UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOAQUIN LUGO and CHRISTINA MONTANEZ, Plaintiffs, -against- CITY OF NEW YORK and POLICE OFFICER RYAN DOHERTY (Shield No. 20696), Defendants.	:	MEMORANDUM & ORDER 16-CV-6340 (ENV) (VMS)

VITALIANO, D.J.

Plaintiffs Joaquin Lugo and Christina Montanez[1] commenced this action against the City of New York (the "City") and Officer Ryan Doherty ("Officer Doherty") of the New York Police Department ("NYPD"), alleging that they were arrested without probable cause, in violation of their rights under the United States Constitution and New York law. On August 21, 2020, Magistrate Judge Vera M. Scanlon issued a Report and Recommendation ("R&R"), in which she recommended granting summary judgment with respect to certain claims withdrawn by plaintiffs, but otherwise denying defendants' motion for summary judgement. Dkt. 44. Defendants filed their objection to the R&R on September 18, 2020, asking the Court to reject the R&R insofar as it recommended allowing several of plaintiffs' claims to survive. Dkt. 47 ("Def's Obj."). Plaintiffs replied in support of the R&R on October 2, 2020. Dkt. 48 ("Pls'

[1] Plaintiffs were previously joined in this action by another co-plaintiff, Vanessa Baez, whose claims were dismissed in their entirety for failure to prosecute in an order dated July 17, 2019. Dkt. 31; *see also* Dkt. 38.

Resp."). For the reasons that follow, the R&R is adopted in its entirety as the opinion of the Court.

Background[2]

On August 19, 2016, Lugo and Montanez, along with others, hosted an eighteenth birthday party for Montanez's son, which was held at a venue called Atlantis Hall in Queens. R&R at 3. They rented the hall for the evening. *Id*. The rental agreement appears to have been repurposed from the stock agreement used by another Queens party venue, with the name and address of the other venue, Medina Hall, crossed out and replaced with those of Atlantis Hall. *Id.* at 4. Other important information in the contract, such as the venue's maximum occupancy of 160, were apparent carry-overs from Medina Hall, which has a lower capacity. *Id.* at 5. Plaintiffs agreed to pay $1125 for the evening rental, including the services of the security guards hired by the venue, who would work the door on the night of the party. *Id*.

As for entertainment, Montanez's son arranged for various musical acts to play free of charge. *Id.* Plaintiffs separately purchased food and refreshments, including, according to plaintiffs, cases of bottled water, two-liter bottles of soda, and non-alcoholic fruit punch that plaintiffs made at home from a powdered mix and stored in four or five plastic containers that were approximately 10–12 inches tall and 5–6 inches wide. *Id.* at 6; *see also* Dkt. 39-13 at 5. To recover the costs of the venue rental, food, and refreshments, plaintiffs charged a $10 cover for entrance, which was collected at the main doors. R&R at 8.

Lugo testified that he spent most of the party working at the main doors with the venue's security staff, where, in addition to collecting the cover charge, he also helped ensure that invited guests and entertainment were admitted and that others were turned away. *Id.* at 7–8. In this

[2] Factual references are drawn from the R&R. *See* R&R at 3–21.

latter category belonged anyone who appeared intoxicated or who looked "much older" than 21 or 22 years old, as they were less likely to know Montanez's son, who was only turning 18. *Id.* When Lugo periodically left his position at the main doors, he instructed security staff to cease admitting guests until he returned. *Id.* at 8. Lugo estimates that he may have admitted more than 200 guests in total that evening, although the parties agree that between 150 and 200 guests were present at the party at any given moment. *Id.*

Atlantis Hall's layout was typical of many mid-sized outer borough catering halls. The main doors of the venue open into a lobby, with a second set of doors leading to the party space. R&R at 6–7. To the left when entering the party space from the lobby was a counter and an adjacent table, where food and beverages were served by those organizing the event. *Id.* at 7. Montanez testified that she set up the food with assistance from Baez and then helped serve food to guests. *Id.* Plaintiffs deny that they, Baez, or anyone else who helped at the party brought, served, or even saw any alcohol at the party, much less the underage consumption of alcohol. *Id.* at 9. The one exception to this, and as far as they knew the only alcohol on the premises, was a bottle of Hennessy cognac that Montanez brought for herself, Lugo, Baez, and other adults to drink. *Id.* at 9–10. Plaintiffs testified that they kept the bottle stored behind the counter the entire evening and never had the opportunity to drink from it. *Id.* at 10.

