

16-1258-cv

Imani Brown v. City of NY

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

August Term, 2016

(Argued: March 10, 2017)

Decided: July 5, 2017)

Docket No. 16-1258-cv

IMANI BROWN,

Plaintiff-Appellant,

v.

CITY OF NEW YORK, a municipal entity, JUSTIN NAIMOLI, New York City Police
Officer, Shield 26063, in his individual capacity, THEODORE PLEVITIS, in his
individual capacity,

Defendants-Appellees.

Before:

JACOBS and DRONEY, *Circuit Judges*, and STANCEU, *Judge*.*

Appeal of judgment for defendants entered by the U.S. District Court for the
Southern District of New York (Forrest, *Judge*) in an action claiming false arrest,

* Timothy C. Stanceu, Chief Judge, United States Court of International Trade,
sitting by designation.

1 unnecessary use of force, and First Amendment retaliation. Because the District Court
2 did not err in granting defendants' motion for summary judgment on the ground of
3 qualified immunity, the judgment is AFFIRMED.

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6 JOSHUA S. MOSKOVITZ, Beldock Levine &
7 Hoffman LLP, New York, NY, *for Plaintiff-*
8 *Appellant.*

9
10 DEVIN SLACK (Richard Dearing and Julie
11 Steiner, *on the brief*), Zachary W. Carter for
12 Corporation Counsel of the City of New York,
13 *for Defendants-Appellees.*

14 _____
15
16 STANCEU, *Judge:*

17 Plaintiff-appellant Imani Brown appeals an April 21, 2016 judgment of the
18 United States District Court for the Southern District of New York ("District Court")
19 (Forrest, *Judge*) in favor of defendants Justin Naimoli and Theodore Plevritis, New York
20 City police officers, on her federal and state law claims of excessive force stemming
21 from her arrest on November 15, 2011. The District Court granted defendants' motion
22 for summary judgment on the federal claims on the ground of qualified immunity and
23 dismissed the state law claims. We affirm the judgment of the District Court.

24 **BACKGROUND**

25 Brown brought this action on February 13, 2013 in the District Court against the
26 City of New York, and against defendants Naimoli and Plevritis in their individual
27 capacities, following her arrest near Zuccotti Park in lower Manhattan. She asserted

1 Fourth Amendment claims for false arrest and excessive use of force, and a First
2 Amendment retaliation claim, under 42 U.S.C. § 1983 and also brought parallel claims
3 under New York state law. In its first dispositive decision, the District Court granted
4 summary judgment for defendants on all of Brown's § 1983 claims and dismissed the
5 state law claims on jurisdictional grounds. *Brown v. City of New York*, No. 13-cv-1018,
6 2014 WL 2767232 (S.D.N.Y. June 18, 2014) ("*Brown I*"). On Brown's first appeal, this
7 Court vacated the judgment entered by the District Court as to the excessive force
8 claims and affirmed the judgment as to all other claims before it. *Brown v. City of New*
9 *York*, 798 F.3d 94 (2d Cir. 2015) ("*Brown II*"). Brown did not appeal the District Court's
10 judgment with respect to any of her claims against the City of New York. *Id.* at 95. On
11 remand, the District Court awarded summary judgment to defendants Naimoli and
12 Plevritis on the § 1983 excessive force claims, holding that qualified immunity insulated
13 these officers from liability, and dismissed the remaining state law claims. *Brown v. City*
14 *of New York*, 13-cv-1018, 2016 WL 1611502 (S.D.N.Y. Apr. 20, 2016) ("*Brown III*").

15 DISCUSSION

16 Because this Court affirmed the District Court's disposition of all of Brown's
17 claims except the excessive force claims, as to which the judgment of the District Court
18 was vacated, *see Brown II*, 798 F.3d at 95, the only claims remaining in this litigation are
19 the excessive force claims brought under 42 U.S.C. § 1983 and under state law. Further,
20 because Brown did not appeal the District Court's final decision on any of her

1 claims against the City of New York, *id.*, the only claims remaining are the excessive
2 force claims brought against Officers Naimoli and Plevritis in their individual
3 capacities.

