no question that [an inmate's] interest in the funds in his prison account is a protected property interest."); *Jensen*, 648 F.2d at 1183 ("[Inmates] obviously have a property interest in the funds on deposit in their inmate accounts."); *see also Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) (holding that due process required a hearing *before* a state seizes property in a debtor's possession).

forty dollars available upon release." N.Y. Correct. Law § 125(2). And as of June 22, 2022, under the City Code, the DOC is obligated to assist discharged individuals with "receiving unused commissary funds." N.Y.C. Admin. Code § 9-162. Although Drew's $274.34 "may not seem like much to the governing class in our society, including lawyers and judges, it is for too many people a vital amount of cash." *Markadonatos v. Village of Woodridge*, 739 F.3d 984, 1000 (7th Cir. 2014) (Hamilton, J., dissenting), *rehearing en banc granted*, *opinion vacated*, 760 F.3d 545 (7th Cir. 2014). Given that City jails alone hold approximately 5,500 individuals at a time, the City's deprivation of inmate funds may total hundreds of thousands—if not millions—of dollars. *See Monthly Jail Population Trends* at 2.

The City's interest, by contrast, "does not require such prompt action that a pre-deprivation hearing is infeasible." *Shinault*, 782 F.3d at 1058. The "integrity" of City jails "does not diminish" if an opportunity to dispute erroneous charges precedes any deduction, "particularly because the funds in fact remain in the [City]'s control." *Id.* "Nor does the financial viability of the correctional system require immediate recoupment of inmate costs given their insignificance in relation to [the DOC's] overall budget," *id.*, which is projected to be $1.34 billion this year, *see* New York City Comptroller, FY 2023 Agency Watch List: Department of Correction (Mar. 2022) at 5, https://tinyurl.com/2vrzmb63.

Unfortunately, under current City procedures, the risk of erroneous deprivation is high. The City never provided Drew with notice of deposits or his purported debts, A178, A191, A196, which is the case for other inmates as well, A32. Indeed, the record suggests that the City *does not even keep records* of inmates' past debts—or purchase dates—after monies are taken from inmate accounts. Although the City tracks various financial transactions with inmates via the Transaction List, that list does not record the dates on which an inmate purportedly used a particular service; instead, it records only the date that the City removed funds from the inmate's account. *See, e.g.*, A255; *see also* A280. Thus, the City's restitution policy makes it nearly impossible to check the accuracy of its accounting.

The City's policy is a black box that creates a high risk of erroneous deprivation from a large population of indigent individuals. This risk is not speculative, as there is ample reason to question the accuracy of the City's calculations and deductions. Drew's Restitution List, for example, contains charges to his account for expenses that he could never have incurred. *Compare* A310-12 (Drew's history in City custody), *with* A252 (Restitution List documenting 10 charges for transactions that occurred on dates when Drew was not in City custody). The district court did not address this clear evidence of erroneous charges against Drew's account, or the general failure of the City to maintain or produce

documentation supporting the deductions from his account—instead, it was satisfied by the mere fact that all deductions were pursuant to a City policy. *See* SPA13.

Some pre-deprivation notice—and an opportunity to dispute erroneous charges—would undoubtedly ameliorate such risks, and establishing such procedures need not be burdensome. New York State, for example, provides inmates with "a monthly print-out of their account balances." New York State Dep't of Corr. and Cmty. Supervision, *Handbook for the Families and Friends of New York State DOCCS Inmates* (July 2015) at 25, https://tinyurl.com/mrbkctd8. Iowa "requires that prison administrators provide written notice of the amount of the deduction to the inmate, who shall have five days after receipt of the notice to submit in writing any and all objections to the deduction." *Montanez*, 773 F.3d at 484 (quotation marks omitted and alterations adopted). And Ohio prison administrators "must provide notice to the inmate of the debt and its intent to seize money from the inmate's account, inform the inmate of a right to claim exemptions, and provide the inmate with an opportunity to assert any exemption or defense before any money may be withdrawn from the account." *Id.* (quotation marks omitted).

