UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELLEN PSYCHAS, *et. al.*, *Plaintiffs*,	
v.	Civil Action No. 18-00081 (ABJ)
DISTRICT OF COLUMBIA, *et. al.*,	
Defendants.	

PLAINTIFFS' MOTION FOR LEAVE TO FILE SURREPLY

Plaintiffs in the above-captioned matter respectfully request leave to submit the attached surreply in response to Defendants' Reply submitted to this court on Aug. 3, 2018. The surreply is proposed to address two misleading statements of "fact" with respect to Plaintiffs' permit PA #118910 that is taken entirely out of the proper context. The surreply is also being proposed in response to a sentence that is designed to mislead the court into thinking that Defendant Stokes only accessed the Transportation Online Permitting System (TOPS) through his own account.

The court's decision on whether or not to grant leave for the filing of a surreply is committed to its sound discretion. *See, e.g. Akers v. Beal Bank*, 760 F.Supp.2d 1, 3 (D.D.C. 2011). Granting leave to file a surreply is appropriate when a reply leaves a party unable to contest matters presented to the court for the first time. *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C.Cir. 2003) *citing Lewis v. Rumsfeld*, 154 F.Supp. 2d 56, 61 (D.D.C. 2001).

A surreply is particularly appropriate in order to address and correct inaccuracies in a reply memorandum. *See Am. Forest & Paper Ass'n v. Envt. Protection Agency*, 1996 WL 509601 *3 (D.D.C. Sep. 4, 1996). There are three misstatements that Plaintiffs wish to bring to the court's attention and then refute:

- On page 4, Defendants claim: "Indeed, plaintiffs' construction permit explicitly stated that a *separate* occupancy permit was required."

- On page 7 of the Reply, Defendants purport as "fact": "[Permit PA #118910] also states that it is a 'construction' permit and that a separate 'occupancy' permit is required."
- On page 11, Defendants assert: "Because defendant Stokes was authorized to access TOPS system in the course of his employment, and used his administrator access to view plaintiffs' account, his manner of access was at all times valid."

As discussed in greater detail in the proposed surreply, any purported requirement under PA #118910 to obtain an "occupancy" permit is unrelated to the tree house's occupation of public space following its completion. With respect to the third statement addressed in the surreply, Plaintiffs have accused Defendant Stokes of much more than merely using his administrator access to view Plaintiff Psychas' TOPS account.

For the foregoing reasons, Plaintiffs ask that the court grant their request to file a surreply. Plaintiffs' proposed surreply would be helpful to the adjudication of Defendants' motion for dismissal. *See Akers*, 760 F.Supp.2d at 3. Moreover, Defendants' filing of the proposed surreply less than one week following Defendants' filing of their Reply would not be prejudicial to Defendants. *See Am. Forest & Paper Ass'n*, 1996 WL 509601 at *3.

Pursuant to L.Cv.R. 7(m), Plaintiffs notified Defendants on Aug. 7, 2018 by email of Plaintiffs' motion for leave to file a surreply. Defendants indicated that they oppose Plaintiffs' motion.

Dated: Aug. 8, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Bonding Yee, certify that on Aug. 9, 2018, I served by email a copy of Plaintiffs' Motion for Leave to File Surreply, Plaintiffs' Surreply in Opposition to Defendants' Motion to Dismiss, and proposed order, to the following:

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PROPOSED SURREPLY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELLEN PSYCHAS, *et. al.*, *Plaintiffs*,	
v.	Civil Action No. 18-00081 (ABJ)
DISTRICT OF COLUMBIA, *et. al.*, *Defendants*.	

PLAINTIFFS' SURREPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

In Defendants' Reply Memorandum submitted to this court on Aug. 7, 2018, Defendants make assertions couched as fact that they did not make previously in their Motion to Dismiss. Without having had an opportunity to address Defendants' new assertions and having moved for leave to file a surreply in the accompanying motion, Plaintiffs hereby respond as follows.

I. PA #118910 does not enumerate an "occupancy" permit requirement in order to authorize the tree house's presence in public space following its completion.