4 Brown raises three arguments on appeal. Pointing to language in this Court's
5 opinion in *Brown II* remanding the case "for trial," she argues, first, that under this
6 Court's mandate the District Court was required to hold a trial and, therefore, lacked
7 discretion on remand to grant summary judgment. Second, she argues that the two
8 defendant police officers waived any defense of qualified immunity. Finally, she argues
9 that the District Court erred on the merits in holding that qualified immunity shielded
10 the officers from liability.

11 We determine *de novo* the meaning of a previous mandate of this Court. *Carroll v.*
12 *Blinken*, 42 F.3d 122, 126 (2d Cir. 1994). In doing so, we reject Brown's first argument,
13 i.e., that the mandate required the District Court to preside over a trial rather than
14 resolve the excessive force claims on a second summary judgment motion.

15 Plaintiff-appellant's argument relies on language in the opinion in *Brown II*
16 stating that Brown's claim against the officers "for use of excessive force must be
17 remanded for trial," *Brown II*, 798 F.3d at 95, that "[t]he assessment of a jury is needed in
18 this case," and that "a jury will have to decide whether Fourth Amendment
19 reasonableness was exceeded . . . ," *id.* at 103. Brown interprets this language as a
20 directive to the District Court to conduct an actual trial, but this interpretation fails to

1 construe the references to a “trial” and a “jury” in the context of the issue this Court
2 was deciding. That issue was whether the District Court erred in granting summary
3 judgment to defendants on the ground that the force used in arresting Brown was not
4 excessive. In considering the issue of whether excessive force was used, this Court
5 applied the “objective reasonableness” standard as explicated in *Graham v. Connor*,
6 490 U.S. 386, 392 (1989). The references to “trial” and “a jury” in the opinion are
7 properly understood in the context of the requirements a movant must meet to obtain
8 summary judgment. *See* Fed. R. Civ. P. 56(a) (requiring movant to show absence of a
9 genuine issue of material fact and entitlement to judgment as a matter of law). On the
10 record before it in *Brown II*, this Court viewed the question of whether the force used in
11 arresting Brown was reasonable under the *Graham* factors as a question to be decided by
12 a jury rather than by the trial court on a summary judgment motion. *Brown II*, 798 F.3d
13 at 102-03.

14 As the opinion in *Brown II* explained, the objective reasonableness standard
15 governs whether the force an officer used to make an arrest was excessive and therefore
16 in violation of rights protected by the Fourth Amendment. *Brown II*, 798 F.3d at 100
17 (“The Fourth Amendment prohibits the use of excessive force in making an arrest, and
18 whether the force used is excessive is to be analyzed under that Amendment’s
19 “reasonableness” standard.” (citing *Graham*, 490 U.S. at 395)). The *Brown II* opinion
20 discussed the three factors the Supreme Court identified specifically, i.e., severity of the

1 crime at issue, whether the suspect poses an immediate threat to safety of the officers or
2 others, and whether the suspect is actively resisting arrest or attempting to flee. *Id.*
3 (citing *Graham*, 490 U.S. at 396). The District Court erred, this Court concluded in
4 *Brown II*, because “[a]n aggregate assessment of all three relevant *Graham* factors would
5 seem to point toward a determination of excessive force and, at a minimum, to preclude
6 a ruling against the victim on a motion for summary judgment.” *Id.* at 102 (footnote
7 omitted).

8 Following this Court’s vacatur of the judgment the District Court entered in
9 *Brown I*, the excessive force claims on remand reverted back to the prior, pre-trial status.
10 A trial court generally must have discretion to rule on matters prior to presiding over
11 an actual trial, including dispositive motions, and an appellate court vacating an award
12 of summary judgment ordinarily would not confine the discretion of a district court as
13 to how to proceed from that point unless doing so was necessary to correct the error
14 determined to have occurred below. Here, a trial was not necessary to correct the error
15 the District Court was held to have committed. That error was corrected by vacating
16 the summary judgment disposing of the § 1983 excessive force claims against the two
17 officers on the ground that excessive force was not used in Brown’s arrest. Consistent
18 with the mandate, the District Court was not free to entertain a second summary
19 judgment motion on the same ground, but it was not constrained from considering a
20 second summary judgment motion raising the issue of whether the § 1983 excessive

1 force claims were defeated by qualified immunity, an issue that neither *Brown I* nor
2 *Brown II* decided. Therefore, we decline to interpret the *Brown II* mandate to have
3 required a trial on the issue of objective reasonableness under the *Graham* standard.
4 The District Court retained its ordinary, and necessary, discretion to manage the
5 remainder of the litigation consistent with the mandate, which addressed only the
6 question of the reasonableness of the force used by the officers, not the question of
7 qualified immunity.

