UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ELI SAMUEL FIGUEROA,

Plaintiff,

-against-

JOSEPH FAILLA and DENNIS CHAN,

Defendants.

11-CV-3160 (ARR)(CLP)

DRAFT JURY CHARGE
May 26, 2017

ROSS, United States District Judge:

Contents

Members of the jury, now that you have heard all the evidence in the case as well as the arguments on each side, it is my duty to instruct you as to the law applicable in this case. We are all grateful to you for the close attention you have given to this case. I ask that you give me that same careful attention as I give you these final instructions.

As you know, the plaintiff, Eli Samuel Figueroa, claims that defendants, Officers Joseph Failla and Dennis Chan, failed to intervene to stop an unknown officer from assaulting him. Defendants dispute these claims. They contend that the alleged assault did not happen.

My instructions will be in three parts:

First, I will instruct you regarding the general rules that define and govern the duties of a jury in a civil case such as this;

Second, I will instruct you as to the legal elements of plaintiff's claim; and

Third, I will give you some general rules regarding your deliberations.

PART I: GENERAL INSTRUCTIONS

Let me start by restating our respective roles as judge and jury.

My job is to instruct you on the law. You must apply the law, in accordance with my instructions, to the facts as you find them. I remind you of your sworn obligation to follow the law as I describe it to you, whether you agree with it or not. You should not be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be — or ought to be — it would violate your sworn duty to base a verdict upon any view of the law other than the one I give you.

If any attorney has stated a legal principle that differs from any that I state to you in my instructions, it is my instructions that you must follow.

You should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate in the jury room.

Your role is to consider and decide the facts from all the evidence in this case. You, the members of the jury, are the sole and exclusive judges of the facts. It is for you and you alone to determine what weight to give the evidence; to determine the credibility or believability of the witnesses; to resolve whatever conflicts may have appeared in the evidence; and to draw whatever reasonable inferences and conclusions you decide to draw from the facts as you have determined them.

Therefore, with respect to any question concerning the facts, it is your recollection of the facts that controls—not what the lawyers have said in their opening statements, in their closing arguments, in their objections, or in their questions.

Since it is your job—not mine—to find the facts, I have neither expressed nor attempted to intimate an opinion about how you should decide the facts of this case. You should not consider anything I have said or done in the course of the trial, including these instructions, as expressing any opinion about the facts or the merits of this case. For example, on occasion, I may have asked questions of a witness. You should attach no special significance to these questions because they were asked by me.

BURDEN OF PROOF – PREPONDERANCE OF THE EVIDENCE

As this is a civil case, plaintiff, Mr. Figueroa, has the burden of proving his claims by a preponderance of the evidence. This means that plaintiff must prove by a preponderance of the evidence each disputed essential element of his claim with respect to each defendant and the damages resulting therefrom. If you find that plaintiff has failed to establish any essential element of his claim by a preponderance of the evidence, you should decide against the plaintiff.

To establish a claim "by a preponderance of the evidence" means to prove that something is more likely true than not true. In other words, a preponderance of the evidence means such evidence as, when considered and compared with the evidence opposed to it, produces in your minds the belief that what is sought to be proved is, more likely than not, true.

A preponderance of the evidence means the greater weight of the evidence. It does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase refers to the quality and persuasiveness of the evidence—the weight and effect it has on your minds.

In determining whether a claim has been proved by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

If you find that the credible evidence on a given issue is in balance or evenly divided between the parties—that it is equally probable that one side is right as it is that the other side is right, or that the evidence produced by the plaintiff, who has the burden of proof, is outweighed by evidence against their claims—then you must decide that issue against the plaintiff. That is because plaintiff is the party who bears the burden of proof in this case, and the party bearing the burden of proof must prove more than simple equality of evidence—he must prove each element at issue by a preponderance of the evidence. On the other hand, the plaintiff need prove no more than a preponderance. So long as you find that the scales tip, however slightly, in favor of the plaintiff—that what they claim is more likely true than not true—then the element will have been proved by a preponderance of the evidence.

Some of you may have heard of proof "beyond a reasonable doubt," which is the proper

standard of proof in a criminal trial. However, a plaintiff in a civil case does not have to satisfy that requirement, and therefore you should put it out of your mind.