As the court is well aware by now, the threshold issue is the status of Plaintiffs' permit, PA #118910. Plaintiffs and Defendants agree that it is a "construction" permit for the portion of Plaintiffs' tree house built 20 inches over public space (*i.e.* a mulch-covered, unpaved tree space) at more than eight (8) feet above the ground. Where they disagree is on what that permit authorized or authorizes.[1] Plaintiffs' position throughout this controversy is that the essence of a construction permit—in this case issued under a "balcony" category—is to allow work completed

[1] Plaintiffs are hopeful that the court will deny Defendants' Motion to Dismiss and in particular will reject Defendants' attempt to depict PA #118910 as a "temporary" authorization of Plaintiffs' tree house, which was classified as a "balcony" under 12A DCMR § 3202.10.2. At this juncture, however, Plaintiffs are merely contesting dismissal under Rule 12(b)(6). It would therefore be premature for the court to declare that PA #11910 is a permanent authorization for Plaintiffs' tree house to occupy public space as a matter of law, especially since Defendants have not yet had to submit their answer to Plaintiffs' First Amended Complaint. Nevertheless, assuming that Defendants will not alter their position markedly or bring forth new issues of material fact that are disputed, Plaintiffs anticipate filing their own motion for judgment on the pleadings on Count V (Declaratory Relief – Continuing Validity of PA #118910), to provide an early opportunity for the court to rule decisively in Plaintiffs' *favor* as a matter of law.

in conformance with the permit's specifications to remain in public space following the building project's completion. As such, a permit for construction of a balcony is, by its very nature, a permit for the newly-constructed "balcony" (*i.e.* the roughly one-third of the tree house's 30 sq. ft. platform that projects into public air space) to occupy public space indefinitely after its completion. *See* Pls.' Opp. at 9-10.

Defendants, on the other hand, want the court to read PA #118910 so narrowly as to be in defiance of logic. Defendants continue to insist that PA #118910 was merely a "temporary" permit that only authorized tree house construction during a finite construction period, November 10-20, 2015, not occupancy of public air space thereafter. *See* Defs.' Reply at 4-5. For Plaintiffs' completed "balcony" to legally remain in public space, Defendants maintain that Plaintiffs must secure a second permit, an "occupancy" permit. *Id.* at 4, 7, 15. As noted previously by Plaintiffs in their Opposition memorandum, however, no two-step process for procuring a "construction" permit then an "occupancy" permit undergirding construction of structures within public space can be found in Titles 12A or 24 of the DCMR. Pls.' Opp'n at 22. Moreover, no "occupancy" category exists in the internal Transportation Online Permitting System (TOPS) interface used by District Department of Transportation (DDOT) officials. *Id.* at 14; *see also* Comp. Exh. Q.

Defendants principally rely on the appearance of the word "occupancy" in 24 DCMR § 226. As explained previously, however, this provision is found in a chapter governing temporary rental of public space but not completed construction projects. This provision is therefore inapplicable to Plaintiffs' tree house, which was authorized under PA #118910 as a permanent structure (*i.e.* a "balcony") permitted to occupy public space indefinitely, not an "occupancy" involving the short-term rental of public space. *See* Pls.' Opp. at 22-23. Defendants also sidestepped the inconvenient fact that DDOT's internal TOPS interface only refers to "Construction" and "PS Rental" permits. *See* Comp. Exh. Q. Instead, Defendants responded with

an assertion, which they did not make in their brief accompanying their Motion to Dismiss (MTD), that "plaintiffs' construction permit explicitly stated that a *separate* occupancy permit was required." Defs.' Reply at 4 (emphasis in original). Defendants later reiterated this claim, stating: "[PA #118910] also states that it is a 'construction' permit and that a separate 'occupancy' permit is required." *Id.* at 7. As discussed below, Defendants' assertions are false and misleading.

PA #118910 has 18 separate conditions. The relevant two (2) conditions that Defendants are likely referring to are the 13th and 14th conditions, printed near the bottom of the permit. These conditions read as follows:

> #13: "This construction permit requires a separate valid permit for temporary occupancy to be on site during the time work is being performed."
>
> #14: "This permit does not authorize the posting of No Parking signs. A separate public space occupancy permit is required."

See Exh. D.

Upon careful study of the permit's fine print, it is evident that Defendants' latest assertion draws on conclusions reached by reading the applicable permit language completely outside of the appropriate context. Conditions #13 and #14 manifestly do not address occupancy of public space by a legal structure after a "balcony" construction project has been completed. When condition #13 is read in its proper context, it can readily be understood that the occupancy being referred to therein concerns the use of public space *surrounding the construction site during the time that work on the authorized building project is ongoing*. Thus, the 13th condition merely serves to regulate the *construction environment*. The condition unquestionably does not mandate the procurement of a second permit for public space "occupancy" once construction of the permitted structure has been completed. Such post-construction occupancy is authorized under the construction permit itself.