8 Brown argues that the issue of qualified immunity, if not explicitly decided, was
9 “implicitly” decided in the previous appeal, maintaining that “[i]t was not necessary for
10 this Court to expressly address qualified immunity for that issue to be subsumed in the
11 mandate and foreclosed on remand.” Br. for Pl.-Appellant with Special App. 19
12 (Aug. 12, 2016), ECF No. 32 (“Pl.-Appellant’s Br.”). The District Court concluded in
13 *Brown III* that the issue of qualified immunity was not implicitly decided in *Brown II*,
14 and we agree. *Brown II* mentioned the qualified immunity defense in analyzing
15 plaintiff-appellant’s false arrest claims, *see* 798 F.3d at 99, but it did not do so in
16 addressing the excessive force claims. As to the latter claims, we can be sure that
17 *Brown II* did not intend to rule on them implicitly: the issue was not decided in the
18 District Court’s initial opinion, it was not argued on appeal, and *Brown II* never
19 addresses it. Instead, *Brown II* confines its analysis to the issue of objective
20 reasonableness under the Fourth Amendment standard of *Graham*. Notably, *Graham*

1 did not involve the question of qualified immunity of police officers. 490 U.S. at 399
2 n.12 (“Since no claim of qualified immunity has been raised in this case, . . . we express
3 no view on its proper application in excessive force cases that arise under the Fourth
4 Amendment.”).

5 What is more, the District Court’s disposition of the excessive force claims that
6 was before this Court in *Brown II* did not require this Court to decide whether qualified
7 immunity applied. In granting summary judgment on the excessive force claims in
8 *Brown I*, the District Court disposed of the § 1983 excessive force claims against the City
9 of New York (a disposition that became final when it was not appealed), in addition to
10 those against the two officers in their individual capacities, by concluding that the
11 officers did not use excessive force. Having done so, the District Court had no need to
12 consider whether the doctrine of qualified immunity protected the two individual
13 defendants from liability. Under the District Court’s holding in *Brown I*, the two officers
14 could not be liable to Brown in their individual capacities for damages arising from a
15 violation of the Fourth Amendment prohibition against excessive use of force that the
16 District Court held not to have occurred.

17 Arguing that the District Court erred in failing to follow the mandate in *Brown II*,
18 plaintiff-appellant relies on *Statek Corp. v. Dev. Specialists, Inc. (In Re Coudert Bros. LLP)*,
19 809 F.3d 94 (2d Cir. 2015) (“*In Re Coudert Bros.*”). She relies, further, on *Puricelli v.*
20 *Argentina*, 797 F.3d 213 (2d Cir. 2015), for the principle that “where a mandate directs a

1 district court to conduct specific proceedings . . . , generally the district court must
2 conduct those proceedings” Pl.-Appellant’s Br. 19 (quoting *Puricelli*, 797 F.3d
3 at 218).

4 *In Re Coudert Bros.* is not on point. In that case, a bankruptcy court expressly was
5 instructed “to apply Connecticut’s choice of law rules in deciding Statek’s motion to
6 reconsider.” 809 F.3d at 99 (citation omitted). Noting that the bankruptcy court did
7 not do so, this Court concluded that “[f]ar from giving full effect to our mandate . . . ,
8 the bankruptcy court here essentially gave it no legal effect.” *Id.* When we consider the
9 context of the vacatur of the summary judgment and the ordering of further
10 proceedings, we cannot conclude that *Brown II* expressly or unambiguously ordered the
11 District Court to conduct a trial on the issue of whether the force used in arresting
12 Brown was excessive under Fourth Amendment standards. In response to the vacatur
13 of the summary judgment, the District Court conducted appropriate further
14 proceedings. It would be incorrect, therefore, to conclude that the District Court gave
15 “no legal effect” to the mandate in *Brown II*.