THE DEFINITION OF EVIDENCE

You must determine the facts in this case based solely on the evidence presented or those inferences which can reasonably be drawn from the evidence. Evidence has been presented to you in the form of sworn testimony from the witnesses and exhibits that have been received in evidence by me. When the attorneys on both sides "stipulate," that is, agree to the existence of a fact, you the jury may accept the stipulation and consider the fact as proven. [Some evidence has been received for a limited purpose only, and when I have given you a limiting instruction as to such evidence, you must follow that instruction.]

Certain things are not evidence, and are to be entirely disregarded by you in deciding what the facts are: arguments, statements, or summations by the lawyers; objections to the questions or to the offered exhibits, and any testimony that has been excluded, stricken, or that I directed you to disregard or that I directed struck from the record. Those are not evidence. Similarly, remember that a question put to a witness is never evidence. Only the answer is evidence.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

There are two kinds of evidence: direct and circumstantial. You may use both types of evidence in reaching your verdict in this case. There is no distinction between the weight to be given to these two types of evidence. You must base your verdict on a reasonable assessment of all the evidence in the case.

Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally experienced through his or her own senses — something seen, felt, touched,

heard, or tasted.

The other type of evidence—circumstantial evidence—is proof of a chain of circumstances that point to the existence or nonexistence of certain facts. To give a simple example, suppose that when you came into the courthouse today the sun was shining and it was a nice day. However, after several hours in the courtroom where there are no windows, people began walking in with wet umbrellas and, soon after, others walked in with wet raincoats. Without you ever looking outside, you would not have direct evidence that it rained, but you might infer from these circumstances that while you were sitting in court, it had begun raining.

That is all there is to circumstantial evidence. Using your reason, experience, and common sense, you infer from established facts the existence or the nonexistence of some other fact.

During the trial you may have heard the attorneys use the term "inference," and in their arguments they may have asked you to infer, on the basis of your reason, experience, and common sense, from one or more proven facts, the existence of some other facts.

An inference is not a suspicion or a guess. Inferences are deductions or conclusions that reason and common sense lead you, the jury, to draw from the facts that have been established by the evidence in the case.

There are times when different inferences may be drawn from facts, whether proved by direct or circumstantial evidence. Plaintiff asks you to draw one. Defendants ask you to draw another. It is for you, and you alone, to decide what inferences you will draw.

So, while you are considering the evidence presented to you, you are permitted to draw, from the facts that you find to be proven, such reasonable inferences as would be justified in

light of your experience.

WITNESS CREDIBILITY

As discussed, in deciding what the facts are in this case, you must consider all of the evidence that has been offered. In doing this, you must decide which testimony to believe and which testimony not to believe. You have had the opportunity to observe all the witnesses. You are the sole judges of credibility of the witnesses and the weight their testimony deserves. Your determination of the issue of credibility very largely must depend upon the impression that a witness made upon you as to whether or not that witness was telling the truth or giving you an accurate version of what occurred. You may choose to disbelieve all or part of any witness's testimony. In making that decision, you may take into account any number of factors, including the following:

- the witness's opportunity to see, hear, and know about the events he or she described;
- the witness's ability to recall and describe those things;
- the witness's manner in testifying—was the witness candid and forthright or did the witness seem as if he or she was hiding something, being evasive or suspect in some way;
- how the witness's testimony on direct examination compared with how the witness testified on cross-examination;
- the reasonableness of the witness's testimony in light of all of the other evidence in the case;
- whether the witness had any possible bias, any relationship to a party, any motive to testify falsely, or any possible interest in the outcome of the trial;
- whether a witness's testimony was contradicted by his or her other testimony, by what that witness said or did on a prior occasion, by the testimony of other witnesses, or by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony

of different witnesses, may or may not cause you to discredit such testimony. In weighing the effects of a discrepancy, you should consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from an innocent error or intentional falsehood.

As the sole judges of the facts, you must decide which of the witnesses you will believe, which portion of their testimony you accept, and what weight you will give to it.

[IMPEACHMENT BY PRIOR INCONSISTENT STATEMENTS

You may have heard evidence that at some earlier time a witness has said or done something that counsel argues is inconsistent with the witness's trial testimony.

Evidence of a prior inconsistent statement was placed before you for the purpose of helping you decide whether to believe the trial testimony of the witness who contradicted himself or herself. If you find that a witness made an earlier statement that conflicts with his trial testimony, you may consider that fact in deciding how much of his trial testimony, if any, to believe.

In making this determination, you may consider whether there was, in fact, any inconsistency; whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a small detail; whether the witness had an explanation for the inconsistency, and whether that explanation appeals to your common sense. It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent, and if so how much, if any, weight to give to the inconsistent statement in determining whether to believe all or part of the witness's testimony.]