In any event, despite State and City law requiring written and oral notification of the DOC's financial policies, *see, e.g.*, 9 N.Y.C.R.R. § 7002.9(a); N.Y.C. Admin. Code § 9-139(a), (e), Drew was never even notified of the restitution policy itself. *See, e.g.*, A17-23, A178, A191, A196; *see also* A75 ("At no time, prior to the

utilization of the facility phones, w[as] any detainee made aware, or adequately notified of a possibility to be charged for calls . . . .”). The City submitted no record evidence to the contrary. *Cf.* DOC Directive No. 3750, *Inmate Orientation* (eff. July 11, 2006) at III(M) (requiring orientation logbook with inmate’s name, date and time of orientation, and inmate’s signature), https://tinyurl.com/bdh38ha7. This alone merits remand. *See Montanez*, 773 F.3d at 484.

* * *

Because the City took Drew’s money pursuant to an established policy and did not provide notice or any form of pre-deprivation hearing, Drew was denied due process under the Fourteenth Amendment. Accordingly, this Court should reverse and remand the cause to the district court for further proceedings. *Cf. Patterson v. Coughlin*, 761 F.2d 886, 893 (2d Cir. 1985) (“In view of our holding that an adequate prior hearing was required, a postdeprivation hearing, by way of an Article 78 proceeding or an action for damages in the Court of Claims, is inadequate, by definition, to meet the requirements of due process.”).

II. The District Court Erred By Failing To Address Drew’s State Law Tort Claims

This Court has repeatedly held that submissions of a *pro se* litigant must be “construed liberally and interpreted to raise the strongest arguments that they *suggest*.” *Triestman*, 470 F.3d at 474 (collecting cases) (quotation marks omitted); *see also Erickson v. Pardus*, 551 U.S. 89, 94 (2007). To satisfy pleading

requirements, a plaintiff need only state "simply, concisely, and directly events that," as alleged, "entitle them to damages." *Quinones v. City of Binghamton*, 997 F.3d 461, 468 (2d Cir. 2021) (quoting *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014)); *see also* Fed. R. Civ. P. 8(a)(2).

Where a plaintiff alleges facts that support a cognizable legal theory, an "imperfect statement of the legal theory supporting the claim asserted" does not warrant dismissal. *Johnson*, 574 U.S. at 11. A plaintiff need not "enumerate" nor "label" a cause of action in the complaint, *Quinones*, 997 F.3d at 468-69, but must simply inform the defendant "of the factual basis for their complaint," *Johnson*, 574 U.S. at 12.

Despite allegations and arguments throughout Drew's submissions that the City was "reckless" and "negligent" when it "confiscated" his money without authorization, the district court failed to consider Drew's conversion and negligence claims. That error requires reversal. *See Triestman*, 470 F.3d at 477. The Court should vacate the judgment and remand the case to the district court for consideration of Drew's tort claims.

A. Drew Sufficiently Raised A Conversion Claim

To state a claim for conversion under New York tort law, a plaintiff must allege that the defendant exercised unauthorized dominion or control over property owned by the plaintiff. *See Colavito v. New York Organ Donor Network, Inc.*, 8

N.Y.3d 43, 49-50 (2006). If a plaintiff seeks to recover for the "taking of [their] property, then the action is properly deemed one for conversion." *Sporn v. MCA Recs., Inc.*, 58 N.Y.2d 482, 488 (1983).