16 Because *Brown II* did not expressly direct the District Court to hold a trial on
17 remand, *Puricelli* is also distinguishable from this appeal. In *Puricelli*, this Court
18 specifically directed that “on remand, the district court shall conduct an evidentiary
19 hearing to resolve” certain specified factual issues pertaining to awards of damages in
20 class action suits to recover on defaulted government bonds. 797 F.3d at 217 (quoting

1 *Hickory Sec. Ltd. v. Republic of Argentina*, 493 Fed. Appx. 156, 160 (2d Cir. 2012)). Rather
2 than follow that mandated procedure, the district court modified the class definitions
3 and granted new class certifications. *Id.* This Court held in *Puricelli* that the mandate in
4 question “gave the District Court specific instructions that did not permit expanding the
5 plaintiff classes.” *Id.* at 218.

6 In summary, *Brown II* did not rule, explicitly or implicitly, on the issue of
7 qualified immunity and is not properly interpreted to have required the District Court
8 to conduct a trial on whether excessive force was used in arresting Brown. We hold,
9 therefore, that the District Court did not err in considering a motion for summary
10 judgment on the qualified immunity issue.

11 Plaintiff-appellant’s second argument is that Naimoli and Plevritis waived their
12 qualified immunity defense, first by raising it in only a “half-sentence argument” in
13 support of their summary judgment motion before the last appeal, and again by failing
14 to raise it in the last appeal. Pl.-Appellant’s Br. 23. Brown argues that in their original
15 summary judgment motion, defendants argued, only summarily, that “the officers are
16 entitled to qualified immunity as it was reasonable under the circumstances for the
17 officers to use the force shown.” *Id.* at 23-24 (citing Mem. of Law in Supp. of Defs.’ Mot.
18 for Summ. J. at 17, *Brown I*, 2014 WL 2767232 (No. 13-cv-1018)). She submits that “[t]his
19 contention does not argue that the law was not clearly established, nor that reasonable
20 officers could be unsure whether the force employed was unconstitutional.” *Id.* at 24.

1 Further, Brown argues that defendant-appellees' failure to raise qualified immunity on
2 appeal in *Brown II* is "a concession that they had not properly raised it in the court
3 below" and that this failure, in any event, waived the qualified immunity defense. *Id.*
4 at 25.

5 The discretion trial courts may exercise on matters of procedure extends to a
6 decision on whether an argument has been waived. *Olin Corp. v. Am. Home Assur. Co.*,
7 704 F.3d 89, 98 (2d Cir. 2012) ("A district court's determination that a party has not
8 waived an argument by raising it earlier is reviewed for abuse of discretion" (citing
9 *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van*
10 *Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 45 (2d Cir. 2005))). The District Court reasoned
11 that Naimoli and Plevitis did not waive the qualified immunity defense because they
12 "pled the defense in the Answer, raised it specifically as to the excessive force claim in
13 the first summary judgment motion, and raised it again on summary judgment now."
14 *Brown III*, 2016 WL 1611502 at *5 n.6. It also reasoned that the "quality of the argument
15 in defendant's briefing does not here serve as a proper basis for a waiver." *Id.*
16 Applying an abuse of discretion standard, we do not find error in the District Court's
17 deciding that the officers did not waive the qualified immunity defense.

18 In arguing that the defendant officers inadequately raised the issue in their
19 summary judgment motion, Brown relies on *Blissett v. Coughlin*, 66 F.3d 531

1 (2d Cir. 1995), and *McCardle v. Haddad*, 131 F.3d 43 (2d Cir. 1997). This reliance is
2 misplaced.