MULTIPLE DEFENDANTS

Although there are two defendants in this case, it does not follow that if one is liable, then the other is liable as well. Each defendant is entitled to fair, separate, and individual consideration of the case without regard to your decision as to the other defendant. If you find that only one defendant is liable, you must impose liability only upon that one defendant.

PART II: SUBSTANTIVE LAW

I will now turn to the second part of this charge and instruct you as to the legal elements of plaintiff's claim.

SECTION 1983 CLAIM

In this case, plaintiff claims that he was injured as the result of the deprivation, under color of state law, of rights secured to him by the United States Constitution, and by a federal statute which protects the civil rights of all persons within the United States. Specifically, he brings this case under a federal statute known as Section 1983 of Title 42 of the United States Code. Section 1983 states, in its relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in an action at law . . . .

Section 1983 creates a federal remedy for persons who have been deprived by state officials, or any persons acting under color of state law, of the rights secured by the United States Constitution. Here, the plaintiff claims that the defendants deprived him of his Fourth Amendment rights by failing to intervene to stop an alleged assault by ~~another~~ an unknown officer. Defendants Failla and Chan, as members of the New York City Police Department, were acting under color of state law at all relevant times.

In order to prove a claim pursuant to section 1983, the plaintiff must establish, by a preponderance of the evidence, both of the following two elements as against each defendant:

1. First, that this conduct deprived the plaintiff of rights secured by the Constitution of the United States; and

2. Second, that the defendant's acts were the proximate cause of the injuries and consequent damages sustained by the plaintiff.

I will now explain these elements in more detail.

FIRST ELEMENT: DEPRIVATION OF A CONSTITUTIONAL RIGHT

The first element of the plaintiff's claim is that he was deprived of his constitutional rights by the defendants. In order for plaintiff to establish this element, he must prove three things by a preponderance of the evidence. First, that the defendant you are considering committed or was personally involved in the acts as alleged by plaintiff. Second, that those acts, as alleged by the plaintiff, caused the plaintiff to suffer the loss of a right protected by the United States Constitution. Third, that in performing the acts alleged by plaintiff, the defendant acted knowingly or recklessly.

Here, plaintiff claims that the defendant officers failed to intervene to stop an unknown officer from assaulting him. You may only consider plaintiff's failure to intervene claim if you determine that plaintiff has proven by a preponderance of the credible evidence that he was subject to an unlawful assault by an unidentified officer.

All law enforcement officers have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officials in their presence. This theory of liability applies when, in light of all of the circumstances surrounding an assault, an officer's failure to intervene despite the opportunity to do so effectively renders him a tacit collaborator in the underlying assault.

This duty only arises, however, if the police officer has a realistic opportunity to intervene. A realistic opportunity means that the defendant had sufficient time to intercede and a capacity to prevent the harm. The question of whether a defendant had a realistic opportunity to intercede will turn on such factors as the number of officers present, their relative locations, the environment in which they acted, the nature and duration of the assault, and any other relevant circumstances. For example, an officer may not have a realistic opportunity to intervene to prevent an assault that occurs rapidly and without warning.

Thus, for plaintiff to succeed on his failure to intervene claim against the defendants, he must prove, by a preponderance of the evidence, each of the following elements:

First, that an unknown police officer violated ~~a~~ plaintiff's rights by assaulting him;

Second, that the defendant you are considering knew of or observed the assault;

Third, that the defendant had a realistic opportunity to prevent the assault; and

Fourth, that the defendant officer failed to take reasonable measures to stop the assault.

With regard to intent, it is not necessary to find that a defendant had any specific intent to deprive a plaintiff of his constitutional rights in order to find in favor of plaintiff. A plaintiff need only prove that a defendant acted knowingly or recklessly in that regard. An act is knowing if it is done voluntarily and deliberately and not because of mistake, accident, negligence, or other innocent reason. An act is reckless if it is done in conscious disregard of its known probable consequences.

If you find that plaintiff has proved that one or more defendants failed to intervene to prevent an assault, then you must still consider whether the plaintiff has proved proximate cause, the second element that plaintiff must prove. I will now turn to this element.

SECOND ELEMENT: PROXIMATE CAUSE

Earlier I told you that the first element of plaintiff's claims is that he was deprived of his constitutional rights by the defendants. The second element that plaintiff must prove is that defendants' acts were a proximate cause of ~~the~~ any injuries sustained by the plaintiff.