On the night of the Montanez birthday party, Officer Doherty and other members of his team arrived outside of Atlantis Hall at some time after midnight and observed the premises from their vehicles for five to seven minutes. *Id.* at 10–11. From there, the officers saw approximately 20 individuals ranging, in apparent age, from 16 to 25 years old in appearance outside the venue, none of whom were drinking alcohol or acting in a disruptive manner. *Id.* at 11, 14 n.32. However, the officers did observe one party guest purchase a beer at a corner store

prior to entering the venue. *Id*.[3] Officer Doherty had been to Atlantis Hall previously in his capacity as a police officer and knew that it did not hold a liquor license. *Id.* at 10.

At around 1:00 a.m., Officer Doherty and the other officers exited their vehicles to conduct a warrantless "walk-in" of the venue.[4] *Id.* at 10. As defendants tell it, none of the guests outside of the venue panicked or attempted to flee at the sight of the police. *Id.* at 12. Once inside Atlantis Hall, Officer Doherty says that he could see Baez behind the counter and plaintiffs standing approximately ten feet away talking with other individuals who seemed older than the average guest age. *Id*. At this point, as he would later testify, Officer Doherty saw various full and partially full containers of alcohol and beer bottles on the counter and he noticed Baez handling, but not serving, the alcohol. *Id.* Consistent with their position that they did not serve alcohol or bring any alcohol to the party other than the unopened bottle of Hennessy, plaintiffs dispute this aspect of Officer Doherty's account. *Id.*

Continuing to take in the scene, Officer Doherty claims that he observed about four individuals at the party whom he believed were under 21 years old. R&R at 12. He approached one, a 20-year-old named Vlad, who had a can of beer or a similar beverage in his pocket or hand, and issued him a summons. *Id.* at 13. Officer Doherty testified that when he asked Vlad

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[3] Around the same time, a woman called 9-1-1 to report that her 15-year-old daughter had been at the party at Atlantis Hall and that underage drinking was taking place there. R&R at 11. Officer Doherty, however, affirmatively testified that he was not responding to this call when he arrived at Atlantis Hall and that he had no knowledge of the call until after plaintiffs' arrests. Doherty Tr. 13:13–22. Because there is nothing in the record otherwise suggesting that it was communicated to Officer Doherty, Judge Scanlon correctly concluded that it is not properly considered as evidence supporting probable cause. R&R at 35–36; *see United States v. Hassain*, 835 F.3d 307, 316 n.8 (2d Cir. 2016). To the extent it is offered to corroborate Officer Doherty's assertion that there was alcohol being served at the party, it is inadmissible hearsay. *See* Fed R. Evid. 801.

[4] Plaintiffs do not challenge the propriety of the officers' decision to enter the venue and that conduct is not considered here.

where he got the beer, Vlad pointed at Baez. *Id.* Plaintiffs deny that they furnished Vlad with the beer and speculate that he may well have been the individual whom the police saw purchase a beer to bring into the venue. Officer Doherty testified further that he spoke with two 16-year-old guests holding red plastic cups that smelled of alcohol, and that both of these guests also gestured to Baez when asked where they got their drink. *Id.* at 13–14. Both of these individuals remain unidentified, as Officer Doherty claims that they fled from the premises and were not seen again. *Id.* at 14.

In the short interval after the officers entered Atlantis Hall, they ordered the party shut down and guests began leaving the venue. *Id.* at 14. Plaintiffs testified that the guests left in a relatively orderly fashion and without any disturbances, an account that is partially corroborated by Officer Doherty's own testimony that "the crowd just dispersed on their own." R&R at 14–15. The crowd may not have dispersed far, as Officer Doherty also testified that he had to leave Atlantis Hall in order to help with crowd control, and that there was some measure of disorder outside. *Id.* at 15.