3 Plaintiff-appellant characterizes *Blissett* and this case as involving “similar
4 circumstances.” Pl.-Appellant’s Br. 24. We disagree. In *Blissett*, this Court affirmed a
5 district court’s ruling that the defense of qualified immunity had been waived where
6 the defendants, although having “raised a general immunity defense in their answer” to
7 the complaint, “did not raise the issue of qualified immunity during the subsequent five
8 years of pre-trial proceedings,” 66 F.3d at 538, and even at trial “never articulated a
9 qualified immunity defense distinct from the contention—the heart of their defense
10 throughout these proceedings—that no constitutional violation occurred.” *Id.* at 539.
11 Here, the officers raised the defense of qualified immunity during pre-trial proceedings,
12 in their first motion for summary judgment before the District Court.

13 *McCardle*, which also affirmed a district court’s ruling that the qualified
14 immunity defense was waived, is inapposite as well. In *McCardle*, the defendant
15 included the qualified immunity defense in its answer but made no motion for
16 summary judgment on that basis nor showed that he had raised it in any pretrial
17 motion, discovery, or court conference. 131 F.3d at 52. The defendant in *McCardle*
18 raised the qualified immunity defense at the close of his case at trial as to one claim
19 against him, but not as to another, and he did so in an improper motion. *Id.*

1 We next consider Brown’s argument that the officers waived their qualified
2 immunity defense by failing to argue it before this Court in the prior appeal.
3 Concluding that the District Court did not abuse its discretion in ruling otherwise, we
4 reject this waiver argument as well.

5 The role of the appellee is to defend the decision of the lower court. This Court
6 has not held that an appellee is required, upon pain of subsequent waiver, to raise every
7 possible alternate ground upon which the lower court could have decided an issue. *See*
8 *Universal Church v. Geltzer*, 463 F.3d 218, 229 (2d Cir. 2006) (stating, in the analogous
9 context of an appeal to a district court from a bankruptcy court, that “[a]lthough it
10 behooves appellees to raise all their defenses on appeal because the appellate court can
11 affirm on any basis supported by the record, even one not relied on by the lower
12 court, *Pollara v. Seymour*, 344 F.3d 265, 268 (2d Cir. 2003), we are not aware of any case
13 requiring them to do so.”). For its argument to the contrary, Brown relies in part on
14 *United States v. Quintieri*, 306 F.3d 1217 (2d Cir. 2002), but that case is not on point.
15 *Quintieri* involved successive appeals by appellant Carlo Donato of a criminal sentence
16 and a remand for resentencing that this Court concluded was a limited, not a *de novo*,
17 resentencing remand. This Court held that “[b]ecause the remand was limited, Donato
18 may not now raise arguments that he had an incentive and an opportunity to raise
19 previously but did not raise, absent a cogent and compelling reason for permitting him
20 to do so.” *Id.* at 1225. Donato, notably, was the appellant, not the appellee, and the

1 holding in *Quintieri* as to the limited scope of the resentencing remand establishes no
2 rule or principle relevant to this appeal of a civil judgment. Brown also argues that
3 allowing the defense of qualified immunity in *Brown III* was error because qualified
4 immunity is to be resolved at the earliest possible stage in litigation and because
5 permitting “this type of piecemeal litigation will waste tremendous resources.”

6 Pl.-Appellant’s Br. 26. According to Brown, the wastefulness results from “two *de novo*
7 appellate reviews of the same record” and “[a]ll of this can be avoided in the future if
8 the Court strictly enforces its mandate and remands for trial.” *Id.* at 27. Resolving the
9 qualified immunity defense at an early stage furthers the rule that qualified immunity
10 insulates a defendant officer from suit as well as shielding him from liability. *See Lynch*
11 *v. Ackley*, 811 F.3d 569, 576 (2d Cir. 2016). This rule, which benefits defendant officers,
12 does not translate to an obligation of an appellee in the situation of Naimoli and
13 Plevritis to have raised the defense of qualified immunity when as appellees they were
14 arguing for affirmance of the judgment below, which was based on a different ground.
15 Nor do we find merit in Brown’s argument concerning “piecemeal litigation.”
16 Avoiding the “piecemeal litigation” as posited by plaintiff-appellant is not a valid
17 reason for disturbing the legitimate exercise of discretion by the District Court on the
18 question of waiver.