At the front of his complaint, Drew describes his action as a "Property Loss Tort Claim." A13. He then includes multiple allegations asserting unauthorized taking of his property. *See, e.g.*, A16 ("[DOC] has confiscated or forfeited Plaintiff['s] personal property; without, adequate process, statutory authority, or legitimate penological objective . . . ."), A17 ("Unknown DOC employee . . . confiscated real property – namely U.S. currency – from this Plaintiff on August 3, 2018 . . . ."), A17 ("The confiscation of United States currency on Aug. 3, 2018 . . . without any procedure, or process, available to notify the rightful owner, clearly indicate[s] deliberate indifference to statutory, and other fundamental property interests, of . . . this Plaintiff, specifically."); *see also, e.g.*, A18-20, A24-25. Indeed, the New York Supreme Court, before removal, classified the complaint as alleging "torts," including "conversion." A59; *see also* Docket Report, *Drew v. City of New York*, Index No. 300201/2018 (N.Y. Sup. Ct., Bronx Cnty. 2018), https://tinyurl.com/4nuz6f9v.

Later submissions and record evidence only reaffirmed these allegations. Drew's opposition brief to the motion for summary judgment makes clear that money was taken from him for phone calls that he "never made" and haircuts that

he did not receive, and that the City inaccurately recorded "discharges" of unused funds on Drew's Transaction List without actually providing him with those funds. A357, A361, A355; *see also* A336 ("Plaintiff's entire complaint clearly revolves around [DOC] seizures of property interests . . . ."). And his deposition testimony, offered as an exhibit to the City's summary judgment motion, similarly includes multiple references to unauthorized taking of his money. *See, e.g.*, A181 ("[My money] was just taken. It was never put in my account. I was never notified that I had it."), A177 ("The Department of Correction confiscated all the money I received since 2015."); *see also* A213-14 ("I'm telling you that's discharge money that I'm supposed to receive that I never received. There are so many places in the record that indicates discharge charges that I didn't get.").

The district court even acknowledged that Drew claimed "he was wrongfully deprived of his funds because he was charged for phone calls he didn't make and haircuts/hairstyles he did not receive." SPA12. The merits of this allegation, however, were not addressed. Instead, the district court simply stated that a "thorough review of the record reveal[ed] that Mr. Drew was charged for telephone calls in accordance with DOC policy, *i.e.*, he was charged for previous calls made as funds became available in his inmate account." SPA13. This "thorough review of the record" overlooked documentary evidence that the City charged Drew for

services he purportedly received while he was not in City (or even State) custody. *Compare* A310-12, *and* A395, *with* A252.

B. Drew Sufficiently Raised A Negligence Claim

The district court also overlooked Drew's negligence claim. To state a claim for negligence under New York law, a plaintiff must allege that (1) a duty was owed to plaintiff by the defendant, (2) the defendant breached that duty, and (3) the plaintiff was injured as a result of that breach. *Pasternack v. Lab'y Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016). As a matter of law, the City—with access to and control over Drew's account—had a fiduciary duty to safekeep his money. *See* N.Y. Correct. Law § 500-c(7) ("[T]he New York city commission of correction . . . shall maintain an institutional fund account on behalf of every . . . prisoner in his or her custody and shall for the benefit of the person make deposits into said accounts of any prisoner funds."); *see also* DOC Directive No. 1506 at VII(A) ("The Inmate Cash Fund consists entirely of money belonging to inmates, and *is held in trust for them*." (emphasis added)).

Drew, for his part, sufficiently alleged the elements of negligence throughout his complaint. Drew alleged that City officials were "reckless and negligent" in taking his money. *See, e.g.*, A15 ("Unknown Supervisor . . . was reckless and negligent in the forfeiture of this Plaintiff's monetary assets beginning on August 3, 2018."), A15 ("Unknown Employee . . . was reckless and negligent in the forfeiture

of this Plaintiff's monetary assets beginning on August 3, 2018."), A22 ("[The City] is fully complicit in the denial of Plaintiff's property interests . . . . In point of fact, [DOC] has been reckless and negligent in forfeiting the monetary assets of Pretrial Detainees as a whole, and this Plaintiff, specifically . . . ."), A17 ("[DOC] has been reckless in taking property of Pretrial Detainees . . . ."). And while the harm at issue is self-evident, Drew alleges that he was "injured" through "the denial of access to his monetary assets." A19.