Within 20 minutes, Officer Doherty re-entered Atlantis Hall, where plaintiffs remained inside. *Id.* at 15. Plaintiffs claim Officer Doherty and other NYPD officers began searching garbage cans in the venue, which turned up three alcohol containers: one unopened bottle of Heineken, one opened can of Coco Nutz, and one empty bottle of Hennessy. *Id.* at 15; *see also* Dkt. 39-13. In addition to these three containers, Montanez claims that the police took her closed Hennessy bottle from behind the counter, emptied it out, and arranged it on top of the counter alongside the other three containers. The officers then took four photos of the four alcohol containers, which plaintiffs allege had been arranged in this fashion to create the misleading impression that alcohol had been served at the party. R&R at 16. The dramatic

effect of these photos was heightened, plaintiffs contend, by the placement of a plastic cup filled with fruit punch and the two mostly full containers of fruit punch next to the empty bottles of alcohol. *Id.* at 16. The photos taken by the officers also included a large plastic jar labelled "tips" alongside the various alcohol and punch containers. Dkt. 39-13.

Officer Doherty does not deny that he took these photos, but claims that he found the four empty containers of alcohol sitting on the counter upon his re-entry and denies that they were uncovered through a search of garbage cans or that the photos were staged in the manner claimed by plaintiffs. R&R at 16. Officer Doherty further asserts that, far from over-emphasizing the amount of alcohol at the party, the photos depict significantly less alcohol than he observed during his first entry into the party and estimates that as much as 90% of the alcohol containers at the party had been disposed of by the time he returned. *Id.* at 16 n.34. However, Officer Doherty testified that his team did *not* conduct a search of the trash to ascertain where the alcohol had been jettisoned. *Id.* Defendants further claim that the inclusion of the fruit punch containers and cup containing fruit punch was not meant to be misleading, as Officer Doherty had already provided direct evidence of their alcoholic content, testifying that they smelled of alcohol. *Id.* at 16.

Opening another investigative front, Officer Doherty spoke with the two security guards outside of the venue and learned that neither held a valid security guard license, for which they were arrested. *Id.* at 17. Officer Doherty also claims that during his conversation with the guards, one of them informed him that guests were charged a $10 cover that included alcohol. *Id.* However, Officer Doherty did not make a note of this particular accusation in his memo book, in which he memorialized his conversation with the guards approximately one hour and

six minutes after it had occurred. *Id.* Instead, those notes focused on facts relevant to the security guard's arrest for not holding the requisite license. *Id.* n.17.

Officer Doherty also spoke with plaintiffs and ascertained that they did not own the Atlantis Hall venue and had rented it for the evening. *Id.* at 18. According to plaintiffs, their discussions with unnamed police officers prior to their arrest centered on the fact that cans or bottles of alcohol could only sporadically be found on the guests, and that it seemed clear that they had been purchased outside the venue. Dkt. 40-3 ("Lugo Tr.") at 50:17–51:1. Lugo further testified that a plainclothes police officer with whom he spoke acknowledged that there did not appear to be alcohol distributed on the premises, and even told him about the individual that they observed purchase a beer and then enter the venue. *Id.* at 64:14–65:2. Lugo affirmed that he was familiar with Officer Doherty as the arresting officer, *id.* at 60:1–12, but did not specifically identify him as making any statements to this effect.

Then, at approximately 1:48 a.m. on August 20, 2016, Officer Doherty arrested plaintiffs and Baez. According to plaintiffs, Officer Doherty did not articulate precisely why they were being arrested and conveyed to plaintiffs the officers' reluctance to make the arrests at all.[5] Once at the precinct, Officer Doherty vouchered the four photos and the tip jar itself as arrest evidence. *Id.* at 18. Officer Doherty also seized approximately $1363 in cash from Lugo and vouchered it for safekeeping but not as arrest evidence. R&R at 18.

Then came a strange twist. While processing Lugo's arrest, Officer Doherty claims to have come across an old but active arrest warrant for failure to appear on a summons for a minor offense dating back to 2000. R&R at 20. Lugo testified that he neither committed nor was

[5] Lugo Tr. at 110:3–5 ("'We'll sort it all out at the precinct.' And that's what they kept telling me."); Dkt. 40-4 ("Montanez Tr.") at 45:19–46:8 ("He pretty much said, he was a little apologetic, he said it wasn't us, we didn't want to arrest you, it was the sergeant.").

summonsed for the underlying warrant offense and notes several issues with the arrest warrant indicating that was directed at another individual and inactive. R&R at 20. For one, the name on the arrest warrant, "Joaquinc [sic] Lugo Salvador" is similar but clearly different than plaintiff Joaquin Lugo's own name. Dkt. 39-17. Additionally, Lugo notes that he made several court appearances in other matters between 2000 and 2016 and was never once called to answer for this warrant. The warrant itself does not state whether it has ever been closed, much less whether it was active on August 20, 2016, and there is no record evidence pointing one way or the other. R&R at 21.[6]