An act is a proximate cause of an injury if it was a substantial factor in bringing about that injury, and if the injury was a reasonably foreseeable consequence of a defendant's acts. In order to recover damages for any injury, a plaintiff must show, by a preponderance of evidence, that his injury would not have occurred without the acts or omissions of a defendant.

DAMAGES

I am about to instruct you as to the proper measure of the damages that you will be considering. The fact that I am giving you these instructions is not an indication of my view as to which party you should find for in the case, or whether any damages are appropriate at all. Instructions as to the measure of damages are given only for your guidance in the event that you should find in favor of the plaintiff in accordance with the other instructions that I have given you.

Thus, if you find that plaintiff has satisfied his burden of proving by a preponderance of the evidence that one or both defendants failed to intervene to stop an unknown officer from assaulting him, then you must determine an amount that is fair compensation for plaintiff's injury. The damages that you award must be fair compensation, no more and no less.

In determining the amount of damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guesswork. The law does not require that a plaintiff prove the amount of his damages with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

MULTIPLE DEFENDANTS

Because this case involves two defendants, you must be careful to award damages only against the defendant or defendants that plaintiff has proved to be liable for his injuries. Although there are two defendants in this case, it does not follow that if one is liable, then the other is liable as well. Each defendant is entitled to fair, separate, and individual consideration of the case without regard to your decision as to the other defendant. If you find that only one

defendant is responsible for a particular injury, then you must impose damages for that injury only upon that one defendant.

Nevertheless, you might find that both defendants are liable for a particular injury. If two persons unite in an intentional act that violates another person's right, then both are jointly liable for the acts of the other; the law does not require the injured party to establish how much of the injury was done by each particular defendant that you find liable. Thus, if you decide that both defendants are jointly liable to a plaintiff, then you may simply determine the overall amount of damages for which they are liable, without breaking that figure down.

COMPENSATORY DAMAGES

The purpose of the law of damages is to award, as far as possible, just and fair compensation for the loss, if any, which resulted from defendants' violation of plaintiff's rights. These are known as "compensatory damages." Compensatory damages seek to make plaintiff whole—that is, to compensate a plaintiff for the damage suffered because of a defendant's conduct.

You may award compensatory damages only for injuries that a plaintiff proves by a preponderance of the evidence were caused by defendants' allegedly wrongful conduct. You may not award compensatory damages for speculative injuries, but only for those injuries that a plaintiff has actually suffered or that he is reasonably likely to suffer in the future. If you find in favor of a plaintiff then you must award that plaintiff such sum of money as you believe will fairly and justly compensate him for any injuries you believe he has proven that he actually sustained as a direct consequence of the conduct of a defendant or defendants.

Compensatory damages are not limited merely to expenses that plaintiff may have borne. A prevailing plaintiff is entitled to compensatory damages for his physical harm or discomfort

and emotional pain and suffering. The damages that you award must be fair and reasonable, neither inadequate nor excessive.

Under the law, defendants take the plaintiff as they find him. Thus, defendants are liable for all injuries they caused to the plaintiff even if the harm caused by defendants exacerbated a pre-existing condition.

PUNITIVE DAMAGES

Plaintiff also seeks punitive damages against defendants. Punitive damages are awarded, in the discretion of the jury, to punish a defendant for extreme or outrageous conduct, and to deter or prevent a defendant and others like him from committing such conduct in the future.

You may award the plaintiff punitive damages against the defendant you are considering if you find that the acts or omissions of that defendant were done maliciously or wantonly. An act or omission is done maliciously if it is prompted by ill will or spite toward the injured person. An act or omission is done wantonly if done with a reckless or callous disregard for the rights of the injured person or when it demonstrates conscious indifference and utter disregard of its effect upon the health, safety, and rights of others.

It is the plaintiff's burden to prove, by a preponderance of the evidence, that the defendant you are considering acted maliciously or wantonly. If you find that plaintiff has met this burden, then you may decide to award punitive damages, or you may decide not to award them. In making this determination, you should consider the underlying purpose of punitive damages, which, as I have said, is to punish the defendant you are considering for outrageous conduct or to deter others from behaving similarly in the future, and whether compensatory damages alone provide the requisite punishment or deterrent effect.

If you decide to award punitive damages, you should keep these same purposes in mind as you determine the appropriate sum to be awarded. In other words, you should consider the

degree to which the defendant or defendants should be punished for the wrongful conduct, and the degree to which an award of one sum or another will deter other persons from committing such wrongful conduct in the future. The amount of punitive damages that you award must be both reasonable and proportionate to the actual harm suffered by the plaintiff and to the compensatory damages you have determined to be appropriate.