Even the City appeared to recognize that Drew raised tort allegations. In its answer to the complaint, the City argued that the district court "should not exercise jurisdiction over any of Plaintiff's state-law claims." A66. And it initially contended that Drew did not file a notice of claim with the City before commencing suit, *see* A66 (citing N.Y. Gen. Mun. Law §§ 50-e, 50-h, 50-i (detailing requirements for the "[p]resentation of tort claims")), a defense it later abandoned after Drew provided the claim number at his deposition, A175.

C. The District Court Wrongly Concluded That A General Release Barred Claims Arising Out Of Pre-Release "Transactions"

The district court also erred in holding that claims "arising out of transactions occurring before November 8, 2016 are barred" by a general release that Drew

signed as part of a settlement agreement with the City in an unrelated litigation. SPA10-11.[9]

The release discharged the City "from any and all liability, claims, or rights of action alleging a violation of [Drew's] civil rights and any and all related state law claims, from the beginning of the world to the date of this General Release." A309. Drew acknowledges that the release bars any relevant claims that *accrued* as of November 8, 2016. The district court, however, held that Drew was barred from asserting, for example, that he did not owe any monies from haircuts that the City alleges occurred between April 8, 2010 and July 1, 2015, *see* SPA13, even though the City has yet to deduct funds from Drew's account for these purported debts, *see* A252.

This analysis confuses "transactions" with "claims." Drew's tort claims accrued when the City took money out of his inmate account to cover those haircuts—the existence of which Mr. Drew disputes—*not* when those haircuts allegedly occurred. A cause of action for conversion, for example, accrues "when all of the facts necessary to sustain the cause of action have occurred, so that a party could obtain relief in court." *State of New York v. Seventh Regiment Fund, Inc.*, 98 N.Y.2d 249, 259 (2002) (quotation marks omitted). Even the City, in its motion for

[9] Although the district court focused on Drew's procedural due process claims, this analysis impacts the overlooked tort claims.

summary judgment, appeared to concede this point, arguing that "the allegations in the Complaint regarding money allegedly *taken* prior to November 8, 2016 are barred by the General Release." A324 (emphasis added). So, for example, Drew has not released the City from liability pertaining to erroneous charges currently on his Restitution List, which the City has yet to deduct from his inmate account. *See* A252-53.

Any claims regarding deductions that occurred—or have yet to occur—after November 8, 2016 are not barred, regardless of when the original charges purportedly took place.

* * *

The district court failed to liberally construe and analyze Drew's conversion and negligence tort claims, granted the City's motion for summary judgment where there was a dispute of material fact regarding unwarranted taking of Drew's money, and misconstrued the parties' general release. For any and all of these reasons, the Court should vacate the judgment and remand the case for further proceedings on Drew's tort claims. *See*, *e.g.*, *Triestman*, 470 F.3d at 474; *Quinones*, 997 F.3d at 469; *Frost v. New York City Police Dep't*, 980 F.3d 231, 251 (2d Cir. 2020).

III. The District Court Abused Its Discretion In Denying Drew's Sole Motion To Amend His Complaint

Finally, the Court should vacate the judgment and remand the cause because the district court abused its discretion in denying Drew's motion for leave to amend

his complaint and dismissing *sua sponte* Drew's claims against the Unknown Defendants.

On June 4, 2020,[10] Drew filed a motion to amend his complaint solely to identify two individuals—Joseph Antonelli and Letitia Bailey—as the Unknown Defendants. *See* A115. The magistrate judge denied the motion as untimely, noting that "discovery in this matter closed on December 23, 2019" and that Drew "ha[d] not established good cause to modify [her May 22, 2019 civil case management plan and] scheduling order that required him to amend his pleadings and join parties by June 21, 2019." A333. Citing the magistrate judge's order, the district court subsequently dismissed Drew's claims against the Unknown Defendants *sua sponte*. *See* SPA1 n.1.