Ultimately, Officer Doherty charged both plaintiffs with numerous offenses pertaining to the provision of alcohol to minors, unlicensed bottling and/or sale of alcohol, reckless endangerment, the creation of disorderly premises, criminal nuisance, the employment of unlicensed security guards, and, in the case of Lugo, for the supposedly active arrest warrant. As noted by Judge Scanlon, the arrest reports authored by Officer Doherty contain statements that contradict certain other evidence in the record and raise potential issues of credibility. R&R at 19. For example, Officer Doherty wrote in the complaint report that Baez was observed behind the bar serving alcohol to underage guests, while at his deposition he testified that he did not observe her serving alcohol. *Id.* The charge for employing unlicensed security guards is also in some tension with Officer Doherty's testimony that he was aware that plaintiffs were merely renting Atlantis Hall for the evening. *Id.*

[6] The skirmishing over Lugo's arrest warrant is almost entirely academic. Given the significant threshold issues of probable cause that arise well before Officer Doherty found himself running a computer search of Lugo's history at the precinct, it is difficult to conceive of a scenario in which the outcome of defendants' motion hinges on whether Officer Doherty had probable cause to arrest Lugo on the basis of the warrant.

Prosecution did not survive the criminal complaint room, as the District Attorney's Office declined to pursue the charges. Plaintiffs and Baez were released from custody at approximately 4 p.m. on the afternoon following the party, about 14 hours after their arrest, without an arraignment or any other proceeding before a judge. R&R at 21. No criminal charges were ever brought against plaintiffs or Baez in connection with the Atlantis Hall party.

Freed, plaintiff then sought redress in this lawsuit, and soon it was defendants who were anxious to bring an end to court proceedings. Following the close of discovery, defendants moved for summary judgment as to the claims regarding both plaintiffs, arguing that probable cause existed for plaintiffs' arrests, that the failure to intervene and malicious abuse of process claims were not supported by sufficient evidence, that Officer Doherty is entitled to qualified immunity, and that the City could not be held liable under *Monell* and its progeny. Dkt. 39-1. Having presided over discovery and pretrial management of this case, the motion was referred to Judge Scanlon.

The Report and Recommendation

In their briefing filed in opposition to defendants' motion for summary judgment, plaintiffs withdrew, without formal entry on the docket, their federal failure to intervene, federal and state malicious abuse of process, and *Monell* claims with respect to all defendants. Dkt. 40 at 5. Judge Scanlon, correspondingly, recommended granting summary judgment on these claims. R&R at 23–24. In her proposed resolution of plaintiffs' remaining claims under § 1983 and state law, Judge Scanlon found that a genuine dispute of material fact exists with respect to probable cause, and, for the qualified immunity issue, "arguable" probable cause.

In particular, Judge Scanlon found that even where Officer Doherty's observations were not specifically countered by evidence from plaintiffs, a factfinder would need to assess his

credibility in order to determine whether the circumstances supported probable cause, particularly in light of certain inconsistencies in Officer Doherty's testimony. Next, she found that a factfinder who credited plaintiffs' account and discredited Officer Doherty's could conclude that he had intentionally committed tortious acts while performing duties within the scope of his employment, precluding summary adjudication of plaintiffs' state law *respondeat superior* claim against the City. R&R at 52–53. Finally, and by the same token, Judge Scanlon found that a factfinder declining to credit Officer Doherty's testimony could very well conclude that he had acted in bad faith and would thus not be entitled to qualified immunity. R&R at 48–49, 52 n.67.

Standard of Review

In reviewing a report and recommendation, a district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Moreover, in conducting its review, the "district court need only satisfy itself that there is no clear error on the face of the record" to accept the reviewed report, provided no timely objection has been made. *Urena v. New York*, 160 F. Supp. 2d 606, 609–10 (S.D.N.Y. 2001) (quoting *Nelson v. Smith*, 618 F. Supp. 1186, 1189 (S.D.N.Y. 1985)); *see also Thomas v. Arn*, 474 U.S. 140, 149–50, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). Clear error exists "where, upon a review of the entire record, [the district judge] is left with the definite and firm conviction that a mistake has been committed." *Saveria JFK, Inc. v. Flughafen Wien, AG*, No. 15-CV-6195 (RRM) (RLM), 2017 WL 1194656, at *2 (E.D.N.Y. Mar. 30, 2017).