19 We next consider Brown’s argument that the District Court, on the merits,
20 impermissibly awarded summary judgment to Naimoli and Plevritis on the ground of

1 qualified immunity. We review a summary judgment award *de novo*, with all evidence
2 viewed in the light most favorable to the nonmoving party and all reasonable inferences
3 drawn in that party's favor. See *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*,
4 577 F.3d 415, 427 (2d Cir. 2009); *Russo v. City of Bridgeport*, 479 F.3d 196, 203
5 (2d Cir. 2007). Summary judgment is warranted only where "there is no genuine
6 dispute as to any material fact and the movant is entitled to judgment as a matter of
7 law." Fed.R.Civ.P. 56(a).

8 This Court's opinion in *Brown II* summarized a number of undisputed facts
9 material to Brown's excessive force claim. The two officers "were arresting Brown for
10 disorderly conduct, a violation that[,] under New York law, is subject to a maximum
11 punishment of 15 days in jail." *Brown II*, 798 F.3d at 101. "Officer Plevritis was 5' 10"
12 and weighed 215 pounds; Officer Naimoli was 5' 7" and weighed 150-160 pounds;
13 Brown was 5' 6" and weighed 120 pounds." *Id.* "Officer Plevritis asked Brown to place
14 her hands behind her back so that they could apply handcuffs, and she refused to do
15 so." *Id.* "One of the officers kicked Brown's legs out from under her, causing her to fall
16 to the ground." *Id.* "One officer succeeded in placing handcuffs on Brown's right
17 wrist." *Id.* "Both officers struggled with Brown, forcing her body to the ground." *Id.*
18 "Officer Plevritis used his hand to push Brown's face onto the pavement." *Id.* "Brown's
19 left arm, without a handcuff, was under her as she fell to the ground." *Id.* "The officers
20 endeavored to take hold of Brown's left arm and bring it behind her to complete the

1 handcuffing.” *Id.* “While on the ground, Brown did not offer her arms for handcuffing
2 in part because she was trying to keep hold of her phone and wallet and reach for the
3 scattered contents of her purse.” *Id.* “Officer Plevritis twice administered a burst of
4 pepper spray directly to Brown’s face.” *Id.* “The officers completed the handcuffing
5 while Brown was still on the ground.” *Id.* “Officer Naimoli was aware of techniques
6 for applying handcuffs to a reluctant arrestee, other than taking a person to the
7 ground.” *Id.*

8 The District Court relied upon these same uncontested facts in granting the
9 summary judgment motion in *Brown III*. *Brown III*, 2016 WL 1611502, at *3. The District
10 Court identified as an additional uncontested fact that “[d]uring the time that plaintiff
11 was refusing to comply with the officers’ instructions, and prior to each administration
12 of pepper spray, the officer informed plaintiff that she would be sprayed.” *Id.* at *2 n.3
13 (citations omitted). The District Court added that it is “also undisputed that the New
14 York City Police Department Patrol Guide requires that pepper spray be used in ‘two
15 (2) one second bursts, at a minimum distance of three (3) feet, and only in situations
16 when the uniformed member of the service reasonably believes it is necessary to . . .
17 [e]ffect an arrest, or establish physical control of a subject resisting arrest.’” *Id.* at *2
18 (quoting New York City Patrol Guide, Procedure No. 212-95 (Jan. 1, 2000)).

19 The District Court recited two contested facts from the *Brown II* opinion, each of
20 which it construed in favor of Brown for purposes of ruling on the summary judgment

1 motion: “According to Brown, the pepper spray was administered one foot away from
2 her face[] (Officer Plevritis claims the first dose was from two feet away and the second
3 dose was from three feet away[]),” and “[a]ccording to Brown, she was trying to use her
4 free arm to pull down her skirt, which was exposing her behind.” *Id.*

5 “Qualified immunity shields government officials from civil damages liability
6 unless the official violated a statutory or constitutional right that was clearly established
7 at the time of the challenged conduct.” *Reichle v. Howards*, 566 U.S. 658 (2012) (citing
8 *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). “To be clearly established, a right must be
9 sufficiently clear that every reasonable official would [have understood] that what he is
10 doing violates that right.” *Id.* at 664 (citing *al-Kidd*, 563 U.S. at 741) (quotations omitted).
11 Controlling authority serves to put officials on notice of what is unlawful; however,
12 “existing precedent must have placed the statutory or constitutional question beyond
13 debate.” *al-Kidd*, 563 U.S. at 741.