"Generally leave to amend should be freely given, and a *pro se* litigant in particular should be afforded every reasonable opportunity to demonstrate that he has a valid claim." *Dluhos v. Floating & Abandoned Vessel, Known as New York*, 162 F.3d 63, 69 (2d Cir. 1998) (quotation marks and citations omitted); *see also* Fed.

[10] In denying Drew's motion and dismissing the Unknown Defendants, the magistrate judge and the district court both mistakenly stated that Drew filed his motion on June 15, 2020—when the Southern District of New York's *pro se* office uploaded the motion to the docket. *See* A333; SPA1 n.1. Under the prison mailbox rule, however, Drew's motion was "filed" on June 4, when he "deliver[ed] [it] to prison authorities for forwarding to the district court." *Walker v. Jastremski*, 430 F.3d 560, 562 (2d Cir. 2005). Even assuming the eleven-day difference was not material to the magistrate judge or the district court's decisions, it is one of the many instances where Drew's *pro se* status was overlooked.

R. Civ. P. 15(a)(2). Indeed, "[a] *pro se* complaint should not be dismissed without the Court granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010) (quotation marks omitted and alterations adopted). "Nonetheless, a motion to amend should be denied if there is an apparent or declared reason—such as undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, or futility of amendment." *Dluhos*, 162 F.3d at 69 (quotation marks omitted and alterations adopted).

In *Dluhos*, this Court explained that, where there is "no indication in the record of any dilatory motion on [the *pro se* plaintiff's] part," and where "it is unlikely that . . . an amendment would cause undue prejudice to any party," "untimeliness of [plaintiff's] motion alone may not justify denying [the] motion to amend"—even if the "motion to amend came nearly nine months late according to the scheduling order." *Id*. at 69-70. Rather, "*pro se* litigant[s] . . . should be permitted some leeway in stating [their] claim[s] with procedural accuracy." *Id*. at 70.

Here, neither the magistrate judge nor the district court found that Drew's delay in filing his motion to amend was a result of "bad faith or dilatory motive," or

that granting the motion would have caused "undue prejudice to any party." *Id*. at 69. Nor did they give Drew an opportunity to be heard on the question of timeliness. Drew's two-page motion to amend did not address the issue, and the district court ultimately dismissed the Unknown Defendants *sua sponte*. Accordingly, the magistrate judge abused its discretion in denying Drew's motion to amend his complaint, and the district court erred in dismissing the Unknown Defendants.

The lower court's denial of Drew's motion as untimely and subsequent *sua sponte* dismissal is particularly striking in light of the record below. In addition to his motion to amend, Drew made one other belated filing. On January 13, 2020—less than three weeks after the close of discovery—Drew moved for leave to serve the City with requests for admission. A96. The magistrate judge interpreted Drew's motion "as a request to extend discovery for the sole purpose of obtaining responses to his requests for admission," but it nevertheless denied the motion as untimely. A105.

By contrast, the district court and magistrate judge, together, accepted *all* of the City's untimely filings and granted *all* of its requests for extensions. This difference in treatment cannot be explained away by the nature of the requests

themselves. Indeed, the City requested *eleven* significant extensions, often well after its deadlines had passed[11]:

- The City's deadline to answer the complaint was December 21, 2018. *See* A1, A57; *see also* Fed. R. Civ. P. 81(c)(2)(C). On May 2, 2019, nearly *six months* after that deadline had passed, the City filed its answer and moved *nunc pro tunc* for an extension of time, a motion which the district court later granted. A57, A2.
- At a telephone conference on May 21, 2019, the magistrate judge ordered the City to serve Drew with an affidavit by July 19, 2019. *See* A70, A3; *see also* A68. On the day of its deadline, the City requested and received, among other things, a one-week extension of that deadline. A70; A4.
- On May 22, 2019, the magistrate judge entered a civil case management plan and scheduling order setting September 30, 2019, as the discovery deadline. A3; *see also* A68. On September 26, 2019, the City moved for and received a two-month extension to complete discovery. A92, A5.
- On December 2, 2019—the new deadline for the close of discovery—the City requested and received a three-week extension to depose Drew. A94, A6.
- On January 1, 2020—two days before the deadline to request a pre-motion conference for a summary judgment motion—the City requested and received a three-week extension of the deadline. A7.
- On March 5, 2020—two business days before its deadline to file a motion for summary judgment—the City requested and received a six-week extension of that deadline. A107, A7.

[11] The City's extension requests (without conferring with, or receiving consent from, Drew) and the district court's extensions became so frequent that Drew filed a "formal objection to any future extensions," stating that "I am under the impression that defense counsel and the Court are litigating this matter between themselves with no input from the Plaintiff." A113.

- On April 16, 2020—two business days before the new summary judgment deadline—the City requested and received a four-week extension of the deadline. A109, A8.
- On May 14, 2020—two business days before the new summary judgment deadline—the City requested and received another thirty-day extension. A111, A8.
- On June 15, 2020—two business days before the new summary judgment deadline—the City requested and received another two-week extension. A122, A8.
- Drew filed his opposition to the City's motion for summary judgment on July 27, 2020—the deadline set by the district court.[12] A365; *see also* A8. Pursuant to the district court's prior scheduling order, the City's reply brief was due two weeks after Drew's opposition. *See* A7. By March 1, 2021, however, the City had still not filed a reply brief, and thus the district court issued an order to show cause as to why the City's motion should not be deemed fully briefed. A397. In response, the City requested and received an additional seven days to file a reply brief. A398, A9.
- On March 12, 2021—the day of the City's new deadline to file its reply brief—the City requested and received another extension of one business day to file its brief. A400, A9.

Rather than granting Drew, *the pro se litigant*, "some leeway" with respect to procedural issues, the magistrate judge and district court held him to strict deadlines while granting *the City* significant deference and leeway. *See Dluhos*, 162 F.3d at 70. In doing so, the magistrate judge and district court abused their discretion.

What's more, this Court has held that a district court has an obligation to assist incarcerated, *pro se* litigants in obtaining discovery necessary to identify defendants

[12] In a subsequent order, the district court once again overlooked the prison mailbox rule and incorrectly stated that Drew filed his motion on August 5, 2020. A397.

in order to avoid dismissal. *See Valentin*, 121 F.3d at 75 (concluding that "at least some inquiry should have been made as to whether [the unknown defendant] exists and could readily be located," where plaintiff was proceeding *pro se* and incarcerated); *Davis*, 160 F.3d at 922 (a *pro se* plaintiff's "fail[ure] to realize until after [a] summary judgment motion [is] filed that he had failed to name the appropriate defendant(s) . . . is understandable"). "Though a court need not act as an advocate for *pro se* litigants, in *pro se* cases there is a greater burden and a correlative greater responsibility upon the district court to insure that constitutional deprivations are redressed and that justice is done." *Davis*, 160 F.3d at 922 (quotation marks omitted). Accordingly, the district court should have, at a minimum, granted Drew "an opportunity for additional discovery" "to identify the individuals who were personally involved" rather than dismissing his claims against the Unknown Defendants *sua sponte*. *Id.*; *see also*, *e.g.*, *Jackson*, 256 F.3d at 96.

CONCLUSION

This Court should reverse the judgment of the district court and remand the case for further proceedings, including to allow Drew to amend his complaint to

identify the Unknown Defendants, and for further proceedings on his procedural due process, conversion, and negligence claims.

Dated: July 7, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Local R. 32.1(a)(4)(A) because it contains 10,339 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word-count feature of Microsoft Word.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font Times New Roman.

Dated: July 7, 2022

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