A district judge, however, is required to "determine *de novo* any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3); *see also Arista Records, LLC v. Doe 3*, 604 F.3d 110, 116 (2d Cir. 2010). Objections that are general,

conclusory, or "merely recite the same arguments presented to the magistrate judge" do not constitute proper objections and are reviewed only for clear error. *Sanders v. City of New York*, No. 12-CV-113 (PKC) (LB), 2015 WL 1469506, at *1 (E.D.N.Y. Mar. 30, 2015) (citation omitted).

Discussion

I. Probable Cause

Defendants contend that the R&R misapplies the law of probable cause, which could not be more significant, since the existence of probable cause is a complete defense to a § 1983 or state law false arrest claim. *See Ackerson v. City of White Plains*, 702 F.3d 15, 19 (2d Cir. 2012). The R&R errs, according to defendants, by overly relying on plaintiffs' "self-serving denials", which they contend should not "have any bearing on the reasonableness of the conclusions drawn by Officer Doherty" based on his personal observations at Atlantis Hall prior to making the arrests. Defs' Obj. at 6, 12.

Indeed, since it is usually a hot button litigation issue, it bears emphasis that the issue of probable cause is related, but distinct, from whether any of the arrest offenses were actually committed by plaintiffs. "When determining whether probable cause exists, courts must consider those facts *available to the officer* at the time of the arrest and immediately before it, as [p]robable cause does not require absolute certainty." *Panetta v. Crowley*, 460 F.3d 388, 395 (2d Cir. 2006) (alteration in original) (citing *Caldarola v. Calabrese,* 298 F.3d 156, 162 (2d Cir. 2002)). Put differently, even taking plaintiffs' testimony as true, Officer Doherty still saw what he saw and heard what he heard, and that alone might support probable cause, notwithstanding the absence of any actual culpability on the part of Lugo or Montanez.

Although well-acknowledged in the R&R, defendants take pains to emphasize that probable cause "is based on the facts warranting arrest and not the statute pursuant to which a plaintiff was charged." Defs' Obj. at 13 (quoting *Dickerson v. Napolitano*, 604 F.3d 732, 752 (2d Cir. 2010)). However, the rule that probable cause does not need to have existed for an offense closely related to the one articulated by the arresting officer does not obviate the need for probable cause to have existed for *some* offense. *Jaegly v. Couch*, 439 F.3d 149, 154 (2d Cir. 2006). Unless defendants propose additional uncharged offenses that were not considered in the R&R, which they have not, there is no legal error in Judge Scanlon's decision to look to the elements of the offenses cited by Officer Doherty. R&R at 27–28.

To this end, the R&R exhaustively reviews the evidence relating to each possible offense that can be derived from the record. Defendants swing away at some of those factual findings and the evidentiary bases for others. The attack, though, is somewhat of a sideshow for the main event, which is the clash over Officer Doherty's credibility. Here too, there is no clear-cut resolution of the parties' disputes. For example, while some of Officer Doherty's observations are contradicted by plaintiffs' account, such as his claim to have seen large quantities of alcohol on the counter, plaintiffs did not witness and cannot contradict other incidents. In particular, Officer Doherty claims that one of the security guards outside informed him that the cover charge included alcohol and that, once inside, he confronted Vlad and other underage partygoers with alcohol-smelling beverages who gestured to Baez when asked where they got their drinks. *See* Doherty Tr. 43:9–25. Although defendants have not offered corroborating testimony from other officers, they urge that Officer Doherty's observations, combined with certain undisputed facts, such as the fact that plaintiffs were charging a cover and worked with unlicensed security

guards, could have led Officer Doherty to reasonably conclude that *some* offense had taken place. Defs' Obj. at 14.