Reading condition #14, the second sentence states: "A separate public space occupancy permit is required." That statement, however, cannot be understood in isolation. Rather, sentence two of condition #14 must be read in conjunction with the first sentence for the entire condition's meaning to be understood. The first sentence reads: "This permit does not authorize the posting of No Parking signs." When the two (2) sentences are read together, the ordinary reader can comprehend that the language was plainly intended to address the situation of construction crew members commuting to a work site and wishing to park vehicles in the immediate vicinity. The condition was undoubtedly included to ensure that permittees understand that a construction permit does not constitute authorization for a builder to commandeer surrounding public space for the purpose of providing parking to his or her workers. Like the 13th condition, the 14th condition has nothing to do with the occupancy of public space by a legal edifice after it has been built. In that case, the occupancy of public space subsequent to construction is authorized by the construction permit covering the structure.

To summarize, conditions #13 and #14 in PA #118910 were boilerplate clauses included to give notice to construction permittees of an additional permitting requirement *if* they wanted to stage construction equipment or materials in public space, or to have their workers park vehicles in the public way during the period of construction. In Plaintiffs' case, however, neither condition was ever remotely relevant to the construction of their homemade tree house. Plaintiffs manifestly did not require, nor utilize, the staging of construction equipment or materials in public space during PA #118910's authorized construction period. Nor did they ever need, or utilize, parking for construction workers on City land when building their tree house.

As the moving party in a motion under Fed. R. Civ. P. 12(b)(6), Defendants have the burden of persuading the court that dismissal is warranted. *Cohen v. Board of Trustees of the University of the Dist. Of Columbia*, 819 F.3d. 476, 481 (D.C.Cir. 2016) *quoting* 5B Charles A.

Wright & Arthur Miller, Federal Practice and Procedure § 1357 (3rd ed. 2015). ("All federal courts are in agreement that the burden is on the moving party to prove that no legally cognizable claim for relief exists."). If there truly is a public space "occupancy" permit requirement subsequent to the procurement of a "balcony" construction permit under the law, Defendants could have easily satisfied their burden of persuasion by pointing to how that process is enumerated in the DCMR. They did not, because that process does not exist. Defendants also neglected to point to any concrete examples of this so-called "occupancy" permit requirement being applied to other balcony construction permittees in previous instances, or to any relevant guidance materials made available to the consumer spelling out a dual-permit requirement. Instead, Defendants first simply insisted in a conclusory fashion that the consumers who have built legal balconies into public space are additionally required to secure "occupancy" permits after-the-fact. *See* MTD at 8 fn.7. Then, when confronted with Plaintiffs' rebuttal inconveniently noting the absence of an "occupancy" category for structures intended to occupy public space over the long term, Defendants continue to rationalize such a category. They do so by grossly misapplying language in PA #118910 to a hypothetical scenario that did not occur in this case.

What is more, if a separate "occupancy" permit were truly required to reinforce a public space construction permit like PA #118910, as claimed by Defendants, this requirement would surely have been communicated by Defendant Stokes, DDOT's senior permitting manager in late 2015, to Plaintiff Psychas. However, Defendant Stokes did not tell Plaintiff Psychas that she would need to secure an "occupancy" permit when she visited his office to apply for a permit on November 6, 2015, or in any subsequent correspondence. Indeed, he made no mention of occupancy permits. *See* Comp. ¶ 47-48. Recall also that Plaintiffs Psychas' sole purpose in applying in-person for a construction permit in November 2015 was to ratify the already-completed tree house's presence in public space. Thus, if the law truly required Plaintiffs to

secure an "occupancy" permit for their tree house, Defendant Stokes would reasonably have directed Plaintiff Psychas to apply for an "occupancy" permit *instead of* a "balcony" construction permit. He did not. *See id.* ¶ 44.

In conclusion, Defendants' reliance on a purported public space "occupancy" permit requirement to support the proposition that Plaintiffs' construction permit PA #118910 was only "temporary" is deceitful. Defendants' gross misrepresentation of the language in conditions #13 and #14 in PA #118910 calls into question their overall credibility in the tree house permitting controversy. What Defendants have done in their Reply is to crudely mine permit conditions related to the staging of construction sites and parking for workers to provide for a false attribution. They extract a single sentence from the permit's conditions referring to an unrelated "occupancy" requirement, presenting this sentence's wording out of context to manufacture an unattested condition for the permitting of a structure whose construction was already authorized to occupy public space indefinitely. Accordingly, the Court should reject Defendants' distortion of the true meaning of conditions #13 and #14 of PA #118910.

II. When Defendant Stokes hacked into Plaintiff Psychas' TOPS account in January 2016, he did not merely "view" her information through his own TOPS account.