14 On the uncontested facts and the two facts that it presumed in Brown’s favor, the
15 District Court held that the officers were shielded from liability by their qualified
16 immunity. We agree. As instructed by the Supreme Court, we are “not to define
17 clearly established law at a high level of generality,” *al-Kidd*, 563 U.S. at 742 (citations
18 omitted), and we consider, as we must, the particular circumstances in which the force
19 was used in effecting Brown’s arrest. The force applied, which was the repeated use of
20 pepper spray, the kicking of Brown’s legs out from under her to bring her to the

1 ground, and Plevritis's using his hand to push Brown's face onto the pavement,
2 occurred after Brown refused to comply with the instructions to place her hands behind
3 her back for handcuffing. During her noncompliance with the instructions, she was
4 warned prior to each application of the pepper spray. The issue presented, therefore, is
5 whether, under clearly established law, every reasonable officer would have concluded
6 that these actions violated Brown's Fourth Amendment rights in the particular
7 circumstance presented by the uncontested facts and the facts presumed in Brown's
8 favor. Here, those circumstances involved a person's repeatedly refusing to follow the
9 instructions of police officers who were attempting to apply handcuffs to accomplish an
10 arrest.

11 No precedential decision of the Supreme Court or this Court "clearly establishes"
12 that the actions of Naimoli or Plevritis, viewed in the circumstances in which they were
13 taken, were in violation of the Fourth Amendment. The excessive force cases on which
14 Brown relies do not suffice for this purpose.

15 Brown first directs our attention to *Robison v. Via*, 821 F.2d 913 (2d Cir. 1987), a
16 decision vacating a district court's summary judgment award in favor of a defendant
17 state police officer on a § 1983 claim. Summary judgment in favor of the officer was not
18 proper, this Court held, due to the plaintiff's testimony that the officer "'pushed' her
19 against the inside of the door of her car, 'yanked' her out, 'threw [her] up against the
20 fender,' and 'twisted [her] arm behind [her] back.'" *Id.* at 923-24. The plaintiff also

1 “testified that she suffered bruises lasting a ‘couple weeks.’” *Id.* The case is inapposite
2 in key respects. The alleged force was more severe than that presented here, and the
3 opinion in *Robison* does not state that the police officer exerted physical force to
4 overcome resistance to arrest. To the contrary, no arrest was attempted, and the force
5 was applied while the officer sought to prevent the plaintiff’s interfering with her
6 children’s removal from her custody. *See id.* at 916-17.

7 Brown next cites *Bellows v. Dainack*, 555 F.2d 1105 (2d Cir. 1977), in which the
8 plaintiff contended that defendant police officers twisted his arm and pushed him into a
9 police car; he further alleged that an officer in the front seat pulled him by the scruff of
10 his neck and struck him in the ribs while the plaintiff was sitting in the back seat. *Id.*
11 at 1106. These allegations are not analogous to the force used against Brown, if for no
12 other reason than that the alleged force was used while the plaintiff in *Bellows* was
13 seated in the back of the police car, i.e., *after* the plaintiff was secured in the officers’
14 custody.

15 *Amnesty America v. Town of West Hartford*, 361 F.3d 113 (2d Cir. 2004), also cited
16 by Brown, involved police actions taken in response to resistance to arrest but
17 additionally involved allegations of serious physical abuse of the plaintiffs that are
18 readily distinguished from the salient facts of this appeal, including, *inter alia*, “pressing
19 their wrists back against their forearms in a way that caused lasting damage,” dragging
20 a plaintiff “by his legs, causing a second-degree burn on his chest,” and “ramming” a

1 plaintiff's "head into a wall at high speed." *Id.* at 123. Vacating an award of summary
2 judgment in favor of the municipal defendant, this Court opined that "[i]t is entirely
3 possible that a reasonable jury would find, as the district court intimated, that the police
4 officers' use of force was objectively reasonable given the circumstances and the
5 plaintiffs' resistance techniques" but also that "a reasonable jury could also find that the
6 officers gratuitously inflicted pain in a manner that was not a reasonable response to the
7 circumstances" *Id.* at 124. Plaintiff-appellant argues, unconvincingly, that the force
8 alleged in *Amnesty America* "compares to, and if anything, is less than, the force used
9 here." Pl.-Appellant's Br. 28.