Although defendants' version of the facts, if taken as true, could constitute probable cause to arrest plaintiffs, Judge Scanlon found that the credibility of Officer Doherty—an interested witness—is squarely at issue, and that the Court should not resolve this credibility issue at summary judgment by treating his testimony as established fact. R&R at 19, 30–31, 39. Plainly, "[a]ssessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment." *Simpson v. City of New York*, 793 F.3d 259, 265 (2d Cir. 2015). This rule applies not only to credibility determinations in he-said-she-said situations, but also where a witness's credibility is broadly disputed, permitting a factfinder to question testimony that is not specifically rebutted by other evidence. For instance, in *Knox v. County of Putnam*, No. 10 CIV. 1671 ER, 2012 WL 4462011 (S.D.N.Y. Sept. 27, 2012), testimony that an officer had repeatedly attempted to coerce a third party into providing a statement against the plaintiff was held to raise "a question of fact regarding [the officer's] credibility and, consequently, a question of fact about the integrity of the entire investigation." *Id.* at *5–6. "This is true even if the credibility of a critical *interested* witness is only partially undermined in a material way by the non-moving party's evidence." *Id.* at *5 (citing *Chem. Bank v. Hartford Accident & Indem. Co.,* 82 F.R.D. 376, 378–79 (S.D.N.Y. 1979)); *see also Sterling Nat'l Bank & Trust Co. v. Federated Dep't Stores, Inc.*, 612 F. Supp. 144, 146 (S.D.N.Y. 1985) ("If the credibility of the movant's witness is challenged by the opposing party and specific bases for possible impeachment are shown, summary judgment should be denied.").

These are not the only flash points in the evidence. To point to a few, plaintiffs highlight evidence creating, as the R&R finds, factual issues regarding the integrity of Officer Doherty's

actions at the crime scene. *See* R&R at 19. Among the assortment of attacks on Officer Doherty's investigation, plaintiffs highlight that his complaint report states that Baez "was observed behind the bar of an unlicensed premises serving alcohol to patrons between the ages of 20 and 16", Dkt. 39-9 at DEF000004, when he later testified that he "didn't see her actually serving alcohol to anyone", Doherty Tr. 33:5–10; *see also id.* 34:3–6. Plaintiffs' testimony also directly contradicts Officer Doherty's claim that Baez was serving alcohol at the counter. *See* Lugo Tr. 45:2–4, 46:16–25, 82:14–83:6; Montanez Tr. 22:4–9. Additionally, another key event, the security guard informing Officer Doherty that alcohol was included in the cover charge, did not even make it into his written account of that conversation, which was memorialized by Officer Doherty in his police memo book approximately one hour and six minutes later. R&R at 17. Judge Scanlon also observed that Officer Doherty's testimony, when viewed in the light most favorable to plaintiffs, was internally inconsistent regarding the dispersal of the party, testifying at one point that "the crowd dispersed on their own" with little need for police intervention, and then, pages away, that guests on the premises were "getting disorderly" and that fights were being started in the street as the party was shut down. R&R at 15.

At another point, plaintiffs testified that after the party had been dispersed, Officer Doherty and his team searched through garbage cans and found three containers of alcohol. *See* R&R at 15–16. Then, after locating Montanez's closed Hennessy bottle, the police opened it, dumped its contents, and placed it empty next to the other three alcohol containers and alongside the large containers of fruit punch. *Id.* at 16. Needless to say, this testimony undermines the evidentiary value of the photos taken by the police, which, if plaintiffs are to be believed, do not depict the scene as it was when they arrived at the venue. Further, the punch, which is the only beverage in the photos of sufficient volume for anything close to event-wide service, is

unlabeled, and the only record evidence that it contained any alcohol is Officer Doherty's testimony that it smelled of alcohol.

According to Officer Doherty, there was a great deal of alcohol aside from the punch that was not photographed because it disappeared during the 20-or-so minute period that he was outside performing crowd control. In fact, Officer Doherty testified that he returned to find only about 10% of the alcohol he once saw still on the counter, but that he never looked in the trash or elsewhere for the rest of the alcohol. Doherty Tr. 58:13–61:4. As Judge Scanlon notes, there is an open question of fact as to whether the quantity of alcohol photographed is flatly inconsistent with the widespread distribution of alcohol, calling into question Officer Doherty's decision to refrain from finding any of the remaining 90% of the alcohol containers in order to document the provision of alcohol that he claims to have witnessed firsthand. R&R at 30–32. This could, in turn, hollow out the credibility of other portions of Officer Doherty's testimony. *See Knox*, 2012 WL 4462011, at *5–6.