Plaintiffs have proffered that Defendant Stokes was authorized to access TOPS only through his own username and password, and only in the course of conducting authorized official DDOT business. Comp. ¶ 103. Plaintiffs have also maintained that Defendant Stokes had no work-related reason to apply for a "renewal" permit on behalf of Plaintiff Psychas, because she had not sought or requested a "renewal" from DDOT. *Id.* ¶ 63-64, 108. Thus, when Defendant Stokes accessed TOPS through Plaintiff Psychas' account after having her password reset to a default, and then submitted a "renewal" permit application (later designated PA #121865) on her behalf, without her knowledge or permission, he acted without and/or in excess of authorized

access. Accordingly, Plaintiffs will have satisfied a critical element in charging a criminal violation of §§ 1030(a)(2)(C), (a)(4), and (5)(A-C).

In Defendants' opening brief, they noted that "[Defendant Stokes] was authorized to access the TOPS system in the course of employment" and that "[he] was 'authorized' to use DDOT's computers and the TOPS system as part of his job." MTD at 14. These statements reveal a fundamental dispute between the parties on a question of law. Properly understood, Defendants' position is that since Defendant Stokes happens to have authorized access to his own TOPS account as part of his job, *ergo* he was legally entitled to enter the TOPS accounts of citizens/ consumers, and to request official action on their behalf without their knowledge or permission. Similar behavior by a Federal employee, however, has led to successful prosecution of the offending individual. *See U.S. v. Rodriquez*, 628 F.3d 1258, 1263 (upholding conviction of former Social Security Administration (SSA) employee for violating 18 U.S.C. § 1030(a)(2)(B), based on the employee's unauthorized access of his SSA account to pry into personal information on current and former acquaintances).

In Defendants' Reply, however, there seems to be a second fundamental disagreement over the nature of Defendant Stokes' activities in TOPS, and whether they were authorized. Now, Defendants assert: "[b]ecause defendant Stokes was authorized to access the TOPS system in the course of his employment *and used his administrator access to view the plaintiffs' account, his manner of access was at all times valid.*" (emphasis added). Defs.' Reply at 11. Defendants' latest assertion in this regard seems to question a factual premise for Plaintiffs' Computer Fraud and Abuse Act (CFAA) claim. The emphasized language indicates that Defendants are denying that Defendant Stokes ever accessed TOPS through Plaintiff Psychas' personal account. Instead, Defendants are fostering an impression that Defendant Stokes merely accessed his own TOPS account to "view" pertinent permitting information in Plaintiff Psychas' TOPS account.

Plaintiffs do not find credible the claim that Defendant Stokes merely accessed TOPS through his own administrator access account simply to "view" Plaintiff Psychas' information. They reject this claim in light of Plaintiff Stokes' own admission that he went into Plaintiff Psychas' account specifically to alter it, effectively impersonating her in applying for a permit "renewal" she had not asked for and did not want. Defendant Stokes' admission was memorialized in the email he sent to Plaintiff Psychas after he went into her TOPS account. *See* Comp. Exh. I. If Defendants wish to persist in denying Defendant Stokes' wrongdoing in spite of his email to Plaintiff Psychas, however, they may do so in their Answer to Plaintiffs' First Amended Complaint. Following such a denial, Plaintiffs should then be allowed to conduct discovery. *See Ikossi v. Dept. of Navy*, 516 F.3d 1037, 1045 (D.C. Cir. 2008).

Whether or not Defendant Stokes submitted the "renewal" application through his own account or through Plaintiff Psychas' account could be a critical issue of material fact on which the parties disagree. However, Defendants' denial of how Defendant Stokes hacked into and then altered Plaintiff Psychas' TOPS information (*i.e.* caused damage)—in a Reply no less—is not an appropriate basis for dismissal at this juncture. *See Int'l Painters and Allied Trades Indus. Pension Fund v. J & J Painting & Maint.*, 2010 WL 3219309, *1 (D.D.C. Aug. 13, 2010).

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint and direct Defendants to submit a timely answer.

Dated: Aug. 8, 2018

Respectfully submitted,

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PROPOSED ORDER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELLEN PSYCHAS, *et. al.*, *Plaintiffs*, v. DISTRICT OF COLUMBIA, *et. al.*, *Defendants*.	Civil Action No. 18-00081 (ABJ)

ORDER

Upon consideration of Defendants' Reply in Support of Motion to Dismiss Plaintiffs' Amended Complaint, Plaintiffs' Motion for Leave to File Surreply, and the entirety of the record, it is

ORDERED that Plaintiffs' Motion for Leave to File Surreply is GRANTED; and

ORDERED that Plaintiffs' Surreply in Opposition to Defendants' Motion to Dismiss is deemed to be filed as of the date of this Order.

SO ORDERED.

Dated: _____

_____
The Honorable Amy Berman Jackson
United States District Court
for the District of Columbia