If you decide to award punitive damages, you must use sound reason in setting the amount—it must not reflect bias, prejudice, or sympathy toward any party. The amount may be as large as you believe it necessary to fulfill the purposes of punitive damages. If you decide punitive damages are appropriate, you may impose punitive damages against one defendant or both defendants, and may impose them against different defendants in different amounts.

ATTORNEYS' FEES

Finally, federal law provides for an award of attorneys' fees to a plaintiff who prevails in a civil rights action. The award of attorneys' fees is a matter to be determined by the Court. Accordingly, if you award any damages to plaintiff, you should not take into consideration the fees that plaintiff may have to pay his attorneys.

PART III: CLOSING INSTRUCTIONS

I have now outlined for you the rules of law applicable to the charges in this case and the processes by which you should weigh the evidence and determine the facts. In a few minutes you will retire to the jury room for your deliberation.

Traditionally, juror number one acts as foreperson. So that your deliberations may proceed in an orderly fashion, you must have a foreperson, but, of course, the foreperson's vote is not entitled to greater weight than that of any other juror.

You function, to reach a fair conclusion from the law and the evidence, is an important one. Your verdict must be unanimous.

When you are in the jury room, you may now discuss the case. It is, in fact, the duty of each of you to consult with your fellow jurors and to deliberate with a view toward reaching agreement on a verdict, if you can do so without violating your individual judgment and your conscience. In the course of your deliberations, no one should surrender conscientious beliefs of what the truth is and what the weight and effect of the evidence is. Moreover, each of you must decide the case for yourself and not merely acquiesce in the conclusion of your fellow jurors. Nevertheless, I do ask you to examine the issues and evidence before you with candor and frankness and a proper deference to and regard for the opinions of one another. Remember that the parties and the court are relying upon you to give full and conscientious deliberation and consideration to the issues and evidence before you.

During your deliberations, you must not communicate with, or provide any information to, anyone except yourselves, by any means, about this case. You may not use any electronic device or media such as a telephone, cell phone, smartphone, iPhone, BlackBerry, or computer to communicate to anyone any information about this case or to conduct any research about this

case until I accept your verdict, nor may you use the Internet or any Internet service or any text or instant message service, or website such as Facebook, LinkedIn, YouTube, or Twitter for those purposes.

You should not consult dictionaries or reference materials or use any other tool, electronic or traditional, to obtain information about the case or to help you decide the case.

In short, do not try to find any information about this case from any source outside what has been presented here at trial until I have accepted your verdict. To do otherwise would violate your oath as a juror.

If it becomes necessary during your deliberations to communicate with me for any reason, simply send me a note signed by your foreperson or by one or more other members of the jury. No member of the jury should ever attempt to communicate with me or with any court personnel by any means other than writing. I will not communicate with any member of the jury on any subject toughing on the merits of this case other than in writing or orally here in open court.

If you wish to have some part of the testimony repeated, or to see any of the exhibits, you may make that request. If you request to see all or some of the exhibits, we will send them into the jury room for you or make them available to you here in open court. If you request to hear certain testimony or to see the trial transcript regarding any matter, I will call you into court and have the court reporter read those portions of the testimony to you or send responsive portions of the trial transcript into the jury room. You can have any of the testimony read back to you or made available to you in transcript form. I suggest, however, that you be specific in your requests so as to avoid hearing testimony or receiving portions of the trial transcript that you do not need to assist you in your deliberations.

If, in the course of your deliberations, you wish to hear any further explanation as to the law, you may send me a note telling me what you would like.

Bear in mind also that you are not to reveal to any person—not even in open court—how the jury stands, numerically or otherwise, on the question of whether the plaintiff has met his burden of proof until after you have reached a unanimous verdict. When you have reached a verdict, simply send me a note signed by your foreperson that you have reached a verdict. Do not indicate in the note what the verdict is.

To assist you in reaching a verdict, I have prepared a verdict form for your use. Your verdict must be unanimous. Although I will provide each of you with a copy of the verdict form, please recall that your unanimous verdict must be recorded on the foreperson's verdict form. I will also provide each of you with a copy of these instructions. Please remember that you must follow these instructions as a whole, and should not rely on any one portion in disregard of remaining portions.

Before now asking you to retire and begin your deliberations, let me first consult with counsel to be certain I have not overlooked any point.