Defendants object that by pointing to inconsistencies that might undermine Officer Doherty's credibility, the R&R itself improperly makes credibility assessments. Defs' Obj. at 10. This misperceives the nature of summary judgment, where the existence of a genuine dispute of material fact, including "[a]ssessments of credibility and choices between conflicting versions", preclude the court from entering judgment in favor of the moving party. *Simpson*, 793 F.3d at 265. All key observations underlying probable cause in this case require the Court to credit Officer Doherty's account. With the chink in his armor exposed, defendants chose to rest their motion submission there rather than offer corroboration from other witnesses whose credibility might have gone unblemished. *See* R&R at 32, 37.

Defendants fare even worse in their search for refuge in a finding of probable cause to arrest plaintiffs for unlawful employment of unlicensed security guards. On this point, Judge Scanlon found that the arrest report itself raises questions as to whether the conduct qualifies under the statute, which prohibits a "security guard company", defined as "any person employing one or more security guards", from "employ[ing]" a security guard without verifying that they are licensed. R&R at 43 (quoting N.Y. Gen. Bus. Law § 89-g(1)(a)). In the arrest report, Officer Doherty wrote both that defendants "did rent the above location" and that they "hired unregistered security at the location." Dkt. 39-9 at DEF000004. The reasonableness of this conclusion is, at best, questionable, and to the extent that New York courts have weighed in they have declined to view security guards who work at a given event or business as "employees" when their services have been contracted from a third party. *McLaughlan v. BR Guest, Inc.*, 149 A.D.3d 519, 521 (N.Y. App. Div. 1st Dep't 2017).[7]

Even assuming, for the sake of argument, that hiring a security guard employed by a third party suffices under § 89-g, Officer Doherty testified that his conclusion that plaintiffs hired the guards at all was based on either Lugo or Montanez admitting to having hired them. Doherty Tr. 75:21–76:16. However, consistent with the rental agreement, plaintiffs have testified as to their clear understanding that the guards were being provided by the venue. Lugo Tr. 36:2–18;

[7] Contrary to defendants' objection, the relevance of *McLaughlan* is not its conclusion about the issue of vicarious liability, which is irrelevant here, but the far more obvious proposition that one who contracts for the services of security guards is not, *ipso facto*, the employer of those guards. As recognized in other provisions of New York law regulating security guard services, an establishment may "employ" security guards, but also may simply "use[] the services" of security guards. N.Y.C. Code § 27-525.1.

Montanez Tr. 19:14–18.[8] The credibility of Officer Doherty's claim that plaintiffs told him otherwise that evening is a material issue of fact that is genuinely disputed.

For the foregoing reasons, the Court overrules defendants' objections that Judge Scanlon misapplied the law of probable cause and made inappropriate credibility determinations in her R&R. To the contrary, with Officer Doherty's credibility in dispute as a factual issue, it would be improper to find, at summary judgment, that probable cause existed to arrest plaintiffs for offenses related to alcohol provision, the hiring of unlicensed security guards, or for Lugo's outstanding arrest warrant.[9]

Other findings related to probable cause have not been objected to by defendants, and as a result are reviewed under a "clear error" standard. *See Dafeng Hengwei Textile Co. v. Aceco Indus. & Commercial Corp.*, 54 F. Supp. 3d 279, 283 (E.D.N.Y. 2014). First, defendants have not objected to Judge Scanlon's finding that there remain triable issues of fact concerning the existence of probable cause for the offenses of unlicensed bottling or sale of alcohol, reckless endangerment, disorderly premises, and criminal nuisance. Additionally, defendants have not objected to Judge Scanlon's recommendation that summary judgment on plaintiffs' state law

[8] Furthermore, Officer Doherty testified that he encountered a woman who he believed was the wife of one of the security guards and was in some way affiliated with Atlantis Hall. Doherty Tr. 69:4–16. At a minimum, this suggests an affiliation between the guards and the venue, rather than plaintiffs, particularly in the absence of any indication that plaintiffs themselves had employed the security guards. In fact, Officer Doherty testified that he never once saw Lugo interact with the security guards. Doherty Tr. 67:6–10.

[9] As discussed previously, even if probable cause existed to arrest Lugo on the strength of the 2000 arrest warrant found by Officer Doherty for a different individual with a similar name, it would not warrant summary judgment for defendants on any of plaintiffs' claims, as Lugo was already under arrest and at the precinct when the warrant was discovered. *See supra* n.9; R&R at 45–46. At most, the arrest warrant would serve to justify detention only after its discovery. *See Underwood v. City of N.Y.*, No. 14 Civ. 7531 (RRM) (PK), 2018 WL 1545674, at *3 (E.D.N.Y. Mar. 28, 2018). However, the Court agrees with Judge Scanlon that defendants have been unable to establish, on the face of the warrant, that there is no genuine dispute of fact as to whether it can support probable cause. *See* R&R at 44–45.

respondeat superior claims against the City be denied. For reasons already discussed in this Order and by Judge Scanlon, *see* R&R at 39–42, 52–53, the Court agrees that disputes as to material issues of fact preclude summary judgment.