10 Brown argues, further, that "*Tracy v. Freshwater*, 623 F.3d 90 (2d Cir. 2010), clearly
11 established that the officers' use of pepper spray in this case was unconstitutional." *Id.*
12 Brown's reliance on this case ignores a critical factual distinction. In *Tracy*, this Court
13 vacated an award of summary judgment in favor of a defendant police officer after
14 noting that there was an issue of fact as to whether pepper spray was used against the
15 arrestee before handcuffs were applied, or after. *Tracy*, 623 F.3d at 98. The opinion
16 concludes that "a reasonable juror could find that the use of pepper spray deployed
17 mere inches away from the face of a defendant already in handcuffs and offering no
18 further active resistance constituted an unreasonable use of force." *Id.* It is uncontested
19 that Brown received pepper spray prior to, and in furtherance of, the officers' attempts
20 to accomplish the handcuffing.

1 Finally, Brown draws our attention to several cases from other circuits. There is
2 some tension in this Court’s case law concerning whether out-of-circuit precedent can
3 ever clearly establish law in this Circuit. *Compare Pabon v. Wright*, 459 F.3d 241, 255
4 (2d Cir. 2006), *with Garcia v. Does*, 779 F.3d 84, 95 n.12 (2d Cir. 2015). Even assuming
5 that such precedent may suffice in certain circumstances, however, we conclude that no
6 such circumstances exist in this case. This is not a case, for example, “where the law
7 was established in three other circuits and the decisions of our own court
8 foreshadowed” the establishment of the rule of law on which Brown seeks to rely.
9 *Matusick v. Erie Cty. Water Auth.*, 757 F.3d 31, 61 (2d Cir. 2014).

10 Similarly, we must reject Brown’s argument that summary judgment on
11 qualified immunity grounds was improper because the officers allegedly violated the
12 New York City Police Department Patrol Guide directive not to use pepper spray from
13 a distance of less than three feet. Our presuming in Brown’s favor the disputed fact as
14 to the distance the officers maintained, as the District Court did, does not change our
15 conclusion. Brown is unable to demonstrate that *any* administering of pepper spray at a
16 distance of as short as one foot upon an uncooperative arrestee violated “clearly
17 established” Fourth Amendment law against excessive force.

18 Brown argues that the two officers “were not entitled to qualified immunity since
19 they violated clearly established law by using substantial and unnecessary force to
20 arrest Ms. Brown when she posed no threat to the officers or others, and there were less

1 aggressive techniques to arrest her for a noncriminal and slight offense.”
2 Pl.-Appellant’s Br. 27. She adds that “[s]ince the officers knew other less aggressive
3 techniques to arrest Ms. Brown, it was unreasonable and excessive to use more
4 aggressive force than needed.” *Id.* at 32. Her argument is grounded in the *Graham*
5 factors, but this Court already has concluded that these factors “would seem to point
6 toward a determination of excessive force,” *Brown II*, 798 F.3d at 102, in concluding that
7 a jury possibly could find the force used against Brown to have exceeded that permitted
8 under the Fourth Amendment. Her positing that she posed no threat and that less
9 forceful methods existed to accomplish her arrest is not directed to the inquiry we must
10 make as to qualified immunity. Again, that inquiry is whether every reasonable police
11 officer would view the force used by Naimoli and Plevritis, in the circumstances in
12 which that force was applied, as excessive according to clearly established law.

13 CONCLUSION

14 The mandate of this Court in *Brown II* did not preclude the District Court’s
15 considering, and ruling on, defendants’ motion for summary judgment on the ground
16 of qualified immunity. Defendants did not waive their qualified immunity defense,
17 and the District Court committed no error in granting that motion. Accordingly, the
18 judgment of the District Court is AFFIRMED.