II. Qualified Immunity

Plaintiffs urge the court to apply a clear error standard to the R&R's findings concerning qualified immunity because defendants have reiterated the original arguments presented in their motion for summary judgment. *See* Pls' Resp. at 5 (citing *Libbey v. Vill. of Atl. Beach*, 982 F. Supp. 2d 185, 199 (E.D.N.Y. 2013)). Although much of defendants' objection to Judge Scanlon's recommendation on this issue is recycled, they have specifically attempted to refute the notion that plaintiffs' claims of fabrication on the part of Officer Doherty can defeat summary judgement on the issue. *See* Defs' Obj. at 18 n.7. This argument, which was not made previously, gets to the heart of Officer Doherty's entitlement to qualified immunity in this case, as "[q]ualified immunity is unavailable . . . where . . . a defendant knowingly fabricated evidence and where a reasonable jury could so find." *Morse v. Fusto*, 804 F.3d 538, 550 (2d Cir. 2015); *see also Case v. City of New York*, 408 F. Supp. 3d 313, 325 (S.D.N.Y. 2019).

Specifically, defendants point to a line of cases dismissing lawsuits in which plaintiffs claimed that arresting officers fabricated physical evidence, supported merely by the plaintiff's own testimony that a firearm or other contraband weren't his, and, at most, evidence of some banal mistake made by an officer that should supposedly raise suspicions. *See, e.g.*, *Apostol v. City of New York*, No. 11-CV-3851 RRM CLP, 2014 WL 1271201, at *5–7 (E.D.N.Y. Mar. 26, 2014) (case for fabrication rested upon fact that an officer other than the one who prepared the arrest complaint neglected to mention marijuana in his memo book). To hold otherwise, observed one court, would permit a plaintiff to create an issue of fact in a § 1983 case based

solely on his own denials "even with twenty police officers or twenty bishops swearing that they had seen him do it." *Jimenez v. City of New York*, No. 15-cv-3257 (BMC), 2016 WL 1092617, at *3 (E.D.N.Y. Mar. 21, 2016).

The present case stands apart from the particularly weak specimens that must be weeded out at the summary judgment stage. For one, there is no facially incriminating physical evidence here, as compared to a firearm or illegal drugs found in a vehicle or apartment. As discussed previously, a photograph depicting a scant amount of alcohol found at a party with more than 200 guests is hardly conclusive proof that a crime was committed, particularly as the contents of the punch were never confirmed to contain alcohol. Instead, probable cause rested upon the impressions of a single police officer and uncorroborated conversations that he had with guests and a security guard. While plaintiffs do not stand upon a mountain of evidence undermining Officer Doherty's account, the inconsistencies pointed to are not limited to insignificant errors, but material inconsistencies in Officer Doherty's sworn statements and the arrest reports. Combined with their own testimony and other evidence in the record, it is clear that plaintiffs have demonstrated "specific bases for possible impeachment" of the sole record defense witness to these crucial facts, raising an issue of fact that is not fit for resolution at summary judgment. *Sterling Nat'l Bank*, 612 F.Supp. at 146. If the jury does not credit Officer Doherty's account, and instead concludes that he fabricated these observations and conversations, then he would not be entitled to qualified immunity. Summary judgment on this issue is therefore denied.

Conclusion

In line with the foregoing, the R&R is adopted in its entirety as the opinion of the Court. Summary judgement is granted with respect to plaintiffs' withdrawn failure to intervene, malicious abuse of process, *Monell*, and catch-all § 1983 claims, as well as their § 1983 false

arrest claim against the City. Summary judgment is denied with respect to plaintiffs' § 1983 claim against Officer Doherty and state law false arrest and *respondeat superior* claims.

The case is respectfully referred to Judge Scanlon for further pretrial proceedings.

So Ordered.

Dated: Brooklyn, New York
April 30, 2021

/s/ Eric N. Vitaliano
ERIC N. VITALIANO
United States District Judge